

3 February 2014

12 Highland Way

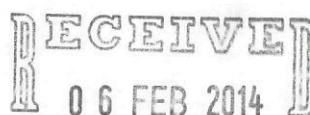
Highton, 3216

Attn: Ms Charine Bennett

Office of the Australian Information Commissioner

GPO Box 2999

Canberra 2601



Dear Ms Bennett

BY:.....

RE: FOI Case Study

Please find attached a copy of my FOI case study that covers some of the legislative history of the FOI Act and a typical agency response to a "**complex and voluminous**" FOI request where the agency has not sought to obtain a "**collateral advantage**" by having the applicant declared a "**vexatious applicant**".

Can you please add the attached document to the files of the OAIC.

Yours sincerely

Phillip Sweeney

Attachment:

Case Study – FOI Act: "**Dealing with "Complex and Voluminous" Applications**"

FOI Case Studies

Case Study - Freedom of Information Act

Case Study #1

Dealing with “Complex and Voluminous” Applications

Under **Section 24** of the *Freedom of Information Act 1982* an agency or Minister may refuse to give access to a document or documents if the agency or Minister is satisfied that a “*practical refusal reason*” exists for refusing access.

However pursuant to **Section 24AB** the agency or Minister must undertake a “*request consultation process*” with the applicant.

Subsection 24AB(3) requires the agency or Minister to take reasonable steps to assist the applicant so that the practical refusal reason no longer exists, including providing the applicant with any information that would assist the applicant revise the request {ss 24AB(4)(b)}.

Subsection 24 AA(1) defines a “*practical refusal reason*” as:

(1) For the purposes of section 24, a *practical refusal reason* exists in relation to a request for a document if either (or both) of the following applies:

(a) the work involved in processing the request:

(i) in the case of an agency--would substantially and unreasonably divert the resources of the agency from its other operations; or

(ii) in the case of a Minister--would substantially and unreasonably interfere with the performance of the Minister's functions;

(b) the request does not satisfy the requirement in paragraph 15(2)(b) (identification of documents).

Subsection 24 AA(3) states:

In deciding whether a practical refusal reason exists, an agency or Minister must not have regard to:

(a) any reasons that the applicant gives for requesting access; or

(b) the agency's or Minister's belief as to what the applicant's reasons are for requesting access; or

(c) any maximum amount, specified in the regulations, payable as a charge for processing a request of that kind.

FOI Case Studies

Legislative History

The Attorney-General's Department produced a set of "**Background Notes**" for the Freedom of Information Bill 1978

It was noted that the Bill has been largely based on the recommendations contained in the 1976 Report of the Interdepartmental Committee on Policy Proposals for Freedom of Information legislation.

In the 1978 Bill subsection 13(3) covered the "*practical refusal test*".

13(3) "Where a request is expressed to relate to all documents, or to all documents of a specified class, that contains information of a specified kind or relate to a specified subject-matter, compliance with the request may be refused if it would interfere unreasonably with the operations of the agency or the performance by the minister of his functions, as the case may be having regard to any difficulty that would exist in identifying, locating or collating documents containing relevant information within the filing system of the agency or the office of the Minister".

IMPORTANT: Note the words used in the 1978 Bill "*interfere unreasonably with the operations of the agency.*"

Report by the Senate Standing Committee of Constitutional and Legal Affairs.

On the 28 September 1978 the Senate resolved that the **Freedom of Information Bill 1978** be referred to the Senate Standing Committee of Constitutional and Legal Affairs {Refer to subsection 2(c) of the **Acts Interpretation Act 1901** {Appendix A}.

Chapter 13 of the Report was titled "**Refusal of access in administrative grounds (clause 13)**"

The report identified one possible "*mischief*" in relation to voluminous requests made under the US Freedom of Information Act as:

"It is not inconceivable as the Department of Foreign Affairs maintained (Submission 150) that deliberate campaigns could be undertaken by extreme groups formulating requests of similar magnitude to disrupt the operations of agencies whose practices they found offensive"

Therefore the Senate Report stated at paragraph 13.3:

"For these reasons we accept that agencies must on occasions be able to refuse requests which would impose extreme burdens on their operations. It is important, however, that the exemption be used sparingly and only when the agency concerned is subject to considerable interference with its operations. In our view it is the magnitude of the interference with an agency's operations that should determine whether a categorical request should be complied with or not. Accordingly, it is necessary to insert in the exemption some quantitative measure of the interference which would be considered unacceptable. As presently drafted, clause 13(3) focuses on "**unreasonable**" interference with the operations

FOI Case Studies

of an agency. While it is difficult to find sufficiently precise language which conveys the appropriate flavour, we believed the sub-clause would be improved by the additional of a quantitative requirement that the interference be "**substantial**" as well as unreasonable".

The Senate Report then makes the following recommendation at paragraph 13.4:

Clause 13(3) should be amended so that compliance with a categorical request can be refused only if it would "*impose a substantial and unreasonable burden on the operations of the agency or the performance by the minister of his functions*".

The report also states at paragraph 13.5:

Clause 13(3) is not the appropriate clause on which an agency should rely when the burden arises because of the need to identify, locate and collate the relevant documents within the sixty-day time limit. Instead, recourse should be had to clause 39(6) which provides that an agency or a minister may apply to the Administrative Appeal Tribunal for an extension of time to deal with requests which invoke the sixty-day time limit. It can be expected that when an agency has acted diligently such applications in the case of categorical requests would rarely be refused.

The report also noted at paragraph 13.9

"A poor information retrieval system or unwise delegation of authority may be the cause of the burden of which it complains. Agencies would realise soon enough that reliance on clause 13(3) for reasons of their own ineptitude would not be considered a legitimate invocation of the exemption"

Guidelines Issued by the Attorney-General 1982

The Attorney-General's Department produced "**Guidelines to the Freedom of Information Act**" {*Australian Government Publishing Service – Canberra 1982 Cat. No. 82 2290 3*}

Under the heading "**The Obligation to Assist and Consult with Applicants**" on page 14 of the Guidelines at paragraph 50 the followings stated:

"Officers handling requests should also have in mind the objectives of the Act set out in section 3(1) and that it is the express intention of the Parliament that any discretions conferred by the Act should be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information"

When the Tribunal "*steps into the shoes*" of such an Officers, that same principles apply.

At paragraph 55 the Guidelines state:

FOI Case Studies

“Agencies and Ministers are also under a like obligation to consult before refusing to grant access in accordance with a request for access expressed in terms of section 24(1)(a) on the grounds of substantial and unreasonable diversion of resources appearing in section 24(1)(b)”

The Guidelines continue at paragraphs 56, 57 and 58:

“What is a reasonable opportunity for consultation in terms of section 24(3) is a question which can only be answered by having regard to all the circumstances surrounding the request.

In a simple case, the requirement may be satisfied by a telephone call in which the officer gets sufficient information to enable him to identify the document. Alternatively, more information may be sought by way of a letter.

In a more complex case the requirement may only be met by the agency arranging a meeting with the applicant at a mutually convenient time to discuss the difficulties and how best those difficulties may be overcome”

Under the heading “**Requests involving Substantially and Unreasonable Diversion of Resources**” on page 17 of the Guidelines at paragraph 66 the followings stated:

“There are two provisions in the Act under which a request may be refused on the ground that compliance “*would substantially and unreasonably divert the resources of the agency from its other operations*” – Sections 17 and 24.

The guidelines at paragraph 68 state:

“What constitutes a “**substantial and unreasonable diversion**” must to a large extent depend on the circumstances. These words recognise that dealing with FOI request may required some reallocation of resources. The diversion must be both substantial and unreasonable. A minimal diversion of resources will not be enough to justify refusal. But any diversion of resources to the point where real delay was being caused to other programs would meet the test. The “unreasonableness” of the diversion will likewise have to be judged by the effect on other programs, and the significance and importance of those programs.

At paragraph 69 the guidelines continue:

“The term “resources” should be understood as including not only staff resources, but also finance and equipment. Thus the employment of staff on overtime, or the expenses of transferring staff from one location to another, would involve a diversion of resources.

At paragraph 70 the term “**resources of the agency**” are discussed:

“The reference to resources is, however, not to be construed as limited to those members of an agency’s staff who are immediately designated for FOI work. The term “*resources of the agency*” should be understood as the resources which might reasonably be made available within the agency at any particular time for dealing with FOI requests. This may sometimes require the deployment of staff from other areas, where this does not involve an unreasonable and substantial interference with the work in those areas”

The Matter of a Large Number of Requests

The guidelines at paragraph 73 states:

FOI Case Studies

“Neither section 17 nor section 24(1) is concerned with the workload resulting from a large number of requests. In each case, it is the work involved in dealing with a particular request which is in issue. The Act is silent as to the way in which resources should be deployed to deal with a volume of requests, except to the extent that there is an obligation to take all reasonable steps to enable a request in accordance with section 19 to be dealt with within the specified time limits. As to this obligation, see paragraph 60 above.”

Need to give Reasons

At paragraph 74 the Guidelines state:

“Where an agency refuses a request under section 17(2) or 24(1) the statement given to the applicant under section 26 should explain the basis on which it has been found that compliance with the request would involve a substantial and unreasonable diversion of resources”

The ARC/ALRC Report

The *Freedom of Information Act 1982* was recently amended by the *Freedom of Information Amendment (Reform) Act 2010*. Representations were made in the *Explanatory Memorandum* that the amendments were based largely on the recommendation made in a joint report produced by the Administrative Review Council and the Australian Law Reform Commission.

ALRC 77

Open government: a review of the federal Freedom of Information Act 1982

The “*Open Government Report*” noted that Proposal “DP 59” was intended to cover situations that are not caught by **Section 24** such as requests for information that the applicant has been advised is for sale or for information to which access has been refused.

The proposal was that the FOI Act be amended to allow an agency to reject such a request on the basis that the application was deemed to be “*vexatious*”.

A number of submissions expressed doubt, however, about the need for such a provision and concern about the potential for decision-makers to abuse it.

Submission 58 stated:

“In the twelve years of operation of the Act, few requests could properly be classified as vexatious”

Concern for abuse was raised in submissions by the *Commonwealth Ombudsman* (No. 53) and the *Australian Consumers’ Association* (No. 55) .

FOI Case Studies

The Review considered that the potential for agencies to invoke such a provision to avoid requests merely because they regard them as nuisances outweighs any advantage there may be in such a provision.

The Review noted :

“*Vexatious*” is a vague concept and is likely to result in unpredictable implementation. In addition, a certain number of time consuming applications that some may describe as vexatious are an inevitable part of any information access regime.”

The Review did however acknowledge that the Act does not currently provide agencies with a mechanism for dealing with repeated requests for documents to which access has already been refused.

The Review then made the following recommendation:

Recommendation 35

The FOI Act should be amended to provide that an agency may refuse to process a repeat request for material to which the applicant has already been refused access, provided there are no reasonable grounds for the request being made again.

The Review made reference to a similar provision in **Section 24A** of the **Freedom of Information Act 1982** (Vic) and noted an example of a reasonable ground for a repeat request may be a *bona fide* belief that the documents in question are no longer exempt.

The **ARC/ALRC Report** made no recommendation that the Information Commissioner should be provided with determinate powers to declare anyone a “*vexatious applicant*”.

In fact the **ARC/ALRC Report** made a specific recommendation AGAINST providing the Information Commissioner with determinative powers, since this was not in keeping with the rationale as to why the role was to be established in the first place.

A “*Fraud on the Parliament*”

The amendments to the **Freedom of Information Act 1982** incorporated as Section 89 K, L, N & N were plagiarised from the **Freedom of Information Act 1992** (Qld).

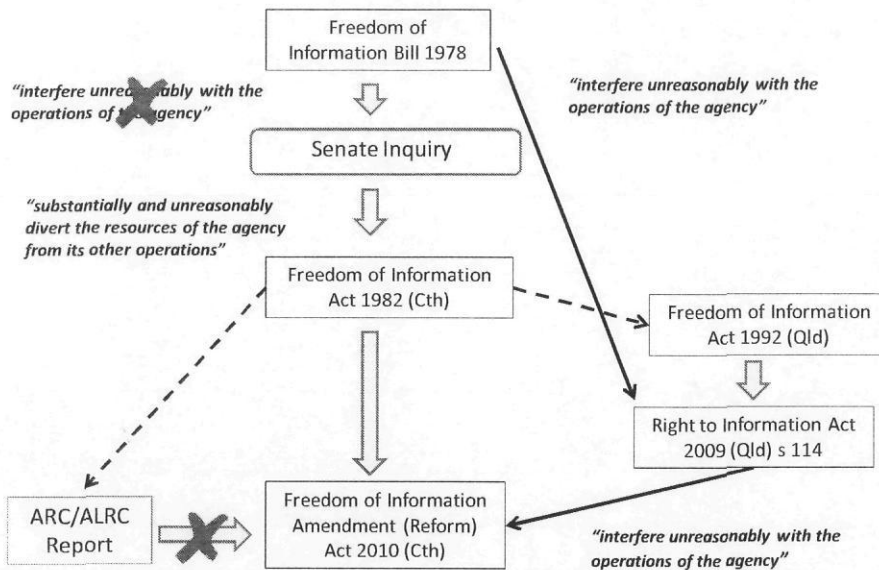
These amendments were never recommended in the **ARC/ALRC Report**.

These amendments were incorporated by someone who had no understanding of the legislative history of the **Freedom of Information Act 1982**.

Since the Members of Parliament and the Senators were not properly informed of these new provisions, these new provisions can be considered a “*Fraud on the Parliament*”, where “*fraud*” is used in an equitable sense.

FOI Case Studies

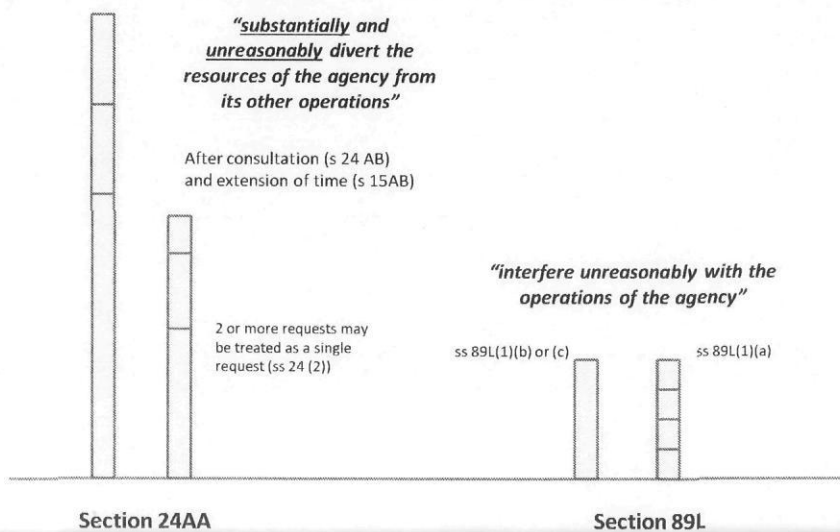
“Fraud on the Parliament”



This has resulted in a “**back door**” means of defeating the recommendation of the Senate Standing Committee of Constitutional and Legal Affairs that was incorporated in the original FOI Act.

An agency can now seek to avoid the more demanding requirements of **Section 24** of the FOI Act and instead seek to apply the much less demanding criteria of **Section 89L**.

Work Load Tests



FOI Case Studies

But how to agencies respond in practice?

Putting the Legislation to the Test

To determine how agencies respond to a “**complex or voluminous**” application the FOI request shown in **Exhibit A** was sent to several agencies.

The documents requested were as follows:

The documents the Applicant seeks are copies of all correspondence produced by the “*name of agency*” between 2 and 6 December 2013 inclusive in which the last letter in the document before the closing (ie Yours Sincerely) is the letter “t”.

Now it would be easy to quickly dismiss such an FOI Application as “**vexatious**” and ignore the FOI request, however both **subsection 11(2)(b)** and **subsection 24AA(3)(b)** state that in refusing an FOI request the agency or Minister cannot have regard to “*the agency's or Minister's belief as to what the applicant's reasons are for requesting access.*”

The FOI Act is predicated on the “**right**” to know and not the “**need**” to know.

One of the agencies in this survey was the **Australian Human Rights Commission** (AHRC).

The first reply received from the AHRC is shown in **Exhibit B**.

Following a reduction in the scope of the request a second reply was received from the AHRC which is shown in **Exhibit C**.

Then following a further reduction in scope a final decision letter was received which is shown in **Exhibit D**.

The responses from the AHRC demonstrate how this particular agency applied Subsection 24AB(3) which requires the agency or Minister to take reasonable steps to assist the applicant so that the practical refusal reason no longer exists as well as demonstrating how and agency should engage in a consultation process with the applicant in order to reduced the scope of a “**complex or voluminous**” request.

There were other agencies who adopted a similar approach.

However no agency responded by claiming that they considered the FOI Application to be “**vexatious**” and would therefore seek to have the Applicant declared a “**Vexatious Applicant**” by the Australian Information Commissioner as a means of avoiding having to process the original FOI Application.

FOI Case Studies

Collateral Advantage in Seeking a “Vexatious Applicant” Declaration

But then none of these agencies were seeking a “*collateral advantage*” by having the Applicant declared a “*Vexatious Applicant*” by the Australian Information Commissioner.

Exhibit A

Date:

Applicant’s Address

Freedom of Information Officer

Agency Name

Agency Address

Dear Sir/ Madam

A Request under the Freedom of Information Act 1982

The Applicant is writing to lodge a request for documents under the *Freedom of Information Act 1982*.

The Documents the Applicant Seeks

The documents the Applicant seeks are copies of all correspondence produced by the “*name of agency*” between 2 and 6 December 2013 inclusive in which the last letter in the document before the closing (ie Yours Sincerely) is the letter “t”.

Personal and confidential information can be redacted.

Can you please confirm receipt of this Freedom of Information Request pursuant to **subsection 15(5)(a)** of the *Freedom of Information Act 1982*.

Yours sincerely

Name of Applicant

FOI Case Studies

resources of the Commission. Identification of the documents falling within your request would require a search of all electronic and paper records of the Commission for the period of your request. It would then be necessary to examine each of those documents in order to determine which ended with the letter 't'. Given the request extends to emails and letters, this could run into hundreds and perhaps thousands of documents.

Request consultation process

You now have an opportunity to revise your request to enable it to proceed.

Revising your request can mean narrowing the scope of the request to make it more manageable or explaining in more detail the documents you wish to access. For example, by providing more specific information about exactly what documents you are interested in, our agency will be able to pinpoint the documents more quickly and avoid using excessive resources to process documents you are not interested in.

Before the end of the consultation period, you must do one of the following, in writing:

- withdraw your request
- make a revised request
- tell us that you do not wish to revise your request.

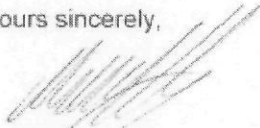
The consultation period runs for 14 days and starts on the day after you receive this notice.

During this period, you are welcome to seek assistance from the contact person I have listed below to revise your request. If you revise your request in a way that adequately addresses the practical refusal grounds outlined above, we will recommence processing it. (Please note that the time taken to consult you regarding the scope of your request is not taken into account for the purposes of the 30 day time limit for processing your request.)

If you do not do one of the three things listed above during the consultation period or you do not consult the contact person during this period, your request will be taken to have been withdrawn.

If you would like to revise your request or have any questions, please contact me.

Yours sincerely,



Michelle Lindley
Deputy Director
Legal

T 02 9284 9679
E michelle.lindley@humanrights.gov.au
F 02 9284 9787

FOI Case Studies

Exhibit B



Australian
Human Rights
Commission

30 January 2014

Philip Sweeney
12 Highland Way
Highlon, VIC 3216

By email: oursuperfund2012@gmail.com

Dear Mr Sweeney,

Freedom of Information Request

I refer to your request for access to documents relating to 'all correspondence produced by the Australian Human Rights Commission between 2 and 6 December 2013 inclusive in which the last letter in the document before the closing (ie Yours Sincerely) is the letter "t" under the *Freedom of Information Act 1982* (FOI Act).

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

I am writing to tell you that I believe that the work involved in processing your request in its current form would substantially and unreasonably divert the resources of this agency from its other operations due to its broad scope. This is called a 'practical refusal reason' (section 24AA).

On this basis, I intend to refuse access to the documents you requested. However, before I make a final decision to do this, you have an opportunity to revise your request. This is called a 'request consultation process' as set out under section 24AB of the FOI Act. You have 14 days to respond to this notice in one of the ways set out below.

Why I intend to refuse your request

In your request you sought documents relating to:

all correspondence produced by the Australian Human Rights Commission between 2 and 6 December 2013 inclusive in which the last letter in the document before the closing (ie Yours Sincerely) is the letter "t".

I decided that a practical refusal reason exists because, given the breadth of your request, the time and resources that would be required to identify and locate the documents you have requested would substantially and unreasonably divert the

Australian	Level 3	GPO Box 5218	General enquiries	1300 369 711
Human Rights	175 Pitt Street	Sydney NSW 2001	Complaints infoline	1300 656 419
Commission	Sydney NSW 2000		TTY	1800 620 241
ABN 47 996 232 602			www.humanrights.gov.au	

FOI Case Studies

Exhibit C



Australian
Human Rights
Commission

30 January 2014

Philip Sweeney
12 Highland Way
Highton, VIC 3216

By email: oursuperfund2012@gmail.com

Dear Mr Sweeney,

Freedom of Information Request

I refer to your revised request for access to documents relating to 'all letter produced by the Australian Human Rights Commission between 2 and 3 December 2013 inclusive in which the last letter in the document before the closing (ie Yours Sincerely) is the letter "I" under the *Freedom of Information Act 1982* (FOI Act).

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

I am writing to tell you that I believe that the work involved in processing your revised request in its current form would substantially and unreasonably divert the resources of this agency from its other operations due to its broad scope. This is called a 'practical refusal reason' (section 24AA).

On this basis, I intend to refuse access to the documents you requested. However, before I make a final decision to do this, you have an opportunity to further revise your request. This is called a 'request consultation process' as set out under section 24AB of the FOI Act. You have 14 days to respond to this notice in one of the ways set out below.

Why I intend to refuse your request

In your request you sought documents relating to:

all letter produced by the Australian Human Rights Commission between 2 and 3 December 2013 inclusive in which the last letter in the document before the closing (ie Yours Sincerely) is the letter "I".

I decided that a practical refusal reason exists because, given the breadth of your request, the time and resources that would be required to identify and locate the documents you have requested would substantially and unreasonably divert the resources of the Commission. The Commission does not have a centralised or electronic document management system which records all letters produced in a certain period. Identification of the documents falling within your request would require a physical search of all electronic and paper records of the Commission for the period of your request. It would then be necessary to examine each of

Australian Human Rights Commission ABN 47 996 232 602	Level 3 175 Pitt Street Sydney NSW 2000	GPO Box 5218 Sydney NSW 2001	General enquiries Complaints infoline TTY www.humanrights.gov.au	1300 369 711 1300 656 419 1800 620 241
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FOI Case Studies

those documents in order to determine which ended with the letter 't'. This could run into hundreds and perhaps thousands of documents.

Request consultation process

You now have an opportunity to revise your request to enable it to proceed.

Revising your request can mean narrowing the scope of the request to make it more manageable or explaining in more detail the documents you wish to access. For example, by providing more specific information about exactly what documents you are interested in, our agency will be able to pinpoint the documents more quickly and avoid using excessive resources to process documents you are not interested in.

Before the end of the consultation period, you must do one of the following, in writing:

- withdraw your request
- make a revised request
- tell us that you do not wish to revise your request.

The consultation period runs for 14 days and starts on the day after you receive this notice.

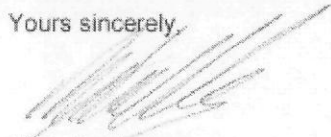
During this period, you are welcome to seek assistance from the contact person I have listed below to revise your request. If you revise your request in a way that adequately addresses the practical refusal grounds outlined above, we will recommence processing it. (Please note that the time taken to consult you regarding the scope of your request is not taken into account for the purposes of the 30 day time limit for processing your request.)

If you do not do one of the three things listed above during the consultation period or you do not consult the contact person during this period, your request will be taken to have been withdrawn.

Contact person

If you would like to revise your request or have any questions, please contact me on the details below.

Yours sincerely,



Michelle Lindley
Deputy Director
Legal

T 02 9284 9679
E michelle.lindley@humanrights.gov.au
F 02 9284 9787

FOI Case Studies

Exhibit D



Australian
Human Rights
Commission

30 January 2014

Philip Sweeney
12 Highland Way
Highton, VIC 3216

By email: oursuperfund2012@gmail.com

Dear Mr Sweeney,

Freedom of Information Request

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

Summary

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

Your initial request was in the following terms:

'all correspondence produced by the Australian Human Rights Commission between 2 and 6 December 2013 inclusive in which the last letter in the document before the closing (ie Yours Sincerely) is the letter "t".'

Through a consultation process, you revised your request as follows:

'all "**letter**" produced by the Australian Human Rights Commission between 2 and 3 December 2013 inclusive in which the last letter in the document before the closing (ie Yours Sincerely) is the letter "t".'

"**Letters**" are correspondence under AHRC letterhead signed under hand.'

Australian	Level 3	GPO Box 5218	General enquiries	1300 389 711
Human Rights	175 Pitt Street	Sydney NSW 2001	Complaints infoline	1300 856 419
Commission	Sydney NSW 2000		TTY	1800 620 241
ABN 47 996 232 602			www.humanrights.gov.au	

FOI Case Studies

I gave you a further opportunity to revise your application and following a further revision, you now seek access to:

'all "**letter**" produced by the Australian Human Rights Commission between 2 and 3 December 2013 inclusive in which the last letter in the document before the closing (ie Yours Sincerely) is the letter "t".

Documents can be further limited to those where the surname of the signatory commences with the letters "X", "Y", or "Z".

"**Letters**" are correspondence under AI IRC letterhead signed under hand.'

A search of the Commission's records indicates there are no documents falling within the scope of your request.

Pursuant to s 24A of the *Freedom of Information Act 1982* (Cth), an agency may refuse a request for access to a document if all reasonable steps have been taken to find the document, and the agency is satisfied that the document does not exist.

Your review rights

If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner review of the decision.

Under section 54 of the FOI Act, you may apply in writing to Commission for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter. If you would like the review to be conducted by the Australian Human Rights Commission, you should send a letter to:

Director, Legal Section
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

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.

Information Commissioner review

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

online: <https://forms.business.gov.au/aba/oaic/foi-review/>

email: enquiries@oaic.gov.au

post: GPO Box 2999, Canberra ACT 2601

in person: Level 3, 175 Pitt Street, Sydney NSW

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to www.oaic.gov.au/freedom-of-information/foi-reviews.

Yours sincerely,



Michelle Lindley
Deputy Director

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F 02 9284 9787