



Our reference: MR17/00340
Your reference: VOFF 458

Mr John Telford
By email: johnt@1earth.net

Dear Mr Telford

Your application for Information Commissioner review of a decision of the Australian Securities and Investments Commission

I refer to your request for Information Commissioner review (IC review) of the decision made by the Australian Securities and Investments Commission (ASIC) on 14 June 2017 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 13 March 2017, you applied to ASIC under the FOI Act for access to 'ASIC Bar Code S02097418 document (email) [1 page?]' dated 18 January 2017.

On 3 May 2017, ASIC made a decision on your request.

On 9 May 2017, you sought internal review of the decision.

On 14 June 2017, in its internal review decision (the decision under review), ASIC identified one document within the scope of your request and refused access to the document in full under ss 33(a)(iii) (damage to international relations exemption) and 33(b) (information or matter communicated in confidence by or on behalf of a foreign government exemption) of the FOI Act.

On 16 June 2017, you sought IC review.

On 14 February 2018, the review officer in this matter, 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 Office of the Australian Information Commissioner (OAIC), the document you requested would be exempt under s 33(b) of the FOI Act. Ms Emery also provided submissions by ASIC in support of its decision, and responded to some of the issues raised in your submissions of 16 June 2017. Ms Emery

asked that you provide any reasons for the OAIC to reconsider this view by 28 February 2018. No response has been received.

Section 33(b) of the FOI Act (information or matter communicated in confidence by or on behalf of a foreign government)

A document will be exempt under s 33(b) of the FOI Act if disclosure would divulge information or matters communicated in confidence by or on behalf of a foreign government to the Commonwealth or a Commonwealth agency.

The FOI Guidelines explain at [5.42]:

The test is whether information is communicated in confidence between the communicator and the agency to which the communication is made — it is not a matter of determining whether the information is of itself confidential in nature. Information is communicated in confidence by or on behalf of another government or authority, if it was communicated and received under an express or implied understanding that the communication would be kept confidential. Whether the information is, in fact, confidential in character and whether it was communicated in circumstances importing an obligation of confidence are relevant considerations. They may assist the decision maker to determine whether, on the balance of probabilities, information was communicated in confidence.

The Department's internal review decision states:

In relation to section 33 of the FOI Act, the document was provided in confidence to ASIC by a foreign government agency. For that reason I find that the terms of section 33 are enlivened and the document is exempt from production. More specifically, I find that providing the document in response to the FOI Request notwithstanding that it was provided in confidence would:

- for the purposes of section 33(a)(i) *"cause damage to .. the international relations of the Commonwealth"* by breaching the confidence of a foreign government agency; and
- for the purposes of section 33(b) *"divulge .. information communicated in confidence .. by .. an authority of a foreign government"*.

I advise that I have made this finding following a process of consultation with a representative of the foreign government concerned.

In this matter, your submissions include:

The email was sent between the staff operating the Trio Capital Limited scheme. The email was not between the Australian government with another country. There is no indication that the email is top secret and highly confidential. There is no indication that the email is about sensitive governmental information or that the release of the email will endanger life or endanger the operation or livelihood of a company. The document we seek is an email. The document we seek is relevant because its content makes the email.

I have viewed the document and ASIC's submissions. Given the document was provided in confidence to ASIC by a foreign government agency, it is my view that the document would be exempt under s 33(b).

Section 33(a)(iii) of the FOI Act (damage to international relations exemption)

I note that in your submissions of 16 June 2017, you submitted that s 33(a)(iii) should not apply in this case.

The exemption under s 33(b) is separate to the exemption under s 33(a)(iii). The exemption under s 33(a)(iii) requires that release of a document would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth.

ASIC also decided that the document was exempt under s 33(a)(iii). I have not discussed that exemption in this letter because if the document is exempt under s 33(b), the practical effect is that it would not be released to you.

Scope of this IC review

In your submissions, you also requested that ASIC make further enquiries as to whether the document could be released to you. This request is outside the scope of an IC review.

Where a document meets the criteria to establish the exemption under s 33(b) (that disclosure would divulge information or matters communicated in confidence by or on behalf of a foreign government to the Commonwealth or a Commonwealth agency), it is exempt and the Information Commissioner cannot decide that access should be granted to it under the FOI Act.

Decision 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.

I am a delegate of the Information Commissioner.

Based on our enquiries, the document was provided in confidence to ASIC by a foreign government agency, and would therefore be exempt under s 33(b).

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.

If you would like to discuss this matter, please contact Ms Emery on (02) 8231 4225 or email caitlin.emery@oaic.gov.au. Please quote reference number **MR17/00340**.

Yours sincerely



Rocelle Ago
Assistant Director, Freedom of Information Dispute Resolution
1 March 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>.