

**David** s 47E(d)

**From:** s 22(1)(a)(ii)  
**Sent:** Monday, 17 January 2022 10:08 PM  
**To:** FOI requests at CO  
**Subject:** [External] Freedom of Information request - Access to operational or administrative documents

Dear Commonwealth Ombudsman,

This is a request under the Freedom of Information Act 1982.

Other than the Work Practice Manual for complaint management (January 2019) or the Agency Guide to the PID Act (Version 2), I request access to any operational or administrative documents that set out how approaches about inadequately investigated internal disclosures under the Public Interest Disclosure Act 2013 are handled by the Office of the Commonwealth Ombudsman.

Please provide the relevant document or documents by return email.

Please use this email address for all replies to this request:

s 22(1)(a)(ii)

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Laura s 47E(d)

**From:** s 22(1)(a)(ii)  
**Sent:** Thursday, 17 February 2022 10:08 PM  
**To:** FOI requests at CO  
**Subject:** [External] Freedom of Information request - Contract and tender notices

Dear Commonwealth Ombudsman,

This is a request for documents. You are welcome to grant access to the documents pursuant to an administrative release. Otherwise, this request for documents should be construed as a request for documents under the FOI Act.

Documents may be provided in digital format (e.g. .pdf, .doc, .docx, and other generally accessible formats) by return email.

#### Background

I refer to an FOI decision made by Gregory Parkhurst, Senior Legal Officer in the Office of the Commonwealth Ombudsman, on 14 February 2022. The reference number for the decision is FOI-2022-10013. The decision letter is accessible at [https://aus01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.righttoknow.org.au%2Frequest%2Faccess\\_to\\_operational\\_or\\_adminis%23incoming-24117&data=04%7C01%7CCombudsman%40ombudsman.gov.au%7C4f7f274e15904f80371b08d9f20e2720%7C443ee9e811ff4c829e4139331045260a%7C0%7C1%7C637806964879761880%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6IjEhaWwiLCJXVCI6Mn0%3D%7C3000&sdata=loLUR6OCxYQOkWIIDnNg3FVfl%2BgINSXEGNxDC01C%2F74%3D&reserved=0](https://aus01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.righttoknow.org.au%2Frequest%2Faccess_to_operational_or_adminis%23incoming-24117&data=04%7C01%7CCombudsman%40ombudsman.gov.au%7C4f7f274e15904f80371b08d9f20e2720%7C443ee9e811ff4c829e4139331045260a%7C0%7C1%7C637806964879761880%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6IjEhaWwiLCJXVCI6Mn0%3D%7C3000&sdata=loLUR6OCxYQOkWIIDnNg3FVfl%2BgINSXEGNxDC01C%2F74%3D&reserved=0).

In his reasons for decision, Mr Parkhurst refers to “the relevant provider of information technology products and services”. This provider of products and services was responsible for designing a “computer system ... for the purpose of managing complaint and investigation work performed by the Commonwealth Ombudsman”. Mr Parkhurst claims that the “relevant provider of information technology products and services has expended considerable resources and time to develop its product.”

Presumably the effort that the “relevant provider of information technology products and services” went to was in response to a procurement request on the part of the Office of the Commonwealth Ombudsman.

#### Request

A level of documentation commensurate with the scale, scope and risk of the procurement must be maintained.

I request access to the following documents:

- a) any and all contract notices prepared pursuant to procurement arrangements for the “computer system [developed] ... for the purpose of managing complaint and investigation work performed by the Commonwealth Ombudsman”, including contract notifications prepared for publication on the AusTender website; and
- b) any and all tender notices prepared pursuant to procurement arrangements for the “computer system [developed] ... for the purpose of managing complaint and investigation work performed by the Commonwealth Ombudsman”, including tender notifications prepared for publication on the AusTender website; and
- c) any and all approaches to market pursuant to procurement arrangements for the “computer system [developed] ... for the purpose of managing complaint and investigation work performed by the Commonwealth Ombudsman”; and
- d) any purchase orders associated with the contract notice for the “computer system [developed] ... for the purpose of managing complaint and investigation work performed by the Commonwealth Ombudsman”; and
- e) any invoices issued by the supplier in relation to the “computer system [developed] ... for the purpose of managing complaint and investigation work performed by the Commonwealth Ombudsman”; and
- f) any and all “request documentation”, as that term is defined in the Commonwealth Procurement Rules, associated with the “computer system [developed] ... for the purpose of managing complaint and investigation work performed by the Commonwealth Ombudsman”.

Yours faithfully,

s 22(1)(a)(i)

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s 22(1)(a)(ii)

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FpbGZsb3d8eyJWljojMC4wLjAwMDAiLCJQJjoiV2luMzliLCJBTil6lk1haWwiLCJXVCI6Mn0%3D%7C3000&data=7s%2FaHkftkql0ZdZfTUo1Ns1i4YQcJgTt3AqCfsXHDbU%3D&reserved=0

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# FOI requests the subject of applications for IC review - Commonwealth Ombudsman

s 22(1)(a)(i)

Office of the Australian Information Commissioner

Response to this request is **delayed**. By law [Office of the Australian Information Commissioner](#) should normally have responded promptly and by **May 19, 2023** ([details](#))

s 22(1)(a)(i) April 19, 2023

Delivered

Dear Office of the Australian Information Commissioner

On 20 March 2023, I applied for access to the original freedom of information requests received by the Office of the Commonwealth Ombudsman that are, as at 20 March 2023, the subjects of applications for information Commissioner review (e.g. of 10 of the FO requests that the Office of the Commonwealth Ombudsman has received are subjects of applications for IC review as at 20 March 2023, then please provide those 10 FO requests) <https://www.righttoknow.org.au/request/f...>

No acknowledgement of receipt was sent to me within 14 days from the Office of the Commonwealth Ombudsman, as is required under section 15(5)(a) of the FO Act.

Concerned by the failure to acknowledge receipt, I sent the Commonwealth Ombudsman an email on 15 April 2023 requesting acknowledgement of receipt of my FO request <https://www.righttoknow.org.au/request/f...>

Both my request and my follow-up email have been ignored.

The administrators on Right to Know suggest that "if any other public authorities or publicly owned companies are involved, then make Freedom of Information requests to them."

I assume that you have access to these original requests since they are normally provided to you upon an IC review request being submitted.

Since my request to the Ombudsman has been ignored, I am applying to the OAC for the documents that I requested from the Commonwealth Ombudsman.

According to the 2021-2022 Legal Services expenditure report submitted to the Office of Legal Service Coordination (<https://www.righttoknow.org.au/request/2...>), the internal legal services expense for the Office of the Commonwealth Ombudsman for the 2021-2022 financial year was \$785,388. That is an increase of \$415,492 on the previous financial year, in which the internal legal services expense for the Office of the Commonwealth Ombudsman was \$369,896.

One of the reasons for the increase in internal legal expenses between the 2020-2021 and 2021-2022 financial years is stated as "increasing workload partly in Freedom of Information requests and OAC review." In the 2021-2022 legal services expenditure report, would I like to know just what kind of FO requests the Office of the Commonwealth Ombudsman is receiving that would justify a more than \$400,000 increase in internal legal services expenditure in a single financial year?

Under the FO Act, would I like access to the original freedom of information requests received by the Office of the Commonwealth Ombudsman that are, as at 19 April 2023, the subjects of applications for information Commissioner review (e.g. of 10 of the FO requests that the Office of the Commonwealth Ombudsman has received are subjects of applications for IC review as at 19 April 2023, then please provide those 10 FO requests)?

Please provide the requested documents by return email.

Yours faithfully,

s 22(1)(a)(i)

OAC Legal Office of the Australian Information Commissioner April 27, 2023

4 Attachments

image001.jpg

3K [Download](#)

image002.jpg

0K [Download](#)

image004.jpg

0K [Download](#)

Freedom of information request FO requests the subject of applications for review Commonwealth Ombudsman.txt

4K [Download](#) [View as HTML](#)

Our reference: FO REQ23/00073

Dear [REDACTED]

I refer to the freedom of information request (FO request) received by the Office of the Australian Information Commissioner (OAC) on 19 April 2023 (attached).

I am writing to tell you that your FO request has been transferred to the Commonwealth Ombudsman ("Ombudsman") under s 16(1)(b) of the Freedom of Information Act 1982 (Cth). Under this section an agency can transfer a request or part of a request if the documents requested are more closely connected to the functions of another agency.

The documents you are seeking in your request are likely to be in the possession of the Ombudsman and are more closely connected to the functions of the Ombudsman, as we note you are seeking FO requests received by the Ombudsman. The OAC has contacted the Ombudsman which has accepted the transfer of your request.

We received your request on 19 April 2023 and the 30 day statutory period for processing your request commenced from the day after that date. The Commonwealth Ombudsman will treat your request as if they received it on the same day we did. You should therefore expect a decision by 19 May 2023.

The Commonwealth Ombudsman may be contacted via the following email address: [1][email address]

This file is now closed.

Kind regards

Jessica

[2][MG] Jessica Summerh

Lawyer

GPO Box 5288 Sydney NSW 2001



P 1300 363 992 E [3][email address]

The OA/C acknowledges Traditional Custodians of Country across Australia and the continuing connection to and

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References

Useful links

- 1 mail to [email address]
- 2 <https://www.oaic.gov.au/>
- 3 mail to [email address]
- 4 <https://www.oaic.gov.au/engage-with-us/n...>

5-22(1)(a)(i) April 27, 2023

Delivered

Dear Jessica Summerh

Thank you for your email.

With respect, I do not think your decision to transfer was the correct one. I now

draw your attention to the judgment in *Bennett v Attorney General* [2007] FCA 1174. At [32]–[37] the Court stated:

32 There appears to be no authority on the central question relating to the construction of s 16(1)(b). Nor does the Explanatory Memorandum relating to the Bill that led to the passage of s 16 assist. As is common in the case, the Explanatory Memorandum simply echoes the words of the relevant statutory provisions. It is therefore necessary to determine the proper construction of s 16(1)(b) by ascertaining the intention of the legislators by reference to the terms of the provisions themselves, the context provided by other provisions of the FO Act and the underlying purpose or object of the legislation.

33 In its own terms, s 16(1)(b) authorises a transfer of a request for access to a document only where the subject matter of “the document” is more closely connected with the functions of an agency other than the recipient of the request. It is important that regard is not to be had to the subject matter of the request, but to the subject matter of “the document.” In some cases, there will be no difference between the subject matter of a particular document and the subject matter of the request for it. A person may invoke the right given by s 15(1) to make a request for access to a document in the knowledge that a specific document exists, and using terms in the request that are apt to describe that specific document. For example, the document may be described by reference to its title, its date, the parties to it (in the case of correspondence) or its contents. More commonly, however, a person seeking to invoke the right to request access to a document will not know precisely what documents exist. The request will be in terms of a description of the kinds of documents sought by the person making the request. In the first type of case, in which a specific document is sought, it would be possible for the recipient to judge from the terms of the request whether the document sought was more closely related to the functions of another agency. From the description in the request, the recipient could reach the necessary conclusion to enable a transfer to be made. By contrast, where documents are sought by general description, it may be impossible to make a decision about the subject

matter of each such document without ascertaining whether the recipient of the request holds any such documents and if so considering the subject matter of each of them. This consideration points to the proposition that at least in some cases a request cannot be transferred pursuant to s 16(1)(b) without the agency receiving it ascertaining whether it has documents to which access is sought by means of the request.

34 Over s 16 of the FO Act applies to transfers in four situations. The situations that are the subject of subs (2) and (3) give rise to a duty to transfer. The word “shall” is used. By contrast in relation to the two conditions of transfer in subs (1) the word “may” is used, connoting that the exercise of discretion is involved. Each of the four situations in which a transfer is required or authorised focuses on the word “document”. By s 16(1)(a) the power to transfer may be exercised only where the document is not in the possession of the recipient agency but to the knowledge of the recipient agency is in the possession of another agency. The recipient of the request could not exercise this power to transfer without knowing that it did not have the document sought in its possession. It could only know the answer to that question if it had taken steps to ascertain what documents it did have answering the description in the request. Paragraphs (a) and (b) of s 16(1) appear to be alternatives. Between them they exhaust the ambit of the discretionary power to transfer a request. Each of those paragraphs contemplates a specific document the subject of a request. Which one of the paragraphs will apply depends on whether the document is or is not in the possession of the recipient of the request. Before a request can be transferred pursuant to s 16(1) it must be the case that the document is not in the possession of the recipient of the request in which case para (a) applies or it is in the possession of the recipient of the request and its subject matter is more closely connected with the functions of another agency in which case para (b) applies. The question whether a document is in an agency's possession can only be answered after the agency has made any necessary search for that document or a document answering its description. Further, each of the duties to transfer specified in subs (2) and (3) could only be carried out if the recipient of the request was aware of what documents it had answering the description in a request and the criteria in those subsections respectively. This is a powerful reason for concluding that the process of transferring under s 16 is one that can only be considered after the recipient of the request has become aware of the documents it has in its possession answering the description in the request by making a search of its own records. In this context particularly because it refers to a “document” rather than to a request as do s 16(1)(a), s 16(2) and s 16(3) there is no reason to suppose that s 16(1)(b) is to be construed any differently.

35 The context of the remaining provisions of s 16 of the FO Act tends to confirm that a transfer can only be put into effect after an agency has conducted a search to ascertain whether or not it has the document sought. Section 16(3A) provides that a request for more than one document (which would include a request for documents by description of categories) is to be treated for transfer purposes as a request for each of those documents separately. In conjunction with s 16(1)(b) this has the effect that the request can only be transferred to the extent that it relates to each specific document of which it can be said that the subject matter is more closely connected with the functions of another agency. Section 16(3A) makes it clear that where the request describes a category or categories of documents to which access is sought s 16(1)(b) provides no authority for the transfer of the whole of the request. The specific subject matter of each document answering the description in the request must be considered. It is unlikely that this could be done without first ascertaining whether the agency receiving the request has documents answering the description. Similarly s 16(4) requires an agency transferring a request to another agency in any of the circumstances outlined in s 16 to send “the document the subject of the request to the other agency” if it is necessary to do so in order to enable the other agency to deal with the request. Plainly without having ascertained whether it has such a document the transferor agency would not be in a position to comply with this requirement.

36 The broader context of the FO Act is also important. It is true that there is not to be found in the provisions of the FO Act any express imposition of a duty on the recipient of a request for access to documents to search its records to ascertain whether it has documents answering the description in the request. Such a duty is implicit, however. Section 11 provides a right to obtain access to documents. Provided that a request made pursuant to s 15(1) complies with the basic requirements of s 15(2) s 15(4) imposes on the recipient of the request a duty to take reasonable steps to assist the person making the request to direct it to the appropriate agency. If the request “should have been directed to another agency or Minister” it is difficult to see how that obligation could be carried out unless the recipient of the request first established that it had no documents answering the description in the request. Section 18 imposes a positive duty on the recipient of the request to give the person making the request access to the document. Only under limited circumstances specified in s 21(1) can such access be deferred. The circumstances in which a request may be refused are a so very limited. Section 24 deals with requests that are so onerous that they would substantially and unreasonably divert the resources of an agency from its other operations or interfere with the performance of a Minister's functions. In those circumstances s 24(1) provides that the request may be refused “without having caused the processing of the request to have been undertaken”. Section 24(2)(a) specifies a duty on an agency or Minister to have regard to the resources that would have been used “in identifying, locating or contacting the documents within the filing system of the agency or the office of the Minister” in determining whether to refuse to grant access to documents under s 24(1). These provisions suggest that where a request is not so onerous the recipient of it is obliged to cause the processing of it to be undertaken using whatever resources are necessary to identify, locate and contact the documents in the filing system of the agency or the office of the Minister concerned. A refusal under s 24A is only possible if a reasonable steps have been taken to find the documents and the recipient of the request is satisfied either that the document cannot be found or that it does not exist. A refusal under s 24A is therefore impossible without a search. Finally there is the specific requirement in s 15(5)(b) that a decision be given on the request within 30 days unless the time is extended under s 15(6). It is hard to see how a decision can be given about whether to grant or refuse access to documents requested (as de from onerous requests of the kinds referred to in s 24(1)) unless the recipient of the request took steps to find out what documents it had and to consider whether they are exempt under various provisions of the FO Act and if not whether deletion of exempt matter or relevant material under s 22 is necessary. In this context it is unlikely to have been the intention of Parliament that the power to transfer a request under s 16(1)(b) is one among a set of obligations that fall on the recipient of a request was intended to be exercised without any step being taken to ascertain whether the recipient of the document has documents answering the description in the request.



37 f the terms of s 16(1)(b) and its context do not lead to the conclusion that s 16(1)(b) should be construed as have suggested then reference to the legislative purpose of the FO Act makes that conclusion abundantly clear. The purpose of the FO Act is expressed in s 3(1) to be "to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth by among other things creating a general right of access to information in documentary form in the possession of Ministers and other agencies" limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held. Not only is this purpose so expressed but Parliament in s 3(2) of the FO Act has expressed its intention that the provisions of the FO Act are to be interpreted so as to further that object. If s 16(1)(b) were to be construed as permitting the recipient of a request to transfer that request without first ascertaining whether it had documents answering the description in the request there would be a considerable gap in the right of access to information given by the FO Act. To the extent to which s 16(1)(b) may be regarded as ambiguous it should be construed in accordance with the legislative purpose expressed in s 3.

As such it was not open to the OAC to simply transfer the request to the Office of the Commonwealth Ombudsman without first satisfying itself that documents requested do not actually exist in its possession because

"Before a request can be transferred pursuant to s 16(1) it must be the case that the document is not in the possession of the recipient of the request in which case para (a) applies or it is in the possession of the recipient of the request and its subject matter is more closely connected with the functions of another agency in which case para (b) applies. The question whether a document is in an agency's possession can only be answered after the agency has made any necessary search for that document or a document answering its description.

The context of my request makes clear that the Office of the Commonwealth Ombudsman failed to address my original request of 20 March 2023 in time (<https://www.righttoknow.org.au/request/f...>) and it was only because the Office of the Commonwealth Ombudsman failed to address my request that a request was made to the Office of the Australian Information Commissioner.

In future please ensure that you take cognisance of judgments of the Federal Court of Australia. They form part of the law of Australia.

Yours sincerely

s 22(1)(a)(i)

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We acknowledge the traditional owners of the land now known as Australia. We pay our respects to their elders past, present and emerging.

Our ref: FOI-2023-10048

7 July 2023

**s 22(1)(a)(ii)**

By email to: **s 22(1)(a)(ii)**

Dear **s 22(1)(a)(ii)**

### **Freedom of Information request – Part access decision**

I refer to your request of 20 April 2023 made to this Office under the *Freedom of Information Act* 1982 (FOI Act). Your request was for access to documents in the following terms:

*Under the FOI Act I request access to documents in the possession of the Office of the Commonwealth Ombudsman relating to Iain Anderson's appointment as Commonwealth Ombudsman.*

I apologise for the delay in processing your request. On 19 May 2023 and again on 19 June 2023, this Office contacted you to advise of the delay and request additional time to process your request.

On 10 June 2023, you applied for Information Commissioner review (IC review) of the deemed refusal of access decision, which occurred on 29 May 2023.

### **Decision**

I am an officer authorised under s 23 of the FOI Act to make decisions in relation to FOI requests. This letter constitutes my notice of decision. I make this decision varying the access refusal decision of 29 May 2023 under s 55G(1) of the FOI Act.

The Office has conducted searches of its electronic case management, records management and email communication systems for any documents this Office holds that are within the scope of your request.

I have identified six (6) documents, totalling 11 pages that are within the scope of your request.

I have decided:

- To grant access to 3 documents in full, and
- To grant access to 3 documents in part.

My reasons for the decision and findings of fact are set out at **Attachment A**.

A schedule setting out my decision in relation to the relevant documents is at **Attachment B**.

Information about your review rights is at **Attachment C**.

Given the IC review application, our Office will notify the Information Commissioner of its revised decision.

**Contacts**

You may contact me via email at [information.access@ombudsman.gov.au](mailto:information.access@ombudsman.gov.au) or via telephone on 1300 362 072.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Mulipola', is positioned above the printed name.

Steven Mulipola  
Senior Legal Officer  
Legal Team

*Influencing systemic improvement in public administration*