



Our reference: FOIREQ22/00113

Julie

By email: [foi+request-8576-af547fdb@righttoknow.org.au](mailto:foi+request-8576-af547fdb@righttoknow.org.au)

## Your Internal Review Application - FOIREQ22/00113

Dear Julie

I am writing to advise you of my decision in response to your application for internal review of the decision made on **14 April 2022** - FOIREQ22/00070

### Original FOI Decision

You lodged a FOI request on 9 March 2022. In your request you sought 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)."*

On 30 March 2022, the OAIC issued you with a request consultation notice under s 24AB of the FOI Act. In that notice, the OAIC advised you that it intended to refuse the request on the basis that 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. The OAIC invited you to respond to the consultation notice to advise whether you wished to:

- 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- not respond and your FOI request would be taken to have been withdrawn

On 10 April 2022 you wrote to the OAIC and revised the scope of your request 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.”*

On 14 April 2022, the OAIC refused the request under s 24(1) of the FOI Act on the basis that a practical refusal reason still existed as the work involved in processing the revised FOI request would still substantially and unreasonably divert the resources of this agency due to the substantial number of documents which fell within the scope of the request and that a practical refusal reason still existed (section 24AA FOI Act).

I note that your original request was for “*all s 55G substituted decisions received...since 2018*” and that your revised request ‘amended’ your request to be from a scope commencing “*...from 1 January 2018.*” Since your original request was for all documents from 2018, which would include all documents from 1 January 2018 onwards, I note that your amended scope was functionally identical to your original request, with no actual reduction of scope occurring.

### **Material taken into account**

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

- your original freedom of information request FOIREQ22/00070 dated 9 March 2022
- your amendment to your request dated 10 March 2022
- the decision of the delegate dated 14 April 2022 the subject of this review
- review of line area consultations I have completed in undertaking this internal review
- further sampling conducted in undertaking this review
- the FOI Act
- relevant case law
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act.

### **Internal Review Decision**

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

An internal review decision is a ‘fresh decision’ made by a person other than the person who made the original decision (section 54C of the *Freedom of Information Act 1982* (the

FOI Act)). As such, I have had regard to, but not relied on, the delegate's original Freedom of Information (FOI) decision.

After reviewing the previous line area advice and searches conducted, and conducting further sampling of documents within the scope of your request, I have decided to affirm the original decision in refusing to process your request under section 24 of the FOI Act, on the basis that that the work involved in processing your request would substantially and unreasonably divert the resources of this agency and that a practical refusal reason therefore exists under section 24 of the FOI Act.

### **When does a practical refusal reason exist (section 24AA)**

For the purposes of section 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.

The 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 section 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.

### **Search and retrieval time**

The Director of the OAIC FOI Regulatory Group was previously consulted to identify documents within the scope of your request. Having reviewed these investigations and sample searches conducted by the line area, I am satisfied that they remain accurate.

As was previously communicated to you, the line area advised the following:

- The OAIC uses a case management system called Resolve to register and process IC review applications received.
- A search was conducted using the data that is captured by Resolve, for Information Commissioner (IC) review applications received by the OAIC for matters where a section 55G decision was made. The search identified 1,352 matters. In some IC reviews, more than one section 55G decision was made by the agency.

- Section 55G decisions issued in IC reviews were not automatically captured in Resolve until approximately December 2019, when an additional data field was added into Resolve.
- Because of this previous lack of functionality, these 1,352 matters do not include all section 55G decisions for the period from approximately 1 January 2018 to December 2019.
- Due to this, each IC decision from this period that has not been recorded as containing a section 55G decision would need to be opened and manually checked to see if a section 55G decision had been made. These files 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 that was marked as having at least one section 55G decision made. The line area estimated that it would take at least 3 minutes to identify the section 55G decision, copy the decision and save it in a separate folder, consider whether it contained any exempt material, and provide comments to the Legal Services Area, with a copy of that decision.

Accordingly, the line area advised that it would take a minimum of **67 hours** to conduct search and retrieval of the 1,352 IC review matters where Resolve identified that a section 55G decision was made.

As noted above, the figure of 1,352 IC matters identified as containing section 55 G decisions does not include all relevant files from January 2018 to December 2019, due to Resolve lacking this automatic recording feature during this time. Of the 1,352 IC review matters identified as containing at least one section 55G decision, only 395 of these matters are from January 2018 to December 2019.

Upon conducting a Resolve search, I have found there are 989 IC review record files from 2018 and 900 IC review records files from 2019. This is a total of 1889 files. This means that, removing the 395 files from this period identified by the line area's search, there are approximately 1,494 further files that would need to be reviewed in the course of processing of your request, in order to determine whether or not these files contained one or more section 55G decisions. Noting that in some instances it may be difficult to immediately identify the section 55G decision in the file due to varying naming conventions, and taking into consideration the line area's advice above, I estimate that it would also take an average of 3 minutes to:

- identify whether a case contained a section 55G decision
- copy the decision and save it in a separate folder,
- consider whether it contained any exempt material, and
- provide comments to the Legal Services Area, with a copy of that decision.

It therefore appears, at an average of 3 minutes per file, that searching these 1,494 files would take at least a further **74.7 hours** of processing time.

I therefore calculate the total search and retrieval time it would take to process your request as being at least **141.7 hours**.

### Decision making time

In addition to the time it would take the line area to conduct reasonable searches to locate the documents within the scope of your FOI request, I must also consider the time that it would take for the FOI decision maker to examine, assess, and consider exemptions for the documents within the scope of your request. I must also consider the time it may take to write the statement of reasons for the decision.

The original decision maker conducted a sample of 20 of the 1,352 IC reviews containing a section 55G decision that were identified by the line area, to assist in calculating the time it would take to process this FOI request. In undertaking this internal review, I undertook a re-sampling of the 20 of the 1,352 decisions marked on Resolve as containing a section 55G decision as identified by the line area. Based on repeating this sampling, I came to the following conclusions:

- The average page numbers in the sampled section 55G decisions was 6.45 pages, with the range of pages in the sample ranging between 2-22 pages. Extrapolating this average number of pages across the 1,352 IC reviews marked as containing section 55 G decisions, there would be approximately 8720 pages to be reviewed and processed.
- I note that of the 20 IC reviews sampled in undertaking this exercise, one file was mislabelled and there was in fact no section 55G decision in this matter. I note that it is possible there may be a small number of the other Resolve files that have been mislabelled in this manner. Based on this sampling, and assuming that 1/20 or 5% of IC review files did not actually contain section 55G decisions, this would reduce the number of IC reviews that do contain 55G decisions to 1284 IC reviews only, and a total page estimate to 8284 pages.
- In conducting this sample, I took an average of 3.05 minutes for each IC review matter to:
  - Review each page of the decision
  - Identify third party information present in the documents
  - Identify other relevant exemptions that may be subject to exemption under the FOI Act
  - Apply exemptions to the documents
- Based on this sample, I estimate that it would take at least **65.27** hours to review and assess the section 55G decisions in the estimated 1284 IC review matters.
- As a conservative estimate, noting that the actual processing time may be much higher, I estimate it would take the FOI decision maker **5 hours** to prepare a schedule of documents regarding the section 55G decisions from the IC review matters within the scope of your request, and another **2 hours** to draft the FOI decision and reasons for decision.

Combined with the estimates for conducting search and retrieval, based on the sample conducted, I estimate that your request would require at least **213.96 hours** or **5.32 weeks** of total processing time.

This estimate does not take into account the additional time that would be required to:

- Collate and prepare documents for third party consultation. All section 55G decision documents contain sensitive and/or confidential personal information about third-party entities, and as such consultation is required under sections 27A of the FOI Act.
- Assess each third-party's response to our consultation, and edit and redact the relevant information for release.
- Consider and apply exemptions on the further section 55G decisions that would be found upon searching the 1,494 IC review files from 2018-2019, as outlined above.

### **Substantial and unreasonable diversion of resources**

On its face, **213.96 hours or 5.32 weeks** of processing time is an unreasonable burden for a single FOI request, taking into account the fact that the OAIC processes a number of FOI requests at any one time, in addition to its other regulatory functions.

The FOI guidelines at [3.117] outline the following relevant considerations when deciding as to whether a practical refusal reason exists:

- the staffing resources available to an agency or minister for FOI processing
- whether the processing work requires the specialist attention of a minister or senior officer, or can only be undertaken by one or more specialist officers in an agency who have competing responsibilities the impact that processing a request may have on other work in an agency or minister's office, 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

Noting that the OAIC is a small agency, consisting of approximately 130 staff members, processing your request would significantly impact on our operations. Processing your request would mean diverting staff from their other functions, such as:

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

In the recent decision of 'ZE' and Services Australia (Freedom of Information) [\[2021\] AICmr 87](#) ('**ZE v Services**') it was found by the Australian Information Commissioner at [39] that

200 hours of processing time met the threshold for a substantial diversion of resources, also finding at [47] that processing such a request would be unreasonable in the circumstances. I note that OAIC is a significantly smaller agency than Services Australia, and that the estimated processing time of this request exceeds 200 hours.

The FOI Guidelines also state at [3.117] that an additional factor that can be considered in deciding whether a practical refusal exists is whether an applicant has cooperated in framing a request in such a way so as to reduce the processing workload. In *ZE v Services* it was noted at [21] that the applicant did not attempt to overcome the practical refusal reason by revising the scope of the request and did not engage in the consultation process in a meaningful way. The Freedom of Information Commissioner at [45]-[49] noted this refusal to engage in the process as a relevant consideration in making her decision that processing the applicant's request would both substantially and unreasonably divert the agency's resources from its other operations. In this case, you have similarly declined to engage with our attempt to assist you in framing your request in such a way that would allow the OAIC to process it, as noted above. I have taken this factor into account in the course of considering whether your request would *unreasonably* divert the agency's resources from its other operations.

I am therefore satisfied that, for the reasons outlined above, processing this request would substantially and unreasonably divert the OAIC from its other operations, as under section 24 and 24AA of the FOI Act.

#### **Document created under section 17 of the FOI Act**

Your original FOI request contained the following:

*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).*

This appears to be a request for the OAIC to produce the relevant information in a table under section 17 of the FOI Act. I have considered whether it is possible to produce a table as you have requested. Relevantly, the FOI Guidelines at [3.212] state that 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)).

Relevant to your request, in the Full Federal Court case of *Collection Point Pty Ltd v Commissioner of Taxation* [\[2013\] FCAFC 67](#), the Court found at [43]-[44] that the reference in section 17(1)(c)(i) to '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 ...' The Court further observed that '[T]he computer or other equipment ... must be capable of functioning independently to collate or retrieve stored information and to produce the requested document' [43]-[44].

For the reasons I have outlined above, and the limitations to the data that is captured by OAIC's case management system Resolve, the OAIC does not have access to any such software that would generate such a table containing the information you have requested. To create a document with the information you have requested would require an employee of the OAIC to manually create a table containing the information you have requested through reviewing and pulling information from close to 3000 IC Review files.

For these reasons, I am satisfied that the documents you requested cannot be produced by a computer or other equipment ordinarily available to the OAIC. As a result, the OAIC is not required to create a document under section 17(1) of the FOI Act to satisfy your request.

#### Further information

Please see the following page for information about your review rights.

Yours sincerely,

*Mark Lindsey-Temple*

**Mark Lindsey-Temple**  
Senior Lawyer

25 May 2022

## **If you disagree with my decision**

### **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 30 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.

s 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](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 [foi@oaic.gov.au](mailto:foi@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](mailto:foi@oaic.gov.au). More information is available on the [Access our information](#) page on our website.