



National Anti-Corruption Commission

Ref: FOI 25/02

7 August 2024

P.C. Sweeney

By email: foi+request-11660-ea85a0c2@righttoknow.org.au

Dear P.C. Sweeney

Decision in relation to your Freedom of Information (FOI) Request – FOI 25/02

I refer to your request for access to documents, made to the National Anti-Corruption Commission (the Commission) under the *Freedom of Information Act 1982* (Cth) (FOI Act).

I am an authorised decision maker under subsection 23(1) of the FOI Act. This letter sets out my decision.

Scope of request

On 10 July 2024, you requested access to documents as follows:

The document or documents I seek is/are copies of documents that might be classified as "prosecution guidelines" to assist the staff of the NACC prioritise what complaints concerning the conduct of Commonwealth Public Officials that might warrant criminal prosecution including contravents of subsection 142.2 of the Criminal Code Act 1995 (Cth) - Abuse of Public Office.

Decision

I have asked relevant Commission staff as to whether the documents requested, or similar to what you requested, are held by the Commission. I have also conducted a keyword search of the Commission's files with nil results. I am

satisfied all reasonable steps have been undertaken to find the documents you have requested and that the requested documents do not exist.

Accordingly, I have decided to refuse your request under sub-paragraph 24A(1)(b)(ii) of the FOI Act as the requested documents do not exist.

Review rights

If you are dissatisfied with my decision, you may seek a review of it. Your review rights are outlined in **Attachment A**.

Relevant provisions

I have outlined relevant provisions of the FOI Act at **Attachment B**. A [full version is available online](#).

Further information

If you have any questions or would like to discuss this decision, please respond in one of the following ways:

Email foi@nacc.gov.au

Post FOI Coordinator
National Anti-Corruption Commission
GPO Box 605
CANBERRA ACT 2601

Yours sincerely

Sophie

FOI Officer

Attachment A: Review rights

You are entitled to:

- apply to the Commission for an internal review of the decision
- apply to the Information Commissioner for a review of the decision, and
- make a complaint to the Information Commissioner about the conduct of an agency under the FOI Act.

If you intend to seek a review, you are encouraged to apply for an internal review first as this may be quicker than an Information Commissioner review. You would still be able to subsequently seek an Information Commissioner review.

Internal review

Under section 54 of the FOI Act, you may apply to NACC for an internal review of this decision.

An application must be made in writing within 30 days of receiving this notice. No particular form is required to apply although it will assist your case if you set out your reasons for seeking a review.

If you intend to seek an internal review of this decision, please email your application to foi@nacc.gov.au.

Information Commissioner review

Under section 54L of the FOI Act, you may apply to the Information Commissioner for a review of this decision.

An application for Information Commissioner review must be made in writing within 60 days of receiving this notice. *If you apply for internal review, you will have a right to apply to the Information Commissioner to review the decision made on review within 60 days of receiving notice of that decision.*

If you intend to seek an Information Commissioner review of this decision, you can apply in one of the following ways:

- [Apply online to seek an Information Commissioner review of this decision](#)

- Email: xxxxxx@xxxx.xxx.xx
- Post: Director of FOI Dispute Resolution
GPO Box 5218
Sydney NSW 2001
- Fax: 02 9284 9666

[Further information about Information Commissioner reviews](#) is available.

Information Commissioner investigation of complaint

Under section 70 of the FOI Act, you may lodge a complaint with the Information Commissioner about an action taken by an agency in the performance of functions or exercise of powers under the FOI Act.

A complaint must be made in writing and identify the agency (and NACC, if your complaint relates to the conduct of a different agency).

The Information Commissioner has discretion within section 73 of the FOI Act to investigate the complaint.

You can lodge a complaint in one of the following ways:

- [Lodge a complaint online](#)
- Email: xxxxxx@xxxx.xxx.xx
- Post: Director of FOI Dispute Resolution
GPO Box 5218
Sydney NSW 2001
- Fax: 02 9284 9666

[Further information about making an FOI complaint to the Information Commissioner](#) is available.

Attachment B: Relevant FOI Act provisions

Making decisions under the FOI Act

9A Functions and powers under this Part

In performing a function, or exercising a power, under this Part, an agency must have regard to:

- (a) the objects of this Act (including all the matters set out in sections 3 and 3A); and
- (b) guidelines issued by the Information Commissioner for the purposes of this paragraph under section 93A.

3 Objects—general

- (1) The objects of this Act are to give the Australian community access to information held by the Government of the Commonwealth, by:
 - (a) agencies to publish the information; and
 - (b) providing for a right of access to documents.
- (2) The Parliament intends, by these objects, to promote Australia's representative democracy by contributing towards the following:
 - (a) increasing public participation in Government processes, with a view to promoting better-informed decision-making;
 - (b) increasing scrutiny, discussion, comment and review of the Government's activities.
- (3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.
- (4) The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

93A Guidelines

- (1) The Information Commissioner may, by instrument in writing, issue guidelines for the purposes of this Act.

Note: For variation and revocation of the instrument, see subsection 33(3) of the *Acts Interpretation Act 1901*.

- (2) For the purposes of the performance of a function, or the exercise of a power, under this Act, regard must be had to any guidelines issued by the Information Commissioner under this section including, but not limited to, guidelines issued for the purposes of the following provisions:
 - (a) paragraph 9A(b) (information publication scheme);
 - (b) 11B(5) (public interest factors);
 - (c) subsection 15(5A) (decisions on requests).

11 Right of access

- (1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:
 - (a) a document of an agency, other than an exempt document; or
 - (b) official document of a Minister, other than an exempt document.
- (2) Subject to this Act, a person's right of access is not affected by:
 - (a) any reasons the person gives for seeking access; or
 - (b) the agency's or Minister's belief as to what are his or her reasons for seeking access.

11A Access to documents on request

Scope

- (1) This section applies if:

- (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
 - (i) a document of the agency; or
 - (ii) an official document of the Minister; and
- (b) any charge that, under the regulations, is required to be paid before access is given has been paid.

(2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access—general rule

(3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

Exemptions and conditional exemptions

(4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

(5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
- (a) a conditionally exempt document; and
 - (b) an exempt document:
 - (i) under Division 2 of Part IV (exemptions); or
 - (ii) within the meaning of paragraph (b) or (c) of the definition of **exempt document** in subsection 4(1).

23 Decisions to be made by authorised persons

- (1) Subject to subsection (2), a decision in respect of a request made to an agency may be made, on behalf of the agency, by the responsible Minister or the principal officer of the agency or, subject to the regulations, by an officer of the agency acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the responsible Minister or the principal officer of the agency.
- (2) A decision in respect of a request made to a court, or made to a tribunal, authority or body that is specified in Schedule 1, may be made on behalf of that court, tribunal, authority or body by the principal officer of that court, tribunal, authority or body or, subject to the regulations, by an officer of that court, tribunal, authority or body acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the principal officer of that court, tribunal, authority or body.

24A Requests may be refused if documents cannot be found, do not exist or have not been received

Document lost or non-existent

- (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.

Document not received as required by contract

- (2) An agency may refuse a request for access to a document if:
- (a) in order to comply with section 6C, the agency has taken contractual measures to ensure that it receives the document; and
 - (b) the agency has not received the document; and
 - (c) the agency has taken all reasonable steps to receive the document in accordance with those contractual measures.

26 Reasons and other particulars of decisions to be given

- (1) Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision-maker shall cause the applicant to be given notice in writing of the decision, and the notice shall:
- (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision; and
 - (aa) in the case of a decision to refuse to give access to a conditionally exempt document—include in those reasons the

public interest factors taken into account in making the decision;
and

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

(b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and

(c) give to the applicant appropriate information concerning:

(i) his or her rights with respect to review of the decision;

(ii) his or her rights to make a complaint to the Information Commissioner in relation to the decision; and

(iii) the procedure for the exercise of the rights referred to in subparagraphs (i) and (ii);

including (where applicable) particulars of the manner in which an application for internal review (Part VI) and IC review (Part VII) may be made.

(1A) Section 13 of the *Administrative Decisions (Judicial Review) Act 1977* does not apply to a decision referred to in subsection (1).

(2) A notice under this section is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.

Internal review

53A What is an access refusal decision?

An **access refusal decision** is any of the following decisions:

(a) a decision refusing to give access to a document in accordance with a request;

(b) a decision giving access to a document but not giving, in accordance with the request, access to all documents to which the request relates;

- (c) a decision purporting to give, in accordance with a request, access to all documents to which the request relates, but not actually giving that access;
- (d) a decision to defer the provision of access to a document (other than a document covered by paragraph 21(1)(d) (Parliament should be informed of contents));
- (e) a decision under section 29 relating to imposition of a charge or the amount of a charge;
- (f) a decision to give access to a document to a qualified person under subsection 47F (5);
- (g) a decision refusing to amend a record of personal information in accordance with an application made under section 48;
- (h) a decision refusing to annotate a record of personal information in accordance with an application made under section 48.

Note: If a decision is not made on a request under section 15 within the time required by that section, a decision is taken to have been made to refuse to give access to a document in accordance with the request (see section 15AC).

54 Internal review—access refusal decision

- (1) This section applies if an access refusal decision is made in relation to a request to an agency for access to a document, other than a decision made personally by the principal officer of the agency or the responsible Minister.
- (2) The applicant in relation to the request may apply under this Part for the review (the **internal review**) of the access refusal decision.

54B Internal review—application for review

- (1) An application for internal review must be in writing and must be made:

- (a) within 30 days, or such further period as the agency allows, after the day the decision is notified to the applicant for internal review (the ***internal review applicant***); or
 - (b) in the case of an access refusal decision of a kind mentioned in paragraph 53A(b), (c) or (f), within whichever of the following is the longer period:
 - (i) 30 days, or such further period as the agency allows, after the day the decision is notified to the internal review applicant;
 - (ii) 15 days after the day the access referred to in that paragraph was given (or purported to be given).
- (2) A decision by an agency to allow a further period for making an application may be made whether or not the time for making such an application has already expired.
- (3) The agency's power to allow a further period for making an application may be exercised by an officer of the agency who is:
- (a) acting within the scope of authority exercisable by him or her; and
 - (b) acting in accordance with arrangements approved by the responsible Minister or principal officer of the agency.

Information Commissioner review

54L IC reviewable decisions—access refusal decisions

- (1) An application may be made to the Information Commissioner for a review of a decision covered by subsection (2).
- (2) This subsection covers the following decisions:
 - (a) an access refusal decision;
 - (b) a decision made by an agency on internal review of an access refusal decision (see section 54C);

- (c) a decision refusing to allow a further period for making an application for internal review of an access refusal decision (under section 54B).

Note 1: An application for the review of an access refusal decision made for the purposes of paragraph (a) may be made regardless of whether the decision was the subject of internal review.

Note 2: If no decision is made on internal review within 30 days, a decision to affirm the original access refusal decision is taken to have been made (see section 54D).

- (3) The IC review application may be made by, or on behalf of, the person who made the request to which the decision relates.

54N IC review applications—application

Content of application

- (1) An IC review application must be in writing, and must:
 - (a) give details of how notices under this Part may be sent to the IC review applicant (for example, by providing an electronic address to which notices may be sent by electronic communication); and
 - (b) include a copy of the notice given under section 26 of the IC reviewable decision for which an IC review is sought.

Note: For who may make an IC review application, see sections 54L and 54M.

- (2) The IC review application may contain particulars of the basis on which the IC review applicant disputes the IC reviewable decision.
- (3) The Office of the Australian Information Commissioner must provide appropriate assistance to a person who:
 - (a) wishes to make an IC review application; and
 - (b) requires assistance to prepare the IC review application.

Delivery of application

- (4) The IC review application must be sent to the Information Commissioner. The IC review application may be sent in any of the following ways:
- (a) delivery to the Information Commissioner at the address of the Information Commissioner specified in a current telephone directory;
 - (b) postage by pre-paid post to an address mentioned in paragraph (a);
 - (c) sending by electronic communication to an electronic address specified by the Information Commissioner.

54S IC review applications—time limits

Access refusal decisions

- (1) An IC review application in relation to a decision covered by subsection 54L(2) (access refusal decisions) must be made within 60 days after the day notice of the IC reviewable decision was given under section 26.

Access grant decisions

- (2) An IC review application in relation to a decision covered by subsection 54M(2) (access grant decisions) must be made within 30 days after:
- (a) if a decision is made on internal review of the decision—the day notice of the decision under section 54C was given to the affected third party for the document in relation to which the decision is made; or
 - (b) otherwise—the day notice under section 26A, 27 or 27A was given to the affected third party for the document in relation to which the decision was made.

Note: For *affected third party*, see section 53C.

Information Commissioner investigations

70 Information Commissioner investigations—making complaints

- (1) A person (the **complainant**) may complain to the Information Commissioner about an action taken by an agency in the performance of functions, or the exercise of powers, under this Act.
- (2) A complaint must:
 - (a) be in writing; and
 - (b) identify the agency (also the **respondent agency**) in respect of which the complaint is made.
- (3) The Office of the Australian Information Commissioner must provide appropriate assistance to a person who:
 - (a) wishes to make a complaint; and
 - (b) requires assistance to formulate the complaint.

72 Information Commissioner investigations—preliminary inquiries

The Information Commissioner may make inquiries of the respondent agency for the purpose of determining whether or not to investigate a complaint made (or purported to be made) under section 70.

73 Information Commissioner investigations—discretion not to investigate

The Information Commissioner may decide not to investigate, or not to continue to investigate, a complaint about an action made under section 70 if the Information Commissioner is satisfied of any of the following:

- (a) that the action is not taken by an agency in the performance of the agency's functions or the exercise of the agency's powers under this Act;
- (b) that:
 - (i) the complainant has or had a right to cause the action to be reviewed by the respondent agency, the Information Commissioner, a court or a tribunal; and

- (ii) the complainant has not exercised, or did not exercise, the right;
and
 - (iii) it would be, or would have been, reasonable for the complainant to exercise the right;
- (c) that:
- (i) the complainant has or had a right to complain about the action to another body; and
 - (ii) the complainant has not exercised, or did not exercise the right;
and
 - (iii) it would be, or would have been, reasonable for the complainant to exercise the right;
- (d) that the complainant has complained to the respondent agency, and the respondent agency:
- (i) has dealt, or is dealing, adequately with the complaint; or
 - (ii) has not yet had an adequate opportunity to deal with the complaint;
- (e) that the complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith;
- (f) that the complainant does not have a sufficient interest in the subject matter of the complaint.

Note: The Information Commissioner may make a decision under this section to investigate only part of a complaint (see section 71).

74 Information Commissioner investigations—transfer to Ombudsman

Scope

- (1) This section applies if the Information Commissioner is satisfied that a complaint about an action could be more effectively or appropriately dealt with:

- (a) by the Ombudsman under the *Ombudsman Act 1976*; or
- (b) by the Ombudsman under a particular Norfolk Island enactment.

Example 1: A complaint about the way in which the Information Commissioner has dealt with an IC review.

Example 2: A complaint relates to an action under this Act, but is part of a complaint that relates to other matters that can be more appropriately dealt with by the Ombudsman.

Transfer of complaints to Ombudsman

- (2) The Information Commissioner:
 - (a) must consult the Ombudsman about the complaint with a view to avoiding inquiries being conducted into that matter by both the Information Commissioner and the Ombudsman; and
 - (b) may decide not to investigate the action, or not to continue to investigate the action.
- (3) If the Information Commissioner decides not to investigate, or not to continue to investigate, the action under paragraph (2)(b), the Information Commissioner must:
 - (a) transfer the complaint to the Ombudsman; and
 - (b) give the Ombudsman any information or documents that relate to the complaint in the possession, or under the control, of the Information Commissioner; and
 - (c) notify the complainant in writing that the complaint has been transferred.
- (4) A notice under paragraph (3)(c) must state the reasons for the Information Commissioner's decision.
- (5) If paragraph (1)(a) applies, a complaint transferred under subsection (3) is taken to be a complaint made to the Ombudsman under the *Ombudsman Act 1976*.

- (6) If paragraph (1)(b) applies, a complaint transferred under subsection (3) is taken to be a complaint made to the Ombudsman under the Norfolk Island enactment concerned.

Note: The Information Commissioner may make a decision under this section to investigate only part of a complaint (see section 71).