



Our reference: FOIREQ22/00432

Attention: Verity Pane

By Email: [foi+request-9315-e8ea5c07@righttoknow.org.au](mailto:foi+request-9315-e8ea5c07@righttoknow.org.au)

## Request for amendment under the FOI Act – FOIREQ22/00432

Dear Verity Pane

I refer to your request for amendment to documents made under section 48 of the *Freedom of Information Act 1982* (Cth) (the FOI Act), received by the Office of the Australian Information Commissioner (OAIC) on 19 December 2022.

### Background – Scope of your request

On 19 December 2022, your request for amendment stated:

*“Attn Molly,*

*ref: FOIREQ22/00357*

*You cannot say you did not receive a response to your practical refusal consultation when the foi itself stated that any such practical refusal consultation is given a response of no withdrawal.*

*You claim is misleading and untrue.*

*For the purposes of the FOI Act I seek amendment of your misleading and untrue claim that no response was given as it factually incorrect as the foi itself gave such a response in the event of such a practical refusal consultation.*

*Verity Pane.”*

Your request was made on 19 December 2022. This means that a decision on your request is due by 18 January 2023.

### Decision

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

Subject to the provisions of the FOI Act, I have made a decision not to amend the document. In accordance with section 51 of the FOI Act, the document will be annotated with the amendment request dated 19 December 2022 you have made regarding this document with reference made to FOIREQ22/00357, being the relevant FOI request file.

Alternatively, if you would like a different statement to be annotated to the document, please provide this statement to the OAIC by **close of business Wednesday 25 January 2023**.

### Requirements of an amendment request

Under section 48 of the FOI Act, if a person considers that their personal information is *“incomplete, incorrect, out of date or misleading”* in a document held by an agency, they can apply for an amendment or annotation to the document.

Under section 50 of the FOI Act, an agency may amend a document where they are satisfied that:

- The personal information is contained in a document which the agency holds and which has been provided to the applicant lawfully, whether as a result of an access request under the FOI Act or otherwise;
- The information is incorrect, incomplete, out of date or misleading; and
- The information has been used, is being used, or is available for use for an administrative purpose.

Where an amendment request is refused, section 51 of the FOI Act states that the document must be annotated.

### Reasons for Decision

In making this decision, I have considered:

- Your email dated 19 December 2022;
- The notification of withdrawal email on FOIREQ22/00357 sent to you on 7 December 2022;
- The FOI request and decision in FOIREQ22/00357;
- The FOI Act, in particular sections 48, 49, 50, 51 and 51A of the FOI Act; and
- The FOI Guidelines issued by the Office under s 93A of the FOI Act (the FOI Guidelines).

I am satisfied that the document subject to your amendment request was sent to you by the OAIC in response to the practical refusal notice for FOI request FOIREQ22/00357

on 7 December 2022. I am satisfied that the document contains your personal information and that the information has been used, is being used, or is available for use, by the OAIC for administrative purposes.

## Consideration

The FOI Guidelines<sup>1</sup> state that when assessing whether the information in a document is incomplete, incorrect, out of date or misleading, a decision maker should consider:

- the nature of the information the applicant seeks to amend
- the evidence on which the decision is to be based, including the circumstances in which the original information was provided, and
- the consequences of amendment, where relevant.

### Nature of the information you are seeking to amend

It appears the sentence you are seeking to amend is part of the notification of withdrawal email ('the document') sent to you in relation to the practical refusal process in FOIREQ22/00357. The relevant sentence is as follows:

As we did not receive a response from you by the deadline, your request has been taken to be withdrawn.

You have stated that the document is incorrect and misleading. In particular, you make the following statements in your amendment request:

You cannot say you did not receive a response to your practical refusal consultation when the foi itself stated that any such practical refusal consultation is given a response of no withdrawal.

You claim is misleading and untrue.

For the purposes of the FOI Act I seek amendment of your misleading and untrue claim that no response was given as it factually incorrect as the foi itself gave such a response in the event of such a practical refusal consultation.

I have noted the material you have directed us to in your initial FOI request FOIREQ22/00357 of 30 October 2022, which contained the following statement:

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<sup>1</sup> <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-7-amendment-and-annotation-of-personal-records/>

For any practical refusal notice I give advance notice that I do not withdraw or vary my foi.

#### Incorrect

The FOI Guidelines state at Part 7.17 that 'Incorrect' has its normal everyday meaning. Personal information is incorrect if it contains an error or defect. An example is inaccurate factual information about a person's name, date of birth, residential address or current or former employment.

In assessing whether the sentence is incorrect, you sought to rely on your initial FOI request for FOIREQ22/00357 in which you state "For any practical refusal notice I give advance notice that I do not withdraw or vary my foi."

In making this decision I have considered the ordinary definition of a 'response'. I consider it a necessary feature of a response that it is in reply to or is answering a question or statement. In your initial FOI request of 30 October 2022, you have provided a statement outlining your position on any possible practical refusal notice.

Despite that statement, the OAIC is required under section 24(1)(a) of the FOI Act to undertake a request consultation process before refusing a request for a practical refusal reason. In my practical refusal notice of 22 November 2022, I acknowledged your position however advised you as to the requirements of s 24(1)(a) of the FOI Act, which says:

... where an agency is satisfied that a practical refusal reason exists, it *must* undertake a request consultation process before making a decision to refuse the request.

I am of the view that your statement contained in your FOI request dated 30 October 2022 is not a 'response' to the practical refusal notice which was sent to you at a later date, 22 November 2022, as it was not provided in reply to or in answering the practical refusal notice. As you had not yet received the notice at the time of making your statement, you were not able to consider the reasons for practical refusal contained therein, and were therefore unable to respond to the issues raised in the notice.

Having considered the above, I am satisfied that the relevant sentence, 'As we did not receive a response from you by the deadline, your request has been taken to be withdrawn' is factually accurate and correct.

## Misleading

The FOI Guidelines state at Part 7.21 that personal information is misleading if it could lead a reader into error or convey a second meaning which is untrue or inaccurate. The FOI Guidelines provide the following example of misleading:

For example, an applicant may claim that a record of opinion or advice is misleading because it does not contain information about the circumstances surrounding that opinion or recommendation. The applicant may seek to have incorporated in the document information that sets out the context for that opinion or recommendation.

My email to you of 7 December 2022 refers to my letter of 22 November 2022 which provided notice under section 24AB of the FOI Act. I therefore consider that the email incorporates the relevant contextual information from the letter, in particular the following passage in the letter:

I note that in your request you stated the following:

*“For any practical refusal notice I give advance notice that I do not withdraw or vary my foi”*

However, as per section 24(1)(a) of the FOI Act, where an agency is satisfied that a practical refusal reason exists, it *must* undertake a request consultation process before making a decision to refuse the request.

The email, when read together with the referenced letter, does not provide an incomplete or misleading record regarding the circumstances in question.

Having considered the above and having reviewed the material that was before the OAIC officer in FOIREQ22/00357, and the document that is subject to this amendment request, I am not satisfied that the opinion is misleading. In my view, the relevant sentence conveys the clear and accurate conclusion that the OAIC did not receive a response from you to the practical refusal notice by close of business Tuesday 6 December 2022.

In light of the above, I do not consider the statement to be misleading.

## Conclusion

In addition to the above reasons, I note in *‘MY’ and Australian Building and Construction Commission (Freedom of information)* [2017] AICmr 108 (‘MY’), the former Australian Information Commissioner Timothy Pilgrim considered whether opinions of the author of the document about the IC review applicant should be

amended. In making a finding that the amendment request should be refused, Commissioner Pilgrim said at paragraphs [28] – [31]:

I consider that the views expressed in the first form are the opinions of the author of the document. It is apparent they are based on evidence before the ABCC. I consider that the opinions expressed in the form are an informed assessment which takes into account competing facts and views. The applicant refers to the same facts, but concludes that they are not evidence that he had no interest in reaching an agreement or engaging with the ABCC's representative. The applicant is entitled to his opinion; however this does not mean that the opinions expressed in the form are incorrect because the applicant disagrees with them.

As the FOI Guidelines explain:

... The opinion may be 'correct' if it is presented as an opinion and not objective fact, [if] it correctly records the view held by the third party, and is an informed assessment that takes into account competing facts and views...

In this case, I consider that accepting the applicant's contentions as 'correct', and therefore possibly allowing for the amendment, would effectively change the record of the author's opinion as expressed at the time. This, in my view, would be contrary to the principle that government records are as accurate as possible.

For these reasons, I am satisfied that the opinions expressed in the first form are not incomplete, incorrect or misleading as claimed by the applicant.

In my view, the reasoning in 'MY' is also relevant in this case.

The sentence subject to the amendment request is that of myself as the FOI delegate in FOIREQ22/00357 during the process of FOI decision making in that matter. Allowing the amendment would effectively change the record of my view as expressed at that time.

For the above reasons, based on the information before me at this time, I am not satisfied that the decision document contains information that is incorrect or misleading.

## Your documents have been annotated

Where the OAIC has decided not to amend a document, you are entitled to have the record annotated provided your request is not irrelevant, defamatory or unnecessarily voluminous.<sup>2</sup> This means that a statement is placed on the relevant record, cross

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<sup>2</sup> See s 51(1)(b) of the *Freedom of Information Act 1982* and *Francis and Department of Veterans' Affairs (Freedom of information)* [2020] AATA 1419.

indexed to the material at issue, outlining your views on why you consider the information to be incomplete, incorrect, out of date or misleading, and your reasons for this.

I have decided to annotate the relevant documents. This means that the OAIC will place a note on the file for FOIREQ22/00357 which states exactly what you have said about the material at issue. The Office will not alter your submissions.

This will ensure that moving forward, anyone who views the relevant files will see that they have been annotated with your submissions.

**Appendix A** contains information about your review rights.

Yours sincerely

**Molly Cooke**

Lawyer

18 January 2023

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## Appendix A: Review rights

### 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.