



23 April 2021

Mr. Jaswinder Singh
BY EMAIL: foi+request-7110-1b436a16@righttoknow.org.au

In reply please quote:

FOI Request: FA 21/03/00028-R1
File Number: OBJ2021/7309

Dear Mr Singh

Decision on Internal Review – Freedom of Information Act 1982

I refer to your correspondence dated 19 March 2021 in which you requested that the Department of Home Affairs (the Department) review its decision on access to documents dated 19 March 2021 under the *Freedom of Information Act 1982* (the FOI Act).

1 Scope of original request

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

Q1: The total number of 489 & 491 visa holders - including Secondary- are currently not in Australia into visa subclasses.?

Q2: The total number of 489 visas was expired, while these visa holders were outside Australia in the past six months?

2 Original Decision on access dated 19 March 2021

On 19 March 2021, the Department made its original decision on the request. The Department conducted reasonable searches and found no documents that fell within the scope of your original request. As such, a decision was made under section 24A of the Act to refuse access to the documents sought.

3 Request for Internal Review

On 19 March 2021, you requested the Department to review its decision dated 19 March 2021. The terms of your review request were as follows:

I am writing to request an internal review of the Department of Home Affairs' handling of my FOI request 'Figure of 489 and 491 visa holders outside Australia'.

I have requested the information about how many 489 and 491 visa holders, which are outside Australia, but my request hasn't completed and got a reply department do not have information. Last year, I requested the same information I got the requested document and how it can be possible that the department does not have figures of visa holders.

4 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.

5 Internal review decision

I have decided to vary the original decision of the Department dated 19 March 2021 and replace it with a decision:

- that one document is within the scope of the following part of your request:
Q1: The total number of 489 & 491 visa holders - including Secondary- are currently not in Australia into visa subclasses?
- to release that document in full.

I have affirmed the Department's original decision to refuse the remainder of your request under section 24A of the FOI Act.

I have provided the reasons for my decision below.

6 Internal review decision: searches for documents within scope

I have reviewed the searches undertaken by the Department in its original decision. I have determined that further reasonable searches for documents could be 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 relevant to your request.

Additional searches for documents

The additional searches undertaken by the Department for further documents within the scope of your request involved enquiries with the Department's Immigration and Visa Statistics Section.

As the responsible business area has previously advised that the requested by you was not held in discrete form in existing documents, the enquiries sought to determine:

- the extent of data held by the Department on its computer systems
- whether the Department is able to produce a document containing the information sought by you from this data
- the processes involved in producing a document.

Outcomes of searches: documents produced

As a result of its enquiries, the Department has determined that it holds further information relevant to the terms of part 1 of your request on its computer systems, and is able to produce the following document from its systems pursuant to section 17 of the FOI Act:

- Visa holders for subclasses 489 Skilled - Regional (Provisional) and 491 Skilled Work Regional (Provisional) as at 1/03/2021 where client location is Outside Australia – 1 page

The information was held on the Department's computer systems on by the Department on 26 February 2021, when the Department received your request for access.

Outcomes of searches: documents unable to be produced

In relation to part 2 of your request, the responsible business are of the Department further advised as follows:

- the Department's ICSE database holds information that indicates whether a client holds a 489 visa that expired in the last six months and whether the client is outside Australia; however this information is only available by viewing individual client records
- the Department is unable to use its existing reporting functions to identify all holders of 489 visas whose visas expired in the relevant timeframe and who are located offshore, which would be necessary to enable a document to be produced
- identifying the relevant data and producing the document would involve the following tasks:
 - reviewing the capabilities of existing ICSE tables to obtain data
 - reviewing current DB2 tables that could be used to extract the data
 - reviewing the links between the ICSE tables and current DB2 tables
 - finding a primary data item to link the tables to
 - reviewing the business rules for the tagging and deriving of data from ICSE and incorporating any existing relevant code
 - writing new code (which on the surface would be complex) and validating this new code
 - extracting the data
 - ensuring that only the latest data was captured by the code
 - validating the data by manually checking it on ICSE, which would involve reviewing the visa grant and cease dates of each client, along with their entry and departure dates
- producing the document using the steps described above would take a minimum of 120 hours (three weeks).

Accordingly, the Department has not produced a document corresponding to the following part of your request:

Q2: The total number of 489 visas was expired, while these visa holders were outside Australia in the past six months?

7 Reasons for decision: 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 under section 17 of the FOI Act.

Whether section 17 of FOI Act applies to request

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 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.

Having considered the response provided by the business area as indicated 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.

As indicated above, the responsible business area of the Department has advised that the process of writing and verifying the code would be complex and would involve a significant amount of work. The process involved in validating the data – involving the manual checking of the data – also involves an extraordinary step, one which the Department considers is necessary given that the data would have been extracted from the writing of new code.

I further note that paragraph 2.33 of the FOI Guidelines provides that the Department is not required to create a new document in response to a request for access, except in limited circumstances when the information is stored on the agency's computer system, and when section 17 of the FOI Act applies to the information.

As the Department is unable to use its computer systems to create a new document containing all information relevant to your request, and any document that it could produce from its computer systems would not be produced using the 'ordinary use' of its computer systems, I have accordingly found that the obligation to produce a document under section 17 does not apply in this instance.

The Department therefore maintains its position that a discrete document containing the information does not exist, and the obligation to produce a document under section 17 does not apply to your request. I have accordingly refused part 2 of your request under section 24A of the FOI Act.

8 Legislation

A copy of the FOI Act is available at <https://www.legislation.gov.au/Details/C2017C00251>. If you are unable to access the legislation through this website, please contact our office for a copy.

9 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>.

10 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.

11 Contact

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

Jack

Position No. 11307

Authorised Decision Maker

Department of Home Affairs