



19 May 2021

Mr Dean Miles

By email: foi+request-7286-029891b1@righttoknow.org.au

Dear Mr Miles

Notice of decision – Freedom of information request dated 5 May 2021

The purpose of this letter is to provide you with a decision about access to documents that you requested under the *Freedom of Information Act 1982* (FOI Act).

Authority

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

FOI request

On 5 May 2021, you requested access to the following documents:

"Dear Patent Office,

Good morning I request information on Letters Patent only being issued to British Subject/s

Yours faithfully,

Dean Miles"

Decision

In response to your request, I have decided to refuse your request for access to documents pursuant to section 24A of the FOI Act, on the basis that I consider that:

- (a) All reasonable steps have been taken to find documents you have requested; and
- (b) I am satisfied from the searches and enquiries undertaken that the documents do not exist.

Material taken into account

In making my decision I have considered the following material:

- Your FOI application
- The FOI Act (specifically section 24A)
- Guidelines released by the Office of the Australian Information Commissioner (OAIC) and issued under section 93A of the FOI Act (Guidelines)
- The formerly enacted *Patents Act 1903* (Cth) (specifically subsection 32(1) and *Patents Regulations 1904* (Cth) (Second Schedule)

Reasons for decision

Your FOI request dated 5 May 2021 requests “information on Letters Patent only being issued to British Subject/s”. Paragraph 2.33 of the FOI Guidelines states, “The right of access under the FOI Act is to existing documents, rather than information.” Your request has therefore been interpreted to mean that you seek documents, specifically letters patent issued to British subjects only, as held by IP Australia.

Summary of searches

In response to your request, a review of patent legislation was undertaken. Enquiries were also made of IP Australia’s Records Management team, as to documents that may relate to your request. The following summarises the outcome from these enquiries:

- (1) The Australian Patent Office was formed, following the enactment of the *Patents Act 1903* (Cth).
- (2) Section 4 of the *Patents Act 1903* (Cth) defined ‘patent’ to mean “letters patent for an invention granted in the Commonwealth”.
- (3) Subsection 32(1) of the *Patents Act 1903* (Cth) provided that:
“Any person whether a British subject or not may make an application for a patent.”
- (4) Subsection 32(2) of the *Patents Act 1902* (Cth) provided that:
“Two or more persons may make joint application for a patent and a patent may be granted to them jointly.”
- (5) Subsection 32(3) of the *Patents Act 1903* (Cth) provided that:
“Any of the following persons may make application for a patent –
 - (a) The actual inventor; or
 - (b) his assignee agent attorney or nominee; or
 - (c) the actual inventor or his nominee jointly with the assignee of a part interest in the invention; or
 - (d) the legal representative of a deceased actual inventor or of his assignee; or
 - (e) any person to whom the invention has been communicated by the actual inventor his legal representative or assignee (if the actual inventor, his legal representative or assignee is not resident in the Commonwealth).
- (6) The application form to apply for a patent to the Australian Patent Office was contained in the Second Schedule, form A of the *Patents Regulations 1904* (Cth). This form provided for the name and address of the applicant to be provided to the Australian Patent Office, but did not seek information as to nationality, in relation to whether the applicant was a British subject or not. A link to the relevant form can be found at <https://www.legislation.gov.au/Details/C1904L00070>
- (7) In consideration that the *Patents Act 1903* (Cth) provided that any person may apply for a patent and the relevant application form did not seek information as to the applicant’s nationality (as outlined above), we consider that documents you requested in relation to letters patent, only being issued to British subjects do not exist.

Should your interest in relation to patents be with respect to those patents issued pre-federation, in colonial times, we recommend that you direct such enquiries to the relevant state archives of New South Wales, or Victoria.

The relevant provision that applies to the making of this decision is contained in section 24A of the FOI Act.

Section 24A - Documents that do not exist or cannot be found

Section 24A of the FOI Act provides that:

“(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:*
 - (i) is in the agency’s or Minister’s possession but cannot be found; or*
 - (ii) does not exist.”*

Paragraphs 3.85 and 3.86 of the FOI Guidelines state the following:

“An agency or minister may refuse a request if it has taken ‘all reasonable steps’ to find the document requested, and is satisfied that the document cannot be found or does not exist (s24A(1)). There are two elements that must be established before an agency or minister can refuse a request for access to a document under s24A:

- the agency or minister must have taken all reasonable steps to find the document, and
- the agency or minister is satisfied that the document cannot be found or does not exist.

It is not enough for an agency or minister to simply assert that the document cannot be found or does not exist before taking any demonstrable steps to try and find the requested document.”

Paragraph 3.88 of the FOI Guidelines states that:

“The meaning of ‘reasonable’ in the context of s24A(1)(a) has been 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.”

The steps undertaken to locate the documents requested by you have been outlined above, under “Summary of searches” along with why it is concluded that such documents do not exist. For the above reasons outlined in the summary, I am satisfied that all reasonable steps have been taken to find the documents requested by you and the documents do not exist in accordance with section 24A of the FOI Act.

Your rights of review

You may seek a review of this decision if you are not satisfied with it. Further information about your review rights is available in FOI fact sheet 12 published by OAIC. I have attached a copy of the fact sheet to this decision. Please be aware that if you wish to seek a review of this decision, you must apply in writing:

- To IP Australia within 30 days from the date of this letter to seek an internal review, or 15 days from the date in which you receive access to the documents, whichever is the longer period (section 54B of the FOI Act); and/or
- To the Information Commissioner within 60 days from the date of this letter to seek a review by OAIC (section 54S(1) of the FOI Act).

An application for review to the Office of the Australian Information Commissioner (OAIC) must be made in writing and be lodged in one of the following ways:

Online: www.oaic.gov.au

Post: Office of the Australian Information Commissioner
GPO Box 5218, Sydney NSW 2001

Facsimile: (02) 9284 9666

Email: enquiries@oaic.gov.au

In person: Level 3, 175 Pitt Street, Sydney, NSW.

There is no cost associated with making an application for review by the Commissioner.

Further information about review rights under the FOI Act is available in Fact Sheet 12 published by OAIC.
<https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>

If you are dissatisfied with the decision of the Information Commissioner, you may apply to the Administrative Appeals Tribunal (AAT) for a review of that decision.

The Information Commissioner is an independent office holder who is authorised to review decisions of agencies and ministers made under the FOI Act.

Complaints process

If you are concerned about the way your request was handled, you may complain to OAIC. This is a separate process from seeking a review of decision that has been made under the FOI Act.

For more information regarding the lodgement of a complaint to OAIC, information about this process is available at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>

Enquiries regarding lodging a complaint to OAIC may be directed to any of the previous OAIC addresses listed under 'Your rights of review'.

Contact

Please advise IP Australia if you decide to lodge either a request for internal review or an application for review to the Commissioner, preferably by email (FOIRequests@ipaustalia.gov.au) so that IP Australia can assist the Commissioner by preparing the delivery of key documents for the review.

Yours sincerely



Lucy Turonek
A/g Deputy Chief Legal Counsel
Office of Legal Counsel
IP Australia