



CDPP

Australia's Federal Prosecution Service

Commonwealth Director
of Public Prosecutions

GPO BOX 3104, Canberra ACT 2601
Level 3, 28 Sydney Avenue
Forrest ACT 2603

Telephone **(02) 6206 5666**
Facsimile (02) 6257 5709
www.cdpp.gov.au

Your Reference:

Our Reference: 2022FI00004

11 May 2022

Trav S

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

Dear Trav S

REQUEST FOR INTERNAL REVIEW UNDER THE FREEDOM OF INFORMATION ACT 1982

I refer to your email of 11 April 2022 requesting an internal review of the Commonwealth Director of Public Prosecutions' (CDPP) decision to refuse access to documents you requested under the *Freedom of Information Act 1982* (FOI Act).

On 10 March 2022 you requested access to the following documents:

1. *Prosecution Policy of the Commonwealth – Guidelines for the making of decisions in the prosecution process*
2. *Offence guide's 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*
 - *Fales or misleading documents – section 137.2 of the Criminal Code*

On 11 April 2022 the decision maker granted access to the *Prosecution Policy of the Commonwealth* and advised you of her decision to refuse access to the offence guide documents you requested.

You requested an internal review of the refusal decision on 11 April 2022. You noted the following:

1. *CDPP claims National Offence Guide's are exempt but such documents are publicly published on the CDPP website. Take for an example CDPP's guide for General Dishonesty Section 135.1 of the Criminal Code [https://www.cdpp.gov.au/sites/default/files/PGI-CFC-003_2.pdf].*
2. *By virtue of their already publishing National Offence Guide's publicly on their website CDPP has acted in a manner that would appear to waive their legal professional privilege claim.*
3. *The requested documents are merely departmental guidelines. Section 3(1) of the FOI Act provide the Australian community with a legally enforceable right of access to information held by government. CDPP's claim that such documents are exempt under*

section 135.1 is without merit. The FOI Act was never intended to block public access to standard departmental guidelines.

4. Standard CDPP National Offence Guides do not constitute legal advice given in confidence. They are merely departmental guides with which to guide a department and public servants. The documents belong to the Australian community to which we have a legally enforceable right of access - unless the documents are exempt or subject to conditional exemptions. They meet neither criteria

5. CDPP states as a reason for refusing access “that there is anticipated or actual litigation” however they do not provide a reasonable justification with which to evidence their claim.

6. It rings as hollow for CDPP to on one hand claim that the release of generic National Offence Guide would result in substantial prejudice to the CDPP when the CDPP currently publishes National Offence Guide’s online publicly.

On 25 April 2022 you further noted:

Please accept the correction below. My 11 April email should read:

3. The requested documents are merely departmental guidelines. Section 3(1) of the FOI Act provides the Australian community with a right of access to information held by government. CDPP’s claim that such documents are exempt under section 42(1) of the Act is without merit.

AUTHORISATION

I am authorised by the Director of Public Prosecutions to make this decision under section 23(1) of the FOI Act. My name and designation are set out below.

DECISION

I have decided to affirm the original decision.

In summary, I have decided that the Offence Guides for sections 135.1, 135.4, 137.1 and 137.2 of the Criminal Code are exempt from release under section 42(1) of the FOI Act.

In making my decision, I have taken into account the following:

- the terms and scope of your request,
- your request for an internal review and the matters raised,
- the content of the documents that fall within the scope of your request
- the FOI Act
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act;
- relevant case law on waiver of privilege.

REASONS FOR DECISION

A document will be exempt 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 have examined the four relevant Offence Guides. The Offence Guides are documents which, because of their content and the purpose for which they were created, constitute legal advice and guidance for the Director and lawyers in the CDPP. In addition, the guides are available to agencies referring briefs of evidence to the CDPP for assessment in accordance with the Prosecution Policy of the Commonwealth. I have formed the view that for the reasons set out in the original decision, legal professional privilege attaches to the Offence Guides. I have considered whether real harm would flow if the confidential communication was disclosed and find that disclosure would cause real harm given the importance of the confidential provision of legal advice for decision making in the CDPP and the referral of briefs of evidence to the CDPP. Accordingly, I affirm the original decision.

I note the following has been provided to you and I agree with this analysis.

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.

WAIVER

In your email of 11 April 2022 requesting internal review, you stated that Offence Guides are published on the CDPP website. You referred to publication of a 2018 edition of the Offence Guide for General Dishonesty contrary to section 135.1 of the Criminal Code.

The CDPP does not publish Offence Guides on the CDPP website. The Offence Guides are published on the CDPP's intranet for use within the CDPP and it is made available to partner agencies who investigate and refer briefs to the CDPP for assessment and prosecution on a confidential basis.

The Offence Guides for offences against sections 135.4, 137.1 and 137.2 are not published on the internet. The current version of the offence Guide for section 135.1 nor the offence guides for sections 135.4, 137.1 and 137.2 have never been published on the CDPP's internet page.

The Offence Guide for section 135.1 of the Criminal Code which you located dates back to 2018. The document was accidentally uploaded externally as a result of an administrative error. Inadvertent disclosure does not always result in a waiver of privilege. The CDPP never deliberately intended for the document to be published externally. The CDPP was not aware of this administrative error as there was no link to the document on the CDPP webpage.

I am satisfied that the CDPP's inadvertent act was not sufficient to amount to waiver of legal professional privilege. When the CDPP became aware of the error immediate steps were taken to remove the document from the internet, a step which is consistent with maintaining legal

professional privilege: *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; *Boensch v Pascoe* [2007] FCA 532.

The 2018 version of the section 135.1 Offence Guide has been superseded by an updated Offence Guide. I am satisfied that accidental disclosure of the outdated Offence Guide has not waived privilege over the current section 135.1 Offence Guide. A person reading the 2018 version published on the internet might acquire some knowledge of the document, however that knowledge is incomplete as the document has been updated and has evolved since 2018. Maintaining a claim of legal professional privilege over the Offence Guide currently in place should be maintained.

Not ‘operational information’

In your email of 25 April 2022, you stated that ‘the requested documents are merely departmental guidelines [...] CDPP’s claim that such documents are exempt under section 42(1) of the Act is without merit.’

Section 42(3) of the FOI Act provides that a document is not an exempt document under section 42(1) if the document is the operational information of an agency.

I have considered whether the Offence Guides comprise operational information.

The expression ‘operational information’ is defined in section 8A of the FOI Act:

An agency’s operational information is information held by the agency to assist the agency to perform or exercise the agency’s functions or powers in making decisions or recommendations affecting members of the public (or any particular person or entity, or class of persons or entities).

Example: The agency’s rules, guidelines, practices and precedents relating to those decisions and recommendations.

The Guidelines issued by the Information Commissioner state that the rationale around the obligation to publish operational information is to ensure that members of the public are adequately informed about the framework of rules, policies, principles and procedures that agencies apply in making decisions or recommendations that affect them, so that they are not disadvantaged through lack of awareness of the information used by agencies in decision making (Part 13 – Information publication scheme, paragraphs 13.85-13.86).

To fall within ‘operational information’, the information must relate to either a ‘decision’ or ‘recommendation’ that affects members of the public. For example, decisions or recommendations that concern a right, privilege, benefit or an obligation, penalty or detriment to which a person or class of persons may be subject (Part 12 – Information publication scheme, paragraph 13.97). Information is not ‘operational information’ unless it concerns government decision making that directly or indirectly affects the public, such as reports on the operation of a government program or compliance with legislative requirements (Part 13 – Information publication scheme, paragraph 13.98).

I find that the Offence Guides within scope of your request contain legal advice and legal opinions on matters concerning prosecution of offences against particular sections of the Criminal Code. The Offence Guides do not contain operational information such as rules, guidelines and practice within the meaning of section 8A of the FOI Act.

While the equivalent of section 8A in *Saunders and Australian Federal Police* [2001] AATA 1006 contained a different legal test, the finding at para [30] of the decision that a manual was not a document within the then section 9(1), namely relating to a document used in making decisions or recommendations for the purposes of legislation or schemes administered but was a document to provide legal advice and assistance to staff of the CDPP in advising Commonwealth investigative agencies, supports the view that these offence guides do not fall within the current section 8A of the FOI Act relating to operational information. The offence guides contain legal advice and legal opinion prepared to assist CDPP lawyers and referring investigative agencies undertake their functions and is not information of a kind that is relevantly used to assist with decision-making or recommendations affecting members of the public.

Accordingly, I find that the Offence Guides do not meet the description of documents coming within section 8A of the FOI Act and so are not excluded from the exemption in section 42(1) by reason of section 42(3) of the FOI Act.

As the entire communication would be privileged from production in legal proceedings on the ground of legal professional privilege, there is no basis to provide you with a redacted version under section 22 of the FOI Act.

RIGHTS OF REVIEW

If you are dissatisfied with my decision you are entitled to seek a review of this internal review decision by the Australian Information Commissioner. An application for review by the Commissioner must be made in writing within 60 days of the date of this letter and should be directed to the following address:

Email: foidr@oaic.gov.au

Information Commissioner (Reviews)
GPO Box 5218
Sydney NSW 2001

The 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