



Victims of Financial Fraud and Department of the Treasury (Freedom of information) [2018] AICmr 61 (29 August 2018)

Decision and reasons for decision of Australian Information Commissioner, Angelene Falk

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| Applicant | Victims of Financial Fraud |
| Respondent | Department of the Treasury |
| Decision date | 29 August 2018 |
| Application number | MR17/00343 |
| Catchwords | Freedom of Information — Whether documents contain deliberative matter prepared for a deliberative purpose — Whether contrary to the public interest to release conditionally exempt documents — (CTH) <i>Freedom of Information Act 1982</i> ss 11A(5) and 47C |

Decision

- Under s 55K of the *Freedom of Information Act 1982* (the FOI Act), I set aside the decision of the Department of the Treasury (the Department) of 24 March 2017. I substitute my decision that:
 - the material that the Department no longer contends is exempt under s 47C of the FOI Act is not exempt
 - the material that the Department contends is exempt under s 47F of the FOI Act is irrelevant to the request, and
 - the material that the Department maintains is exempt under s 47C is exempt under this provision.
- The Department must now provide the applicant with a copy of the documents, edited only to the extent necessary to delete the exempt or irrelevant material under s 22 of the FOI Act.

Background

3. On 12 February 2017, Victims of Financial Fraud (the applicant) applied to the Department for access to documents relevant to the collapse of Trio Capital which has been described in a Senate inquiry in 2012 as ‘the largest superannuation fraud in Australian history’.¹ Specifically, the applicant sought access to:
 - ... document under the Freedom of Information Act 1983 of what ASIC² and APRA³ contribute to safeguard and protect superannuation in the Australian financial market and the report by APRA alerting Treasury to the gaps in legislation that prevented the questioning of overseas Trio entities. [sic]
4. On 10 March 2017, the Department gave notice to the applicant of its intention to impose a charge in relation to the request and provided a preliminary estimate of \$14.50, pursuant to s 29(1) of the FOI Act.
5. On 21 March 2017, the Department received payment of the charge in full.
6. On 16 June 2017, the applicant sought IC review of the Department’s decision to impose a charge and the deemed decision to refuse access to the request under s 54L of the FOI Act.
7. On the same day, the Department wrote to the applicant to advise that a decision on the request had been made on 24 March 2017, and provided a copy of the decision.
8. The Department’s decision advised the applicant that the information sought in the first part of the request for ‘what ASIC and APRA contribute to safeguard and protect superannuation in the Australian financial market’ is publicly available and therefore it did not make a decision on this part of the request under the FOI Act.
9. In relation to the applicant’s request for ‘the report by APRA alerting Treasury to the gaps in legislation that prevented the questioning of overseas Trio entities’, the Department’s decision advised the applicant it had identified one document falling within the scope of the request. The Department decided to refuse access to the document, relying on the deliberative processes exemption (s 47C) of the FOI Act.

Scope of IC review

10. On 11 August 2017, the Department advised the applicant that it would waive the charge of \$14.50 on the basis that it had not issued its decision to the applicant within the statutory timeframe. I therefore do not need to review the Department’s decision to impose a charge in this IC review.
11. On 22 January 2018, the applicant advised the Office of the Australian Information Commissioner (OAIC) that it agrees to limit the scope of this IC review to the Department’s decision in relation to the request for access to ‘the report by APRA alerting Treasury to the gaps in legislation that prevented the questioning of overseas entities.’ Accordingly, there is one document at issue in this IC review (the document).

¹ See, Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the collapse of Trio Capital*, May 2012 at page xvii. Available here, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2010-13/trio/report/index.

² The Australian Securities and Investment Commission.

³ The Australian Prudential Regulation Authority.

12. During the course of this IC review, the Department advised the OAIC that it no longer contends that the document is exempt in full. The Department maintains that certain material is exempt under s 47C and also contends that this material is alternatively exempt under the disclosure of law enforcement methods and procedures exemption (s 37(2)(b)) or the certain operations of agencies exemption (s 47E(d)) of the FOI Act. The Department also contends that certain material comprising the names and telephone numbers of public servants is exempt under the personal privacy exemption (s 47F) of the FOI Act, or irrelevant to the request (s 22(1)(a)(ii)).
13. The applicant subsequently advised the OAIC that it does not seek access to the names and telephone numbers of public servants. I am therefore satisfied that this material can reasonably be regarded as irrelevant to the request, and it is not necessary for me to consider whether it is exempt under s 47F as the Department contends.
14. Based on the information before me, I am satisfied that the material that the Department found exempt under s 47C can appropriately be considered under this provision. It is therefore not necessary for me to consider the Department's alternative exemption contentions under ss 37(2)(b) and 47E(d).
15. Accordingly, the issue to be decided in this IC review is whether the material that the Department maintains is exempt under s 47C of the FOI Act is conditionally exempt, and if so, whether giving the applicant access to a conditionally exempt document at this time would, on balance, be contrary to the public interest.
16. In making my decision, I have had regard to the following:
 - the Department's decision and reasons for decision
 - the document at issue
 - the FOI Act, in particular ss 11A(5) and 47C
 - the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard in performing a function or exercising a power under the FOI Act (FOI Guidelines), in particular paragraphs [6.7] – [6.28] and [6.52] – [6.85], and
 - the parties' submissions.

Deliberative processes exemption (s 47C)

17. The Department maintains that certain material in the document is exempt under s 47C of the FOI Act.
18. As discussed in the FOI Guidelines and previous IC review decisions,⁴ the main requirements of this public interest conditional exemption are that:
 - the document contains or relates to 'deliberative matter' (s 47C(1))

⁴ Generally, see Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982 (FOI Guidelines)* at [6.52] - [6.88]; *William Summers and Department of the Prime Minister and Cabinet (Freedom of information)* [2018] AICmr 9; *Dan Conifer and Department of the Prime Minister and Cabinet (No. 2) (Freedom of information)* [2017] AICmr 117; *Allister McCaffrey and Australian National University (Freedom of information)* [2017] AICmr 77; *'KV' and Indigenous Land Corporation (Freedom of Information)* [2017] AICmr 17; and *John Quinn and Australian Taxation Office* [2016] AICmr 94.

- the document was prepared for a ‘deliberative purpose’ (s 47C(1))
 - the material is not ‘purely factual’ or non-deliberative (s 47C(2)), and
 - it would be ‘contrary to the public interest’ to give access at this time (s 11A(5)).
19. In the Administrative Appeals Tribunal (AAT) decision of *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945 (‘Wood’), Deputy President Forgie explains that the meanings of the words ‘opinion’, ‘advice’ and ‘recommendation’ all involved consideration, followed by the formation of a view either about a certain subject or about a course of action and the subsequent transmission of that view.⁵
20. The FOI Guidelines explain:
- The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one’s course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.⁶
21. In its decision and reasons for decision, the Department said:
- The document in question contains the opinions, advice and recommendations from APRA to the department regarding possible legislative gaps relevant to the factual circumstances of the collapse of Trio Capital Limited (Trio). This material is deliberative material for the purposes of section 47C.
22. I have examined an unedited copy of the document and it is apparent that the material that the Department maintains is exempt under s 47C records deliberative matter in the form of advice, opinions and recommendations provided by APRA to the Department with respect to possible gaps in legislation relevant to the collapse of Trio Capital Limited.
23. Section 47C(2) provides that deliberative matter does not include operational information or purely factual material. From my examination of the document, it is apparent that it does contain some factual material, such as descriptions of legislative provisions. However, the FOI Guidelines explain:
- ‘Purely factual material’ does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.⁷
24. In my view, it is not possible to separate the factual material from the deliberative material in this case because the factual material forms an integral part of the deliberative content and purpose of the document, and is intertwined with the deliberative content.⁸
25. For these reasons, I am satisfied that the material the Department maintains is exempt under s 47C is conditionally exempt under this provision.

⁵ *Wood; Security, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945 [39].

⁶ *FOI Guidelines* [6.58] (footnotes omitted).

⁷ *FOI Guidelines* [6.73] (footnotes omitted).

⁸ *FOI Guidelines* [6.74].

Public interest

26. In finding that documents contain material that is conditionally exempt under s 47C, I am therefore required to consider whether it would be contrary to the public interest to give access to a conditionally exempt document at this time (s 11A(5)).

27. The applicant submits:

... the information requested would benefit over 15 million Australians, many compelled into superannuation and others with investment savings in the Australian financial system, as they could learn to manage their investment risks better. VOFF requested documents showing what ASIC and APRA contribute to safeguard and protect superannuation in the Australian financial market, including the report by APRA alerting Treasury of the gaps in legislation that prevented the questioning of overseas Trio entities. ...

Without recognising the legislation weaknesses that limits ASIC and APRA's powers to protect superannuation in the global market, opens and exposes each and every person in the Australian market to (avoidable) risks. But people cannot avoid what they are not entitled to learn about.

In the Trio fraud, Australia's [sic] financial regulators were powerless to act in international jurisdictions, could not question overseas Trio operators, could not claw back ill gotten gains. It is in the public interest to have transparency concerning issues surrounding investment safety and investment security in a global market. It fits within the FOI Act that the request made by VOFF is in the public interest to reduce potential and possible risks that could lead to the loss of Australian superannuation and investment savings.

28. I am satisfied that the relevant public interest factors favouring disclosure in this case are that disclosure of the material would:

- promote the objects of the FOI Act, and
- inform debate on a matter of public importance by assisting inquiries into possible deficiencies in legislation relating to superannuation regulation.

29. The public interest factors favouring disclosure must be balanced against any public interest factors against disclosure.

30. In its reasons for decision, the Department said:

I have weighed the factors for and against disclosure of this material and, in my view; the factors against disclosure outweigh the factors in favour of disclosure. I therefore consider that disclosure of the material would, on balance, be contrary to the public interest.

The main factor against disclosure is, in my view, the fact that disclosure of the material could prejudice advisory processes carried out within government. It is important that such functions being carried out in a candid and confidential manner. The disclosure of such frank, forthright and confidential advice would, in my view, make the provision of such advice to ministers in the future considerably more difficult. It would, therefore, not be in the interests of good government and, therefore, contrary to the public interest.

31. In relation to whether the inhibition of frankness is a relevant public interest factor against disclosure, the FOI Guidelines explain:

[With consideration to the Administrative Appeals Tribunal case of *Rovere and Secretary, Department of Education and Training* [2015] AATA 462] The Information Commissioner considers that frankness and candour in relation to the s 47C conditional exemption may have some application as one public interest factor against disclosure in combination with other factors, and possibly as the sole factor where the public interest is clearly, heavily weighted against disclosure of a document of a minister, or a document that would affect the effective functioning of government.

Agencies should start with the assumption that public servants are obliged by their position to provide robust and frank advice at all times and that obligation will not be diminished by transparency of government activities.⁹

32. The FOI Guidelines further explain that generally, the circumstances in which frankness and candour claims may be contemplated when considering deliberative material and weighing the public interest will be special and specific.¹⁰

33. The Department submits:

While the department acknowledges that public servants are expected to operate within a framework that encourages open access to information ... the department submits that, in this case, the circumstances are such that disclosure of the information would be contrary to the public interest on the basis that it could reasonably be expected to prejudice advisory processes carried out within government, and in particular those processes between APRA and the department in the context of broader policy discussions.

There is a significant public interest in public servants being able to deliberate fully and effectively on the operation of law, policies and government decisions. In this case, the deliberation between the department and APRA needs to be protected by confidentiality as its disclosure would be likely to have a detrimental impact on the effective operation and supervision of the superannuation sector.

In addition, disclosing the deliberations between APRA and the department would be likely to have a negative impact on the ability or willingness of public servants to engage in the same way in future deliberative exercises, particularly when similarly difficult issues arise. While that is not true of all deliberative processes, the unique nature of the policy and legal issues that arose in this case made it necessary and desirable for the public servants to explore the issue in depth and from a wide range of angles.

The department consulted with APRA during the original decision making process and again for the purposes of this review. On both occasions, APRA has expressed concern with respect to release of the document, for the reasons discussed above. The department and APRA have developed a close working relationship where the provision of advice is regularly sought regarding superannuation legal, administrative and policy issues. Disclosure of the document may cause damage to the productive working relationship established between the two agencies, particularly with respect to advisory processes, as it may inhibit the ability of the department to obtain frank opinions and advice from APRA in the future.

34. The Department also relies on submissions provided by APRA during the course of this IC review. I have had regard to those submissions, including parts of the submissions that describe and discuss the contents of the documents at issue, which the OAIC agreed to receive in confidence.¹¹

35. In its non-confidential submissions, APRA submits:

There have been no changes to the legislative provisions referred to in the relevant document since July 2012. ...

There is general ongoing public debate about reforms needed to the superannuation framework to ensure that it remains fit for purpose as the superannuation industry continues to evolve and expand. Recent proposed reforms have focused on improving the legislative and regulatory framework, including through proposals to provide APRA with the power to issue directions ... These reforms have not to date been implemented, nor do they

⁹ FOI Guidelines [6.82] – [6.83]. See also *Rovere and Secretary, Department of Education and Training* [2015] AATA 462.

¹⁰ FOI Guidelines [6.85].

¹¹ Generally, see *Direction as to certain procedures to be followed in IC reviews* [5.1]-[5.5].

specifically address the gaps discussed in the relevant document. The gaps in the legislation identified in the relevant document still exist today.

... It is a lengthy process to amend the legislation and there is a risk that individuals or entities would exploit the identified gaps in the intervening period.

36. APRA further submits:

... there is significant public interest in APRA being able to take appropriate enforcement action in relation to breaches of the SIS Act [Superannuation Industry (Supervision) Act 1993]. Disclosure of the relevant document creates a heightened risk that APRA would be unable to prove a breach of the legislation due to individuals or entities exploiting the identified gaps and weaknesses in the current legislation. ...

... there is significant public interest in preventing fraud from occurring in the superannuation industry. APRA considers that public confidence in superannuation is essential to the delivery of sound retirement outcomes for all Australians. Disclosure of the relevant document may facilitate the commission of fraud by enabling persons to exploit the identified gaps and weaknesses.

37. Based on my examination of the document, I agree that disclosure of the document could reasonably be expected to prejudice the enforcement of existing legislation by increasing the risk of fraud or unlawful conduct if the information were to become available to individuals seeking to circumvent the relevant legislation.

38. Based on the information before me, I consider that there are two public interest factors against disclosure in this case — disclosure could reasonably be expected to:

- prejudice law enforcement, and
- prejudice an agency's ability to obtain similar information in future, in particular by prejudicing interagency communications in relation to possible gaps in legislation that have been or could be relevant to the enforcement of law.

39. I am satisfied that frankness and candour is a relevant consideration in this case, in combination with my finding that disclosure could reasonably be expected to prejudice law enforcement.

40. I consider that the public interest factors against disclosure outweigh the factors favouring disclosure in this case. In particular, I am satisfied that the public interest in protecting the government's ability to enforce existing legislation relating to superannuation sector outweighs the public interest factors favouring disclosure.

41. Giving access to the material that the Department maintains is exempt under s 47C at this time would, on balance, be contrary to the public interest.

42. As I have found this material exempt under s 47C, it is not necessary for me to consider whether it is also exempt under ss 37(2)(b) and 47E(d) as the Department contends.

Angelene Falk

Australian Information Commissioner

29 August 2018

Review rights

Review by the Administrative Appeals Tribunal

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal (AAT). The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.

Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>.

Accessing your information

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