



CDPP

Australia's Federal Prosecution Service

**Commonwealth Director
of Public Prosecutions**

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Your Reference:

Our Reference: 2021FI00018

16 August 2021

Phillip Sweeney

By email: foi+request-7605-6271189a@righttoknow.org.au

Dear Mr Sweeney

NOTICE OF DECISION UNDER SECTION 26 OF THE FREEDOM OF INFORMATION ACT 1982 (CTH)

I refer to your email of 17 July 2021 to the Commonwealth Director of Public Prosecutions (CDPP) requesting access under the *Freedom of Information Act 1982* (Cth) (FOI Act) to:

Under the section titled "General Prosecutions" – "Offences" on the CDPP website is

s.142.2(1) Criminal Code – abuse of public office

The documents I seek are:

- (i) Documents held by the CDPP that would identify previous prosecutions for this offence by the CDPP; and*
- (ii) Any guidelines in the possession of CDPP that would be used by the CDPP to prosecute a Commonwealth Public Officer who had contravened this section of the Criminal Code.*

AUTHORISATION

I am a person authorized by the Director of Public Prosecutions to make decisions on requests for access to documents under the FOI Act. My name and position are:

Kirstin Duncan
Senior Federal Prosecutor
International Assistance and Specialist Agencies

MATERIAL FACTS

On 17 July 2021 you made your FOI request by email via the Right To Know website.

On 2 August 2021 the CDPP acknowledged receipt of the FOI request by email.

DECISION

A search was undertaken of all records held by the CDPP. I identified one document which falls within the scope of your request and the CDPP further used its computer system to produce one document (the relevant documents).

The relevant documents are listed in the schedule in Attachment A.

In column 2 of the schedule I have described in brief terms each of the documents concerned.

In column 3 of the schedule I have indicated whether access to the document is granted or refused.

In column 4 of the schedule I have indicated by way of notation the basis of my decision to refuse access to the document.

Part (i) of your request

At the time that your request was made, the CDPP did not hold an existing document containing the data you requested in part (i) of your request.

In accordance with section 17 of the FOI Act, the CDPP used its computer system to produce a penalty outcome summary report containing the information that falls within part (i) of your request. The data produced in the document existed in the possession of the CDPP on 17 July 2021 when your request was received. I have decided to grant access to this document.

Part (ii) of your request

The *Prosecution Policy of the Commonwealth* underpins all of the decision made by the CDPP throughout the prosecution process, including for prosecutions of offences against section 142.2(1) of the *Criminal Code*. The Prosecution Policy is a publicly available document and you can access a copy at www.cdpp.gov.au/prosecution-process/prosecution-policy. The CDPP also publishes other Policies and Guidelines which may apply to particular prosecutions. You can access these documents at www.cdpp.gov.au/publications.

I identified one document within part (ii) of your request which is not a generally available publication. This document provides internal legal guidance to CDPP prosecutors on offences against s142.2(1) of the Criminal Code.

The document is exempt under section 42 of the FOI Act and I have decided to refuse your request for access to this document.

REASONS FOR DECISIONS AND FINDINGS OF MATERIAL FACTS

In making my decision in response to your application, I have taken the following into account:

- the terms and scope of your request
- the FOI Act
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (available on www.oaic.gov.au).

Part (ii) of your request – document subject to legal professional privilege

A document is an exempt document under section 42 of the FOI Act if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

I am satisfied that the CDPP guideline on s142.2(1) of the Criminal Code attracts legal professional privilege.

I am satisfied that each of the following criteria has been met:

- that a solicitor/ client relationship exists between the Director of the CDPP and CDPP lawyers, between CDPP lawyers or between CDPP lawyers and partner agencies who refer matters to the CDPP for potential prosecution
- that the dominant purpose of the guideline on s142.2(1) of the Criminal Code is for the provision of legal advice
- that the advice is given in confidence
- that there is anticipated litigation
- that there has been no waiver of privilege either express or implied

Lawyer-client relationship

Legal professional privilege is capable of attaching to communications between an in-house legal adviser and their employer, provided that the legal adviser is consulted in a professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client (*Waterford v Commonwealth* (1987) 163 CLR 54).

The Office of the CDPP is established by the *Director of Public Prosecutions Act 1983* (DPP Act) and consists of the Director and the members of the staff of the Office who are legal practitioners. Section 16 of the DPP Act provides that the Director or member of the staff of the Office who is a legal practitioner is in his or her official capacity entitled to practice as a barrister, solicitor or barrister and solicitor in a Federal Court or in a Court of a State or Territory.

The relationship between the Director and the solicitors employed within the Office of the CDPP is sufficient for the CDPP to be regarded as the ‘client for the purposes of legal advice provided by her staff or by a Crown Prosecutor’ (*CDPP v Kinghorn* [2020] NSWCCA 48). The CDPP and its legal practitioners are also in a lawyer-client relationship with partner agencies and investigators in these agencies and legal advice is provided in relation to actual or anticipated litigation.

Legal advice

The concept of ‘legal advice’ has been interpreted widely. It can extend to advice as to what should prudently or sensibly be done in the relevant legal context (*Australian Wheat Board v Cole* (No 5) [2006] FCA 1234). I find that the guideline was created for the dominant purpose of providing legal advice in relation to the prosecution of s142.2(1) Criminal Code offences.

The guideline is a legal resource prepared by CDPP legal practitioners on behalf of the Director. It is a resource for CDPP legal practitioners and the partner agencies which investigate and refer briefs of evidence to the CDPP for assessment and prosecution in accordance with the *Prosecution Policy of the Commonwealth*. The guideline is itself legal advice and also contains a summary of legal advice provided to officers of the CDPP.

Confidential communication and dominant purpose

The guideline was prepared on the understand that the usual and well established relationship of confidence between a lawyers and client governed the communication. The legal advice contained in the guideline was prepared and held on a confidential basis for the dominant purpose to give legal and procedural advice on matters concerning prosecuting s142.2(1) Criminal Code offences.

The communications were confidential at the time they were made and remain confidential.

No Waiver

Section 42(2) of the FOI Act provides that a document is not an exempt document if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.

A person who would otherwise be entitled to the benefit of legal professional privilege may waive that privilege, either expressly or by implication. Legal professional privilege is waived if the conduct of the person seeking to rely on the privilege is inconsistent with the maintenance of the privilege.

The guideline is available to CDPP partner agencies on a confidential basis, who are advised that privilege attaches to the guideline. This limited disclosure is not inconsistent with maintaining confidentiality of the communications where the disclosure is to partner agencies for the directly limited purpose directly related to the prosecution of section 142.2(1) Criminal Code offences. Accordingly, I am satisfied that there has been no waiver.

Section 93A of the FOI Act required me to have regard to any guidelines by the Information Commissioner. *Guideline Part 5 – Exemptions* requires me to consider whether ‘real harm’ would result from releasing the guideline. I consider that disclosure of the guideline would result in substantial prejudice to the CDPP in the on-going course of prosecutions or potential prosecutions. It would undermine and inhibit the full and frank provision of legal advice by the CDPP in the course of anticipated or actual litigation by the CDPP between officers of the CDPP, and the CDPP and partner agencies.

The parts of the guideline that are privileged cannot be separated from those parts which are not. The entire guideline is exempt under section 42 of the FOI Act and is not appropriate to grant access to the document with deletions pursuant to section 22(1) of the FOI Act.

RIGHTS OF REVIEW

Under section 26 of the FOI Act I am required to inform you of your rights of review.

Section 54 of the FOI Act gives you the right to apply for an internal review of the decision refusing to grant access to documents. An application for internal review of the decision must be made in writing in 30 days of receipt of this letter. No particular form is required but it is desirable to set out in the application the grounds on which you consider the decision should be reviewed. An application may be sent to FOI@cdpp.gov.au or to the following postal address:

FOI Coordinator
Commonwealth DPP
PO Box 3104
CANBERRA ACT 2601

If the decision on internal review goes against you, you are entitled to seek a review of that decision by the Information Commissioner. Alternatively, you are entitled to bypass the internal review

process and make an application directly with the Office of the Information Commissioner pursuant to section 54L of the FOI Act.

An application to the Information Commissioner may be made in writing and should be directed to the following address:

Office of the Australian Information Commissioner (Reviews)
GPO Box 5218
SYDNEY NSW 2001

The Information Commissioner also accepts online requests via their website. You can locate the relevant form at www.oaic.gov.au

Yours faithfully

A handwritten signature in black ink, appearing to read 'K Duncan', with a small mark at the end.

Kirstin Duncan
Senior Federal Prosecutor
International Assistance Specialist Agencies

Attachment A

No.	Document	Decision	Reason
1	Penalty Outcome Summary Report – section 142.2(1) Criminal Code Prosecutions	Release in full	
2	Guideline	Exempt in full	This Office declines access on the basis that the document contains information which is subject to legal professional privilege and is exempt in full from release pursuant to section 42(1) of the FOI Act.