



Our reference: FOIREQ21/00028

John Doe

By email: foi+request-7103-b65f4d5a@righttoknow.org.au

Your Freedom of Information Request - FOIREQ21/00028

Dear John Doe,

I refer to your request for access to documents made under the *Freedom of Information Act 1982* (Cth) (the FOI Act) and received by the Office of the Australian Information Commissioner (OAIC) on 23 February 2021.

In your email you seek access to the following:

"...correspondence, meeting notes, and decision / approval papers relating to the the OAICs guidance and advice "Disclosure of public servant's names adn contact details in response to Fol requests.

I do not request copies of documents relating to drafts of the guidelines, only those in respect of the published guideline..."

On 4 March 2021, I wrote to you to seek clarification on the scope of your FOI request:

"...Thank you for correspondence of 23 February 2021. I am writing to seek clarification on the scope of your FOI request.

In your request you seek access to:

"...I request disclosure of correspondence, meeting notes, and decision / approval papers relating to the the OAICs guidance and advice "Disclosure of public servant's names adn contact details in response to FOI requests.

I do not request copies of documents relating to drafts of the guidelines, only those in respect of the published guideline."

From the scope of your request, it appears that you are seeking access to documents relating to the OAIC's position paper - Disclosure of public servants' name and contact details in response to FOI requests. However, the second part of your request says you are not seeking copies of documents 'relating to drafts of the guidelines, only those in respect of the published guideline.'

The OAIC has power under the FOI Act to issue Guidelines – the OAIC's position paper is not a Guideline. As noted at the end of the Executive Summary in the position paper, the OAIC is in the process of updating parts 3 and 6 of the FOI Guidelines to reflect the position expressed in the position paper. The OAIC has not yet published Guidelines in response to the position paper.

*As a result, I have interpreted your request to be for access to documents relating **only** to the position paper; and only to the **published** [position paper](#).*

You also say you are not seeking documents relating to drafts of the 'guidelines'. I interpret your use of the word 'guideline' to be a reference to the OAIC's position paper. However, until the position paper was published, it was a draft. Therefore, all documents generated before the position paper was published necessarily 'relate to drafts'. If your request is interpreted in this way, there will be no documents within the scope of your request.

The OAIC has published 49 consultation responses from Australian Government agencies and members of the public. They can be accessed at the following links:

- <https://www.oaic.gov.au/engage-with-us/consultations/disclosure-of-public-servants-names-and-contact-details/>
- <https://www.oaic.gov.au/engage-with-us/consultations/disclosure-of-public-servants-names-and-contact-details/submissions/>

In order for the OAIC to efficiently process your request, can you please clarify the following:

*Whether the OAIC has correctly interpreted the scope of your request above. That is, that you are only seeking access to documents relating to the **published** position paper, and that you **are not** seeking access to documents regarding the draft versions of the OAIC's position paper. For clarity, this will likely result in no documents being found.*

*I would be grateful to receive your response by **8 March 2021**..."*

As the OAIC did not receive a response from you to our correspondence of 4 March 2021, I also wrote to you on 11 March 2021. In my correspondence, I stated:

"...I refer to my correspondence sent to you on 4 March 2021 regarding the scope of your FOI request- FOIREQ21/00028

In my correspondence, I advised you of the OAIC's interpretation of your request and I asked you to confirm that the OAIC has correctly interpreted the scope of your request by 8 March 2021. I note that I have not received a response from you to date.

Unless the OAIC receive a response from you, we will interpret the scope of your request as outlined in my correspondence of 4 March 2021. Please note, this may result in no documents being found for the reasons I have mentioned in my previous correspondence of 4 March 2021.

If you wish to provide further clarification in relation to the OAIC's interpretation on the scope of your FOI request, please do so in writing by return email to this address..."

Decision

I am an officer authorised under s 23(1) of the FOI Act to make decisions in relation to FOI requests.

I have identified one document within in the scope of your request. I have decided to grant you access to the document in full.

This document is the *Position Paper – Disclosure of public servants’ names and contact details in response to FOI requests*. This document is available on the OAIC’s website at: <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/public-servants-names-and-contact-details/>.

Material taken into account

In making my decision, I have had regard to the following:

- your FOI request dated 23 February 2021
- the FOI Act, in particular s 24A
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines),
- *Clifford Chance Lawyers and National Competition Council* (Freedom of information) [2020] AICmr 26 (26 June 2020) and *Timmins and Attorney-General’s Department* [2015] AICmr 32 (28 April 2015)
- the searches conducted by the OAIC’s Executive and Freedom of Information Regulatory Group.

Scope of your request and searches for documents

As set out above, in your email you seek access to:

“...correspondence, meeting notes, and decision / approval papers relating to the the OAICs guidance and advice “Disclosure of public servant’s names adn contact details in response to Fol requests.

I do not request copies of documents relating to drafts of the guidelines, only those in respect of the published guideline...”

On reading your request, I considered the scope of your request to be unclear. I wrote to you on two separate occasions to invite you to confirm the scope of your request. You did not respond to my correspondence.

I have set out my communication with you about the scope of the request above. In my correspondence I explained that I considered that you are seeking access to documents relating to the OAIC’s position paper. I explained that under the FOI Act the Information Commissioner has the power to issue FOI Guidelines. The FOI Guidelines are issued by the Information Commissioner under s 93A of the FOIA Act. The OAIC’s position paper are not FOI Guidelines issued under the FOI Act. I also informed you that the OAIC is in the process of updating Parts 3 and 6 of the FOI Guidelines to reflect the position paper. These updates are not yet published.

I advised you that as the OAIC has not yet published 'Guidelines', I had interpreted your request to be for access to documents relating to the position paper. As you specifically excluded documents relating to drafts of the 'guidelines' and requested access to documents in respect of the published 'guideline', I advised you that I had interpreted your request as a request for access to documents in respect of the published position paper.

Further, as you had specifically excluded documents relating to drafts of the 'guidelines', I advised that until the position paper was published, it was in draft form. Further, all documents generated before the position paper was published necessarily 'relate to drafts' of the position paper. I advised that if your request is interpreted in this way, there will be no documents within the scope of your request.

To assist you to clarify the scope of your request, I provided you with hyperlinks to the OAIC's position paper and submissions provided in response to the position paper. However, I did not receive a response to my email. I followed up my email a week later but did not receive a response to my follow up email.

The FOI Guidelines explain at [3.26]:

... it is implicit in many provisions of the [FOI] Act that findings, including inferences from known facts, may need to be made. The following examples are illustrative:

... in making a decision about release of documents, it is implied that the decision maker must first make findings about the scope of the request and the documents in the agency's possession that fall within that scope...

The FOI Guidelines further explain at [3.54]:

A request should be interpreted as extending to any document that might reasonably be taken to be included within the description the applicant has used. A request for a 'file' should be read as a request for all of the documents contained in the file, including the file cover

The FOI Guidelines at [3.110]:

A request can be described quite broadly and must be read fairly by an agency or minister, being mindful not to take a narrow or pedantic approach to its construction.

The Information Commissioner has recently considered the scope of an FOI request in *Clifford Chance Lawyers and National Competition Council* (Freedom of information) [2020] AICmr 26 (26 June 2020). In *Clifford Chance*, the Commissioner considered a decision of the former Information Commissioner McMillan, *Timmins and Attorney-General's Department* [2015] AICmr 32. In *Timmins*, former Information Commissioner McMillan considered a decision to refuse a request for the most recent summary of the work undertaken and work still remaining to be completed on the ALRC Report 112, *Secrecy Laws and Open Government in Australia*, tabled in Parliament on 11 March 2010. The Department had given access to one document in part (based on s 22 of the FOI Act) and the issue for Commissioner McMillan's consideration was whether two further documents, which that document referred to as Attachments A and B, fell within the scope of the applicant's request. Commissioner McMillan said:

... I begin by commenting that it is regrettable that this issue of scope has become a contested issue to be resolved by an IC review decision. This partially stems from the precise and helpful way the applicant framed his request – ‘the most recent summary of the work undertaken and work still remaining to be completed ...’. Had he framed his request more broadly – ‘all documents recording the government’s consideration of the ALRC report’ – there would have been less room for argument about whether the attachments fell within the scope of the request.

... the FOI Act requires only that an applicant ‘provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency ... to identify it’ (s 15(2)(b)). The Guidelines that I have issued under s 93A of the FOI Act supplement that section by advising that ‘a request should be interpreted as extending to any document that might reasonably be taken to be included within the description that the applicant has used’.

In *Timmins*, Information Commissioner McMillan found that Attachment A fell within the scope of the applicant’s request and that Attachment B did not. In relation to Attachment B, Professor McMillan had said at para 21 that:

It was a draft ‘Options Paper’ dated April 2012 that was being prepared for consultation with other government agencies on options for legislative reform. It was clear from the brief that further work was required to finalise the consultation paper, and that it was attached to the brief to illustrate the work underway. Attachment B embodied work being undertaken by the Department, rather than (as requested by the applicant) ‘the most recent summary’ of work being undertaken.

The other variable is the terms of the applicant’s request. An applicant may ask for a specific document, or for documents that contain information of a specified kind or that deal with a particular topic. With that in mind, the FOI Act requires only that an applicant ‘provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency ... to identify it’ (s 15(2)(b)). The Guidelines that I have issued under s 93A of the FOI Act supplement that section by advising that ‘a request should be interpreted as extending to any document that might reasonably be taken to be included within the description that the applicant has used’.

Findings

Your request is for correspondence, meeting notes, and decision/ approval papers relating to the OAIC’s guidance and advice *‘Disclosure of public servant’s names and contact details in response to FOI requests’*. As explained to you previously, no Guidelines have been published. Your description of the guidelines is in fact the title of the position paper. Accordingly, I have interpreted the scope of your request as a request to access to documents relating to the position paper. Importantly, you have specifically excluded documents that relate to drafts of the guidelines [position paper] and only seek access to documents in respect of the published guideline [position paper].

To find documents that may fall within the scope of your request, I co-ordinated searches by writing to staff in the OAIC’s Freedom of Information Regulatory Group and members of the OAIC Executive who were responsible for the position paper and therefore most likely to hold documents within scope of your request. Relevant staff conducted searches for documents across the OAIC’s document storage system, Content Manager, and email accounts.

Staff located documents relating to the position paper. After close consideration of these documents, I formed the view that these documents do not fall within the scope of your request. The documents that were located by staff related to draft versions of the position paper. They do not relate to the published position paper. Documents related to the approval process were identified, however, these documents related to the draft position paper, not the published position paper. After reviewing the documents located, I consider that one document is within the scope of your FOI request, the published position paper.

Based on my interpretation of your request and the search results, I have identified one document within in the scope of your request. I have decided to grant you access to the document in full.

Your review rights are outlined on the following page.

Yours sincerely,

Joseph Gouvatsos
Lawyer

25 March 2021

If you disagree with my decision

Internal review

You have the right to apply for an internal review of my decision under Part VI of the FOI Act. An internal review will be conducted, to the extent possible, by an officer of the OAIC who was not involved in or consulted in the making of my decision. If you wish to apply for an internal review, you must do so in writing within 30 days. There is no application fee for internal review.

If you wish to apply for an internal review, please mark your application for the attention of the FOI Coordinator and state the grounds on which you consider that my decision should be reviewed.

Applications for internal reviews can be submitted to:

Office of the Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

Alternatively, you can submit your application by email to foi@oaic.gov.au, or by fax on 02 9284 9666.

Further Review

You have the right to seek review of this decision by the Information Commissioner and the Administrative Appeals Tribunal (AAT).

You may apply to the Information Commissioner for a review of my decision (IC review). If you wish to apply for IC review, you must do so in writing within 60 days. Your application must provide an address (which can be an email address or fax number) that we can send notices to, and include a copy of this letter. A request for IC review can be made in relation to my decision, or an internal review decision.

It is the Information Commissioner's view that it will usually not be in the interests of the administration of the FOI Act to conduct an IC review of a decision, or an internal review decision, made by the agency that the Information Commissioner heads: the OAIC. For this reason, if you make an application for IC review of my decision, and the Information Commissioner is satisfied that in the interests of administration of the Act it is desirable that my decision be considered by the AAT, the Information Commissioner may decide not to undertake an IC review.

Section 57A of the FOI Act provides that, before you can apply to the AAT for review of an FOI decision, you must first have applied for IC review.

Applications for IC review can be submitted online at:

https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10

Alternatively, you can submit your application to:

Office of the Australian Information Commissioner

GPO Box 5218

SYDNEY NSW 2001

Or by email to foidr@oaic.gov.au, or by fax on 02 9284 9666.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the Access our information page on our website.

Disclosure log

Section 11C of the FOI Act requires agencies to publish online documents released to members of the public within 10 days of release, except if they contain personal or business information that would be unreasonable to publish.

The documents I have decided to release to you do not contain business or personal information that would be unreasonable to publish. As a result, the documents will be published on our disclosure log shortly after being released to you.