



CDPP

Australia's Federal Prosecution Service

Commonwealth Director
of Public Prosecutions

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Your Reference:

Our Reference: 2022FI00004

11 April 2022

Trav S

Via Email: foi+request-8582-e2ab7726@righttoknow.org.au

Dear Trav S

FREEDOM OF INFORMATION REQUEST - NOTICE OF DECISION UNDER SECTION 26 OF THE FREEDOM OF INFORMATION ACT 1982

I refer to your email to the Commonwealth Director of Public Prosecutions (CDPP) of 10 March 2022 in which you requested access to the following:

1. *Prosecution Policy of the Commonwealth – Guidelines for making of decisions in the prosecution process* **[Part 1 of your request]**
2. *Offence guide's [sic] for*
 - *General Dishonesty – section 135.1 of the Criminal Code*
 - *Conspiracy to defraud – section 135.4 of the Criminal Code*
 - *False or misleading information – section 137.1 of the Criminal Code*
 - *False or misleading documents – section 137.2 of the Criminal Code* **[Part 2 of your request]**

AUTHORISATION

I am a person authorised by the Director of Public Prosecutions to make decisions on requests for access to documents under the *Freedom of Information Act 1982* (FOI Act). My name and position are set out below.

RELEVANT MATERIAL

In reaching my decision I referred to the following:

- the terms of your request
- the document relevant to the request
- the FOI Act

- Guidelines published by the Office of the Information Commissioner under section 93A of the FOI Act (The FOI Guidelines)

FINDINGS OF MATERIAL QUESTIONS OF FACT

My findings on material questions of fact in so far as they relate to your request are as follows:

On 10 March 2022 you made your FOI request by email via the Right to Know website.

On 10 March 2022 the CDPP acknowledged your request.

DECISION

A search of the electronic records of the CDPP was conducted.

Part 1 of your request

As advised to you in the email dated 10 March 2022 the *Prosecution Policy of the Commonwealth* is a publicly available document at www.cdpp.gov.au/prosecution-process/prosecution-policy.

This document is released to you in full.

Part 2 of your request

Four documents within Part 2 of your request were located. These documents provide internal legal guidance to CDPP prosecutors on offences against sections 135.1, 135.4, 137.1 or 137.2 of Schedule 1 to the *Criminal Code Act 1995* (Commonwealth) (the Criminal Code).

The documents are exempt in their entirety under section 42 of the FOI Act and I am refusing your request for access to these documents.

REASONS FOR DECISION AND FINDINGS OF MATERIAL FACTS

Documents subject to legal professional privilege

A document is an exempt document under section 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 the CDPP Offence Guides on sections 135.1, 135.4, 137.1 and 137.2 of the Criminal Code attract legal professional privilege.

I am satisfied that each of the following criteria has been met in relation to each document:

- 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 Offence Guides is for the provision of legal advice
- that the advice is given in confidence
- that there is anticipated or actual 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 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 by the CDPP 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 relevant CDPP Offence Guides were created for the dominant purpose of providing legal in relation to the actual or anticipated prosecution of offences against sections 135.1, 135.4, 137.1 and 137.2 of the Criminal Code.

The Offence Guides are legal resources prepared by CDPP legal practitioners on behalf of the Director. They are legal resources for CDPP legal practitioners and partner agencies who investigate and refer briefs of evidence to the CDPP for assessment and prosecution in accordance with the *Prosecution Policy of the Commonwealth*. The Offence Guides constitute legal advice and also contain summaries of legal advice provided to officers of the CDPP.

Confidential communication and dominant purpose

The Offence Guides were prepared on the understanding that the usual and well-established relationship of confidence between lawyers and clients govern the communications. The legal advice contained in the Offence Guides was prepared and held on a confidential basis for the dominant purpose of giving legal and procedural advice on matters concerning prosecuting offences against sections 135.1, 135.4, 137.1 and 137.2 of the Criminal Code.

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 the 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 other person seeking to rely on the privilege is inconsistent with the maintenance of the privilege.

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

FOI Guidelines

Section 93A of the FOI requires 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 Offence Guides. I consider that disclosure of the Offence Guides 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 between officers of the CDPP, and between the CDPP and partner agencies.

The parts of the Offence Guides that are privileged cannot be separated from those parts which are not. The Offence Guides are entirely exempt under section 42 of the FOI Act and it is not appropriate to grant access to the documents 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 internal review of a decision refusing to grant access to documents. An application for internal review of a decision must be made in writing within 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 that the decision should be reviewed. An application may be sent to foi@cdpp.gov.au or to the following postal address:

FOI Coordinator
Commonwealth Director of Public Prosecutions
PO Box 3104
CANBERRA ACT 2617

If a 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 Australian 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 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".

Kirstin Duncan
Senior Federal Prosecutor
International Assistance Specialist Agencies