

5 October 2022

Ms Roxanne Missingham
Director, Scholarly Information
Services (University Librarian)
Canberra ACT 2601 Australia

Goobely Woobely via the Right to Know website
email: foi+request-9136-0ffb9a3@righttoknow.org.au

www.anu.edu.au
CRICOS Provider No. 00120C

Dear Mr Woobely,

Freedom of Information request no. 202200038 - Decision on internal review under the Freedom of Information Act

This letter advises you of my decision following your request for an Internal Review of the decision of the University concerning your request for access to documents under the *Freedom of Information Act 1982* (Cth) (FOI Act).

You have sought Internal Review of the University's decision, in particular:

- You argue that the exemptions claimed of Legal Professional Privilege (s42) and confidentiality (s45) applied to the document identified as in scope of your request cannot be sustained.
- You further state that Legal Professional Privilege has been waived by dissemination of the document to third parties, namely PARSA executive
- You also state that Legal Professional Privilege has been at least partially waived because the report was alluded to in the media (Canberra Times article); and
- You state that dissemination of the document to PARSA executive undermines claims of confidentiality.

I am authorised under section 23(1) of the FOI Act to make decisions on internal review. I was not involved, or consulted, in the making of the original decision. In undertaking my review I have been guided by the principles articulated in the Administrative Review Council's *Internal Review of Agency Decision Making* (Report No 44, 2000), Chapter 8.

Background

On 16 July 2022, you made an FOI request in the following terms:

I am seeking under the Freedom of Information Act a copy of the report produced by EY for the university relating to the governance of PARSA. The report is mentioned in this article:
<https://www.canberratimes.com.au/story/7815067/it-was-really-a-shock-anu-cuts-funding-to-postgraduate-students-association/?cs=14329>

On 6 September 2022, the University informed you that one document had been located that pertained to your request and that it had decided that the document was fully exempt from disclosure in accordance with section 42 (Legal Professional Privilege) and section 45 (Confidentiality).

On 6 September 2022, you asked for an internal review of that decision, for the reasons outlined earlier in this Notice.

Material taken into account

I have taken the following material into account in making my decision:

- The request for documents dated 16 July 2022, and related correspondence;
- The results of searches undertaken;
- The consultation response dated 1 September 2022
- The University's decision dated 6 September 2022;
- The FOI Act;
- Your request for internal review dated 6 Sept 2022;
- A search of the internet for the Canberra Times article mentioned in the Review request of 6 September 2022;
- Further advice received from responsible work area;
- OAIC FOI Guidelines; and
- A review of the documents.

Decision and reasons for decision

In your request for review, you have stated that:

- Legal Professional Privilege has been waived by dissemination of the document to third parties, namely PARSA executive
- Legal Professional Privilege has been at least partially waived because the report was alluded to in the media (Canberra Times article)
- Dissemination of the document to PARSA executive undermines claims of confidentiality

In the course of my review I have considered further advice from work area concerned about whether the EY Report was shared with PARSA executive members and consultation advice from the third party. I have decided that the claims of LPP and confidentiality have not been rendered invalid.

The FOI Guidelines relevantly state at section 5.146 that:

“privilege may be waived in circumstances where:

- the communication in question has been widely distributed,
- the content of the legal advice in question has been disclosed or
- a person has publicly announced their reliance on the legal advice in question in a manner that discloses the substance of the legal advice.”

Section 5.148 states that:

“If the document has been disclosed to a limited audience with a mutual interest in the contents of the document, it may not be inconsistent to continue to claim that the document is confidential and privileged, if a limited disclosure of the existence and the effect of legal advice could be consistent with maintaining confidentiality in the actual terms of the advice.”

The document in scope of the request (the EY report) was not disclosed to PARSA executive. Limited content was disclosed to a restricted audience with mutual interests in the content and was provided in the context of confidential discussions. Given the circumstances, I have concluded that the claim that Legal Professional Privilege was waived by dissemination of the document has no foundation.

A newspaper article referred to the fact that the University sought a review by EY and referred to a confidential report. It did not disclose any content of the report and noted that the document had **not** been disclosed, “Mr Yip said the new executive didn't see the full confidential report” (Sarah Lansdown, ‘Australian National University cuts funding to postgraduate and research students association’, Canberra Times, 16 July 2022). As the document in scope of the request was not shared, legal professional privilege was not waived.

I have considered whether all reasonable steps have been taken to ensure the validity of the exemptions claimed over the EY report. I have reviewed the steps taken by staff concerned to ascertain whether the EY report was shared with PARSA Executives and to ensure that the exemptions were appropriately applied.

I consider that the University has been diligent in their efforts to ensure the claims under sections 42 and 45 have been affirmed. The document was prepared by Ernest and Young for a specific purpose and on a confidential basis and was not shared with PARSA Executives.

I therefore affirm the University's original decision to you.

I find that:

- A search of the internet has been undertaken and, although a media article does allude to the report, the document and its contents have not been disclosed;
- As a result of internal consultation, it has been determined that the full report was not shared outside the required participants and therefore privilege has not been waived and section 42 is still a valid claim under the Act;
- As the report was not shared with any unnecessary participants, the confidential nature of the report has not changed and s45 still applies to the document; and
- On review of all the information provided, the decision provided to you on 6 September 2022 is affirmed.

Your review rights

If you are dissatisfied with my decision, you may apply to the Australian Information Commissioner for review. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

online: https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10
email: foidr@oaic.gov.au
post: GPO Box 5218, Sydney NSW 2001
fax: 02 9284 9666

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

Yours sincerely



Roxanne Missingham
Director, Scholarly Information Services (University Librarian)