



Australian Government

Office of the Australian Information Commissioner

Our reference: MR22/01812

Agency reference: PM/22/006

BE

By email: foi+request-9544-badb06f9@righttoknow.org.au

Your application for Information Commissioner review of the Prime Minister of Australia's FOI decision

Dear BE

I refer to your application for Information Commissioner review (IC review) of a revised decision made by the Office of the Prime Minister of Australia (Prime Minister's Office) on 9 August 2023 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

The purpose of this letter is to advise you of my intention to exercise the discretion to discontinue this IC review under s 54W(a)(i) of the FOI Act on the basis that your IC review application is lacking in substance, and to give you an opportunity to provide reasons for me to reconsider finalising this review.

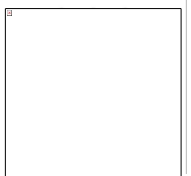
The reasons for my view follow.

Scope of IC review

The issue to be decided in this IC review is whether the Prime Minister's Office has taken all reasonable steps to find documents within the scope of your request, as required under s 24A of the FOI Act.

In forming my view as review officer, I have had regard to the following:

- i. the scope of your FOI request dated 8 August 2022
- ii. the Prime Minister's Office's original decision, and reasons for decision, of 7 October 2022
- iii. the Prime Minister's Office's revised decision, and reasons for decision, of 9 August 2023
- iv. evidence of searches undertaken by the Prime Minister's Office
- v. the FOI Act, in particular s 24A
- vi. the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard in performing a function or exercising a power under the FOI Act, in particular paragraphs [3.85] – [3.94]



- vii. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and
- viii. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.

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 systems and the practice of destruction or removal of documents, and
- the record management systems in place
- the individuals within an agency or minister's office who may be able to assist with the location of documents, and
- the age of the documents.¹

In this context 'reasonable' has been understood as taking steps that are 'not going beyond the limit assigned by reason; not extravagant or excessive; moderate...Of such an amount, size, number, etc., as is judged to be appropriate or suitable to the circumstances or purpose' (see *De Tarle and Australian Securities and Investments Commission (Freedom of Information)* [2015] AATA 770 at [19]).

¹ Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act (FOI Guidelines)* [3.88] – [3.89].

Your FOI request

On 8 August 2022, you made a request to the Prime Minister's Office for access to:

1. Communication between the Prime Minister's Office and any office holder, official or employee of the AWU, CFMMEU or ACTU during the period 1 June 2022 to 25 July 2022 in relation to the Australian Building and Construction Commission (ABCC), the Code for the Tendering and Performance of Building Work 2016 (Building Code) or the Code for the Tendering and Performance of Building Work Amendment Instrument (Amended Building Code).

2. Internal communications between members of the Prime Minister's office (including the Prime Minister) during the period 1 June 2022 to 25 July 2022 in relation to the Australian Building and Construction Commission (ABCC), the Building Code or the Amended Building Code. In this request a reference to the Prime Minister's Office includes the Prime Minister.

For the avoidance of doubt, the request includes all forms of communication including emails (including attachments), memorandums or notes, electronic communications such as SMS, WhatsApp messages, iMessages and Signal messages.

Prime Minister's decision

In its original decision of 7 October 2022, the Prime Minister's Office identified 2 documents relevant to item (2) of your request, which it refused you access to on the basis that the documents were exempt under s 34 of the FOI Act (Cabinet documents exemption). No documents relevant to item (1) of your request could be found.

In its revised decision of 9 August 2023, the Prime Minister's Office granted you partial access to the 2 documents identified as relevant to item (2) of your request, with redactions made to parts of the documents under s 34. The Prime Minister's Office maintained that no documents could be found relevant to item (1) of your request.

Parties' submissions

On 6 September 2023, you advised that you wished to proceed with a review of the revised decision in relation to the sufficiency of searches conducted.

On 20 September 2023, you made further submissions stating that the searches appeared insufficient for reasons including that:

- the searches undertaken were limited to two advisors for unknown reasons
- your request specifically sought communications involving the Prime Minister directly and there is no evidence that the Prime Minister's records have been searched.

On 24 January 2024, the Prime Minister's Office submitted:

- the two advisors with responsibility for the relevant subject matter were tasked with undertaking searches of their emails and any other systems used for work purposes, based on a key word search during the relevant date range
- in identifying relevant persons, the decision maker took into account the context of the request, including its subject matter as well as the fact that it was made a short time after the period of the requested communication.

On 25 June 2024, the OAIC requested a further submission from the Prime Minister's Office to address the sufficiency of the searches undertaken, noting your request also extended to any communications involving the Prime Minister directly.

On the same day, the Prime Minister's Office responded, advising:

... the operating environment of the Office is such that only a small number of staff exist with direct responsibility for the subject matter relevant to the scope of the request.

The relevant advisers who would have knowledge and awareness the subject-matter of the request were readily identifiable, and there would be no further benefit in extending the search request to others who are unlikely to have any awareness of the requested documents. As the searches conducted covered all relevant persons and systems within the Office, there is no reasonable basis for further searches to be undertaken.

On 16 July 2024, a delegate of the Commissioner issued a notice to the Prime Minister's Office under s 55V of the FOI Act, requiring it to undertake further searches for documents, and requested particulars about the searches undertaken.

On 30 July 2024, the Prime Minister's Office responded advising that:

- the Prime Minister's Chief of Staff has now separately undertaken additional searches for documents relevant to the request, but no further documents have been found as a result.

On 22 August 2024, the OAIC asked the Prime Minister's Office to explain whether the searches undertaken by the Chief of Staff extended to searches of the Prime Minister's official email account.

On 29 August 2024, the Prime Minister's Office further responded that:

The searches undertaken by the Prime Minister's Chief of Staff did not extend to the Prime Minister's official email account, however the Office has arranged for those searches to be undertaken and no relevant documents have been identified.

A copy of the Prime Minister's Office's submissions of 24 January 2024, 25 June 2024 and 30 July 2024 are attached for your reference.

Evidence of searches undertaken

The Prime Minister's Office has provided the OAIC with details of the searches undertaken in relation to your FOI request and the outcome of those searches. I have considered these records, which demonstrate that:

- two advisors, including a senior advisor, were tasked with undertaking searches of their emails as well as any other storage system used for work records
- the Prime Minister's Chief of Staff was tasked with undertaking searches of all physical and electronic systems that may hold work-related communications including emails, mobile phone(s), filing cabinets, group or home drives and notebooks
- the Prime Minister's Chief of Staff undertook searches of the Prime Minister's official email account
- each of the relevant officers including the Chief of Staff confirmed they had undertaken the requested searches but could not identify any further documents relevant to the request.

I have also considered the records of the above searches undertaken by the Prime Minister's Office, which were provided to the OAIC during the course of this IC review, which identify:

- the date searches were undertaken, in September 2022, and July 2024
- the persons who undertook the searches, including two advisors within the Prime Minister's Office, and the Prime Minister's Chief of Staff
- the locations searched, which extended to the Prime Minister's official email account
- the search terms used, namely the key words 'Australian Building and Construction Commission', 'ABCC' and 'Building Code, over the requested date range
- the outcomes of the searches undertaken, being that only 2 documents could be located, which you were provided partial access to on 9 August 2023.

Discretion not to continue to undertake an IC review

Under s 54W(a)(i) of the FOI Act, the Information Commissioner may decide not to undertake a review, or not to continue to undertake a review, if the Information Commissioner is satisfied that the IC review application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith.

Having regard to the scope of your request, the parties' submissions and the Prime Minister's Office's evidence of searches, it appears that the Prime Minister's Office has taken all reasonable steps to find documents within the scope of your request as it was required to do by s 24A and that any further relevant documents, if they existed, would have been found. In particular, I am satisfied that had there been any communications involving the Prime

Minister directly, or any further communications involving the Office more broadly, that these would have been discovered through the searches undertaken by the individuals with the relevant subject matter knowledge and with access to the Prime Minister's official communications.

For these reasons, I intend to exercise the discretion to decide to discontinue this IC review under s 54W(a)(i), because I am of the view that this IC review application is lacking in substance.

I will review all material before the OAIC in deciding whether to exercise the discretion to decide not to continue to undertake a review in this case.

If you disagree with this view, please write to us by **18 September 2024** and advise us of your reasons. Your reasons will be taken into account before a decision is made on whether to finalise this matter under s 54W.

If I do not hear from you by this date your IC review will be finalised under s 54W(a)(i) and you will be notified of your review rights.

If you would like to discuss this matter, please contact me by email at FOIDR@oaic.gov.au or by phone on 1300 363 992. In all correspondence please quote MR22/01812.

Yours sincerely



Tania Strathearn
Assistant Director

4 September 2024