



**Our reference: FOIREQ22/00141**

Julie

By email: [foi+request-8989-046c55f4@righttoknow.org.au](mailto:foi+request-8989-046c55f4@righttoknow.org.au)

**Your Freedom of Information request FOIREQ22/00141**

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 6 June 2022.

**Scope of your request**

In your original 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 1 January 2020, since a request must be a request for documents.*

*Based on an earlier request, the OAIC states that Resolve has recorded and identified s 55G decisions since 'approximately Dec 2019'. It is unclear why the OAIC did not record such decisions in a searchable way beforehand, given the significant potential for abuse with such s 55G decisions.*

*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).*

*While the OAIC may not be obligated to provide such a table in lieu, agencies have produced such tables under s 17 despite some manual intervention involved (see <https://www.righttoknow.org.au/request/6767/response/19110/attach/4/FOI%2038412%20Document%20created%20in%20accordance%20with%20section%2017%20of%20the%20FOI%20Act%20final.pdf> for example), because of the efficiency of not having to assess more information than has been requested.*

*FOI does stand for 'freedom of [official] information', and the object of the Act is to not unnecessarily or unethically take an artificial prescriptive stance contrary to the objects of the Act.”*

On 7 June 2022 we acknowledged your request and sought to clarify the scope request:

*“Could you please clarify the scope of your request. Would you please kindly advise whether:*

- 1. you are seeking copies of the actual 55G decisions, or*
- 2. a table including the date the decision was received, the FOI agency it was received from and the date of the original FOI request, or*
- 3. both of the above?*

*We would be grateful if you can please kindly let us know by **close of business on Thursday 9 June 2022**. If we do not hear from you by this date we will assume that you would like to access both a copy of the actual 55G decision and a table outlined in your FOI request. “*

Because you did not respond to our request for clarification of the scope of your request, we at this point interpreted your request to be for copies of both the actual s55G decisions and a table including the date the decision was received, the FOI agency it was received from and the date of the original FOI request.

### **Request consultation process**

On 29 June 2022, I 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 then-current form would substantially and unreasonably divert the resources of the OAIC from its other operations. In the letter, I advised that 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 would be taken to have been withdrawn.

On 1 July 2022, you wrote to the OAIC with your consultation response. In your response you revised your scope as follows:

*“Of the 1,123 documents currently identified as in scope, I exclude as irrelevant all draft and preliminary s 55G decisions as they are by definition not decisions made but proposed ones that are deliberative and therefore exempt under the FOI Act (which is why including them as in scope for calculating processing time is evidence of 'padding' by the OAIC who would be aware such documents are exempt in full and therefore not assessed for release).*

*I also exclude as irrelevant all third party information of private individuals and corporate entities that are not FOI agencies.*

*I also exclude as irrelevant the names and contact details of any Commonwealth official or contractor other than OAIC employees.*

*As I am only interested in the following, my view is that it would be most efficient and practicable for the OAIC to create a table under s 17 of the Freedom of Information Act (as done here*

*<https://www.righttoknow.org.au/request/6767/response/19110/attach/4/FOI%2038412%20Document%20created%20in%20accordance%20with%20section%2017%20of%20the%20FOI%20Act%20final.pdf> even though said s 17 document was not produced solely by computers - s 17 does not prevent an FOI agency from producing such a document, and where it is more practicable and efficient to do so, the objects of the Freedom of Information Act support such a decision being taken) to report the following:*

*\* the date the FOI request was received by the FOI agency (or internal review request was received, where the s 55G substitution is for an internal review decision gone deemed) to which the operationalised s 55G decision relates to*

*\* the date the FOI agency issued the s 55G substituting decision to the FOI applicant*

*\* the name of the FOI agency who made the s 55G substituting decision*

*This would be the most efficient and practical method of doing this FOI as it does not require any consideration and review of any irrelevant information, and these details are obtainable from the relevant Resolve report that records the s 55G substituting decision as having been made by the FOI agency (which the FOI agency reports to the OAIC).*

*If, and only if, the OAIC refuses to produce such a table under s 17, then the OAIC can provide copy of:*

*\* The first page of the operationalised (no drafts or preliminary documents) s 55G substituting decision reported to it by the foi agency that made it, with all irrelevant information as listed earlier excluded*

*\* Copy of the Resolve report where that s 55G substituted decision is reported for each operationalised s 55G decision.”*

## Material taken into account

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

- your FOI request FOIREQ22/00141 dated 6 June 2022
- your amendment to your request dated 1 July 2022
- consultation with the appropriate line area
- sampling conducted
- the FOI Act, in particular s 17, 24, 24AA, and 24AB
- relevant case law
- the FOI Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines).

## 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 circumstances that would require us to create a document in response to your request under s 17 of the FOI Act do not arise in this instance, and therefore no obligation to create such a document exists in this case. In light of this, I am satisfied 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) of the FOI Act) and that a practical refusal reason still exists under s 24AA of the 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

Document created under s 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).”*

On 1 July you restated this part of your request on the following terms:

*“As I am only interested in the following, my view is that it would be most efficient and practicable for the OAIC to create a table under s 17 of the Freedom of Information Act (as done here <https://www.righttoknow.org.au/request/6767/response/19110/attach/4/FOI%2038412%20Document%20created%20in%20accordance%20with%20section%2017%20of%20the%20FOI%20Act%20final.pdf> even though said s 17 document was not produced solely by computers - s 17 does not prevent an FOI agency from producing such a document, and where it is more practicable and efficient to do so, the objects of the Freedom of Information Act support such a decision being taken) to report the following:*

*\* the date the FOI request was received by the FOI agency (or internal review request was received, where the s 55G substitution is for an internal review decision gone deemed) to which the operationalised s 55G decision relates to*

*\* the date the FOI agency issued the s 55G substituting decision to the FOI applicant*

*\* the name of the FOI agency who made the s 55G substituting decision*

*This would be the most efficient and practical method of doing this FOI as it does not require any consideration and review of any irrelevant information, and these details are obtainable from the relevant Resolve report that records the s 55G substituting decision as having been made by the FOI agency (which the FOI agency reports to the OAIC).”*

This appears to be a request for the OAIC to produce the requested 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)).

The FOI Regulatory Group line area was consulted in order to determine whether a s 17 table was able to be generated in response to 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.

- In December 2019, an additional data field was added into *Resolve* for reporting purposes to capture IC reviews where a s 55G decision was made by the agency in the IC review. However, the data captured by this field is only in relation to whether a s 55G decision was made. The date the decision was made is not captured by *Resolve*'s reporting functionality, and nor is the date that the FOI request was received by the relevant agency.
- Therefore, as previously advised to you, there is no report that can be generated in a discrete form that captures the information that you have requested.

Based on this advice, it appears that it is not possible to use the *Resolve* program to generate a report with the information that you have requested.

I note that, in order to create a report that contains the requested information, staff of the OAIC would have to:

- Manually interrogate each IC review that indicates that a s55G is recorded to establish if a s55G decision was received (some of the files have not been recorded accurately)
- Peruse the *Resolve* file to obtain the date of the relevant s55G decision,
- Obtain the date that the original FOI request/ internal review request was made, and
- Manually put this information into a table.

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' [44]. Similarly, in the recent case of *YH and Australian Communications and Media Authority (Freedom of information)* [2021] AICmr 64, it was found that a "manual process" of locating the requested information in number of other documents and then manually collating this information in a new document goes beyond what s 17 requires, and therefore s 17 does not apply in these circumstances (see [30]-[33]).

For the reasons I have outlined above, due to limitations to the data that is captured by *Resolve*, the OAIC does not have access to any such software that would generate such a table containing the information you have requested, as per the requirements of s 17. 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 over 1,000 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 able to create a document under s 17 of the FOI Act to satisfy your request.

In your revised FOI request, you have requested for certain material/documents to be provided to you if a s 17 table containing the requested information cannot be produced. I will consider these aspects in the following section of my decision.

#### 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.

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 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.

#### Search and retrieval time

The FOI Regulatory Group was consulted to identify documents within the scope of your request.

The line area undertook a sampling exercise of 10 documents from the *Resolve* files that were marked as containing a s 55G decision. The line area advised that it would take the approximately 3 minutes per *Resolve* file to open the file, identify whether the *Resolve* file contains a s 55G decision, and note any exempt or out of scope material of which to advise the decision maker. In light of the revised scope of your request a staff member of the Legal team repeated this sampling and confirmed that this process would still take an average of approximately 3 minutes per *Resolve* file to access the file, identify whether a s 55G decision or decisions are within the file, download the relevant documents (if relevant), and then conduct and record a preliminary review of the first page of the document, or documents, to advise the decision maker of the document's contents and any potentially exempt material.

Legal conducted a search on *Resolve* to confirm the number of IC reviews where a s 55G decision was received in the period specified in your FOI request. This search indicates that there were a total of 1,123 section 55G revised decisions received by the OAIC in the time period of 1 January 2020 to 10 June 2022. All of these *Resolve* files would need to be reviewed in order to process your request.

Accordingly, using this estimate provided by the line area, I estimate that it would take at least **56.15 hours** to conduct search and retrieval of the 1,123 IC review matters where *Resolve* was able to identify that a section 55G decision was made. I note that in your revised scope you excluded as irrelevant all draft and preliminary s 55G decisions. Unfortunately, this would not reduce the line areas processing time, as they would still be required to manually open the files to identify whether a s 55G decision exists on file, open the relevant documents, and review them to confirm their contents, as outlined above.

#### 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 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 would take to generate the requested *Resolve* reports (as per the final part of your revised request) and examine, assess, and consider exemptions for the



reports, as well as the time it would take to write the statement of reasons for the decision.

A staff member from the Legal team conducted a sample of 20 of the 1,123 IC reviews containing a section 55G decision that were identified, to assist in calculating the time it would take for an FOI Officer to process your FOI request. The sampling is approximately 1.7% of the total review decisions that we have identified.

Based on the sample, I calculate that:

- In conducting the sample, it took an average of approximately 2.3 minutes in each IC review matter to:
  - review the first page of the 55G decision (noting that your request is limited to only the first page of each decision);
  - identify personal and business information about third-party entities and redact this information as per your request; and
  - identify any other relevant exemptions that may apply.
- 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 noted that it is possible there may be a small number of 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 contain s 55G decisions to approximately 1067 IC reviews.
- I note that of the 20 IC reviews initially sampled in relation to your initial FOI request (prior to the revised scope), two files were at early stages of the process and no section 55G decisions had at that point been added to the file. In the more recent sampling process, no such files were found. Based on both samples, and assuming that 2/40 or 5% of IC review files were in initial stages and did not actually contain section 55G decisions, this would further reduce the number of s 55G decisions to approximately 1,011.
- Based on this sample, I estimate that it would take at least **38.74 hours** to review and assess the first pages of the 55G decisions in the estimated 1,011 IC review matters.
- As per the last part of your request for the *Resolve* reports of matters containing a s 55G substituted decision, in my sample the average page numbers in the *Resolve* reports generated was 4.4 pages, with the range of pages in the sample ranging between 2-22 pages. Extrapolating this average number of pages across the 1,011 files estimated to contain section 55G decisions, there would be approximately 4,448 pages to be reviewed.
- In conducting the sample of *Resolve* reports, I took an average of 2 minutes for each IC review matter to:

- generate the *Resolve* report;
- review each page of the report;
- identify personal and business information about third-party entities and redact this information as per your request; and
- identify other relevant exemptions that may be subject to exemption under the FOI act
- Based on this sample, I estimate it would take at least **33.7 hours** to generate, review and assess the *Resolve* reports for the section 55G decisions in the estimated 1,011 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 documents and applicable exemptions in these 1,011 IC review matters in 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 **135.59 hours**, or approximately **3.3 weeks** of total processing time.

#### Substantial and unreasonable diversion of resources

As noted in the FOI Guidelines, at [3.119], whether a practical refusal exists will be a question of fact in the individual case. I am satisfied that **135.59 hours** 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

OAIC is a small agency. It does not have a dedicated FOI team. While OAIC consists of approximately 130 staff members in total, the FOI requests received by the OAIC are processed by a handful of staff members within its small Legal Services Team. Processing your request would have a significant impact on the line area operations as well as the operations of the Legal Services Team. 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.

Relevantly, in the recent decision of *'NY' and Australian Building and Construction Commission (Freedom of information)* [2018] AICmr 19 it was found by the Information Commissioner at [33] that 120 hours of processing time met the threshold for a substantial and unreasonable diversion of resources for an agency of similar size to the OAIC. I note also that that the estimated processing time of this request exceeds that of this recent decision, being **135.59 hours**.

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.

### **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.

### Further information

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

Yours sincerely



**Margaret Sui**  
Senior Lawyer

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