



26 November 2020

JS

By email: foi+request-6743-d9969856@righttoknow.org.au

Dear JS

Freedom of Information – Decision

I refer to your email of 27 October 2020 which states:

Under FOI I seek access to documents concerning or relating to the decisions by the ABCC to publish information in the Disclosure log about the release of documents to FOI applicants on:

- 1) 26 June 2019 Records relating to Building Code compliance activities involving Hutchinson Builders. 4 documents released in part.
- 2) 4 June 2019 Records relating to Building Code compliance activities involving Hutchinson Builders. 12 documents released in full, 26 documents released in part.

I also seek access to documents concerning or relating to the decisions by the ABCC to remove from its disclosure log the information about the release of documents on the 4th and 26th of June 2019.

Summary of Decision

I am an authorised decision-maker under section 23 of the *Freedom of Information Act 1982* (the FOI Act). This letter sets out my decision on your request for access.

Following searches for documents in scope of your request, I have identified 6 documents relevant to your request. I have decided to release 3 documents in part and that 3 documents are wholly exempt from disclosure. The decision in relation to each document is set out in Attachment A to this decision.

In reaching my decision, I referred to the following:

- the terms of your request;
- the documents relevant to the request;
- the FOI Act; and
- Guidelines published by the Office of the Information Commissioner under section 93A of the FOI Act.

Section 42 – Legal Privilege

Subsection 42(1) of the FOI Act provides:

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.

A document is exempt from production on the ground of legal professional privilege if all of the following apply:

- a. there exists a lawyer-client relationship;
- b. there have been confidential communications which are recorded in the document;
- c. the communications were for the dominant purpose of providing legal advice or in the context of actual or anticipated legal proceedings; and
- d. the privilege has not been waived.

I have considered each of these factors in turn.

Lawyer-client relationship

The documents comprise or relate to advice obtained by the ABCC from an external legal services provider retained by the ABCC. I am satisfied that there is a lawyer-client relationship with the external legal service provider.

Confidential communications

The documents to which the exemption has been applied contain communications made in the context of the lawyer-client relationship and were made on the understanding that the usual relationship of confidence between a solicitor and a client governed the communication. The communications were confidential at the time that they were made and remain confidential.

Dominant purpose for the provision of advice

The communications were made for the dominant purpose of providing legal advice. They comprise emails requesting advice from external legal providers, receiving the advice requested and discussions about how that advice applied to ABCC activities.

No waiver of privilege

Subsection 42(2) of the FOI Act provides that:

A document is not exempt because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.

There is no evidence before me that indicates that the substance of the communications has been disclosed more broadly, or used in any way that would be inconsistent with maintaining the confidentiality of the communications. Rather, the content of the communications has only been shared with a limited number of people within the ABCC.

Conclusion

Accordingly, I am satisfied that the documents are exempt under section 42.

Exemption – Section 47F: personal privacy

Section 47F of the FOI Act conditionally exempts a document to the extent that its disclosure would involve the unreasonable disclosure of personal information about any person. Personal information includes any information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not.

I am satisfied that the documents contain personal information about current employees



of the ABCC. The personal information I have identified includes names, direct contact numbers and email addresses.

Personal information will be conditionally exempt if disclosure would be 'unreasonable'. In considering whether disclosure would be unreasonable, section 47F(2) of the FOI Act requires me to take into account:

- the extent to which the information is well known;
- whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
- the availability of the information from publicly accessible sources; and
- any other matter that I consider relevant.

Firstly, I am satisfied that the individuals concerned are not generally known to be associated with the subject matter discussed in the documents.

As part of making my decision, I have taken into account the threats and statements made against ABCC employees by prominent building industry participants in the past. Against this background, I find that there are legitimate concerns relating to the disclosure of personal information of the ABCC employees. In these circumstances, I find it would be unreasonable to disclose their personal information.

Further, I find that it would be unreasonable to disclose the direct telephone numbers in the documents.¹ These direct contact details are not published by the ABCC.

Ultimately, I find that the disclosure of the personal information within the documents would be an unreasonable disclosure of personal information about the ABCC employees. Accordingly, I find that each of the documents is conditionally exempt under section 47F of the FOI Act to the extent that they reveal names, email addresses and direct phone numbers. I must give access to the documents unless, in the circumstances, access would on balance be contrary to the public interest (considered below).

Public interest consideration

In determining whether it would be contrary to the public interest, I have balanced relevant matters for and against disclosure.

I have considered that releasing personal information would generally promote the objects of the Act, however I am not convinced that the release of the personal information would assist in informing debate, or enhance scrutiny or promote oversight of the ABCC's activities.² On the contrary, it is my view that there are a number of factors which weigh against disclosure. These factors are:

- disclosure of the information of both ABCC employees would unreasonably interfere with the privacy of the individuals concerned; and
- disclosure of personal information of ABCC employers would prejudice the management function of the ABCC because agency employees would generally expect their personal information will not be made publicly available.

On balance, I find that disclosure of the information in the documents is contrary to the public interest. Accordingly, I have decided that the documents are exempt under section

¹ This is consistent with the approach taken by Deputy President Forgie in *Chief Executive Officer, Services Australia and Warren (Freedom of information)* [2020] AATA 4557 at [128]-[130].

² *Chief Executive Officer, Services Australia and Warren (Freedom of information)* [2020] AATA 4557 at [132]-[133].

47F of the FOI Act.

Review rights

Internal review

I am not the principal officer of the ABCC. As a result, you are entitled under section 54 of the FOI Act to seek an internal review of my decision. An internal review will be conducted. Your application must be made within 30 days of you receiving this notice.

An internal review may be submitted by sending it to Freedom of Information Section, ABCC, at either of the following contact addresses:

- By post: GPO Box 9927 MELBOURNE VIC 3001 Australia
- By email: foi@abcc.gov.au

Please note in your application the decision that you wish to be reviewed.

If you choose to seek an internal review, you will subsequently have a right to apply to the Australian Information Commissioner for a review of the internal review decision.

Review by the Australian Information Commissioner

Alternatively, under section 54L of the FOI Act, you may seek review of this decision by the Australian Information Commissioner without first going to internal review. Your application must be made within 60 days of you receiving this notice.

The Australian Information Commissioner is an independent office holder who may review decisions of agencies and Ministers under the FOI Act. More information is available on the Australian Information Commissioner's website www.oaic.gov.au.

You can contact the Information Commissioner to request a review of a decision online or by writing to the Information Commission at:

- By post: GPO Box 5218 Sydney NSW 2001
- By email: foidr@oaic.gov.au

If you have any queries about this decision, please contact the FOI Section by email to foi@abcc.gov.au.

Yours sincerely



James Matheson
Australian Building and Construction Commission

Doc Number	Date	Description	Decision	Exemptions
Document 1	9 September 2019	Email between ABCC employees relating to uploading of content to FOI Disclosure Log	Release in part	S 47F
Document 2	6 October 2020	Emails relating to review of FOI disclosure log (also containing legal advice from external legal provider)	Release in part	S 42, s 47F
Document 3	6 October 2020	Email chain between ABCC and external legal service provider containing legal advice	Exempt in Full	S 42, s 47F
Document 4	8 October 2020	Email from ABCC employee to Matt Kelleher (Deputy Commissioner, Legal) containing legal advice	Exempt in Full	S 42, s 47F
Document 5	8 October 2020	Email from ABCC employee to Matt Kelleher (Deputy Commissioner, Legal) containing legal advice	Exempt in Full	S 42, s 47F
Document 6	8 October 2020	Email between ABCC employees relating to removal of content from FOI Disclosure Log	Release in part	S 47F

