

Mr James Smith
C/- Right to know

Reply to: GPO Box 4889
SYDNEY NSW 2001

Our reference: 1-8L2MH7A
Contact: Tel: 13 28 69
Email: foi@ato.gov.au

By email:
foi+request-2007-b3f735ee@righttoknow.org.au

15 July 2016

Decision regarding your Freedom of Information request

Dear Mr Smith,

The purpose of this letter is to provide you with a decision regarding your request for access to documents under the *Freedom of Information Act* (**the FOI Act**) dated 18 June 2016. I am an officer authorised under section 23 of the FOI Act to make decisions regarding access to documents.

Your request was for access to:

“...all documents which were created in the process of obtaining information to make your decision to exempt material which was identified in the scope of my original request.”

For the purpose of this application, I have interpreted the ‘*decision to exempt material*’ to be the decision made pursuant to s47E of the FOI Act in your previous request titled ‘SES Communications regarding ATO Enterprise Agreement offer’ (our reference 1-85DQTML).

Decision

I identified two documents which fall within the scope of your request. Each document is an email trail initiated by ATO General Counsel officers to Senior Executive Staff (**SES**) in the course of addressing your initial FOI request.

I have decided to release one document in full. This document contains the rationale behind the decision to exempt material under s47E of the FOI Act and the corresponding response from the Workplace Relations SES. The document conveys a similar message communicated to you in the decision letter of your original FOI request, specifically that the exemption of SES communications regarding on-going Enterprise Agreement (**EA**) negotiations is reasonable in the circumstances. I have determined that the release of this document allows scrutiny of the decision making process and as such is in line with the objectives of the FOI Act.

I have decided to exempt the remaining document in full under s42 of the FOI Act as it is subject to a claim of legal professional privilege by the ATO.

Section 42 exempts from disclosure documents which by their nature would be privileged from production in legal proceedings on the grounds of legal professional privilege.

In determining whether the documents are subject to legal professional privilege, the following criteria must be met:

- the information was communicated for the dominant purpose of giving or receiving legal advice, or for use in connection with actual or anticipated litigation;
- the advice was communicated in-confidence;
- the giving of advice is attended by the necessary degree of independence; and
- the legal adviser-client relationship is present.

The document to which s 42(1) has been applied is privileged from production as it satisfies the criteria set out above. The information was communicated in-confidence and for the dominant purpose of giving or receiving legal advice. I am satisfied that a legal adviser-client relationship exists because the client, the ATO, retained the services of General Counsel for the purposes of obtaining professional advice.

Section 93A of the FOI Act requires me to have regard to any guidelines issued by the Information Commissioner. Guideline *Part 5 – Exemptions* requires me to consider whether ‘real harm’ would result from releasing the document. I consider that disclosure of the document would result in substantial prejudice to the ATO in the on-going course of EA negotiations.

The ATO asserts privilege over the document that I have decided is exempt under s 42(1) and has not waived that privilege.

Material taken into consideration

In reaching my decision I have considered and relied upon the following:

- content of the identified documents;
- terms and scope of your request;
- relevant provisions of the FOI Act, including the objects of the Act in section 3 and s42;
- and
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act.

Your review rights

If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner review of the decision. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal review

Under section 54 of the FOI Act, you may apply in writing to the ATO for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter, quoting our reference number at the top of this letter, and lodged in one of the following ways:

email: **FOI@ato.gov.au**
post: Australian Taxation Office, General Counsel, GPO Box 4889, Sydney
NSW 2001.

Where possible please attach reasons why you believe review of the decision is necessary.

The internal review will be carried out by another officer within 30 days. If you have not been informed of the outcome of the review within that time, you may apply to the Australian Information Commissioner under section 54L of the FOI Act.

Information Commissioner review

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, include a copy of this notice, and be lodged in one of the following ways:

- online: <https://forms.business.gov.au/aba/oaic/foi-review-/>
- email: enquiries@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 www.oaic.gov.au/foi-portal/review_complaints.html#foi_merit_reviews.

Complaints

Any complaint about the processing of your FOI request can be directed also to the Information Commissioner. The complaint needs to be in writing and identify the agency against which the complaint is made. There is no particular form required to make a complaint, however using the online form is preferable.

- online: https://forms.business.gov.au/aba/landing.htm?formCode=ICCA_1
- phone: 1300 363 992
- email: enquiries@oaic.gov.au
- post: GPO Box 5218, Sydney NSW 2001

For more information

If you have any questions, please phone 13 28 69 between 8.00am and 5.00pm, Monday to Friday and ask for ATO General Counsel.

Yours sincerely

ATO General Counsel

Tel: 13 28 69

Email: foi@ato.gov.au