

Information Act 2002 Guideline

Sufficiency of Search

What is sufficiency of search?

People who are seeking access to information held by public sector organisations often complain that an organisation has not made sufficient searches or inquiries to locate all the information that they are seeking. When an organisation receives an application to access government information (an FOI application), the organisation must take all reasonable steps to ensure that the relevant information is found. This is known as sufficiency of search and it requires the organisation to have in place adequate search procedures and guidelines in order to identify all relevant information requested.

The *Information Act 2002* (the Act) contains the following definitions:

Government informationⁱ means “a record held by or on behalf of a public sector organisation and includes personal information”.

A recordⁱⁱ means “recorded information in any form (including data on a computer system) that is required to be kept by a public sector organisation as evidence of its activities or operations of the organisation, and includes part of a record and a copy of a record.”

Information that meets the definition of a record may take many forms, including:

- hard copy files;
- hard copy meeting notes and file notes kept in an office draw to preserve secrecy;
- hard copy and electronic diary notes;
- hard copy and electronic calendar entries;
- email messages;
- text messages;
- files of any type stored electronically;
- online forms;
- communications sent or received by an App, for example, Whats App, WeChat, Messenger, Instagram, Twitter, LinkedIn, Snapchat, Pinterest or Tik Tok;
- audio and video recordings stored on a computer or other device;
- other information stored on a memory stick, computer, hard drive, mobile phone, tablet or other device.

Information may fall within the definition of a ‘record’ even if it is stored on a device that is not an NTG asset, for example, an official communication or photographs taken by a government officer as part of an investigation utilising a private phone because an NTG device has developed a fault.

All reasonable steps

Section 27 of the Act provides that a public sector organisation may decide that the information cannot be identified, found or does not exist after taking all reasonable steps to locate the information.

The decision of the Australian Administrative Appeals Tribunal in *Cristovao and Secretary, Department of Social Security* (1998) AATA 787 considered issues of sufficiency of search, stating that the questions to be answered are:

- a. Whether all reasonable steps were taken to locate the information; and
- b. Whether after conducting all reasonable steps the information cannot be located.

While the Tribunal was considering Commonwealth legislation, the comparable sections (*Freedom of Information Act 1989* (Cth) s 24A and *Information Act 2002* s 27) both require a decision maker to have undertaken all reasonable steps to locate information before deciding that information does not exist.

The Federal Court has upheld this approach in *Chu v Telstra Corporation Ltd* (2005) 147 FCR 505, and the Tribunal continues to apply the same reasoning – see *Mercer v Aged Care Quality and Safety Commissioner* [2020] AATA 2051, [25]; *Dezfouli and Australian Federal Police (Freedom of information)* [2019] AATA 4079, [16] and *Duley v Secretary, Department of Human Services* [2015] AATA 816, [8].

Sufficiency of search – how far do I need to go?

The searches required to respond to an FOI request can be complex. Under s 27 of the Act you must take all reasonable steps to locate the information. While the Act is silent on what reasonable steps means, in the 2005 Federal Court decision of *Chu v Telstra Corporation Ltd* [2004] AATA 1127, the Court stated that in determining if all reasonable steps had been taken to find the requested documentation, consideration will be given to:

- the content and relevance of the documents;
- the existence and location of the requested documents;
- the steps already taken to locate the documents;
- the consultation of all relevant persons within the organisation as to the possible existence of further documents;
- the age of the documents;
- the systems of file management and practices relating to document destruction or removal;
- the willingness of the applicant to provide further information to assist with the search;
- the willingness of the organisation to conduct further searches;
- the purpose for which the request for documents was made; and
- the commitments and workload of the organisation of the agency. For example how many FOI requests are submitted in a year and how many staff members carry this workload? Has there been an increase in the amount of FOI requests submitted in a year? How long did this application take and how long does the average response take? (See *Re Viewcross Services Pty Ltd and Telstra Corporation Ltd* [2003] AATA 1025.)

Being disorganised is no excuse for not being able to locate information.

Search Declarations – what detail should they contain?

Although the *Information Act 2002* does not require an organisation to complete a search declaration, it is a means of demonstrating compliance with the duties imposed on organisations by the Act.

As discussed, section 27 of the Act requires organisations to take all reasonable steps to locate requested information. Section 10 requires an organisation to make available to the public such government information as is reasonably possible and to provide the information to the public promptly. Section 17(1) requires an organisation to deal with an application as promptly and efficiently, and as fairly and openly as reasonably possible. To fulfil these duties, an organisation

must conduct thorough and adequate searches to locate the information requested. The manner and extent to which these searches are conducted are open to scrutiny upon review.

A search declaration should contain the following information:

Steps taken to locate the relevant information

This should include information identifying which databases have been searched and the search terms used. Databases should include all those considered relevant, e.g. TRM or PROMIS etc, as well as emails, hard drives, network drives and any disks, memory sticks or USBs. All hard copy records should also be identified. This could include, but is not limited to, such items as files, folders, notebooks and diaries.

Destroyed or deleted files should also be included if relevant with an explanation as to why certain action has been taken. For example an explanation that emails have been deleted as a hard copy has been placed on the relevant file or that the records or files have been destroyed in accordance with an approved disposal schedule. If the latter is the case, a copy of the disposal schedule and authority should be recorded.

If the number of records identified is extensive, a table format may be preferable to a list of all documents in a statement format.

Examples:

I have searched the XYZ database by (insert method) and located files ABC. I searched the 123 database but did not locate any information relevant to this application. I searched the red and blue files in the store-room but found nothing of relevance.

I also searched for files in the off-site archive storage and located files 456 which I considered to be relevant to the application. I have searched the email and USB which contained relevant files DEF. In undertaking these searches I searched under the following search terms:

XYZ; Xyz; xYz; xyZ; X.Y.Z.; x.y.z.; etc.



I have searched all computer files and all paper files.



Consultation with all relevant persons within the organisation as to the possible existence of further information

This should include a list of all persons and their positions involved in the search for documentation including details of emails or phone calls made.

Examples:

The following people have been consulted about this search:

Name and position: Chris Taylor, Manager
Date and time: 19/02/2020 @ 10am
Result: Chris found an old email to the applicant which was considered relevant and was placed on the file



I have completed the search and found nothing.
Signed: Chris.



Willingness of the applicant to provide further information to assist with the search

All contact with the applicant should be detailed including requests for further clarification regarding the information sought by letter, email, telephone and file notes.

Examples:

The applicant telephoned/emailed/wrote on <date> to say that he is forwarding further information to the office to assist with the search in locating the required material, including the date he believes the material was created and the staff members involved.
Signed action officer and date.



The applicant rang to discuss his application.



Additional searches

Details of the number of searches undertaken in order to locate the information as well as any additional searches should be recorded.

Examples:

Primary search result – the first search conducted by Sarah Smith on 19 February 2018 failed to locate any relevant information.

Secondary search result – a second search was undertaken by Mathew White on 23 February 2018 after receiving further information from the applicant. This resulted

in the location of ABC files which were considered to be relevant.

A third search, undertaken by Joe Bloggs on 1 March 2018 in response to an internal review request, located files XYZ relevant to the application. Copies of this material were provided to the applicant on 7 March 2018.



All searches completed.



Commitments and workload of the organisation

The organisation should keep a detailed log of the time taken in responding to an FOI application, particularly in regard to searches. In the case of a large request, recording of information in a table format makes the collation of time for estimate purposes easier.

Examples:

Name	Date	Task	Start time	Finish time	Running Total
C Lee	19/2/18	Email	10:00	11:00	1hr
C Lee	21/2/18	TRM	15:00	16:15	1hr 15 min



Courtney Lee searched for 15 minutes.



Sufficiency of search internal review and complaint

Section 27 of the Act provides that an organisation may decide that the information cannot be identified, that the organisation holds the information but cannot find it, or the information does not exist. However, the organisation can only rely on this section after taking all reasonable steps to find the information.

The terms of this section apply not only where no information can be located, but also where an applicant has been provided some information but is still not satisfied that an organisation has taken all reasonable steps to locate their requested information.

If the applicant is not satisfied that the organisation has taken all reasonable steps to find the information they may lodge an application for a review of that decision (section 38). If the applicant is aggrieved by the review decision, they may make a complaint to the Information Commissioner (section 103).

If a complaint is made to the Information Commissioner, or nominated delegate, the Commissioner may ask the applicant to provide the following types of information:

- details of the applicant's reasons for believing that the organisation holds additional information that falls within the scope of the FOI application, and any supporting evidence. For example a document referring to the existence of further information; and
- details of any further searches or inquiries the applicant believes the organisation could reasonably be requested to conduct in an effort to locate the additional information.

The Information Commissioner may contact the respondent organisation and request more information about the complaint. This may include, but will not be limited to:

- requiring the organisation to conduct further searches or make further inquiries;
- making further inquiries directed at specified officers, or former officers of the organisation, who may have relevant information; and
- requiring the organisation, or specified officers, to provide evidence about the alleged additional information.

Following the investigation, the Commissioner will consider whether or not there is sufficient prima facie evidence that the additional information does exist and whether the searches conducted by the organisation have been reasonable in the circumstances.

If there is insufficient evidence to substantiate the matter complained of, the Commissioner must dismiss the complaint (section 110(5)).

If there is sufficient evidence to substantiate the matter complained of, the Commissioner must refer the matter to mediation (section 110(4)). If the matter is not resolved at mediation or if the Commissioner dismisses the complaint under section 110(5), it may progress to a hearing before the Northern Territory Civil and Administrative Tribunal (the Tribunal).

What are the possible outcomes of a sufficiency of search review?

Not all sufficiency of search applications will result in the applicant being given access to additional documents. There are a number of possible outcomes:

- The organisation may locate some or all of the additional documents the applicant claims should exist and the organisation may agree (or the Tribunal may order) that some or all of the information be provided to the applicant.
- The Tribunal at hearing may be satisfied that there are no reasonable grounds to believe that the organisation holds any additional information and the application will be dismissed.
- Additional documents may exist but they have been legitimately transferred to another organisation.
- Additional documents may exist, but they may have never been held by the organisation and the organisation may have no right to access them. This could include information held by

an independent consultant hired by the organisation. Some of the information, such as the consultant's final report might be held by the organisation, but working documents may remain the property of the consultant and therefore be outside the scope of the FOI application.

- Additional documents may once have existed, but they may have been legally disposed of by the organisation. No organisation can keep all its documents indefinitely, and many documents become irrelevant to operational requirements with the passage of time. The archives service and the records service authorise 'Retention and Disposal' schedules. These cover the various categories of information held by organisations which permit the destruction of information after a specified time period has elapsed.
- Further information may have existed, and should still exist but it cannot be located. If the decision-maker is satisfied that all reasonable searches and inquiries have been made by the organisation to locate the information and there is no further evidence as to its present whereabouts, a finding would be made to that effect.
- An applicant may believe that information is covered by the terms of the FOI application, but the organisation contends that it is not. A decision will be made according to a fair and objective assessment of the terms of the relevant FOI application. If the alleged additional information falls outside the terms of FOI application, the organisation would be entitled to require the applicant to lodge a fresh FOI application for that information.
- An applicant may complain about missing documents, and inquiries establish that the information does exist, but the organisation only received that information after the date that the FOI application was made. Such documents may fall outside the scope of the FOI application and the organisation would be entitled to require the applicant to make a fresh application for that information.

Further reading

For further reading and resources specifically regarding what constitutes 'all reasonable steps' please refer to the Office of the Australian Information Commissioner available at:

<https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/processing-foi-requests-taking-all-reasonable-steps-to-find-documents/>

<https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-3-processing-and-deciding-on-requests-for-access/#ftnref33>

This guideline is produced by the Information Commissioner to promote awareness and understanding about the *Information Act 2002*. It is not a substitute for the Act. You should read the relevant provisions of the Act to see how it applies in any particular case. Any views expressed in this guideline about how the Act works are preliminary only.

ⁱ Section 4 **Definitions** *Information Act 2002*.

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