



CDPP

Australia's Federal Prosecution Service

Commonwealth Director
of Public Prosecutions

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3 September 2021

Mr Phillip Sweeney

By email: foi+request-7606-79dc1376@righttoknow.org.au

Dear Mr Sweeney

REQUEST FOR INTERNAL REVIEW UNDER THE *FREEDOM OF INFORMATION ACT 1982* ("the FOI Act")

I refer to your email of 19 August 2021 requesting an internal review of the decision of Ms Kirstin Duncan of 16 August 2021 refusing access to the documents sought, namely "copies of correspondence between ASIC and the CDPP in relation to the decision by the CDPP not to proceed with criminal charges as recommended by the Hayne Royal Commission".

Two documents have been identified which fall within the scope of your request. A copy of Ms Duncan's decision (and attached schedule of documents) in relation to these documents is attached (Attachment A).

In reviewing this matter 3 further documents falling within the scope of your request have been identified. A schedule of these documents is attached (Attachment B).

AUTHORISATION

I am authorised by the Director of Public Prosecutions to make this decision under section 23 of the FOI Act. My name and designation are set out below:

DECISION

I have decided the documents falling within your request initially identified and the further documents identified are exempt under s 42 of the FOI Act and accordingly access is refused.

REASONS FOR DECISION

In making my decision, I have taken into account the terms and scope of your request made by email dated 17 July 2021, your request for an internal review and the matters raised, the FOI Act, and the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act.

A document is an exempt document under s 42(1) 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 each of the documents attract legal professional privilege and would be privileged from production in legal proceedings on the grounds of legal professional privilege in their entirety.

LEGAL ADVICE PRIVILEGE/LITIGATION PRIVILEGE

I am satisfied the documents comprise legal advice from the CDPP to the Australian Securities and Investment Commission (“ASIC”) in connection with anticipated litigation, namely potential prosecutions.

The Office of the CDPP was established by the Director of Public Prosecutions Act 1983 (“the 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 CDPP and its legal practitioners are in a lawyer-client relationship with agencies and investigators that refer briefs of evidence to the CDPP for consideration in accordance with the Prosecution Policy of the Commonwealth. Legal advice is provided in relation to actual or anticipated litigation, namely prosecutions.

I am satisfied that the documents are confidential communications from the CDPP to ASIC created for the dominant purpose of providing legal advice in relation to anticipated litigation. I am satisfied that these were confidential communications at the time they were made and that they remain confidential. I am satisfied these communications took place in the context of a legal-advisor client relationship being in existence and that the communications were for the dominant purpose of giving and receiving legal advice in connection with anticipated litigation.

I have considered whether exempt parts could be redacted and the remainder released, but I have determined that any remaining information would be of little value.

I am also satisfied that the documents were confidential communications in the course of a legal-advisor client relationship and made for the dominant purpose of conducting anticipated litigation, namely a prosecution, and are privileged on this basis.

NO WAIVER

Section 42(2) 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.

I am satisfied there has not been any waiver of this privilege.

I have considered in accordance with the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act whether real harm would flow if the confidential communications were disclosed. I consider that disclosure would undermine and inhibit the full and frank provision of legal advice in relation to anticipated litigation and would cause real harm and substantial prejudice to the CDPP and ASIC.

I note that ASIC has issued a media release about these matters: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-173mr-asic-finalises-investigation-into-amp-financial-planning-fees-for-no-service-criminal-conduct/>

Rights of Review

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

You are entitled to seek a review of this internal review 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:

Information Commissioner (Reviews)
GPO Box 2999
CANBERRA ACT 2601

The information Commissioner also accepts online requests via their website. You can locate the relevant form at <http://www.oaic.gov.au>.

Yours sincerely



James Carter
Deputy Director
International Assistance Specialist Agencies