



CDPP

Australia's Federal Prosecution Service

**Commonwealth Director
of Public Prosecutions**

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Your Reference:

Our Reference: 2021FI00019

16 August 2021

Phillip Sweeney

By email: foi+request-7606-79dc1376@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:

The Hayne Royal Commission identified misconduct by AMP executives and possibly by directors that could give rise to criminal prosecution.

The documents I seek are 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.

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 two documents which fall within the scope of your request (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.

In summary, I am satisfied that both documents attract legal professional privilege and are exempt under section 42 of the FOI Act. I have decided to refuse your request for access to these documents.

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).

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.

Paragraphs 5.127 and 5.129 of the FOI Guidelines require the CDPP to consider whether:

- a. there is a legal advisor-client relationship
- b. the communication was for the dominant purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation
- c. the advice is independent; and
- d. the advice given is confidential.

I am satisfied that the documents are exempt from production in their entirety under section 42 of the FOI Act.

The relevant documents were prepared in circumstances where the CDPP provided confidential legal advice to the referring agency, the Australian Securities and Investments Commission (ASIC) in connection with potential prosecutions.

The Office of the CDPP is established by the *Director of Public Prosecutions Act 1983* (DPP Act) and consists of the Director and 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 this Office who is a legal practitioner in his or her official capacity is 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 partner agencies and investigators in these agencies and legal advice is provided in relation to actual or anticipated litigation.

I am satisfied that the documents constitute confidential communications from the CDPP to ASIC, created for the purpose of providing legal advice in relation to anticipated litigation. The communications were confidential at the time they were made and remain confidential.

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

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.

I am satisfied that there has not been any waiver of that privilege over the documents.

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 documents. I consider that disclosure of the CDPP’s legal advice to ASIC 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 to its partner agencies in the course of anticipated or actual litigation.

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', is written over a light blue rectangular background.

Kirstin Duncan
Senior Federal Prosecutor
International Assistance Specialist Agencies

Attachment A

No.	Document	Decision	Reason
1	Letter from the CDPP to ASIC dated 13 July 2021	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.
2	Letter from the CDPP to ASIC dated 22 June 2021	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.