

Determination

External review - section 39 *Freedom of Information Act 1991*

Applicant	[REDACTED]
Agency	Attorney-General
Ombudsman reference	2017/12384
Agency reference	17/0928
Determination	The determination of the agency is confirmed.

REASONS

Application for access

1. By application under the *Freedom of Information Act 1991 (the FOI Act)* the applicant requested access from the Attorney-General's Department to:
 1. Any complaint made, investigation conducted howsoever determined in relation to [REDACTED] [the applicant] from **1.1.16 to date**.
 2. For avoidance of any doubt, I require any and all documents and information inclusive of any investigation file past or present, the recipients of any communications with/from any third party and any investigator howsoever determined for the purposes of conducting any investigation. ("**the information**").

Background

2. On 12 October 2017 the Attorney-General's Department transferred the access application to the Attorney-General (**the agency**).
3. For ease of reference, the procedural steps relating to the application are set out in the appendix.

Jurisdiction

4. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

5. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 7 February 2018. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to confirm the agency's determination.
6. The agency did not wish to make any further submissions. To date, the applicant has not responded to my provisional determination. Accordingly, this determination is in the same terms as my provisional determination.

Relevant law

7. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
8. The FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'² or 'available for inspection'.³ Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusing access.
9. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
10. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

Documents in issue

11. The agency identified eight documents within the scope of the application, numbered 1 to 5 and 4A to 4C (documents 4A to 4C are attachments to document 4).
12. The agency determined to grant the applicant full access to documents 4 and 5 and partial access to document 4C. The agency refused access to:
 - documents 1 to 3 in their entirety, claiming they are exempt as documents subject to legal professional privilege (clause 10(1))
 - documents 4A and 4B in their entirety, claiming that they are otherwise available for inspection (section 20(1)(b))
 - the redacted parts of document 4C, claiming they are exempt as affecting personal affairs (clause 6(1)).
13. Clauses 6(1) and 10(1) provide:

Clause 6(1)

A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

Clause 10(1)

A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.

14. Section 20(1)(b) provides:

(1) An agency may refuse access to a document—

...

(b) if it is a document that is available for inspection at that or some other agency (whether as part of a public register or otherwise) in accordance with Part 2, or in accordance with a legislative instrument other than this Act, whether or not inspection of the document is subject to a fee or charge...

¹ *Freedom of Information Act 1991*, section 12.

² *Freedom of Information Act 1991*, section 20(1)(a).

³ *Freedom of Information Act 1991*, section 20(1)(b).

15. On 6 February 2018 the applicant advised that he did not seek access to document 4A or the redacted parts of document 4C.
16. Accordingly, documents 1 to 3 and 4B are in issue for the purpose of my review (**documents in issue**). I will confine my determination to these documents. That said, I will make a comment with respect to document 4A.

Issues in this review

17. It is for me to consider whether the agency has justified the determination to refuse access to the documents in issue.

Submissions

The applicant

18. When applying for external review, the applicant commented that he had been refused access to documents that relate to him 'personally'.
19. The applicant has expressed a particular interest in the 'initial document' from the Attorney-General 'which appears to have commenced the investigation'. In so doing, he submitted that the investigation appears to have been commenced as retaliation for allegations he made against the Attorney-General, the Premier and AGD.

The agency

20. In its original determination, the agency refused access to the documents in issue for the following reasons:

Documents 1 to 3

The above documents contain material subject to legal professional privilege. The communications contained within these documents were created for the dominant purpose of seeking legal advice...

Document 4A

The document is publicly available on <https://jade.io/> [REDACTED].

Documents 4B and 4C

These documents are protected by copyright, and to copy and disclose them would be an offence against the *Copyright Act 1968* (Commonwealth)... I have determined they are exempt from disclosure pursuant to clause 12(1) [documents the subject of secrecy provisions]...⁴

21. Following internal review, the agency varied the determination with respect to documents 4B and 4C, and confirmed the determination with respect to the remaining documents. It proffered the following reasons for refusing access to document 4B:

Document 4B

... is publicly available at [http://www.abr.business.gov.au/SearchByAbn.aspx?SearchText=\[REDACTED\]](http://www.abr.business.gov.au/SearchByAbn.aspx?SearchText=[REDACTED]) or by entering the ABN Number [REDACTED] into the search bar at

⁴ I note that the agency no longer relies on clause 12(1), however. See notice of determination following internal review, dated 1 December 2017.

<http://www.abr.business.gov.au>. I refuse access to this document pursuant to section 20(1)(b) of the FOI Act.

Consideration

Documents 1 to 3

22. The agency claims documents 1 to 3 exempt as documents subject to legal professional privilege.
23. Document 1 is a short minute from the Attorney-General to the Crown Solicitor dated 24 May 2017. Document 2 consists of two emails between the Attorney-General's Ministerial Adviser and a Solicitor employed in the Crown Solicitor's Office dated 2 August and 9 August 2017. Document 3 is a short minute from a Solicitor employed in the Crown Solicitor's Office to the Attorney-General dated 25 July 2017.
24. Clause 10(1) allows an agency to refuse an applicant access to a document where the document would be able to be withheld from disclosure in any hypothetical legal proceedings on the grounds of legal professional privilege.
25. In *Esso Australia Resources Limited v The Commissioner of Taxation*, the High Court decided that a document is privileged from production in legal proceedings if it is a confidential communication between a client and their solicitor that was created for the dominant purpose of obtaining or giving legal advice; or if it is a confidential communication made for the dominant purpose of use, or obtaining material for use in, pending or anticipated legal proceedings.⁵
26. Dominant has been held to mean a 'ruling, prevailing or most influential' purpose.⁶
27. Having regard to the contents of documents 1 to 3, and the author and recipient of each, I am satisfied that they:
 - represent confidential communications in the course of a lawyer-client relationship
 - were created for the dominant purposes of obtaining (document 1) and giving legal advice (documents 2 and 3).
28. Accordingly, I am satisfied that documents 1 to 3 would be privileged from production in legal proceedings and are therefore exempt under clause 10(1).

Document 4B

29. Document 4B is an 'ABN Lookup' extracted from the Australian Business Register. The agency claims to be entitled to refuse access to document 4B on the basis that it is available for inspection.
30. In order to refuse access to a document under section 20(1)(b) it must be available for inspection either in accordance with:
 - part 2 of the FOI Act; or
 - a legislative instrument other than the FOI Act.
31. Part 2 of the FOI Act concerns the publication of the agency's information statement and policy documents.
32. Document 4B is publicly available. It cannot, in my view, be categorised as an information statement or policy document of the agency, however. I will therefore

⁵ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49.

⁶ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49, 64-65.

consider whether it is available for inspection in accordance with a legislative instrument other than the FOI Act.

33. Under section 24 of *A New Tax System (Australian Business Number) Act 1999* the Registrar must establish and maintain an Australian Business Register (ABR). Certain information must be entered into the ABR.⁷ ABN Lookup is the 'public view' of the ABR.⁸
34. I am satisfied that document 4B is available for inspection via [http://www.abr.business.gov.au/SearchByAbn.aspx?SearchText=\[REDACTED\]](http://www.abr.business.gov.au/SearchByAbn.aspx?SearchText=[REDACTED]) in accordance with *A New Tax System (Australian Business Number) Act 1999* and *A New Tax System (Australian Business Number) Regulations 1999*. Accordingly, in my view, the agency has justified its refusal to release document 4B in accordance with section 20(1)(b).

Determination

35. In light of my views above, I confirm the agency's determination.

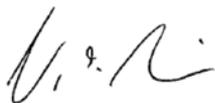
Comments

Limitations of external review

36. Whilst I acknowledge the applicant's motives for seeking access to the documents, I do not have the power to make a determination the effect of which would be to give the applicant access to exempt documents.⁹

Document 4A

37. Document 4A is a judgment of the Supreme Court of Western Australia: [REDACTED]. The agency refused access to it under section 20(1)(b). It is published online at multiple locations, along with other judgments of the Supreme Court of Western Australia.¹⁰
38. I comment that the agency does not appear to have been justified in refusing access to document 4A under section 20(1)(b) because it:
- is not an information statement or policy document of the agency
 - does not appear to have been published in accordance with a legislative instrument.



Wayne Lines
SA OMBUDSMAN

26 February 2018

⁷ See *A New Tax System (Australian Business Number) Act 1999*, in particular sections 11 and 25 and *A New Tax System (Australian Business Number) Regulations 1999*, regulations 5 and 6.

⁸ See <https://abr.business.gov.au/> (accessed 5 February 2018).

⁹ *Freedom of Information Act 1991*, section 39(12).

¹⁰ See for example <https://jade.io/> [REDACTED]; [http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WASC/\[REDACTED\].html](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WASC/[REDACTED].html); and <http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf/byCitationNo.xsp> (all accessed on 5 February 2018).

APPENDIX - 2017/12384

Procedural steps

Date	Event
29 August 2017	The Attorney-General's Department received the FOI application by email.
12 October 2017	The Attorney-General's Department transferred the application to the Attorney-General. ¹
13 November 2017	The agency determined the application.
17 November 2017	The agency received the internal review application by email.
1 December 2017	The agency varied the determination. ²
4 December 2017	By email, the Ombudsman received the applicant's request for external review.
8 December 2017	The Ombudsman advised the agency of the external review and requested submissions and documentation.
20 December 2017	The agency provided the Ombudsman with its submissions and documentation.
1 February 2018	By email, Ombudsman SA sought and received additional submissions from the applicant about the scope of his access application.
6 February 2018	Ombudsman SA sought and received submissions, by telephone, from SAI Global and the agency. Ombudsman SA sought and received additional submissions from the applicant, including about the scope of his access application, by telephone and email.
7 February 2018	The Ombudsman issued his provisional determination to the parties.
16 February 2018	By email, the agency responded to the provisional determination.

¹ *Freedom of Information Act 1991*, section 16(1).

² By email dated 4 December 2017 the agency re-sent this determination to the applicant because attachments were accidentally omitted from its notice dated 1 December 2017.

