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OAIC reference: MR22/01812

FOI reference: PM/22/006IC

IC Review – MR22/01812 – BE and Prime Minister of Australia Submissions on behalf of decision-maker

These submissions are made in response to the application of BE (**applicant**) for Information Commissioner (**IC**) review of the s 55G decision made under the *Freedom of Information Act 1982* (**FOI Act**) on 9 August 2023 on behalf of the Prime Minister of Australia.

These submissions may be shared with the applicant.

Enclosed documents

In accordance with 10.100 of the FOI Guidelines, copies of the following documents are enclosed:

- Annexure A – copy of the original FOI request of 8 August 2022 (the terms of the request were not modified);
- Annexure B – copies of the search requests;
- Annexure C – s 55 decision.

Summary

The s 55G decision sets out the comprehensive searches that were undertaken in response to the applicant's request. The steps taken identified responsive documents, which have been provided to the applicant. Nonetheless, the applicant maintains their contention that reasonable searches were not undertaken.

This contention should not be accepted in circumstances where the advisers with responsibility for the relevant subject-matter area in the office (and who would reasonably have been aware of the existence of such documents if they existed) were (1) asked to search for responsive documents wherever they might be stored; (2) in fact provided responsive documents that they had identified by their searches; and (3) confirmed to the decision-maker they were not aware of any further communications the subject of the request.

The request

The applicant sought two categories of documents as follows:

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),

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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.

Relevant principles

The FOI Act requires that 'all reasonable steps' be taken to find documents responsive to an FOI request.¹ Further, the FOI Guidelines outline that:

- 'reasonable' 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',²
- 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,³ and
- 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, andthe age of the documents.⁴

The revised s 55 decision

The decision-maker initially identified two documents falling with the second category of requested documents. These documents were produced under the s 55 decision, subject to exemptions. The applicant does not contest the exemption decision.

The s 55 decision set out in considerable detail the steps that were taken to identify any other documents responsive to the applicant's request. In summary:

- the two advisers in the office with responsibility for the relevant subject matter were requested (in writing) to search their records for responsive documents. The search request:

¹ FOI Act, s 24A.

² FOI Guidelines [3.88].

³ FOI Guidelines [3.89].

⁴ Ibid.

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- set out the terms of the request in full, which made clear that the request covered all forms of documents and communications, including ‘SMS, Whatsapp messages, iMessage and signal messages’
 - requested that the advisers search their emails as well as ‘*any other storage system you use for work records*’
 - provided appropriate search parameters, namely the key words ‘Australian Building and Construction Commission’, ‘ABCC’ and ‘Building Code’ over the relevant date range, 1 June 2022 to 25 July 2022.
- Both advisers responded that they had searched their records as requested and the responsive documents were provided to the decision-maker.
 - The decision-maker also records in the s 55 decision that the advisers confirmed to her that, apart from the identified document, they were not aware of any other communication falling within the terms of the request.
 - The decision-maker noted that staff in the Office undertake general training about FOI and are advised the Act applies to all types of documents (broadly defined and including emails, documents, phone messages such as text messages, signal, whatsapp as well as photos and videos), wherever those documents are stored.
 - The decision-maker was satisfied that, having regard to their responsibility for the relevant subject matter of the request, the two advisers ‘*could reasonably be expected to have been involved in, or aware of, any communication the subject of [the] request if such communications existed*’.

In all of the circumstances – including the subject matter of the request; the fact that it covered very recent events when it was received; and the searches requested of the relevant advisers and their response – the decision maker was thus satisfied that the only documents responsive to the request were the two documents identified.

A copy of the emails sent to the advisers, and their responses, are annexed, with personal information redacted for privacy reasons.

Reasonable searches were undertaken

It is submitted that the s 55 decision makes clear that reasonable searches were undertaken in all of the circumstances.

The two advisers in the office with responsibility for the relevant subject-maker were asked to search their records for responsive documents, wherever they might be stored. The decision-maker found that these two advisers were likely to have knowledge of the existence of such communications, if they existed – and noted that the advisers confirmed to her they were not aware of any further documents. Two documents were, in fact, identified as a result of the search process. And, the decision-maker appropriately took into account the context of the request, including its subject matter as well as the fact it was made a short time after the period of the requested communication.

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In these circumstances, the searches that were conducted covered all the persons and systems that would reasonably be expected to have documents responsive to the requests. If further documents existed, it was reasonably likely that the steps taken in response to the request would have uncovered them. No further searches were necessary.

Conclusion

For these reasons, the decision under review should be affirmed.

If you require further information to support the processing of this IC review, please contact foi@pmc.gov.au.

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