



Our reference: MR17/00003
Your reference: 450

Mr John Telford
Secretary, Victims of Financial Fraud Incorporated

By email: johnt@1earth.net

Dear Mr Telford

Your application for IC review of an FOI decision by ASIC

I refer to previous correspondence regarding your application for Information Commissioner review (IC review) of the decision of the Australian Securities and Investments Commission (ASIC) of 21 December 2016 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

I am a delegate of the Information Commissioner. I have decided to finalise this review under s 54W(a)(i) of the FOI Act. My reasons are set out below.

Background

On 1 December 2016, you applied to ASIC for access to a copy of Appendix 4 to ASIC's submission to the Parliamentary Joint Committee Inquiry into the collapse of Trio Capital Limited.

On 21 December 2016, ASIC advised you that it had identified one document relevant to your request and decided to refuse access to the document in full. In making its decision, ASIC relied on the contempt of Parliament exemption, on the basis that public disclosure of the document would infringe the privileges of the Parliament of the Commonwealth (s 46(c) of the FOI Act).

On 2 January 2017, you sought IC review of ASIC's decision. In your application for IC review, you made submissions as to the public interest in the release of the information requested and your reasons for seeking access, together with your past attempts to seek the same document under the FOI Act from ASIC and the Hon Kelly O'Dwyer MP.

The Office of the Australian Information Commissioner (OAIC) conducted enquiries with ASIC in processing your IC review application and considered your subsequent submissions in this matter.

On 4 January 2018, an officer of this office, Ms Caitlin Emery, wrote to you advising of her intention to recommend that your application for IC review be declined under s 54W(a)(i) of the FOI Act on the basis that your application for review is lacking in substance.

Ms Emery explained that, based on the information before the OAIC, the document remains confidential and would therefore be exempt under s 46. Further, in undertaking this review, the OAIC is unable to take into account any public interest in release of the document. Ms Emery asked that you provide any reasons for the OAIC to reconsider this view by 18 January 2018.

On 15 January 2018, you provided submissions to the OAIC. In your submissions you queried whether the OAIC could 'contact other members of the committee, remind them that ASIC withheld vital evidence from their enquiry, and ask whether they would consider the release of Appendix 4.' You also asked '[c]an the OAIC grant access to the document if it remains confidential to the applicant and not made public?'

You made additional submissions as to the background to the matter and your reasons for seeking access to the document.

Contempt of Parliament exemption (s 46(c))

Subsection 46(c) of the FOI Act provides:

A document is an exempt document if public disclosure of the document would, apart from this Act and any immunity of the Crown:

...

(c) infringe the privileges of the Parliament of the Commonwealth or of a State or of a House of such a Parliament or of the Legislative Assembly of the Northern Territory.

ASIC's decision states:

Appendix 4 of ASIC's submission to the Parliamentary Joint Committee on Corporations and Financial Services (PJC) Inquiry was provided on a confidential basis. Public disclosure of this document would infringe the privileges of the Parliament of the Commonwealth.

ASIC submits:

ASIC has refused access to Appendix 4 on the basis that it is exempt from release under section 46(c) of the FOI Act. Confidential Appendix 4 is subject to Parliamentary privilege and if ASIC were to release the document it would be in contempt of Parliament. ASIC has no authority to determine that the document be made public.

Victims of Financial Fraud's submissions

In your submissions of 22 February 2017, you stated:

To our knowledge ASIC did not approach to Parliament or the committee members of the PJC into which ASIC submitted Appendix 4 to ask whether ASIC can now release Appendix 4.

It is highly probable that the Parliament and specifically the Senators that chaired the PJC Inquiry in the Collapse of Trio would be agreement to the release of Appendix 4.

In your submissions of 16 May 2017, you said:

VOFF believe the confidential period for Appendix 4 commenced from the time it was submitted to the PJC Inquiry (September 2011) up to when the PJC released its report in May 2012. The purpose of s46(c) should now be exhausted since it is now public knowledge that the Australian Prudential Regulatory Authority (APRA), ASIC and the liquidator PPB Advisory have all closed their investigations and Trio Capital Limited is no longer active.

ASIC referred to the attached transcript of the Parliamentary Joint Committee hearing on 6 September 2011 and submits:

In particular we draw your attention to the direction in the transcript and the taking of certain confidential information in camera.

ASIC also provided the attached letter from the Chair of the Parliamentary Joint Committee, Ms Deborah O'Neill MP, to ASIC's Chairman dated 29 April 2013 confirming the confidential status of the document at issue.

In your submissions of 16 May 2017, you referenced that it would be a breach of parliamentary privilege for a person to publish evidence given to a parliamentary committee before a committee has authorised publication of the evidence (page 3).

In your submissions of 15 January 2018, you submitted:

Deb O'Neill's letter to ASIC should not be regarded as the standing order. Because Deb O'Neill's comments are in line with Mr Shorten's attack against financial advisors, her action may not reflect the consensus of the PJC members. Just days after the PJC inquiry Report was released May 2012, Paul Fletcher for example, in a telephone link-up with VOFF executives, said he knew nothing about the GCSL documents. The OAIC should contact other members of the committee, remind them that ASIC withheld vital evidence from their enquiry, and ask whether they would consider the release of Appendix 4.

I confirm the request that we consult with committee members is outside of the scope of an IC review, which in this case is a merit review of a decision of ASIC refusing to give access to a document in accordance with a request under the FOI Act.

In your latest submissions, you further submit:

ASIC, in their submission to the PJC Inquiry say 'When our inquiries and investigations are complete, we will review the appendix (4) to assess the extent to which it can be made public.' ASIC state on its website, 'ensuring fair, orderly and transparent markets' and also claim, 'We will not agree to keep regulatory outcomes secret. This is important for regulatory transparency and effective deterrence'.

In ASIC's submissions of 14 May 2017, which were provided to you on 3 May 2017, ASIC advised:

We note that in the ASIC public submission, ASIC stated (at page 11) that Appendix 4 is provided to the PJC on a confidential basis and that when ASIC's inquiries and investigations were complete ASIC would review Appendix 4 and consider the extent to which its contents can be made public.

We advise that this statement is misconceived. ASIC has refused access to Appendix 4 on the basis that it is exempt from release under section 46(c) of the FOI Act. Confidential Appendix 4 is subject to Parliamentary privilege and if ASIC were to release the document it would be in contempt of Parliament. ASIC has no authority to determine that the document be made public.

On the basis of the information before me that the document remains confidential, and disclosure has not been authorised by the Parliamentary Joint Committee, it is my view that disclosure would be in contempt of Parliament and therefore Appendix 4 is exempt under s 46.

Victims of Financial Fraud's reasons for seeking access

In your application for IC review, you submitted that '[t]echnically the decision not to release documentation is supported by legislation'. In that letter, and your submissions of 10 January, 22 February and 16 May 2017, and 15 January 2018, however, you raised various matters in support of your application for IC review and the release of the document to you.

These submissions include:

- It is in the public interest, the public has a right to know;
- Applicants' personal interest;
- ASIC must be transparent and allowed to be put under scrutiny;
- The information can be checked for accuracy;
- It is essential to VOFF's argument; and
- VOFF perceive ASIC is suppressing information from the public and the victims.

In your submissions of 15 January 2018, you asked '[c]an the OAIC grant access to the document if it remains confidential to the applicant and not made public?' In response to your query, I confirm that in relation to non-conditional exemptions such as s 46, the applicant's identity or reasons for seeking access cannot be taken into account by the Information Commissioner in an IC review. Further, the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.

The exemption under s 46 falls under Division 2 of Part IV of the FOI Act and is not subject to a public interest test. That means that where a document meets the criteria to establish the exemption (that public disclosure of the document would infringe the privileges of the Parliament of the Commonwealth), it is exempt and the Information Commissioner cannot decide that access should be granted to it under the FOI Act.

As your submissions note, the exemption under s 46 requires a decision maker to consider the effect of disclosure to the public generally, rather than to an individual applicant. This is

because the words of s 46(c) say '[a] document is an exempt document *if public disclosure of the document would... infringe the privileges of the Parliament of the Commonwealth*' (*emphasis added*).

In the Administrative Appeals Tribunal decision of *Prinn and Department of Defence (Freedom of Information)* [2016] AATA 445, Deputy President Forgie discussed the role of a review body in a merit review of an access refusal decision under the FOI Act and found that if an exemption is not subject to the public interest test under s 11A(5) of the FOI Act, the review body is unable to take into consideration the reasons why the information is being requested by an applicant. Deputy President Forgie explained at [38]:

... it matters not at all whether there are sound reasons why information should be disclosed or whether the person seeking access will not reveal it to another in any circumstances. If a document is exempt, I cannot grant access to it under the FOI Act.

Discretion not to conduct an IC review

Section 54W(a)(i) of the FOI Act provides the Information Commissioner with a discretion not to undertake a review, or not to continue to undertake a review, where the review application is lacking in substance.

Based on our enquiries, the document remains confidential and would therefore be exempt under s 46. The arguments raised in your submissions essentially go to issues other than whether the exemption applies to the document in this matter. Rather, they pertain to the public interest in release of the document and your organisation's interest in seeking access to the documents.

As explained above, in undertaking this review, the OAIC is unable to take into account any public interest in release of the document or matters concerning your organisation's interest in release of the document in this matter. On this basis, I have decided that your IC review application is lacking in substance.

Accordingly, I have decided not to continue to undertake the IC review.

Your IC review application is now closed. Your review rights are set out below.

Yours sincerely



Andrew Solomon
Assistant Commissioner
Dispute Resolution

30 January 2018

External review

Judicial review

You can apply to the Federal Court of Australia or the Federal Circuit Court for a review of a decision of the Information Commissioner if you think that a decision by the Information Commissioner not to review or not to continue to undertake review of your IC review application under the *Freedom of Information Act 1982* (the FOI Act) is not legally correct.

You can make this application under the *Administrative Decisions (Judicial Review) Act 1977*.

The Court will not review the merits of your case but it may refer the matter back to the Information Commissioner for further consideration if it finds the decision was wrong in law or the Information Commissioner's powers were not exercised properly.

An application for review must be made to the Court within 28 days of the OAIC sending the decision to you. You may wish to seek legal advice as the process can involve fees and costs. Please contact the Federal Court registry in your state or territory for more information, or visit the Federal Court website at <http://www.fedcourt.gov.au/>.

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>.