



Decision and Statement of Reasons made under the *Freedom of Information Act 1982*

Decision and reason for decision of Tayla (Position Number 62213294), Information Law Section, Legal Services and Audit Branch, Department of Veterans' Affairs

Applicant: Julie

Decision date: 3 February 2021

FOI reference number: FOI 40240

Sent by: foi+request-7017-5abe9e56@righttoknow.org.au

Dear Julie,

Freedom of Information Request: FOI 40240

Decision

1. The Department of Veterans' Affairs (**Department**) has undertaken a reasonable search of its records and has not been able to identify documents relevant to your request.
2. For this reason, I have made a decision to refuse your request under section 24A of the *Freedom of Information Act 1982 (FOI Act)*, as the documents cannot be found or do not exist.

Authority to make this decision

3. I, Tayla (Position Number 62213294), Information Access Officer, Information Law Section, am an officer authorised by the Secretary of the Department to make decisions about access to documents in the possession of the Department in accordance with section 23(1) of the *Freedom of Information Act 1982 (FOI Act)*.

Summary

4. On 14 January 2021, you made a request for access to documents in the possession of the Department. Your request sought access to:

"...For the purposes of the Freedom of Information Act, I request copy of records held by the Department regarding how it resolves its practices of failing to comply with the Information Commissioner's guidance in (page numbers refer to documents in file <https://www.righttoknow.org.au/request/6862/response/19622/attach/10/FOIREQ20%200232%20Documents%20Part1.pdf>):

** making FOI EOT requests "early in the processing cycle" instead of after a deemed decision, or only a day or two before a processing period expires (pages 80 and 89);*

** distinguishing between the disclosure of SES officer names and other officer names (despite the clear guidance given in *Maurice Blackburn Lawyers and Department of Immigration and Border Protection [2015] AICmr 85*);*

** failing to identify the full name of delegates (Page 141, section 26(1)(b) FOI Act, *Bartucciotto and Commissioner for Complaints [2006] AATA 36, Dreyfus and Attorney-General [2015] AATA 995, Lever and Australian Federal Police [2017] AATA 1407, 'AH' and Australian Federal Police [2013] AICmr 59, Rudd and Civil Aviation Safety Authority [2013] AICmr 87, 'BB' and Department of Human Services [2014] AICmr 11, Stephen Waller and Department of Environment [2014] AICmr 133, John Mullen and Australian Aged Care Quality Agency [2017] AICmr 11, 'MA' and Department of Veterans Affairs [2017] AICmr 72, Maria Jackel and Department of Immigration and Border Protection [2017] AICmr 101, Reece Walters and Great Barrier Reef Marine Park Authority [2019] AICmr 9, 'FM' and Department of Foreign Affairs and Trade [2015] AICmr 31, and 'PO' and Australian Federal Police [2018] AICmr); and**

** failing to provide direct access on FOI disclosure logs to released material (as detailed at page 102 and 105), which the Information Commissioner describes as "an unnecessary barrier to accessing government information..."*

5. As no extensions of time have been applied to process your request, a decision on your request is due by 15 February 2021.

Material taken into account

6. In accordance with section 26(1)(a) of the FOI Act, my findings on any material question of fact, the material on which those findings were based and the reasons for my decision to refuse access to the documents follows.
7. I have taken the following material into account in making my decision:
 - the terms of your request;
 - the types of documents that are in the possession of the Department;
 - Sections 3, 11 and 11A of the FOI Act which give the Australian community a legally enforceable right to obtain access to information held by the Government of the Commonwealth. I also considered section 24A of the FOI Act (Requests may be refused if documents cannot be found, do not exist or have not been received) relevant to my decision;
 - the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines); and
 - searches undertaken by relevant business areas of the Department.
8. A full extract of all FOI Act provisions used to make my decision are provided in **Schedule 2**.

Reasons for decision

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

9. Section 24A(1) of the FOI Act provides that 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.
10. I am satisfied that all reasonable steps have been taken to find information relevant to your request, having regard to:

- the terms of your request;
- the subject matter of the documents;
- the current and past file management systems and the practice of orderly destruction or removal of documents;
- the Department's record management systems and practices; and
- the individuals and areas within the Department who may be able to assist with the location of the information you seek access to.

11. Despite the reasonable searches undertaken, the Department has been unable to identify documents relevant to your request. A description of the searches undertaken to locate the documents which you are seeking to access is at **Schedule 1**.
12. For these reasons, I am refusing your request for access to documents as described in your request in accordance with section 24A of the FOI Act.

Your rights of review

13. If you are dissatisfied with my decision, you may apply for internal review or request the Office of the Australian Information Commissioner (**OAIC**) review my decision. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal review

14. Under section 54 of the FOI Act, you may apply in writing to the Department for an Internal Review of my decision. The Internal Review application must be made within 30 days of the date of this letter. Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.
15. You can make your application for Internal Review in one of the following ways:

Post: Legal Services and Audit Branch, Department of Veterans' Affairs
GPO Box 9998, Canberra ACT 2601

Facsimile: (02) 6289 6337

Email: Information.Law@dva.gov.au

OAIC review

16. Under section 54L of the FOI Act, you may apply to the OAIC to review my decision. An application for review by OAIC must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

Online: www.oaic.gov.au
Post: Office of the Australian Information Commissioner
GPO Box 5218, Sydney NSW 2001
Facsimile: (02) 9284 9666
Email: enquiries@oaic.gov.au
In person: Level 3, 175 Pitt Street, Sydney NSW 2000

17. More information about your review rights under the FOI Act is available in Fact Sheet 12 published by the OAIC: <http://oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-fact-sheets/foi-factsheet-12-your-review-rights>

Contact us

18. If you wish to discuss this decision, please do not hesitate to contact the Information Law Section using the following details:

Post: Legal Services and Audit Branch, Department of Veterans' Affairs
GPO Box 9998, Canberra ACT 2601
Facsimile: (02) 6289 6337
Email: Information.Law@dva.gov.au

Yours sincerely,

Tayla (Position Number 62213294)

Information Access Officer
Information Law Section
Legal Services and Audit Branch

3 February 2021



Summary of document searches

The Department conducted the following searches to identify files and documents that fall within scope of your request (“relevant documents”).

The Information Law team were consulted in relation to your request and relevant searches were conducted for the documents described in your request.

Searches were undertaken of the Department’s file management system, HPE Content Manager, the shared drive and the Department’s intranet using the following terms:

- 'Extension of time'
- 'EOT'
- 'failure to comply'
- 'deemed decision';
- 'Staff names'
- 'Disclosure log access'
- 'disclosure log'
- 'administrative release'
- 'Information Commissioner guidance'
- 'Information Commissioner' and
- 'delegate name'

At the conclusion of these searches no documents matching the description of your request were located.



Schedule of relevant provisions in the FOI Act

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 or the Government of Norfolk Island, by:
 - (a) requiring 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.

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) an 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.
(see section 11A).

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. (see section 11A).