



'F' and Department of Defence [2013] AICmr 15 **(28 February 2013)**

Decision and reasons for decision of
Acting Freedom of Information Commissioner, Toni Pirani

Applicant: 'F'
Respondent: Department of Defence
Decision date: 28 February 2013
Application number: MR12/00268
Catchwords: Freedom of Information – Refusal of access to documents – Whether reasonable steps taken to find documents – (Cth) *Freedom of Information Act 1982* s 24A(1)

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Summary

1. I affirm the decision of the Department of Defence (the **Department**) of 9 July 2012 to refuse access to the requested documents under the *Freedom of Information Act 1982* (the **FOI Act**), on the basis that the documents do not exist. The Department took all reasonable steps to find documents falling within the scope of the applicant’s request.

Background

2. On 3 June 2012, the applicant applied to the Department for:
 - ... DFDA¹ Disciplinary KPI Report (or Reports) that help us to locate Courts Martials and Defence Force Magistrate records for [a former serving member of the ADF] between 1 January 2001 – 31 December 2006.
3. On 9 July 2012, the Department refused the applicant's request under s 24A of the FOI Act. It said that it had taken all reasonable steps to locate the requested reports, but they could not be found or did not exist.
4. On 29 July 2012, the applicant sought IC review under s 54L of the FOI Act.

Decision under review

5. The decision under review is the decision of the Department on 9 July 2012 to refuse the applicant access to the DFDA Disciplinary KPI Report (or reports) and Courts Martials and Defence Force Magistrate records on the basis that they could not be found or do not exist.

Whether reasonable steps taken to find a document

6. The issue in this IC review is whether the Department has taken all reasonable steps to locate the requested reports. Section 24(a)(1) of the FOI Act provides:

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.

7. The Australian Information Commissioner has issued Guidelines under s 93A to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. The Guidelines explain that:

The FOI Act is silent about what an agency or minister must do in terms of searching for documents that may be relevant to a request. Agencies 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 environment. At a minimum, an agency or minister should take comprehensive steps to locate a document, having regard to:

¹ *Defence Force Discipline Act 1982.*

- the subject matter of the documents
- the current and past file management systems and the practice of destruction or
- removal of documents
- the record management systems in place
- the individuals within an agency who may be able to assist with the location of
- documents, and
- the age of the documents

...

The Information Commissioner considers that, as a minimum, an agency should conduct a search by using existing technology and infrastructure to conduct an electronic search of documents, as well as making enquiries of those who may be able to help locate the documents.²

The search conducted by the Department

8. According to submissions from the Department, all Australian Defence Force and civilian personnel management details are recorded on Defence's Personnel Management Keying system (**PMKeyS**).
9. In response to the applicant's request, the Department conducted a *DFDA Disciplinary KPI Report* search of the Conduct Reporting and Tracking System, which sits within the PMKeyS environment and is used to track and provide reports on discipline data.
10. The Department reported that they were not able to locate any discipline data relating to the former serving member of the ADF named by the applicant. To verify this, senior staff from the Office of the Australian Information Commissioner attended the Department to view the conduct of the search for the requested documents. No document was able to be produced.
11. I note that the applicant has made multiple requests to the Department for the same or similar documents relating to discipline reports or data relating to the same former serving member of the ADF. I note that separate searches for such information and documents have been conducted by the following:
 - Inspector-General of the Australian Defence Force
 - Office of the Chief Judge Advocate General
 - Director General Australian Defence Force Legal Service
 - Headquarters Air Command, and

² Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, [3.54], [3.56], footnotes omitted.

- Directorate Coordination – Air Force Headquarters.
12. On each occasion no documents were identified relating to the former serving member.

Findings

13. For the purposes of s 24A(1), I am satisfied that:
- the Department has taken all reasonable steps to find and locate any documents that it holds that fall within the scope of the applicant's request, and
 - those documents:
 - are in the Department's possession but cannot be found, or
 - do not exist.

Decision

14. Under s 55K of the FOI Act, I affirm the Department's decision of 9 July 2012.

Toni Pirani
Acting Freedom of Information Commissioner
28 February 2013

Review rights

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. The current application fee is \$816, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.