



Administrative Appeals Tribunal

FOI ref: 2024/0197

1 October 2024

Ivy

By email: foi+request-12029-717b68c1@righttoknow.org.au

Dear Ivy,

Notice of Decision for Freedom of Information Request no. 2024/0197

The purpose of this letter is to give you a decision about access to documents that you have requested under the *Freedom of Information Act 1982 (FOI Act)*.

Summary

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

You lodged an FOI request on 8 September 2024 for access to:

"I was wondering if you could give me information on how many Members / Decision makers have had past involvement representing government agencies like the NDIA in appeals processes.

I have concerns that a Member has recently been appointed to the AAT when she had recently represented the NDIA against me during my appeal.

I would like to know how many other Members with possible partisan positions or conflicts are currently or about to be appointed"

I have interpreted your request in two parts:

1. Document containing information on how many Tribunal members have past work experience representing respondent agencies
2. Document containing the number of Tribunal members who have declared past employment for or with a respondent agency as an actual or potential conflict

The definition of document in section 4(1) of the FOI Act is broad and includes any record of information. However, the FOI Guidelines [at paragraph 2.42] confirm that the right of access under the FOI Act is to existing documents, rather than to information and there is no obligation for an agency to create a document which did not previously exist in response to a FOI request.

Decision

I have decided to refuse access to the documents on the basis that they do not exist.

In making my decision, I have taken the following into account:

- the content of the documents that fall within the scope of your request;
- the FOI Act, specifically section 24A;
- the guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (**FOI Guidelines**)

Section 24A of the FOI Act provides that, after all reasonable steps have been taken to find the documents, access to documents may be refused if the documents do not exist or cannot be found.

Part 1 of your request

In order to locate documents in scope of your request I reached out to and liaised with the President's Chambers section of the Tribunal. President's Chambers is responsible for holding all documents related to the appointment of members.

Based on this liaison, I am satisfied that the Tribunal does not hold any document which contains information on how many members have past work experiencing representing respondent agencies. Whilst the Tribunal does hold a copy of each member's Curriculum Vitae (CV) this does not necessarily include specific information about whether they worked for a law firm which represented a respondent agency and, if so, which agency. For this reason I do not consider that the CVs which the Tribunal holds would provide the information you are seeking so I do not consider these documents in scope of your request.

Given that I am satisfied that no documents exist which contain information about members past work experience, including whether they represented respondent agencies, it follows that access to this is refused under section 24A of the FOI Act.

Part 2 of your request

It is a fundamental requirement that members avoid having conflicts of interest in the performance of their duties. Conflicts of interest as dealt with in the following sections of the AAT Act:

- Section 11(2) provides that a part-time member must not engage in any paid employment that, in the President's opinion, conflicts or may conflict with the proper performance of their duties.
- Section 14(1) provides that a member constituted to a proceeding who has a conflict of interest in relation to that proceeding must disclose the conflict to the President and to the parties and must not take part in that proceeding unless the President and the parties consent.

- Section 14(2) defines a conflict of interest for the purposes of section 14(1) as the member having 'any interest, pecuniary or otherwise, that could conflict with the proper performance of the member's functions in relation to the proceeding'.

Under these statutory definitions, a conflict of interest would not include instances where a member has previously been employed by a law firm acting for a respondent agency. Whilst the Tribunal requires any members to declare conflicts as noted above, the current legislation governing the Tribunal does not require that any record or document be created or maintained containing all declared conflicts. Therefore, I am satisfied that the Tribunal possesses no documents which satisfy the parameters of your request.

For the reasons outlined above I have decided to refuse access to your request under section 24A of the FOI Act on the basis that there are no documents which exist containing the information you seek.

Your review rights

Information about how you can apply for a review of this decision or complain about how we have dealt with this matter is set out in the attached fact sheet, FOI 2.

If you have any questions about this decision, please contact me at foi@aat.gov.au.

Yours sincerely,

Marta

Authorised FOI Officer (EL 1)

Attachments

FOI 2 – Information about reviews and complaints under the Freedom of Information Act

Information about reviews and complaints under the Freedom of Information Act

What should I do prior to applying for internal review or contacting the Office of the Australian Information Commissioner?

Before you apply for an internal review or contact the Office of the Australian Information Commissioner, we recommend that you telephone the officer who made the FOI decision. It is often possible to resolve concerns or answer your questions using this approach and, if not, the officer will be able to assist you in applying for review.

How do I apply for internal review to the AAT?

You can apply to us for an internal review of the FOI decision. The application for internal review must be made within 30 days or such further period as we allow, after the day the decision is notified to you. To apply for an internal review you must do so in writing. You may also wish to explain why you are not satisfied with the decision. A different and more senior officer authorised under the *Freedom of Information Act 1982* (the FOI Act) will conduct the internal review and make a new decision within 30 days after receipt of your application.

If you have already applied for internal review and want to seek a further review of that decision, you will need to apply to the Australian Information Commissioner.

How do I apply for review to the Australian Information Commissioner?

You may also apply directly to the Australian Information Commissioner for review of the FOI decision. The application for review must be made within 60 days after the day notice of the decision was given. An application for review must be in writing, include details of how notices in relation to the review are to be sent to you and include a copy of the decision. You may also wish to explain why you are not satisfied with the decision. An online application form is available on the Office of the Australian Information Commissioner's website found here: [Information Commissioner Review Application form](#).

What if I want to make a complaint about the handling of a Freedom of Information request?

If you have a complaint about the way in which we have processed your request for access under the FOI Act you can ask the Australian Information Commissioner to investigate. An online complaint form is available on the Office of the Australian Information Commissioner's website, found here [FOI Complaint Form](#).

Where can I find further information or contact details for the Office of the Australian Information Commissioner?

Further information is available on the Office of the Australian Information Commissioner's website at www.oaic.gov.au and you can contact the office on 1300 363 992 or by email at enquiries@oaic.gov.au.