

Our ref: FOI-2020-10039

18 August 2020



Dear 

On 21 July 2020, you requested access under the *Freedom of Information Act 1982* (FOI Act) to:

*Records of complaints against Border Force alleging improper or unprofessionally conducted searches or questioning of people based on racial grounds or national origin. I would like records for 2016-2017, 2017-2018, 2018-2019, 2019-2020 and 2020 to date, with accompanying details of the alleged racial profiling or misconduct in each case. Where possible I would like any specific reference to the compliments being Chinese-Australian, Chinese or of Asian appearance.*

This letter constitutes notice of my decision on your request. I am authorised to make decisions on behalf of our Office under s 23 of the FOI Act.

### Decision

I understand from the terms of your request that you are seeking information about the number of complaints received by our Office that allege racial profiling in the enforcement activities of the Australian Border Force for each of five financial years you have specified. You are also seeking details of the alleged misconduct in each identified case.

I have interpreted your request to be for a report document containing that information. However, the report you are seeking does not exist.

A manual search of the records held in this Office has identified certain relevant complaints. Using that information, I have decided to provide you with the following information that I hope will assist you:

- Our Office received six complaints over the relevant period that allege unprofessional behaviour, with a racial element, during interactions with Australian Border Force personnel. We received one complaint in 2016, one in 2018 and four in 2019.
- None of the relevant complaints were from a person with apparent Chinese heritage. The apparent ethnicities were, Middle Eastern x 1, South African x 1, Thai x 1, Malaysian x 1 and Pakistani x 2.
- All six complaints were about interactions at airports, specifically, the way the complainants were questioned and/or, asked to submit to a pat down search.

The reasons for my decision are set out at **Attachment A** to this letter. A schedule of relevant provisions of the FOI Act at **Attachment B**.

## **Review rights**

### ***Internal review***

Under s 54 of the FOI Act, you may apply in writing to our Office for an internal review of my decision. The internal review application must be made within 30 days of the date on which you were notified of my decision.

In your application, please provide the reasons for why you believe review of the decision is necessary. The internal review will be carried out by a decision maker, other than the original decision maker, within 30 days.

### ***Review by the Australian Information Commissioner***

Under s 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 at:  
[https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR\\_10](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10)
- via email to: [FOIDR@oaic.gov.au](mailto:FOIDR@oaic.gov.au)
- by overland mail to GPO Box 5218 SYDNEY NSW 2001
- in person to Level 2, 175 Pitt Street, Sydney NSW

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

### **Complaints to the Information Commissioner**

You may complain to the Information Commissioner about action taken by the Ombudsman in relation to your FOI request.

You may lodge your complaint in one of the following ways:

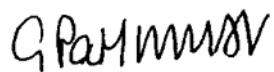
- online at: [www.oaic.gov.au](http://www.oaic.gov.au)
- by overland mail to GPO Box 5218 SYDNEY NSW 2001
- by email to: [FOIDR@oaic.gov.au](mailto:FOIDR@oaic.gov.au)

More information about the FOI complaints process is available on the Office of the Australian Information Commissioner website at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/>.

**Contacts**

If you require clarification of any of the matters discussed in this letter you should contact me using the contact information set out at the foot of the first page of this letter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'G Parkhurst'.

Gregory Parkhurst  
Senior Legal officer

## **ATTACHMENT A – Reasons for decision**

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### **Material taken into account**

In making my decision I had regard to the following:

- the terms of your request
- the records in our complaint management system
- relevant provisions of the FOI Act, and
- the Australian Information Commissioner’s Freedom of Information Guidelines, available at <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/> (the Guidelines).

### **Basis of decision**

I have decided that the document you are seeking does not exist.

I have set out below my findings of fact and reasons for decision.

### **Section 24A - Requests may be refused if documents cannot be found, do not exist or have not been received**

An agency may refuse a request if it has taken ‘all reasonable steps’ to find the document requested, and is satisfied that the document cannot be found or does not exist (FOI Act, s 24A(1)).

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 operating environment [Guidelines [3.89]].

The FOI Act provides a right of access to existing documents, rather than to information. The FOI Act does not require agencies to create new documents in response to requests for access, except under certain limited circumstances which do not apply to your request.

On receiving your FOI request, we searched our Office’s records for a report containing information fitting the description set out in your request.

Our searches did not identify a report containing the information you seek. However, manual searches of our complaint records identified six complaints over the period you have specified alleging mistreatment with a racial element during an interaction with Australian Border Force. One in 2016, one in 2018 and four in 2019.

None of the relevant complaints were from a person with apparent Chinese heritage. The apparent ethnicities were, Middle Eastern x 1, South African x 1, Thai x 1, Malaysian x 1 and Pakistani x 2.

All six complaints were about interactions at airports, specifically, the way the complainants were questioned and/or, asked to submit to a pat down search.

### **Section 17 - Requests involving use of computers etc.**

Under s 17 of the FOI Act, where a document such as a specific report does not exist but can be produced by the use of a computer system ordinarily available to the agency, the agency should produce the document.

As our first search did not produce any documents, as a second search we asked our Information Communication and Technology (ICT) team to produce a report from our complaints management system.

Our ICT team created a report using the key variables 'Australian Border Force', 'racial' and/or 'unprofessional'. However, the resultant report did not meet the terms of your request. It contained a large amount of irrelevant material, did not adequately distinguish nationalities, and did not capture the conduct of searches or questioning by Australian Border Force officials.

### **Conclusion**

The steps we have taken to search for documents within the scope of your request, include conducting two electronic searches and making enquiries to staff in our Office who may have been able to help locate relevant documents.

Having conducted those searches, I am satisfied that a report containing the specific information you are seeking does not exist (s 24A), and that our Office cannot produce a document from a computer system that is ordinarily available to us (s 17).

Accordingly, I have refused your request under s 24A of the FOI Act on the basis that the document you seek does not exist.

## **Attachment B – Schedule of relevant provisions of the FOI Act**

### **Section 11 - Right of access**

- (1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:
  - (a) a document of an agency, other than an exempt document; or
  - (b) an official document of a Minister, other than an exempt document.
- (2) Subject to this Act, a person's right of access is not affected by:
  - (a) any reasons the person gives for seeking access; or
  - (b) the agency's or Minister's belief as to what are his or her reasons for seeking access.

### **11A Access to documents on request**

...

- (5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

### **17 Requests involving use of computers etc.**

- (1) Where:
  - (a) a request (including a request in relation to which a practical refusal reason exists) is made in accordance with the requirements of subsection 15(2) to an agency;
  - (b) it appears from the request that the desire of the applicant is for information that is not available in discrete form in written documents of the agency; and
  - (ba) it does not appear from the request that the applicant wishes to be provided with a computer tape or computer disk on which the information is recorded; and
  - (c) the agency could produce a written document containing the information in discrete form by:
    - (i) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or
    - (ii) the making of a transcript from a sound recording held in the agency;

the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

- (2) An agency is not required to comply with subsection (1) if compliance would substantially and unreasonably divert the resources of the agency from its other operations.

**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.