



Our reference: FOIREQ22/00303

Attention: Mr Steven Roddis

By Email: [foi+request-9399-907e2ce3@righttoknow.org.au](mailto:foi+request-9399-907e2ce3@righttoknow.org.au)

## Your Freedom of Information request – FOIREQ22/00303

Dear Mr Roddis,

I refer to your request for access to documents made under the *Freedom of Information Act* 1982 (Cth) (the FOI Act) received on 25 September 2022.

In your email dated 25 September 2022 you sought access to the following:

*In similar vein to*

*[https://www.righttoknow.org.au/request/9038/response/26878/attach/7/FOI%2021.2%201800%20Decision%20Document.pdf?cookie\\_passthrough=1](https://www.righttoknow.org.au/request/9038/response/26878/attach/7/FOI%2021.2%201800%20Decision%20Document.pdf?cookie_passthrough=1)*

*Please provide a summary of how many times the string: "api.www.optus.com.au" or "http://api.www.http://optus.com.au" or "https://api.www.optus.com.au" are mentioned or cited across all OAIC records and communications since January 2016*

On the same date, you wrote to the OAIC clarifying your request as follows:

*Correction:*

*please substitute "http://api.www.http://optus.com.au" with "http://api.www.optus.com.au"*

I confirm that the OAIC has processed your request on this revised basis.

## Decision

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

I have refused access to your request under s 24A of the FOI Act on the basis that all reasonable steps have been taken to identify relevant documents and I am satisfied the documents do not exist or cannot be found. I have also decided that a document cannot be produced under s17 of the FOI Act.

## Material taken into account

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

- your freedom of information request FOIREQ22/00303 and subsequent correspondence, as outlined above,
- correspondence and discussions with relevant OAIC line areas regarding your request,
- the FOI Act, in particular s 24A and s 17 of the FOI Act,
- relevant case law, and
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act.

## Whether reasonable steps were taken to find documents – s 24A

Section 24A requires that an agency take ‘all reasonable steps’ to find a requested document before refusing access to it on the basis that it cannot be found or does not exist.

Section 24A provides as follows:

*(1) An agency or Minister may refuse a request for access to a document if:*

*(a) all reasonable steps have been taken to find the document; and*

*(b) the agency or Minister is satisfied that the document:*

*(i) is in the agency’s or Minister’s possession but cannot be found; or*

*(ii) does not exist*

The FOI Guidelines state:

*Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency’s operating environment or the minister’s office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:*

- *the subject matter of the documents*
- *the current and past file management system and the practice of destruction or removal of documents*
- *the record management system in place*
- *the individuals within the agency who may be able to assist with the location of documents, and*

- *the age of the documents.*<sup>1</sup>

#### Searches undertaken

A member of the OAIC's Legal Services team sought advice from a member of the Privacy Regulation and Strategy team regarding whether any summary document containing the key terms within the scope of your request would be in existence. They advised that no such document existed in their records and confirmed that no other area of the OAIC in their view would hold such a document.

In order to undertake a search of the OAIC records more broadly, a search and retrieval request was sent to the OAIC's Information Management & Governance Officer to search for any documents held within the OAIC's records containing any of the key terms specified within your request.

Searches were undertaken across the OAIC's record storage systems Resolve (including Resolve summary fields), Content Manager, as well as the I and O Drives for the following terms specified in your request.

- o "api.www.optus.com.au"
- o "http://api.www.optus.com.au"
- o "https://api.www.optus.com.au"

These searches failed to locate any documents that contained any of the above terms. We note that there is a number of limitations to the searches conducted:

- not all documents are able to be searched for content (for instance, PDF documents cannot be searched for content if they are not saved in a readable format, so unless the search terms appear in the title, documents in 'unreadable' formats will not appear in searches undertaken.
- It is not possible to do a global search of OAIC email accounts since 2016 to the date of your request. Each individual officer would need to conduct a search of their individual email accounts. Each officer who left the OAIC would require engagement with OAIC's ICT provider to conduct the search.

While I note these search limitations, having regard to the subject matter of the documents you have requested, being a document that contains a summary of the times your requested key terms have been "mentioned or cited across all OAIC records and communications since January 2016", the fact that not a single document containing any of your requested key terms was able to be located, as well as the above-outlined advice from the relevant Privacy line area

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<sup>1</sup> Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982 (FOI Guidelines)* [3.89], footnotes omitted.

regarding their belief that no such document would exist, I am satisfied am satisfied that the documents do not exist or cannot be found

### Document created under s 17 of the FOI Act

As I am satisfied that the documents do not exist or cannot be found, I have considered whether the OAIC may produce a document under s 17 of the FOI Act containing the information that 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)).*

As discussed above, a search and retrieval request was sent to the OAIC's Information Management & Governance Officer to search for any documents held within the OAIC's records containing any of the key terms specified within your request. No documents were able to be located that contained any of the terms the subject of your request across these systems

Based on this advice, it appears that it is not possible to use any computer system or equipment ordinarily available to the OAIC to generate a report with the information that you have requested, due to our computer systems not being able to identify where these terms have been used.

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 and noting the limitations of the searches able to be undertaken, 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 of the FOI Act. To create a document with the information you have requested would require a staff member to manually review every email sent or received by the OAIC, and every document created or received by the OAIC, since 2016 up until the date of your FOI request, and

manually record the frequency of the occurrences of the terms contained in your request in a new document. I consider that to create such a document would require manual intervention beyond the obligation created by s 17 of the FOI Act. I also note that such a task would appear to be a substantial and unreasonable diversion of resources of the OAIC.

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.

## **Conclusion**

On the basis of the searches conducted and the advice provided by the Privacy Regulation and Strategy line area, I am satisfied that all reasonable steps have been taken to locate any document within the scope of your request, and that the documents do not exist or cannot be found. For the reasons outlined above, I am also satisfied that this is not a circumstance where the OAIC is under an obligation to create a document under s 17 of the FOI Act.

Accordingly, I refuse your request for access to documents under s 24A of the FOI Act.

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

Yours sincerely

A handwritten signature in black ink that reads "Emily Elliott". The signature is written in a cursive, flowing style.

**Emily Elliott**  
a/g Director, Legal Team

25 October 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\\_](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_)

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