



Australian Government
Attorney-General's Department

Our ref: FOI20/139; CM20/7355

7 September 2020

By email: [REDACTED]

Dear Mr Dickson

Freedom of Information Request FOI20/139 – Decision letter

The purpose of this letter is to give you a decision about your request for access to documents which you submitted to the Attorney-General's Department (the department) under the *Freedom of Information Act 1982* (the FOI Act).

Your request

On 8 August 2020, you requested access to:

'1. As the States of Australia agreed to unite in one indissoluble Commonwealth, and as a result fail to be sovereign nations, I request the enumerated head of power subject to the Constitution of the Commonwealth to empower a State to engage with sovereign independent nations outside of Australia in any matter whatsoever, and

2. Section 2(2) of the Australia Act provides that a State fails to possess any capacity to engage in relations with countries outside Australia and as a result I request any exemption granted to Daniel Andrews as Premier of the State of Victoria to engage in relations with ANY sovereign nations outside of the Commonwealth of Australia specifically China.'

On 20 August 2020, the department accepted the transfer of your request from the Department of Foreign Affairs and Trade and, on 21 August 2020, the department acknowledged your request.

On 27 August 2020, you provided additional information regarding the *Seas and Submerged Lands Act 1973* for consideration:

*'... The States have no international personality, no capacity to negotiate or enter into treaties, no power to exchange or send representatives to other international persons and no right to deal with other countries, through agents or otherwise. Their claims to international personality or to sovereignty are groundless (see *Bonser v. La Macchia* (1969) 122 CLR 177).'*

A decision in relation to your request is due on 7 September 2020.

My decision

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

In making my decision, I have taken the following into account:

- the terms of your request;
- advice provided to me by officers with responsibility for matters to which your request relates;
- the provisions of the FOI Act; and
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines).

Section 24A of the FOI Act relevantly provides that an agency or Minister 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:

- is in the agency's possession but cannot be found; or
- does not exist.

When considering a decision to refuse access under section 24A of the FOI Act, the Guidelines relevantly provide at [3.89] that 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;
- 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.

To identify the documents for your request, I arranged for an officer with responsibility for FOI matters to undertake searches of the department's records management systems. Searches were undertaken with reference to the information provided in the scope of your original request on 8 August 2020, and the additional information received on 27 August 2020. Despite these efforts, no relevant documents were identified.

Having regard to the above, I am satisfied that reasonable steps to locate the documents to which you have sought access were undertaken. I am also satisfied that the documents do not exist within the department's records holdings. I have therefore decided to refuse access pursuant to section 24A of the FOI Act.

Additional information

The Constitution adopts a federalist model which provides states with a large degree of autonomy over the governance of their own affairs. However, the Commonwealth Parliament also has an express power to legislate in relation to 'external affairs' (section 51(xxix) of the Constitution). Commonwealth legislation overrides any inconsistent state legislation by virtue of section 109 of the Constitution.

You may be aware of the Australia's Foreign Relations (State and Territory Arrangements) Bill 2020, which was introduced in the House of Representatives on 3 September 2020. As noted in the Explanatory Memorandum, the Bill would establish a legislative scheme for Commonwealth engagement with arrangements between State or Territory governments and foreign governments. The Bill would ensure that arrangements between State or Territory governments and foreign governments, and their associated entities, do not adversely affect Australia's foreign relations and are not inconsistent with Australia's foreign policy.

A copy of the Bill and accompanying Explanatory Memorandum are publicly available here: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6596.

Your review rights under the FOI Act are set out at **Attachment A** to this letter.

If you wish to discuss this decision, you can contact the FOI case officer for this matter, Da Eun, who can be reached on (02) 6141 6666 or by email to foi@ag.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'JBaker', written in a cursive style.

Joanna Baker

A/g Director

Freedom of Information and Privacy Section

Attachments

Attachment A: Review rights



Attachment A - FOI Review rights

If you are dissatisfied with the decision of the Attorney-General's Department (the department), you may apply for internal review or Information Commissioner review of the decision.

The department encourages applicants to consider seeking internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal review

Under section 54 of the *Freedom of Information Act 1982* (FOI Act), applications for internal review must be made in writing within 30 days of the date of the decision letter, and be lodged in one of the following ways:

email: foi@ag.gov.au

post: Freedom of Information and Privacy Section
Strategy and Governance Branch
Attorney-General's Department
3-5 National Circuit BARTON ACT 2600

An officer of the department other than the officer who made the original decision will complete the internal review within 30 days of receipt of your request.

Providing reasons you believe internal review of the decision is necessary will facilitate the completion of the internal review.

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 the decision letter, and be lodged in one of the following ways:

online: https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10

email: foidr@oaic.gov.au

post: GPO Box 5218 Sydney NSW 2001

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>