



Our reference: FOIREQ22/00070

Julie

By email: foi+request-8576-af547fdb@righttoknow.org.au

Your Freedom of Information request FOIREQ22/00070

Dear Julie

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 9 March 2022.

Scope of your request

In your request you seek access to the following:

“I request copy of all s 55G substituted decisions received by the Office of the Australian Information Commissioner since 2018, since a request must be a request for documents.

It may be simpler to provide a table of the date the s 55G decision was received by the Office of the Australian Information Commissioner, the FOI agency it was received from, and the date of the original FOI request (not the decision date) the s 55G substitution relates to (as the s 55G decision states this).”

Request consultation process

On 30 March 2022, my colleague, Toby Shanks, wrote to you under s 24AB of the FOI Act to advise you of our intention to refuse your request under s 24(1) of the FOI Act. This was because the work involved in processing your request in its current form would substantially and unreasonably divert the resources of the OAIC from its other operations. In particular, Mr Shanks advised you of your options. That is, you could;

- withdraw your request;
- revise the scope of the request (a number of options for revising the scope were provided to you); or
- not respond and your FOI request will be taken to have been withdrawn.

On 10 April 2022, you wrote to the OAIC with your consultation response. In your response you revised your scope as follows:

I vary my FOI only to the extent that the period of time in scope commences from 1 January 2018 since the OAIC claim this was the first time the OAIC even kept records of s 55G substitutions it had approved.

Decision

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

Having considered your response to the request consultation notice and the revised scope of the request, I am of the view that the work involved in processing your request in its current form would still substantially and unreasonably divert the resources of this agency due to the substantial number of documents which fall within the scope of the request (ss 24AA(1)(a)(i) and 24AA(2)(b)(i) FOI Act) and that a practical refusal reason still exists (s 24AA FOI Act).

Therefore, I have decided to refuse your request for documents on the basis that a practical refusal reason exists under s 24 of the FOI Act.

Reasons for decision

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

- your FOI request of 9 March 2022
- your correspondence of 10 April 2022
- consultation with the appropriate line area
- sampling conducted
- the FOI Act, in particular ss 24AA and 24
- the FOI Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines)
- estimation of time and resources, necessary for the purposes of calculating processing time.

Diversion of resources (s 24)

Under s 24(1) of the FOI Act, if an agency or Minister is satisfied, when dealing with a request for a document, that a practical refusal reason exists in relation to the request, the agency or Minister:

- a) must undertake a request consultation process; and
- b) If, after the request consultation process, the agency or Minister is satisfied that the practical refusal reason still exists- the agency or Minister may refuse to give access to the document in accordance with the request.

When does a practical refusal reason exist (s 24AA)

For the purposes of s 24, a practical refusal reason exists in relation to a request if the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations.

FOI Guidelines at [3.116] state that:

In deciding if a practical refusal reason exists, an agency or minister must have regard to the resources required to perform the following activities specified in s 24AA(2):

- identifying, locating or collating documents within the filing system of the agency or minister
- examining the documents
- deciding whether to grant, refuse or defer access
- consulting with other parties
- redacting exempt material from the documents
- making copies of documents
- notifying an interim or final decision to the applicant.

Your original FOI request and the calculation of processing time

We consulted with the Director of the FOI Regulatory Group, to identify documents within the scope of your request.

The line area advised the following:

- The OAIC uses a case management system called Resolve to register and process IC review applications received.
- S 55G decisions issued in IC reviews were not automatically captured in Resolve until December 2019, when an additional data field was added into Resolve.
- A search was conducted using the data that is captured by Resolve, for IC review applications received by the OAIC for matters where a s 55G decision was made. The search identified 1,352 matters. In some IC reviews, more than one 55G decision was made by the agency.
- However, to identify s55G decisions for the period 1 January 2018 to December 2019 each IC review would need to be opened and manually check to see if a s55G decision had been made. These decisions would be in addition to the 1,352 matters identified above.
- For the purposes of calculating time to conduct search and retrieval, the line area examined 10 of the 1,352 matters where at least one 55G decision was made. The line area estimated that it would take at least 3 minutes to identify

the s 55G decision, copy the decision and save it in a separate folder, consider whether it contains any exempt material, and provide comments to the Legal Services Area, with a copy of that decision. The line area estimates that it would take a staff member at least 67 hours to complete these tasks for all 1,352 files.

Accordingly, the line area estimates that it would take at least **67 hours** to conduct search and retrieval of the 1,352 IC review matters where Resolve was able to identify that a s 55G decision was made.

Decision making time

In addition to the time required by the line area to conduct search and retrieval of the documents which fall within the scope of your FOI request, additional time is required by the FOI decision maker to examine, assess, and edit the documents in scope in order to make the FOI decision.

I conducted a sample of 20 of the 1,352 IC reviews containing a 55G decision that were identified by the line area, to help calculate the time it would take for an FOI Officer to process your FOI request.

Based on the sample, I calculated the following:

- Of the s 55G decisions in the sample, the decisions ranged from 2 to 22 pages with a range of complexity levels in the decision. Using an average of 7 pages in each decision from the sample, in relation to the 1,352 IC reviews identified there would be at least 9,464 pages to be reviewed and processed for 1,352 IC review matters.
- In conducting the sample, I took 3.83 minutes on average for each IC review matter to
 - review each page of the decision,
 - identify personal and business information about third-party entities
 - identify any other relevant exemptions that may be exempt and redacted, and
 - apply the redactions where appropriate.
- Based on the above sample, we estimate that it would take at least **86 hours** to review and assess the s 55G decisions in the 1,352 IC review matters.
- We conservatively estimate that it will take the FOI decision maker **5 hours** to prepare a schedule of documents regarding at least the 1,352 s 55G decisions in scope of your FOI request, and another **2 hours** to draft the FOI decision and reasons for decision.

Combined with the line area estimate for conducting search and retrieval, based on the sample conducted, we estimate it would take a staff member of the OAIC at least **160 hours** to process your FOI request.

The process time estimated above do not take into account the additional time required to:

- Collate and prepare documents for third party consultation. All s 55G decision documents contain sensitive and/or confidential personal and business information about third-party entities, as such consultation is required under sections 27 and 27A of the FOI Act.
- assess each third-party's response to our consultation, edit and redact the relevant information for release and
- the additional search and retrieval time required to locate all 55G decisions in scope of your FOI request, which due to the limitation of the data captured by Resolve, would require a staff member to manually go through IC reviews received by the OAIC prior to 1 January 2018, where a s 55G decision was made in the matter between 1 January 2018 until the date of your FOI request.

Why processing your request will unreasonably divert the OAIC's resources

An estimate of processing time is only one of the considerations to be taken into account when deciding whether a practical refusal reason exists. As well as requiring a request to substantially divert an agency's resources, s 24AA also requires the request to unreasonably divert an agency's resources from its other functions before it can be refused under s 24.

The *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982 (FOI Guidelines)* identify matters that may be relevant when deciding whether processing the request will unreasonably divert an agency's resources from its other functions. These include:

- the staffing resources available to the agency for FOI processing
- the impact that processing a request may have on other work in the agency, including FOI processing whether an applicant has cooperated in framing a request to reduce the processing workload
- whether there is a significant public interest in the documents requested
- other steps taken by an agency or minister to publish information of the kind requested by an applicant.

The OAIC is a small agency, employing approximately 130 (head count) staff. Processing a request of this size would substantially impact on the OAIC's operations

because of the limited number of people the OAIC has available to process FOI requests. This makes it likely that staff will be diverted from their other work in the OAIC, including:

- undertaking regulatory functions in both FOI and privacy
- conducting IC review
- delivering internal legal advice
- improve agencies processes for managing FOI requests.

Request for a table

I note that your FOI request stated:

It may be simpler to provide a table of the date the s 55G decision was received by the Office of the Australian Information Commissioner, the FOI agency it was received from, and the date of the original FOI request (not the decision date) the s 55G substitution relates to (as the s 55G decision states this).

Under s 17 of the FOI Act, if an FOI request is made for a document that could be produced by using a computer ordinarily available to the agency for retrieving or collating stored information, an agency is required to deal with the request as if it was a request for written documents to which the FOI Act applies. I have considered whether or not it is possible to create a table as you have requested.

Part 3 of the FOI Guidelines provides, at [3.212], the obligation to produce a written document arises if:

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

The information you have requested is not available in a discrete format. That is each individual s55G decision would need to be opened manually to identify both the agency and the date of the original FOI request. In addition, all IC Reviews for the period 1 January 2018 to December 2019 would need to be reviewed to determine whether any s55G decisions are on file. This information would then need to be entered manually into a table.

Given the time taken to identify all relevant s55G decisions and enter information into a table manually, I consider it would substantially and unreasonably divert the

resources of the agency from its other operations. For these reasons I have not created a table under s17 of the FOI Act.

Conclusion

On the basis of the above considerations, I have found that processing your FOI request would substantially and unreasonably divert the OAIC's resources from its other operations. As such, I have refused your request under s24 of the FOI Act. For the same reasons, I have not created a table under s 17 of the FOI Act.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Angela Wong', written in a cursive style.

Angela Wong
Lawyer

14 April 2022

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 foi@oaic.gov.au. More information is available on the Access our information page on our website.