



Our reference: FOIREQ22/00187

Julie

By email: foi+request-8989-046c55f4@righttoknow.org.au

Your Internal Review Application - FOIREQ22/00187

Dear Julie

I am writing to advise you of my decision in response to your application for internal review of the decision made on **8 July 2022** (FOIREQ22/00141).

Original FOI Decision

You lodged a FOI request on 6 June 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 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 the OAIC acknowledged your request and sought clarification of the scope of the request. You did not respond to our request for clarification and on 29 June 2022 we 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.

On 1 July 2022, you wrote to the OAIC and 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.”*

On 8 July 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).

On 16 July 2022, you lodged a request for internal review of the handling of your FOI request (FOIREQ22/00141). On 22 July 2022, the OAIC sought to clarify if you were seeking an internal review of the decision in FOIREQ22/00141 and on 27 July and 1 August 2022 you confirmed that you were seeking internal review of the decision in FOIREQ22/00141. You did not revise the scope of your FOI request in this correspondence.

Material taken into account

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

- your original freedom of information request FOIREQ22/00141 dated 6 June 2022
- your amendment to your request dated 1 July 2022
- the decision of the delegate dated 8 July 2022 the subject of this review
- relevant sampling from the original decision
- 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.

Document created under s 17 of the FOI Act

On 1 July 2022, you indicated that the most efficient way of providing the information you were seeking was to create a table under s 17 of the FOI Act. You requested a table that included:

- 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; and
- the name of the agency who made the s55G substituting decision.

I have considered whether it is possible to create such a table under s 17 of the FOI Act. The original decision maker considered whether a table could be created under s 17 of the FOI Act and determined that a table could not be produced solely by computers. It was identified that a resolve report could be produced that would identify the agency that issued the s 55G decision to the FOI applicant consistent with your request. However, a resolve report could not be produced that would identify:

- 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; and
- the date the FOI agency issued the s 55G substituting decision to the FOI applicant.

As such, the original decision maker determined that the OAIC was not able to create a document under s 17 of the FOI Act to satisfy your request. I have considered and affirm the decision that the OAIC is not able to produce a document solely by computers to provide you the information you are seeking.

I am therefore satisfied, for the reasons given above, that the OAIC is not obliged to produce a document under s17 of the FOI Act as a table could not be produced solely by computers. As such, I have refused your request for a document to be created under s 17 of the FOI Act.

Document created outside of the FOI Act

As noted in your correspondence 1 July 2022 even if the OAIC is not under an obligation under s 17 to produce a document *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.* I accept that it was open to the OAIC to produce a document containing the information you are seeking outside of the FOI Act.

To produce a document containing the information you are seeking, an employee of the OAIC would need to manually create a table by reviewing and retrieving information from over 1,000 individual IC Review files. The FOI Regulatory Group estimated that it would take over 50 hours to manually create such a document. On this basis, I have decided not to create a document outside of the FOI Act containing the information you have requested.

Diversion of resources s 24 of the FOI Act

If a decision was made to refuse your request for a table under s17 of the FOI Act, as I have done above, then your request stated that the OAIC provide a 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; and
- Copy of the Resolve report where that s 55G substituted decision is reported for each operationalised s 55G decision.

After reviewing the previous line area advice and 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 FOI Regulatory Group was consulted to identify documents within the scope of your request. They identified 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. In relation to the relevant IC decision, they 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 them 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 FOI request decision maker.

As a result of your revised scope, 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 FOI request decision maker of the document's contents and any potentially exempt material.

In conducting this review, I contacted the FOI Regulatory Group and asked them to confirm the number of section 55G revised decisions received by the OAIC in the time period of 1 January 2020 to 10 June 2022. The Resolve report, run on 11 August 2022, identified 1,200 relevant decisions. This is an increase from the report originally run on 27 June 2022 which identified 1,123 relevant decisions. The FOI Regulatory Group has identified that the discrepancy may have occurred as a result of some section 55G revised decisions not being identified in Resolve until after the end of the financial year (the first report was run 27 June 2022 and the second report 11 August 2022).

I have reviewed the estimate of the FOI Regulatory Group and Legal team and affirm the estimate of approximately 3 minutes per Resolve file. Based on this sampling, it is estimated that it would take at least **60 hours** to conduct search and retrieval of the 1,200 IC review matters (updated number provided 11 August 2022) where *Resolve* was able to identify that a section 55G decision was made. I also note that in your revised scope you excluded as irrelevant all draft and preliminary s 55G decisions. However, this would not reduce the line area 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, as well as the time it would take to write the statement of reasons for the decision.

I note that a staff member from the Legal team conducted a sample of 20 of the 1,200 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. I have reviewed this sampling. Based on the sample, the original decision maker calculated 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.
- one file in the sample was mislabelled and there was in fact no section 55G decision in this matter. Based on this 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 1140 IC reviews.

- 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 1,083.
- Based on this sample, it is estimated that it would take at least **41.52 hours** to review and assess the first pages of the 55G decisions in the estimated 1,083 IC review matters.
- In relation to the *Resolve* reports of matters containing a s 55G substituted decision, in my sample the average 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 1,083 files estimated to contain section 55G decisions, there would be approximately 4,765 pages to be reviewed.
- In conducting the sample of *Resolve* reports, it 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, it was estimated that it would take at least **36.1 hours** to generate, review and assess the *Resolve* reports for the section 55G decisions in the estimated 1,083 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 1,083 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, it was estimated that your request would require at least **144.62 hours**, or approximately **3.9 weeks** of total processing time. Having reviewed the sampling conducted by the FOI Regulatory Group and the Legal team, I affirm the total processing time estimate of **3.9 weeks**.

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 **144.62 hours** of processing time is an unreasonable burden for a single FOI request, taking into account the fact that the OIAC 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 am therefore satisfied that, for the reasons outlined above, processing your request for the first page of the s55G decision and corresponding resolve reports 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 the OAIC is not obliged to create a table under s17 of the FOI Act for the information you have requested as a document could not be produced solely by computers. As such, I have refused your request for a document under s17 of the FOI Act.

Because I refused your request for a document under s17 of the FOI Act, I further considered your request for the first page of the relevant s55G decision and the corresponding resolve reports. I have found that processing your FOI request for these documents would substantially and unreasonably divert the OAIC's resources from its other operations. As such, I have affirmed the original decision to refuse your request under s 24 of the FOI Act.

Further information

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

Yours sincerely

Emma Liddle
Director Legal

15 August 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

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, 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.