



8 September 2022

JH

BY EMAIL: @

In reply please quote:

FOI Request: FA 22/07/01317-R1

File Number: OBJ2022/20468

Dear JH

Freedom of Information Act 1982: internal review decision

I refer to correspondence received by the Department of Home Affairs (the Department) on 2 August 2022, in which you requested an internal review of an access refusal decision under section 54 of the *Freedom of Information Act 1982* (the FOI Act).

The decision under review is the Department's original decision dated 1 August 2022, in which the Department responded to the access request you made on 27 July 2022.

The Department has decided to **vary** its original decision on your request. Further details of the decision are provided at paragraphs 7 to 8 below.

1 Scope of original request received 27 July 2022

The scope of your original request was as follows:

Consistent with the Freedom of Information Act 1982, I request the incoming government briefs provided from the Department to its respective Ministers since 21 May 2022.

I am not seeking drafts of the above documents.

2 Original decision on access dated 1 August 2022

Documents within scope

The Department identified the following four documents as falling within the scope of your request:

- the Incoming Government Brief delivered to the Minister for Home Affairs – 312 pages
- the Incoming Government Brief delivered to the Minister for Immigration, Citizenship and Multicultural Affairs – 197 pages
- the Incoming Government Brief delivered to the Minister for Emergency Management – 122 pages
- the Australian Border Force (ABF) Incoming Government Brief – 34 pages.

Original access decision

The Department's original decision was to find that the documents within the scope of the request have been published by the Department and are therefore publicly available. The Department accordingly found that the FOI does not apply to these documents, by the operation of section 4(1)(d) of the FOI Act.

3 Request for internal review received 2 August 2022

On 2 August 2022, you requested the Department review its access decision of 1 August 2022. The terms of your review request were as follows:

I am writing to request an internal review of Department of Home Affairs's handling of my FOI request 'Incoming Government Briefs'.

My application has not had reasonable searches conducted by the decision maker and the decision maker has not shown how they have considered whether the redactions in the publicly available document are still relevant, particularly those which rely on a public interest test.

I request that this decision be reviewed by another decision maker.

On 5 August 2022, the Department contacted you to clarify the scope of your review request, in particular the nature of the documents you claimed the documents the Department had failed to locate. The Department did not receive a response from you to this correspondence.

4 Scope of internal review

I have considered your claims made in your request for internal review that the decision maker had not shown that they had considered whether the redactions applied to the documents published by the Department were still relevant.

I consider that the obligation of the Department to grant access to documents, as provided by sections 11 and 11A of the FOI Act, applies only to documents of an agency as defined by section 4 of the FOI Act. Accordingly, decision makers are not required to consider whether exemptions should apply to documents when those documents are not 'documents of an agency' as defined by section 4 of the FOI Act. The original decision-maker did not therefore assess – and was not required to assess – whether the documents published by the Department were subject to exemptions. The decision to apply exemptions to the documents prior to their publication by the Department was not made by the decision-maker for this request, but for the decision-maker for a previous request made to the Department.

I therefore consider that the decision of the Department to have previously applied exemptions to documents within the scope of the request prior to their publication by the Department is not a reviewable access refusal decision as defined by section 54A of the FOI Act.

Accordingly, and based on the terms of your internal review in paragraph 3 above, I consider you are seeking review of:

- the searches conducted by the Department in its original decision

- the Department's decision, following those searches, to identify the four documents indicated at paragraph 2 above as falling within the scope of your request.

5 Authority to make decision

I am authorised under section 23 the FOI Act to make decisions to release and to refuse access to exempt documents and to conduct internal reviews.

6 Information considered

I have considered:

- the terms of your original request
- the submission made by you in support of your request for internal review
- the documents within the scope of the request
- the searches undertaken in the original decision
- the FOI Act; and
- Guidelines published by the Office of the Information Commissioner under section 93A of the FOI Act (the FOI Guidelines).

7 Internal review decision

I have decided to vary the original decision of the Department dated 1 August 2022.

I have set aside the original decision to refuse the request under section 4(1)(d) of the FOI Act and replaced it with a decision to refuse the request under section 24A of the FOI Act.

I have provided the reasons for my decision below.

8 Reasons for internal review decision: searches for documents within scope of request

Section 24A of the FOI Act provides that the Department must take all reasonable steps to locate documents within the scope of the request, and may refuse access to documents if, following these searches, it is satisfied that the documents cannot be found or do not exist.

Searches for documents within scope of request

The searches undertaken by the Department for documents within the scope of your request were as follows:

- a request for the relevant business area of the Department, Executive and International Group, to conduct searches for documents
- searches by this business area of held on HP TRIM Content Manager (TRIM), the Department's electronic records management system.

Whether all reasonable steps taken to locate documents

Paragraph 3.88 of the FOI Guidelines notes that the Act is silent on what constitutes 'all reasonable steps' to search for a document, but suggests that the term should be:

'construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such as amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose'.

Paragraph 3.89 of the FOI Guidelines further provides that, at a minimum, an agency's searches for documents should have regard to:

- the subject matter of the documents
- the current and past file management systems and the practice of destruction or removal of documents
- the record management systems in place
- the individuals within an agency or minister's office who may be able to assist with the location of documents, and
- the age of the documents.

Having considered the searches conducted above, and the outcomes of these searches, I am satisfied that the Department has undertaken all reasonable steps to locate these documents. In making this decision, I have taken into consideration:

- You have not provided further information about the nature of the further documents to which you seek access, which would enable further searches for documents to be conducted by the Department.
- The Department's Ministerial and Parliamentary Branch, contained within the Executive and International Group, is responsible for the coordination of Incoming Government Briefs. Accordingly, I consider that the Executive and International Group was best placed to advise on the existence of relevant documents and conduct searches for documents.
- As TRIM is the mandated electronic document and records management system (EDRMS) for the Department, any documents within the scope of the request would be expected to be stored on TRIM. The relevant documents were located from a search of TRIM.
- As there are three Ministers associated with the Home Affairs portfolio – the Minister for Home Affairs, the Minister for Immigration, Citizenship and Multicultural Affairs and the Minister for Emergency Management – it would be expected that a minimum of three Incoming Government Briefs would exist. The Department has identified four Incoming Government Briefs, noting that the Australian Border Force has produced a separate brief to the Minister for Home Affairs in relation to its functions.
- The documents at issue are published on the Department's disclosure log at <https://www.homeaffairs.gov.au/access-and-accountability/freedom-of-information/disclosure-logs/2022>. Section 4(1)(d) of the FOI Act provides that a document for the purpose of the FOI Act does not include material maintained for reference purposes that is otherwise publically available. Section 11(1)(a) of the FOI Act further provides that the right of access conferred by the FOI Act applies to 'a document of an agency', as defined by section 4 of the FOI Act. Accordingly, the identified documents are publicly available and are not 'documents of an agency' as defined by section 4.
- I therefore consider that, while the Department has identified documents within the scope of the request, these publicly available documents are not 'documents of an agency' and are therefore not documents to which the FOI Act applies.

- While I consider that draft versions of the Incoming Government Briefs are not publicly available, and accordingly could be considered 'documents of an agency' to which the FOI Act would apply, you have indicated that you do not seek access to draft documents. I therefore consider that further documents within the scope of the request do not exist.

I am accordingly refusing your request under section 24A of the FOI Act.

9 Legislation

A copy of the FOI Act is available at <https://www.legislation.gov.au/Series/C2004A02562>. If you are unable to access the legislation through this website, please contact our office for a copy.

10 Your review rights

Review by the Office of the Australian Information Commissioner

You may apply directly to the Office of the Australian Information Commissioner (OAIC) for a review of this decision. You must apply in writing within 60 days of this notice. For further information about review rights and how to submit a request for a review to the OAIC, please see <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

11 Making a complaint

You may complain to the Australian Information Commissioner about action taken by the Department in relation to your request.

Your enquiries to the Australian Information Commissioner can be directed to:

Phone 1300 363 992 (local call charge)

Email enquiries@oaic.gov.au

There is no particular form required to make a complaint to the Australian Information Commissioner. The request should be in writing and should set out the grounds on which it is considered that the action taken in relation to the request should be investigated and identify the Department as the relevant agency.

12 Contact

Should you wish to discuss my decision, please do not hesitate to contact via email at xxx.xxxxxxx@xxxxxxxxxxx.xxx.xx



**Authorised Decision Maker
Steve Biddle
Department of Home Affairs**