



Our ref: 60960

Blake Fryer
Right to Know

By email: foi+request-4506-b5108bba@righttoknow.org.au

Dear Blake Fryer

Freedom of Information Act 1982 - Notice of Decision

I refer to your correspondence, received by the Department of Industry, Innovation and Science (the department) on 16 April 2018, for access under the *Freedom of Information Act 1982* (FOI Act) to the following:

“Please provide all documents (including emails and formal advice) on legal advice the Department has received/generated on the interpretation and administration of the R&D Tax Incentive. Including specific advice as it relates to the ICT Industry.

The date range for these documents should be 01 November 2016 - 01 May 2018.”

Decision

I am an authorised decision maker under section 23 of the FOI Act.

I have decided to exempt the request in full under section 42 of the FOI Act on the grounds that disclosure of any legal advice sought by the Department would be a breach of Legal Professional Privilege.

I have decided to not provide any further details on source, nature and extent of the legal advice sought on the grounds that doing so would cause the letter itself to be a breach of section 42 of the FOI Act (Legal Professional Privilege).

Section 26(2) – Decision Letter would itself become an exempt document

Subsection 26(2) of the FOI Act states the following:

(2) A notice under this section is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.

As such, the Department is not required to issue details in the decision document which would render the decision document itself an exempt document. Confirming the extent, source and subject of any legal advice sought by the Department would be a breach of Legal Professional Privilege. Please see below for further details.

Section 42(1) – Legal Professional Privilege

Section 42(1) of the FOI Act states the following:

“(1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.”

The definition of Legal Professional Privilege comes from the case of *Esso Australia Resources Limited v The Commissioner of Taxation*¹. The general definition is as follows:

“Legal professional privilege (or client legal privilege) protects the confidentiality of certain communications made in connection with giving or obtaining legal advice or the provision of legal services, including representation in proceedings in a court.”

You have requested information relating to the provision of legal advice in relation to the Research and Development Tax Incentive scheme, including the substantive legal advice. Any legal advice, or correspondence generated in the procurement of legal advice, would be subject to Legal Professional Privilege.

However, by extension, any documents confirming the source, subject matter or existence of legal advice sought by the Department would also be subject to Legal Professional Privilege, as this would provide a written record of the existence of lawyer/client communications.

As such, the department cannot confirm or deny the existence of the requested material.

If you are dissatisfied with any part of my decision, your review rights are set out in **Attachment B**.

Please do not hesitate to contact the FOI team by e-mail at FOI@industry.gov.au, if you require any further clarification.

Yours sincerely



Peter Bartholomew
A/g General Counsel
Legal, Audit and Assurance Branch
Corporate Division

26 April 2018

¹ [1999] HCA 67, [35].

REVIEW RIGHTS

Application for Internal Review

Section 54 of the FOI Act gives you the option to apply for a departmental internal review of my decision. If you make an application for internal review it will be conducted by an officer of the department (other than me) appointed by the Secretary of the department to conduct a review and make a completely fresh decision on the merits of the case.

Application for a review of the decision must be made within 30 days after the day of receipt of this letter, or within 15 days of receipt of the documents to which this decision relates (whichever is the longer period). You do not have to pay any fees or processing charges for an internal review, except for charges relating to the provision of any additional relevant material located as a result of the review (for example photocopying). While a specific form is not required, it would assist the decision maker if your application specifies the grounds on which you consider the decision should be reviewed.

Application for a review of a decision should be addressed to:

FOI Coordinator
Department of Industry, Innovation and Science
GPO Box 2013
CANBERRA ACT 2601

or by e-mail to: FOI@industry.gov.au.

Review by the Australian Information Commissioner

If any decision on internal review were not satisfactory to you, section 54L of the FOI Act gives you the right to apply for review of my decision by the Information Commissioner.

An application for review by the Information Commissioner may be made regardless of whether the decision was the subject of a departmental internal review. An application for review by the Information Commissioner must be made within 60 days of receipt of this notice. There is no fee for review by the Information Commissioner.

You must apply in writing and you can lodge your application in one of the following ways:

Online: www.oaic.gov.au
Post: GPO Box 5218, Sydney NSW 2001
Fax: +61 2 9284 9666
Email: enquiries@oaic.gov.au

An application form is available on the website at www.oaic.gov.au. Your application should include a copy of this notice and your contact details. You should also set out why you are objecting to the decision.

Complaints to the Australian Information Commissioner

You may complain to the Australian Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. The Australian Information Commissioner will make a completely independent investigation of your complaint. A complaint to the Australian Information Commissioner must be made in writing and can be lodged online using the Information Commissioner Complaint Application form on the Australian Information Commissioner's website at www.oaic.gov.au.

