

Our reference: LS8304

Phillip Sweeney  
Right to Know

By email to Phillip Sweeney <[foi+request-6929-f4d14427@righttoknow.org.au](mailto:foi+request-6929-f4d14427@righttoknow.org.au)>

Dear Mr Sweeney

### Your Freedom Of Information Request No. LS8304

I refer to your email dated 26 November 2020 1:15 PM in which you request ('your FOI Request') to the Australian Electoral Commission ('AEC') under the [Freedom of Information Act 1982](#) (the 'FOI Act') for access to documents relating to obtaining any paper ballot scanning/counting machines for evaluation purposes.

2 I am writing today to give you a decision about access to documents that you requested in your FOI Request.

#### Summary

3 I, Owen Jones, Senior Lawyer of the AEC, am an officer authorised under subsection 23(1) of the FOI Act to make decisions in relation to FOI Requests.

4 Specifically, you sought access to documents:

that would disclose whether the AEC over the last 5 years has obtained any paper ballot scanning/counting machines for evaluation purposes for the potential use of such machines at a future Federal Election

5 I identified no documents that fell within the scope of your FOI Request (the 'Relevant Documents').

6 I did this by directing inquiries to the AEC's Chief Information Officer who informed me that the AEC has not over the past 5 years obtained any paper ballot scanning/counting machine for evaluation.

7 With regard to the Relevant Documents, I have decided to refuse access because no such documents exist.

8 More information, including my reasons for my decision, is set out below.

## Decision

9 With regard to the Relevant Documents, I have decided to refuse access under paragraph subparagraph 24A(1)(b)(ii) of the FOI Act because they do not exist as a document of the AEC.

## Material taken into account

10 I have taken the following material into account in making my decision:

- (a) the content of the documents that fall within the scope of your FOI Request;
- (b) the [Commonwealth Electoral Act 1918](#) (the 'Electoral Act;'), specifically section 6,
- (c) the FOI Act, specifically section 4, Part III in general, and in particular. Sections 15 and 24A; and
- (d) the guidelines ('[FOI Guidelines](#)') issued by the Australian Information Commissioner under section 93A of the FOI Act, in particular paragraphs 2.29–2.44; and 3.85–3.94.

## Reasons

### Documents that do not exist

11 Subparagraph 24A(1)(b)(ii) of the FOI Act permits access to a document to be refused where that document does not exist.

12 With respect to the Relevant Documents, I found that no such documents exist as a document of the AEC.

### Consideration

13 The reason for making my finding in paragraph 12 (as mentioned in paragraph **Error! Reference source not found.** of this letter) is that the AEC has not over the past 5 years obtained any paper ballot scanning/counting machine for evaluation.

### The AEC as an agency

14 The AEC falls within the definition of an 'agency' for the purposes of the FOI Act as the following paragraphs explain.

15 The expression 'agency' is defined in subsection 4(1) of the FOI Act.

16 Insofar as is material section 4 of the FOI Act provides:

#### 4 Interpretation

(1) In this Act, unless the contrary intention appears:

**agency** means a Department, a prescribed authority or a Norfolk Island authority.

**prescribed authority** means:

- (a) a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment or an Order-in-Council, other than:
  - (i) an incorporated company or association; or
  - (ii) a body that, under subsection (2), is not to be taken to be a prescribed authority for the purposes of this Act; or
  - (iii) the Australian Capital Territory House of Assembly; or
  - (iv) the Legislative Assembly of the Northern Territory or the Executive Council of the Northern Territory; or
  - (vi) a Royal Commission; or
  - (vii) a Commission of inquiry; or

17 The AEC is an unincorporated body established for a public purposes by the Electoral Act.

18 It follows that the FOI Act applies to the AEC.

### **Document of an agency**

19 Insofar as is material section 4 of the FOI Act provides:

#### **4 Interpretation**

(1) In this Act, unless the contrary intention appears:

***document of an agency***: a document is a ***document of an agency*** if:

- (a) the document is in the possession of the agency, whether created in the agency or received in the agency; or

### **Refusal of access to non-existent documents**

20 Insofar as is material, subsection 24A(1) of the FOI Act provides:

#### **24A Requests may be refused if documents cannot be found, do not exist or have not been received**

##### *Document lost or non-existent*

(1) An agency or Minister may refuse a request for access to a document if:

- (a) all reasonable steps have been taken to find the document; and
- (b) the agency or Minister is satisfied that the document:

...

- (ii) does not exist.

#### **Outcome**

21 Accordingly, I am satisfied that each Relevant Document has never existed as a document of the AEC for the purposes of the definition of the expression 'document of an agency' provided by section 4 of the FOI Act.

22 Consequently, I decided to refuse access to the Relevant Documents under subparagraph 24A(1)(b)(ii) of the FOI Act.

## Your review rights

- 23 If you are dissatisfied with my decision (which is deemed to be a refusal to grant access), you may apply for internal review or Information Commissioner review of the decision. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

### ***Internal review***

- 24 Under section 54 of the FOI Act, you may apply in writing to the AEC for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter.
- 25 Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.]

### ***IC review***

- 26 Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

online:

[https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR\\_10](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10)

email:

[foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)

post:

GPO Box 5218 Sydney NSW 2001

- 27 More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

## FOI Complaints

- 28 If you are unhappy with the way we have handled your FOI request, please let us know what we could have done better. We may be able to rectify the problem. If you are not satisfied with our response, you can make a complaint to the Australian Information Commissioner. A complaint to the Information Commissioner must be made in writing. Complaints can be lodged in one of the following ways:

online:

[https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA\\_1](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1)

email:

[foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)

post:

GPO Box 5218 Sydney 2001

- 29 More information about complaints is available on the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/>.

- 30 If you are not sure whether to lodge an Information Commissioner review or an Information Commissioner complaint, the Office of the Australian Information Commissioner has more information at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>

## Questions about this decision

31 If you wish to discuss this decision, please contact me, using my details below:

email:	legal@aec.gov.au
fax:	02 6293 7657
post:	Locked bag 4007, Canberra ACT 2601
telephone:	02 6271 4528

Yours sincerely



Owen Jones  
Senior Lawyer  
**Legal Services**  
**Legal and Procurement Branch**

4 December 2020.