

FOI CASE STUDIES



► [Services Australia and 'WE' \(Freedom of information\) \[2020\] AICmr 62 \(14 December 2020\)](#)

VEXATIOUS APPLICANT DECLARATION (s 89K)

The Acting Australian Information Commissioner declared 'WE' a vexatious applicant under s 89K of the *Freedom of Information Act 1982* (FOI Act) on the basis that they repeatedly engaged in access actions that involved an abuse of process. The declaration prohibits 'WE' from making requests for access to documents for a period of 12 months to either Services Australia or the Office of the Australian Information Commissioner, or from seeking internal review during that time.

During an approximately two year period, 'WE' made 105 'access actions' to Services Australia. Significantly, 40 access requests were made after Services Australia notified 'WE' that it intended to apply for a declaration if 'WE' did not moderate their behavior and 11 access requests were made after the application for a vexatious applicant declaration was made to the Information Commissioner.

This is the only second vexatious applicant declaration to completely restrain an applicant from making access requests under the FOI Act for a specified period (see *Services Australia and 'RS' (Freedom of information) [2020] AICmr 6*). The decision is a reminder that the Information Commissioner, in finding that the discretion to make a declaration is enlivened by s 89L(1) of the FOI Act, may make a s 89K declaration in terms that are not specifically sought by the agency. In this case, Services Australia sought a declaration that would permit 'WE' to continue to make access applications, provided they obtained the permission of the Information Commissioner to do so. 'WE' had also agreed to the declaration being made in those terms, provided that Services Australia continued to process outstanding requests.

Significantly, the declaration will permit Services Australia not to process access requests and applications for internal review made prior to the declaration.

The Acting Commissioner found that the relevant abuse of process was that the access actions had unreasonably interfered with the operations of an agency (s 89L(4)(b)), including that Services Australia had spent over 418 hours processing the access requests. The Acting Commissioner also took into account that 'WE' had generally sought information falling into four categories and had refused the requests to be dealt with under administrative access. The Acting Commissioner declined to consider whether the access actions also involved harassing or intimidating an individual or an employee of an agency as alleged by Services Australia (s 89L(4)(a)) [62].

► [**Paul Farrell and Department of Defence \(Freedom of Information\) \[2021\] AICmr 3 \(3 February 2021\)**](#)

MANAGEMENT OF PERSONNEL (s 47E(c)) – CERTAIN OPERATIONS OF AGENCIES (s 47E(d)) – PERSONAL PRIVACY (s 47F) – PUBLIC INTEREST TEST (s 11A(5))

The applicant requested access to a report detailing the outcomes of Court Martial and Defence Force Magistrate proceedings (military tribunals) between September 2014 and 18 September 2017.

Disclosure would not have a substantial adverse effect on management of personnel

The Commissioner rejected the department's argument that publication or disclosure of the document would have a substantial adverse effect on discipline, particularly noting that since 31 March 2019, the names of accused in Service Tribunals were published.

The Commissioner found that given the nature of the document and the reasons that the document exists, being the outcome of military tribunals where allegations of misconduct are tested, she was not satisfied that the department established that the names in the document should be exempt under s 47E(c) as disclosure would not have a substantial adverse effect on the department's ability to manage its personnel.

Disclosure would be an unreasonable disclosure of personal information

The Commissioner was satisfied that in circumstances where an accused has not had their matter heard before the Defence Force Discipline Appeal Tribunal, where it was the practice of the department to de-identify outcomes, or where no decision has been published, that it would be an unreasonable to disclose this personal information in response to an FOI request.

The Commissioner was also satisfied that giving access to the names of individuals who have not had their matters heard and decisions published by the Defence Force Discipline Appeal Tribunal, would on balance, be contrary to the public interest.

► [**Dreyfus and Attorney-General \(Commonwealth of Australia\) \(Freedom of information\) \[2021\] AATA 249 \(17 February 2021\)**](#)

LEGAL PROFESSIONAL PRIVILEGE – CLAIM OF IMPLIED WAIVER – WHETHER PRIVILEGE WAS IMPLIEDLY WAIVED BY CONDUCT INCONSISTENT WITH THE MAINTENANCE OF LEGAL PROFESSIONAL PRIVILEGE

The applicant requested access to the legal advice provided to the Attorney-General about the operation of the 'Medivac legislation'.

The only issue before the Tribunal was whether the Attorney-General waived privilege in relation to the legal advice and associated documents. Mr Dreyfus argued the Attorney-General waived privilege when he disclosed the substance of the advice in a media release and a series of media interviews. The Attorney-General argued that references to the advice that were made during media interviews were only in relation to two propositions arising from the advice.

Purpose of disclosing advice is highly relevant in discerning whether privilege waived

The Tribunal agreed with the Attorney-General that disclosure was limited to the two propositions. However, it accepted Mr Dreyfus' contention that the disclosure amounted to the disclosure of a conclusion of legal advice and a reason underpinning that conclusion. The Tribunal noted that disclosure of the gist or substance of legal advice may or may not effect a waiver of privilege depending on whether or not the requisite inconsistency of conduct is established.

The Tribunal held that a highly relevant factor in discerning any inconsistency of the conduct with the maintenance of privilege was the purpose of the limited disclosure in the given context. The Tribunal considered that in this particular context, a limited disclosure of legal advice was made partially for the purpose of gaining a political advantage against a political opponent. The focus of the media release was not only to convince the public of a drafting error in the legislation, but also to attribute that error to the Government's political opponents.

The Tribunal found that the limited disclosure for this partial purpose was inconsistent with the maintenance of legal professional privilege and found that the Attorney-General, by his conduct, impliedly waived privilege over the parts of the first advice that addressed the two propositions disclosed in the press release, attached summary of the advice, and his public comments.

The Tribunal held that the Attorney-General's statements that he did not intend to waive privilege were insufficient, in the context of the conduct as a whole, to protect against an implied waiver.

Privilege only waived over parts of the advice

The Tribunal did not consider that the extent of the Attorney-General's disclosure and his purpose in doing so were inconsistent to the extent that waiver had occurred over the entirety of the advice. There had been no relevant disclosure of the other parts of the first advice, which addressed separate and discrete issues.

In relation to the second advice, which was received after the disclosures, the Tribunal noted that even though there was overlap with the first advice, the two documents were separate advices that addressed distinct issues. The Tribunal did not consider that privilege could have been impliedly waived by the Attorney-General's conduct that took place before the documents had been received by him.

► **[‘WN’ and Inspector General of Taxation \(Freedom of information\) \[2020\] AICmr 71 \(22 December 2020\)](#)**

SUBSTANTIAL ADVERSE EFFECT ON THE PROPER AND EFFICIENT CONDUCT OF AGENCY OPERATIONS (s 47E(d))

The applicant sought access to documents listing the capabilities and contact details (direct phone numbers and/or email addresses) of the Inspector General of Taxation (IGT) officers.

Release of unrecorded direct telephone numbers would have a substantial adverse effect on the proper and efficient conduct of the operations of the agency

The Commissioner found that the IGT employees’ direct telephone numbers and work mobile telephone numbers were conditionally exempt under s 47E(d). Unsolicited calls to those numbers would fall outside the IGT’s service platform and be unrecorded, undermining accountability, transparency, quality assurance and employee support.

Public interest did not favour disclosure

The Commissioner was also satisfied that disclosure of those numbers would be contrary to the public interest. She took into account the applicant’s submissions that without this contact information he had difficulty making complaints. She gave only limited weight to the IGT’s submission that disclosure could prejudice its employees’ right to privacy and their health and safety, as that concern was not particularised to individual employees and there was no evidence that the applicant was likely to behave unreasonably. However, she accepted that disclosure could reasonably be expected to prejudice the IGT’s performance of its functions, including complaint handling.

Other particulars of employees did not fall within s 47E(d)

The Commissioner found that the other information in the directory, including APS classifications and position titles of staff, was not conditionally exempt under s 47E(d). With respect to the direct complaints lines, the Commissioner considered it significant that IGT employees routinely disclosed those numbers to complainants.

► **[‘WM’ and Department of Home Affairs \(Freedom of information\) \[2020\] AICmr 70 \(22 December 2020\)](#)**

PREJUDICE LAWFUL METHODS OR PROCEDURES (s 37(2)(b)) – SUBSTANTIAL ADVERSE EFFECT ON THE PROPER AND EFFICIENT CONDUCT OF THE OPERATIONS OF AN AGENCY (s 47E(d))

The applicant made a request to the Department for access to documents relating to the Department’s consideration, assessment or finding in relation to the applicant’s identity, nationality or citizenship. The Department exempted the Identity Integrity Assessment form and Identity Integrity Assessment report under ss 37(2)(b), 47C and 47E(d).

Details of methods and procedures for conducting forensic document examination would prejudice lawful methods or procedures for identity verification investigation (s 37(2)(b))

The Acting Commissioner had regard to previous IC review decisions dealing with a document examination report and document examiner investigation. Having regard to the contested material and the Department’s evidence, she was satisfied that the

disclosure of the relevant material would reveal lawful methods and procedures used by the Department in conducting forensic document examination and investigating the identity of individuals that is not generally known to the public, and that disclosure would prejudice the effectiveness of those methods and procedures. She affirmed the decision that the document was exempt under s 37(2)(b) of the FOI Act.

Remaining material would have a substantial, adverse effect on Department's identity investigations operations (s 47E(d))

The Acting Commissioner agreed with the Department that disclosing the processes and measures to make identity determinations could have the effect of revealing various aspects of the Department's identity investigations and thereby have a substantial and adverse effect on the efficient operations of the Department when conducting similar investigative actions in the future.

Public interest is against disclosure

In finding that disclosure would be contrary to the public interest, the Acting Commissioner found that disclosure could reasonably be expected to prejudice the ability of the Department to maintain and enforce the integrity of Australia's visa and citizenship processes by revealing covert operating procedures, in the context of a broader national migration framework.

As she was satisfied that the remaining contested material was exempt under s 47E(d), she did not consider the application of s 47C of the FOI Act.

► 'WD' and Department of the Prime Minister and Cabinet (Freedom of information) [2020] AICmr 61 (14 December 2020)

DELIBERATIVE MATERIAL (s 47C) – PUBLIC INTEREST TEST (s 11A(5))

The applicant requested access to the redacted content in a Department of Prime Minister and Cabinet (Department) brief to the Parliamentary Secretary to the Prime Minister regarding the *Humanitarian Overseas Medal (Iraq) Declaration 2004* dated 26 September 2013. The applicant had obtained the redacted brief under the FOI Act as a result of an earlier request.

Deliberative material

The Acting Commissioner examined the document and found that it was created for the dominant purpose of providing advice and recommendations from the Assistant Secretary Honours, Symbols and Territories, Mr Peter Rush, to the then Parliamentary Secretary to the Prime Minister, The Hon. Josh Frydenberg in relation to the award of the Humanitarian Overseas Service Medal to a commercial contractor. The Acting Commissioner was satisfied that the advice and recommendations were deliberative matter for the purposes of s 47C.

Disclosure was not against the public interest

The Acting Commissioner found disclosure would not be contrary to the public interest noting that the Department had failed to particularise its contentions that disclosure would inhibit frankness and candour and there were no special or specific circumstances on the information before her such that a frankness and candour claim should weigh heavily against disclosure.

► **Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of information) [2020] AATA 4964 (9 December 2020)**

DAMAGE TO DEFENCE OF THE COMMONWEALTH (s 33(a)(ii)); DELIBERATIVE PROCESSES (s 47C); EFFECT ON FINANCIAL INTERESTS OF THE COMMONWEALTH (s 47D); EFFECT ON LAWFUL BUSINESS, COMMERCIAL OR FINANCIAL AFFAIRS (s 47G(1)(a))

Senator Patrick applied to the Department of the Prime Minister and Cabinet (Department) for access to an audit report completed by the Auditor-General on 6 September 2018 with respect to the acquisition by the Department of Defence from Thales Australia Ltd of the fleet of vehicles described as ‘protected mobility vehicles – light’ and known as the Hawkei.

Damage to defence of the Commonwealth: s 33(a)(ii)

The Department contended that disclosure of the exempt parts of the report (Disputed Material) would harm the prospects of Thales and the Australian Army exporting the Hawkei, which would have a negative flow on consequence for the sustainment of the capability of the Hawkei for use by the Australian Army.

The Deputy President took the view that the Disputed Material effectively restates what is contained in publicly available parts of the report, and that some information in the Disputed Material had been sourced from the public domain. On that basis, the Deputy President was not satisfied that the Disputed Material would, or could reasonably be expected to, cause damage to the export prospects of the Hawkei.

Deliberative processes: s 47C

The Deputy President found the report did not involve a deliberative process of the Auditor-General. He found that the Auditor-General’s act of assessing the conduct of the Department of Defence with respect to the relevant procurement project did not involve a weighing up or evaluation of competing arguments. Nor did it involve the exercise of a judgment in developing and making a selection from different options. Rather, the report was prepared for the purposes of the Auditor-General performing the function of conducting a performance audit and preparing an audit report. The Deputy President’s characterisation of the report and the Auditor-General’s function led him to conclude that s 47C does not apply. The findings on s 47C are particular to the circumstances of this case and take a narrow view of the scope of the ‘deliberative processes’ exemption.

► **Plowman and Australian Securities and Investments Commission (Freedom of information) [2020] AATA 4729 (24 November 2020)**

MANAGEMENT OR ASSESSMENT OF PERSONNEL (s 47E(c)); PERSONAL PRIVACY (s 47F)

Ms Plowman requested documents related to a workplace complaint made against her.

Reasonableness of searches

Hard copy searches were conducted by ASIC; however, no electronic searches were conducted of ASIC’s files. The ASIC employee responsible for processing the request did not consider it necessary because she did not reasonably expect any electronic documents to exist in the particular circumstance of the documents relevant to the request. The Deputy President was satisfied in these circumstances that ‘reasonable efforts were made’ to search for documents.

Management or assessment of personnel: 47E(c)

ASIC contended that the exempt material contained personal information and opinions of ASIC employees related to workplace issues and if it were released, employee engagement and cooperation could decrease and there was a risk that employees would not feel safe to raise concerns confidentially and have workplace issues addressed. Additionally, ASIC contended that because no investigation was undertaken and no adverse findings were made that there was no need to provide particulars of the complaints to the applicant.

The Deputy President considered that had ASIC taken the view that the complaint deserved to be investigated, the applicant would have been informed of the details and accorded procedural fairness, but that because no investigation was undertaken, it was not necessary to do so. He accepted ASIC's contention that disclosure of documents going to complaints raised with management would tend to discourage employees from raising matters with management.

Public interest test

The Deputy President commented that the public interest question did not relate to whether Ms Plowman was afforded procedural fairness; rather, it related to whether it was in the public interest to disclose the documents which were conditionally exempt. The Deputy President accepted the evidence of the ASIC witness as to the damage to the public interest.
