



Besser and Department of Infrastructure and Transport [2013] AICmr 19 (6 March 2013)

Decision and reasons for decision of
Acting Freedom of Information Commissioner, Toni Pirani

Applicant: Linton Besser

Respondent: Department of Infrastructure and Transport

Decision date: 6 March 2013

Application number: MR11/00135

Catchwords: Freedom of information — Request for access to documents — Whether documents contain deliberative matter — Certain operations of agencies — Whether disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency — Whether documents conditionally exempt from release — (CTH) *Freedom of Information Act 1982* ss 11A(5), 22, 47C and 47E

Contents

Summary	2
Background	2
Decision under review	3
Deliberative processes exemption (s 47C).....	3
Findings	5
Certain operations of agencies exemption (s 47E)	5
Findings	8
The public interest test (s 11A(5))	8
Findings	9
Decision.....	9

Summary

1. I set aside the decision of the Department of Infrastructure and Transport (the **Department**) of 23 May 2011 and substitute my decision, under ss 11A(5), 22 and 47E of the *Freedom of Information Act 1982* (the **FOI Act**), granting access to the documents sought, modified by deletions.

Background

2. On 1 November 2010, Mr Besser, a journalist with *The Sydney Morning Herald*, applied to the Department for access to 12 internal audit reports for the financial years 2007–08, 2008–09 and 2009–10, specifically:
 - Airport Curfew Dispensation
 - Review of Corporate Credit Cards
 - FMA Compliance – Procurement
 - Maritime and Land Transport – Vehicle Imports Review
 - Review of Better Regions
 - Review of Cash Withdrawals from Corporate Credit Cards
 - Internal Audit of Grants Administration
 - Review of Nation Building – Economic Stimulus Plan Programs
 - Usage of Credit Cards
 - ‘Lessons Learnt’ review – Project Management Reporting
 - National Bike Paths Projects
 - Collection of Public Monies on Behalf of Australian Maritime Safety Authority.
3. Due to machinery of Government changes, two of the internal audit reports requested by Mr Besser had become the responsibility of, and were formally transferred to, the Department of Regional Australia, Regional Development and Local Government.¹ The Department considered the remaining 10 audit reports when making its decision on the applicant’s request.
4. On 17 March 2011, the Freedom of Information Commissioner set aside the Department’s decision dated 23 November 2010 and substituted his decision to reduce the charge imposed by the Department by 50 per cent.²
5. On 23 May 2011, the Department advised that the documents requested by the applicant were exempt documents under ss 47C and 47E of the FOI Act. In its reasons for decision the Department stated that ‘the exempt material contains information which could be expected to prejudice the effectiveness of

¹ The ‘Review of Better Regions’ and ‘National Bike Paths Projects’ audit reports.

² See www.oaic.gov.au/publications/decisions/2011-aicmr2.html.

future audits conducted by the Department. To this end, the internal audit documents are internal working documents which contain material which would disclose the deliberative processes of the Department’.

6. The Department provided the applicant with partial access to the 10 audit reports. In each case, the applicant was given access to the Executive Summary of the audit report, including the background, scope of the audit, objective, summary of results and management’s response. The Department exempted the remainder of the reports, including testing results and detailed findings and analyses.
7. By letter dated 31 May 2011, the applicant sought IC review of this decision under s 54L of the FOI Act.

Decision under review

8. The decision under review is the decision of the Department on 23 May 2011 to refuse the applicant full access to the documents he requested.
9. In correspondence with the Office of the Australian Information Commissioner, the applicant agreed that the names of Departmental employees could be redacted from the reports.

Deliberative processes exemption (s 47C)

10. The Department has claimed that the documents that are the subject of this IC review contain material that relate to its deliberative processes.
11. Section 47C of the FOI Act provides:

47C Public interest conditional exemptions—deliberative processes

General rules

- (1) A document is conditionally exempt if its disclosure under this Act would disclose matter (**deliberative matter**) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:
 - (a) an agency; or
 - (b) a Minister; or
 - (c) the Government of the Commonwealth; or
 - (d) the Government of Norfolk Island.
12. The Australian Information Commissioner has issued Guidelines under s 93A to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. As the Guidelines explain:

... 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.³

13. The Guidelines further explain that the decision or conclusion reached at the end of a deliberative process is not deliberative matter for the purposes of s 47C.⁴
14. The Department stated in its decision that the ‘internal audit reports contain opinion, advice and recommendation from the Department’s independent internal audit providers. The internal audits necessarily relate to the deliberative processes of the Department’.
15. I have examined an unedited copy of each of the 10 internal audit reports. Nine of the 10 reports specifically note that a draft report was prepared, and a final later prepared. Many of the reports also include a ‘management response’ or ‘management comment’ section in the Executive Summary released to Mr Besser. Most of the reports have been signed off by a Partner of the independent auditor, and an Executive Director, Chief Financial Officer, or Chief Operating Officer of the Department. In my view, these factors are clear indicators that the documents are final reports, and, in this respect, not deliberative in nature.
16. However, in its reasons for decision, the Department also contended that the audit reports were deliberative because their disclosure may affect the effectiveness of future audits. The Department’s reasoning seems to be that the deliberations, findings and recommendations of finalised audit reports are part of an ongoing system of reviewing and assessing its internal processes and practices and, in this respect, are deliberative.
17. Internal audits identify incidences of non-compliance and make recommendations about where improvements can be made regarding statutory compliance, administration and service delivery. The outcomes of one audit will provide a basis for assessing an agency’s processes and practices in future audits, and in this sense are part of an ongoing process of review and improvement.
18. However, whilst internal audits may be part of an ongoing process of assessing compliance within Australian Government agencies, each individual audit report is itself final and reflects the state of an agency’s practices and processes at a particular point in time. In this sense, they are final and not deliberative.

³ *Guidelines*, [6.62], quoting *Re Waterford and Department of the Treasury (No 2)* [1984] AATA 67, [58].

⁴ *Guidelines*, [6.68]. See also *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19; *Briggs and the Department of the Treasury (No. 3)* [2012] AICmr 22.

19. These standards of compliance and service delivery may change over time (and it is reasonable to expect that an agency's processes will change as a result of an audit), but I do not think that this means that a finalised audit report may never be disclosed because it is part of a broader and ongoing audit environment within the Australian Government.
20. I do not consider internal audit reports, once finalised, to be deliberative.

Findings

21. The 10 internal audit reports are not conditionally exempt under s 47C.

Certain operations of agencies exemption (s 47E)

22. In its decision, the Department claimed that the documents subject to this IC review contain information, the disclosure of which would, or could reasonably be expected to, prejudice or have a substantial adverse effect on its operations. In particular, the Department relied on ss 47E(a), (b) and (d).
23. Section 47E of the FOI Act relevantly provides:

47E Public interest conditional exemptions—certain operations of agencies

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

- (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;
- (b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;

...

- (c) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

24. The Department made submissions to the OAIC noting that 'the integrity of the audit process would be affected because the key features of the investigation and analysis tasks undertaken as part of the audit process would be disclosed. If the methodology used by the auditors to identify areas for investigation and analysis were to become widely known I believe that it could be possible for practices to be created so as to prevent effective future analysis and detection through audit processes.'
25. The Guidelines provide:

In the context of this exemption, a prejudicial effect could be regarded as one which would cause a bias or change to the expected results leading to detrimental or disadvantageous outcomes. The expected change does not need to have an impact that is 'substantial and adverse', which is a stricter test.⁵

⁵ *Guidelines*, [6.91].

26. However, the Department also noted that ‘many of the documents are out of date’ and ‘it would not be in the public interest to disclose information which resulted from operations performed under superseded and obsolete settings’.
27. In light of this, it is difficult for the Department to also claim that disclosure of the documents could reasonably be expected to prejudice the methods for the conduct of future audits where, as claimed, their ‘systems have changed’.
28. However, I do consider the disclosure of the sampling methodology used in many of the reports would, or could reasonably be expected to, prejudice the effectiveness of sampling methods used by the Department when undertaking future internal audit by disclosing information that is not already well known.
29. In his application for IC review, the applicant noted that there may be procedural sensitivities in reports such as the credit card audit report. However, the applicant further noted that such analysis is a ‘logical auditing exercise, does not use secretive methods, and can readily be expected to be employed by any Commonwealth agency, and indeed any private commercial enterprise, to ensure there is limited leakage of funds’.
30. Many of the reports disclose the sampling methodology in both the Executive Summary (which has already been released to the applicant) and the body of the report. Where this is the case, I do not think the disclosure of this information again in the body of the report would, or could reasonably be expected to, prejudice the effectiveness of sampling methods used by the Department in future audits. I am not satisfied that these documents are conditionally exempt under s 47E(a).
31. However, where this information has not been disclosed in the Executive Summary or there is additional detail regarding the sampling methodology in the body of the report, I consider the disclosure of this information could reasonably be expected to prejudice the undertaking of future audits. As the Department argued, where not already known, the disclosure of this information may provide individuals with sufficient information to enable them to act in a manner so as to circumvent scrutiny in future audits.
32. I am satisfied that the following information about sampling methodologies, not already disclosed to the applicant, could reasonably be expected to prejudice the effectiveness of future audits undertaken by the Department and is conditionally exempt under s 47E(a):
 - *Usage of Credit Cards* (Part 3 –Other Matters for Audit Committee
Attention: dot points on pages 9–10)
 - *Review of Cash Withdrawals from Corporate Credit Cards* (Sections A.1 –
Audit Sample and A.4 – Scope and Limitations)
 - *Review of Corporate Credit Cards* (Part 2.7 – review of compliance levels:
dot points on pages 14–15).

33. In relation to the conditional exemption under s 47E(b) which is also claimed by the Department, I disagree that disclosure of the internal audit reports would 'prejudice the attainment of the objects of particular tests, examinations or audits'.
34. The Department noted in its decision that 'there is a risk that those employees or third parties who contribute directly to the data used to form the contents of the report, may use knowledge of specific testing methods to manipulate future outcomes. If this were to occur, it would prejudice both the effectiveness and the attainment of the objects of these audits'.
35. For the same reasons outlined above at [31], those sections of the audit reports that I found were conditionally exempt under s 47E(a) are also conditionally exempt under s 47E(b). I am satisfied that the disclosure of this information could reasonably be expected to prejudice the attainment of the object of an internal audit if individuals were able to use information about sampling methodologies to influence the outcomes of future audits, including by avoiding scrutiny during an audit.
36. However, I do not consider that the Department has provided any reasons demonstrating how this would occur in relation to the remainder of the audit reports. In my view, the information contained in the unedited versions of the reports cannot reasonably be expected to prejudice the attainment of the objects of particular audits to be conducted, particularly given the information in the edited versions already provided to Mr Besser.
37. The Department also relied on s 47E(d) in its decision on the basis that 'line areas being investigated in audits would not be as candid and forthright in the provision of information to the auditors'.
38. The Guidelines provide that:

[t]he predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its expected activities in an expected manner. Where disclosure of the documents reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the public interest factors of accountability and transparency are further weighted towards disclosure.⁶
39. As the applicant noted, the Department should not be dependent on the good will of its staff when undertaking audits. In fact, I would consider it an obligation of APS employees to assist their employer in relation to audits being conducted into the agencies activities in accordance with the APS Values and Code of Conduct.
40. I am not satisfied that it would, or could, reasonably be expected that, given the release of the executive summaries, the disclosure of the remainder of the reports would result in the outcome claimed by the Department.

⁶ *Guidelines*, [6.111].

41. In my view, the disclosure of the documents the subject of this IC review cannot reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Department.

Findings

42. The following parts of the listed audit reports are conditionally exempt under s 47E(a) and (b) and if exempt, edited copies of these reports could be provided to the applicant under s 22:
- *Usage of Credit Cards* (Part 3 –Other Matters for Audit Committee Attention: dot points on pages 9–10)
 - *Review of Cash Withdrawals from Corporate Credit Cards* (Sections A.1 – Audit Sample and A.4 – Scope and Limitations)
 - *Review of Corporate Credit Cards* (Part 2.7 – review of compliance levels: dot points on pages 14–15).
43. The remaining parts of the audit reports the subject of this IC review are not conditionally exempt under s 47E.

The public interest test (s 11A(5))

44. I have found that parts of 3 audit reports are conditionally exempt under s 47E(a) and (b) of the FOI Act. Section 11A(5) provides that, if a document is conditionally exempt, it must be disclosed ‘unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest’.
45. Section 11B(3) of the FOI Act lists factors that favour access when applying the public interest test. Three of those factors are applicable to this IC review: promoting the objects of the FOI Act, informing debate on a matter of public importance, and promoting effective oversight of public expenditure.
46. In particular, as noted in the earlier decision of *Besser and Department of Infrastructure and Transport* [2011] AICmr 2,⁷ some of the documents contain information about whether the Department is using Commonwealth resources consistently with its obligations under the *Financial Management and Accountability Act 1997* (the FMA Act). Disclosure would promote accountability, transparency and public oversight in relation to the Department’s use of Commonwealth resources and compliance with its statutory obligations.
47. The Guidelines include a non-exhaustive list of further factors that favour access. None of those factors is applicable to this IC review.⁸

⁷ This decision concerned charges for access to the audit reports

⁸ *Guidelines*, [6.25].

48. The Guidelines also include a non-exhaustive list of factors against disclosure.⁹ One factor is relevant to this IC review: disclosure of the information could reasonably be expected to prejudice the effectiveness of testing or auditing procedures.
49. For the reasons outlined above at [31] and [35], I consider that the disclosure of the information about sampling methodologies could reasonably be expected to prejudice the effectiveness of future audits. In balancing these factors — for and against disclosure — I give the greatest weight in this IC review to the factor against disclosure.
50. I am satisfied that the disclosure of the remainder of the audit reports satisfies the public interest in providing accountability and transparency in relation to the Department's use of Commonwealth resources and compliance with its statutory obligations, without prejudicing the effectiveness of future audits by revealing details about the sampling methodologies used.

Findings

51. Giving the applicant access to the parts of the three documents would, on balance, be contrary to the public interest.

Decision

52. Under s 55K of the FOI Act, I set aside the Department's decision of 23 May 2011 and decide, in substitution for that decision, to grant access to the documents sought, edited under s 22 to remove the names of Departmental officers (as was agreed by the applicant) and the following exempt material:
 - *Usage of Credit Cards* (Part 3 –Other Matters for Audit Committee Attention: dot points on pages 9–10) (s 47E(a) and (b))
 - *Review of Cash Withdrawals from Corporate Credit Cards* (Sections A.1 – Audit Sample and A.4 – Scope and Limitations) (s 47E(a) and (b)), and
 - *Review of Corporate Credit Cards* (Part 2.7 – review of compliance levels: dot points on pages 14–15) (s 47E(a) and (b)).

Toni Pirani
Acting Freedom of Information Commissioner
6 March 2013

⁹ *Guidelines*, [6.29].

Review rights

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. 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. The current application fee is \$816, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.