



25 August 2021

Ned

BY EMAIL: foi+request-7079-d11cbc40@righttoknow.org.au

In reply please quote:

FOI Request : FA 21/02/01000

File Number : OBJ2021/6528

Dear Ned

Decision on Internal Review – Freedom of Information Act 1982

I refer to your correspondence dated 14 July in which you requested that the Department of Home Affairs (the Department) review its decision on access to documents dated 13 July 2021 under the *Freedom of Information Act 1982* (the FOI Act).

1 Scope of original request received 27 April 2021

The scope of your original request for access to documents under the FOI Act was as follows:

- 1. Documents showing any advice and any directive(s) that has been communicated to Posts regarding the general processing (i.e. non-case specific) of 309 visas in the period 01/07/2020 to present.*
- 2. The intranet page that outlines internal policies and procedures for assessing and making a determination on 309 as well as the individual PDF files associated with each sub step.*
- 3. A statistical breakdown from 01/01/2020 to current of the number of applications in calendar days to decision for 309 visa by post and by decision type (granted/rejected)*
- 4. forecasting/planning for family visa subclass for the 19/20 20/21 21/22 FY*
- 5. A statistical breakdown of 309 applications on hand since 01/07/2020 by country of passport broken down into number of applications awaiting processing at each regional processing office and how many applications are yet to be appointed for processing.*

The purpose is to illustrate how applications have been distributed globally based on specific regional processing issues.

2 Original decision on access dated 12 May 2021

Documents within scope

The Department identified one document as falling within point 1 of your request

The Department identified that documents within point 2 of your request were publicly available via LEGEND.com

In accordance with section 17 of the FOI Act, the Department used its computer system to produce one document that contained information falling within points 3 to 5 of the scope of your request.

The above document and the data produced in response to points 3 to 5 of your request were in the possession of the Department on 27 April 2021 when your FOI request was received.

Decision on access

The original decision maker decided to:

- release one document in full with irrelevant material deleted under section 22(1)(a)(ii) of the FOI Act
- release one document in full
- Refuse access to the publicly available documents

3 Request for internal review dated 14 July 2021

On 14 July 2021 you requested the Department review its decision dated 13 July 2021. The terms of your review request were as follows:

I am writing to request an internal review of Department of Home Affairs' handling of my FOI request '309 processing directives, statistics and procedures.'

The Information provided does not go anywhere near to addressing the questions at hand. Point number 2 can be excluded from the request as per the decision, however there has been no effort made to provide the data sets that were requested. In addition the dingle document released has very little relevance to what was requested.

This request needs to be re addressed and done correctly this time so as the actual data requested is provided and not just some arbitrary table compiled without any consideration to the details of the request.

4. Scope of Internal review

Based on the terms of your internal review in paragraph 3 above, I consider you are seeking review of:

- the searches conducted by the Department in regard to points 1, 3 4 and 5 in its original decision, including considerations as to whether documents could be produced from computer systems pursuant to section 17 of the FOI Act

Based on your submission I do not consider you have requested a review in regards to

- The decision to refuse access to publicly available documents (point 2)
- The decision to exempt parts of one document as irrelevant to your request under section 22 of the FOI Act

I have therefore not considered these points in the scope of my review.

5 Authority to make decision

I am an officer authorised under section 23 of the FOI Act to make decisions on requests for access to documents, including internal reviews.

6 Information considered

I have considered:

- the terms of your original request
- the submission made by you in support of your request for internal review
- the searches undertaken in the original decision
- information held on departmental systems
- advice from officers of the Family Visa Programme who are responsible for the requested information
- the FOI Act 1982 and
- the Guidelines published by the Office of the Information Commissioner under section 93A of the FOI Act (the FOI Guidelines).

7 Internal review decision

I have decided to vary the original decision of the Department dated 13 July 2021 (“the original decision”) and have made a fresh decision on your request as follows:

- to release one document in full which contains data requested under point 3 by providing the subclass 309 visa grants and refusals by posts from 01/01/2020 to 28/02/2021 and to refuse that part of point 3 requesting for the number of calendar days these applications were pending until grant or refusal date pursuant to section 24A of the FOI Act;
- to refuse in full your request for access under point 5 pursuant to section 24A of the FOI Act; and
- to affirm the primary decision with respect to the data provided in response to point 4 of your request

Please note that information in regard to point 4 above was released previously and therefore I am not providing you another copy of that information.

I have provided the reasons for my decision below.

8 Reasons for internal review decision: searches for documents within scope of request

I have considered the submissions made by you in relation to your reasons for requesting an internal review. I have reviewed the searches undertaken by the Department in its original decision. I have determined that there is a need to confirm if further reasonable searches for documents could have been undertaken by the Department, including searches of departmental computer systems.

The Department has therefore conducted further reasonable searches to determine whether it holds further documents/information within the scope of your request.

Additional searches for documents

The searches undertaken by the Department for further documents within the scope of your request involved enquiries with the responsible business area of the Department which in turn conducted further searches of the Departments records management system and computer based programs in relation to family migration data.

Outcomes of searches

The relevant business area of the Department has advised that:

- In regards to point 1 of your request no additional documents can be located
- In regard to point 4 of your request the table previously provided includes all of the Family visa streams planning levels for 2021-22 and the previous 2 years
- In regard to points 3 and 5, the Department does not have the data requested readily available in existing statistics reports and it would require the development of new code or pivot tables to produce the data. The Department can only provide the breakdown of the data regarding subclass 309 visa applications in the format previously provided and in the format now being released under this internal review.

As the information to which you seek access is known to be contained in non-discrete form in Departmental computer systems, I now give consideration to whether section 17 of the FOI Act applies to your request.

Whether the Department can produce written document containing information in discrete form

Section 17 of the FOI Act applies if:

- the Department could produce a written document containing the information using a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information (s. 17(1)(c)(i)), and
- producing a written document would not substantially and unreasonably divert the resources of the agency from its other operations (s. 17(2))

In considering whether section 17(1)(c)(i) applies to the request, I am guided by paragraph 3.207 of the FOI Guidelines, citing the decision of the Full Federal Court in *Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCAFC 67; 95 ATR 334, in which the Full Federal Court:

...held that the reference in s 17(1)(c)(i) to a 'computer or other equipment that is ordinarily available' means 'a functioning computer system including software, that can produce the requested document without the aid of additional components which are not themselves ordinarily available ... [T]he computer or other equipment must be capable of functioning independently to collate or retrieve stored information and to produce the requested document.' This will be a question of fact in the individual case, and may require consideration of 'the agency's ordinary or usual conduct and operations'. For example, new software may be ordinarily available to an agency that routinely commissions or otherwise obtains such software, but not to an agency that does not routinely do such things.

In the earlier decision of the Federal Court in *Collection Point*, the Court found that:

If a new computer program is required to be written to produce the document then a computer is not being used in a manner that is ordinarily available to the agency because an extraordinary step is required to be taken.

Both Courts confirmed the earlier view of the Administrative Appeals Tribunal that:

The documents requested by Collection Point were not capable of being produced by the ATO by the use of a computer, being a use that is ordinarily available to the ATO for retrieving and collating stored information. Instead, to answer the request, the ATO would have been required to use a computer in an extraordinary manner, as compared to the ordinary processes available for the retrieval and collation of such material.

The relevant Departmental business area has confirmed that information you wish to access is not available by the ordinary use of the Department's computer systems. The business area instructs that it would need to take an extraordinary step to retrieve, collate and produce a document containing this information. This would involve the writing of new code and production of new pivot tables.

Having considered the above, I am satisfied that producing the document would not involve the 'ordinary use' of the Department's computer systems but would involve the use of an 'extraordinary step', namely the reviewing of existing data tables, the writing of code (equivalent to writing a new program), and the manual verification of the data produced by the code.

I am therefore satisfied that section 17(1)(c) of the FOI Act does not apply to your access request.

Whether all reasonable steps taken to locate documents

Paragraph 3.88 of the FOI Guidelines notes that the Act is silent on what constitutes 'all reasonable steps' to search for a document, but suggests that the term should be:

'construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose'.

Paragraph 3.89 of the FOI Guidelines further provides that, at a minimum, an agency's searches for documents should have regard to:

- the subject matter of the documents
- the current and past file management systems and the practice of destruction or removal of documents
- the record management systems in place
- the individuals within an agency or minister's office who may be able to assist with the location of documents, and
- the age of the documents.

Having considered the searches conducted above, and the outcomes of these searches, I am satisfied that the Department has undertaken all reasonable steps to locate these documents. In making this decision, I have taken into consideration:

- that the subject matter of your request indicates that the information was unlikely to be held in discrete documents and is more likely to be held on the Department's computer systems
- that the business area consulted was best placed to advise of the Department's capacity to produce documents from the Department's computer systems that contain the data requested.
- the advice from this business area that the Department was unable to produce a document in the format you require by the ordinary use of its computer systems.

I have therefore determined that the Department has taken all reasonable steps to find the documents that fall within the scope of the request as it was required to do by section 24A of the FOI Act, and that:

- a discrete document does not exist
- the Department cannot produce a written document containing the information by the use of a computer or other equipment that is ordinarily available, as would otherwise be required by section 17 of the FOI Act.

Section 24A refusal of access to documents that cannot be found or do not exist

Section 24A of the FOI Act provides that the Department may refuse access to a document when that document cannot be found or does not exist. Before the Department can make a decision under section 24A, it must be satisfied that it has taken all

reasonable steps to locate relevant documents, including searches of computer systems to determine whether documents can be produced from these systems in accordance with section 17 of the FOI Act.

Based on the results of the searches above and advice from the family visa programme I am refusing in part point 3, and refusing in full point 5 of your request under section 24A of the FOI Act.

9 Legislation

A copy of the FOI Act is available at <https://www.legislation.gov.au/Series/C2004A02562>. If you are unable to access the legislation through this website, please contact our office for a copy.

10 Your review rights

Review by the Office of the Australian Information Commissioner

You may apply directly to the Office of the Australian Information Commissioner (OAIC) for a review of this decision. You must apply in writing within 60 days of this notice. For further information about review rights and how to submit a request for a review to the OAIC, please see Fact Sheet 12 "Freedom of information – Your review rights", available online at <https://www.oaic.gov.au/freedom-of-information/foi-review-process>.

11 Making a complaint

You may complain to the Australian Information Commissioner about action taken by the Department in relation to your request.

Your enquiries to the Australian Information Commissioner can be directed to:

Phone 1300 363 992 (local call charge)

Email enquiries@oaic.gov.au

There is no particular form required to make a complaint to the Australian Information Commissioner. The request should be in writing and should set out the grounds on which it is considered that the action taken in relation to the request should be investigated and identify the Department of Home Affairs as the relevant agency.

12 Contact

Should you wish to discuss my decision, please do not hesitate to contact via email at foi.reviews@homeaffairs.gov.au.

Electronically signed

Antonette

Position Number 60016903

Authorised Decision Maker

Department of Home Affairs