



# ***Thomson and Australian Federal Police*** **[2013] AICmr 83 (22 November 2013)**

Decision and reasons for decision of  
Privacy Commissioner, Timothy Pilgrim

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**Applicant:** Brendan Thomson

**Respondent:** Australian Federal Police

**Decision date:** 22 November 2013

**Application number:** MR12/00051

**Catchwords:** Freedom of Information — Legal professional privilege — Whether documents subject to legal professional privilege — Whether documents contain personal information— Whether disclosure of personal information would be unreasonable — Whether disclosure would be contrary to public interest (CTH) — Freedom of *Information Act 1982* ss 11A(5), 22, 42, 47F

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## Summary

1. I set aside the access refusal decision of the Australian Federal Police (the **AFP**) of 9 February 2012 (as varied) and substitute my decision, under ss 11A(5) and 22 of the *Freedom of Information Act 1982* (the **FOI Act**), refusing access to some of the documents sought and granting access to others, some modified by deletions.

## Background

2. On 12 December 2011, Mr Brendan Thomson, an employee of the AFP, applied to the Commonwealth Ombudsman for access to all 'documentation, notes [and] emails relating to the investigation conducted' into two complaints made by the applicant to the Ombudsman about the AFP.
3. On 19 January 2012, the Ombudsman's office advised that it had identified documents within the scope of Mr Thomson's request that had been received from the AFP and that it intended to transfer that part of the applicant's request to the AFP for processing.
4. On 1 February 2012, the AFP accepted the transfer of Mr Thomson's request concerning those documents. The documents relate to an AFP investigation into whether Mr Thomson had breached the *Australian Federal Police Act 1979* (**AFP Act**).
5. On 9 February 2012, the AFP wrote to Mr Thomson providing a schedule of 7 documents (comprising 20 pages) that it said fell within the scope of his request. The AFP decided to provide Mr Thomson with edited copies of the seven documents. In making its decision, the Department relied upon exemptions in ss 42 (legal professional privilege) and 47F (personal privacy). It also edited some documents (under s 22) to remove information it considered irrelevant.
6. On 10 February 2012, Mr Thomson sought IC review of this decision under s 54L of the FOI Act.
7. On 3 April 2013, the AFP varied its decision under s 55G of the FOI Act and released further parts of two documents to Mr Thomson.

## Variation of access refusal decision (s 55G)

8. Section 55G(1) of the FOI Act states, in part, that an agency may vary (or set aside and substitute) an access refusal decision (the original decision) in relation to a request at any time during an IC review of the access refusal

decision if it has the effect of giving access to a document in accordance with the request.

9. In its original decision of 9 February 2012, the AFP disclosed the mobile phone numbers of AFP employees which were included in email correspondence between AFP employees.
10. In its revised decision of 3 April 2013, the AFP exempted this information under s 47F of the FOI Act. The AFP also released additional information in other parts of the documents that it had exempted in its original decision.
11. In submissions to the OAIC, the AFP advised that the original decision to disclose the mobile phone numbers was made in error and the revised decision editing this information from the documents was intended to correct this mistake. I draw the AFP's attention to their obligations under the Privacy Act in describing this disclosure as an 'error'.
12. Section 55G is intended to have the effect of providing a benefit to an applicant in the IC review process by providing for the release of additional information following on from an original decision. I do not accept that s 55G may be used to release less information than has been provided to an applicant in an original decision. Further, I do not consider that the fact that the AFP released additional information in other parts of the documents in its revised decision alters this view.
13. While it is not within the scope of this review, I note that there may be circumstances where it is arguable that the mobile phone number of employees can be found to be personal information. There may also be instances where it may not be unreasonable to disclose such information, including where the mobile number is listed as part of an automated email signature included in emails sent external to the organisation and where it can be found that such information has been included in a document because of the employee's usual duties or responsibilities.<sup>1</sup> Agencies should give careful consideration to their policies and practices in relation to including mobile phone numbers in email signatures for external emails.

#### ***Disclosure log considerations***

14. The AFP is required, by s 11C of the FOI Act, to publish on its website, to the public generally, information that has been released in response to each FOI access request, subject to some exceptions. This publication is known as a 'disclosure log'.
15. One of the exceptions to this requirement to publish is where the documents in question contain 'personal information about any person, if it would be

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<sup>1</sup> Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s93A of the Freedom of Information Act 1982* [6.140].

unreasonable to publish the information' (s 11C(1)(a)). The mobile phone numbers of the AFP officers is personal information.

16. I note that it is for the AFP to decide whether these documents, in particular the mobile phone numbers that were disclosed, should be published on the disclosure log. The test that the AFP has to apply (whether it would be unreasonable to publish the information on a website to the public generally) is different to the test that is to be applied in considering whether information is conditionally exempt (whether it would be unreasonable to disclose that information to the applicant).

## **Findings**

17. Pages 3, 4, 5, 8, 14, 15, 16 and 19 contain mobile phone numbers that the AFP released in its original decision, but exempted under s 47F in its revised decision. These additional exemptions cannot be applied under s 55G of the FOI Act and this information is not exempt under s 47F for the purposes of this IC review.

## **Decision under review**

18. The decision under review is the decision of the AFP on 9 February 2012 (as varied on 3 April 2013) to refuse the applicant access to 6 of the 20 pages: pages 1, 3, 4, 7, 8 and 11.<sup>2</sup>

## **Legal Professional Privilege exemption (s 42)**

19. Section 42(1) of the FOI Act provides:

### **Documents subject to legal professional privilege**

- (1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
20. The AFP exempted all of page 1 and parts of pages 3 and 4 under s 42 of the FOI Act. Page 1 is an email containing preliminary advice from the AFP's Legal Branch to the Professional Standards Branch. Pages 3 and 4 are email correspondence referring to the legal advice. Mr Thomson contends that privilege has been waived in relation to the advice.

## **Does the advice attract privilege?**

21. Legal professional privilege protects confidential communications between a lawyer and client from compulsory production. The Australian Information Commissioner has issued Guidelines under s93A of the FOI Act to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. The Guidelines explain that the FOI Act does not define legal

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<sup>2</sup> A number of pages identified by the AFP were duplicates. On 14 October 2013, the applicant agreed to exclude the duplicate pages from the scope of this IC review.

professional privilege for the purposes of the exemption in s 42: 'To determine the application of this exemption, the decision maker needs to turn to common law concepts of privilege'.<sup>3</sup>

22. The Guidelines also explain that, at common law, determining whether a communication is privileged requires consideration of the following:
  - whether there is a legal adviser-client relationship
  - whether the communication was for the purpose of giving or receiving legal advice, or for use in connection with actual or anticipated litigation
  - whether the advice given is independent
  - whether the advice given is confidential
23. For legal professional privilege to apply to a communication, there must be a true lawyer-client relationship between the legal adviser and the agency. It is well established that an independent legal adviser-client relationship can exist between a lawyer employed by the government and a government agency.<sup>4</sup> Whether such a relationship exists in a particular case is a question of fact.<sup>5</sup>
24. The AFP exempted all of page 1 and parts of pages 3 and 4 under s 42 of the FOI Act. Page 1 is an email containing preliminary advice from the AFP's Legal Branch to the Professional Standards Branch. Pages 3 and 4 are email correspondence referring to the legal advice.
25. I am satisfied that the Legal Branch was an independent adviser to the Professional Standards Branch when it provided the advice on page 1. The relationship between the Legal Branch and the Professional Standards Branch was a solicitor-client relationship. The advice was sought and prepared to assist the Professional Standards Branch in relation to its investigation into whether Mr Thomson had breached the AFP Act. I am satisfied that the email on page 1 was prepared for the dominant purpose of giving legal advice.
26. Whilst not always determinative of whether a communication is privileged, I note that page 1 was marked as in-confidence. I am satisfied that given the content and subject matter of the email, the advice on page 1 was confidential.
27. However, with the exception of one sentence, I am not satisfied that pages 3 and 4 attract legal professional privilege. Pages 3 and 4 are email communications between the AFP's Legal, Protection and Professional Standards Branches providing an update on the status of the advice and the internal clearance process for the advice. With the exception of one sentence on page 3, pages 3 and 4 do not contain the advice itself. They are not communications for the purposes of receiving legal advice and do not reveal the content of the legal advice.

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<sup>3</sup> *Guidelines* [5.116].

<sup>4</sup> *Guidelines* [5.120].

<sup>5</sup> *Guidelines* [5.120].

28. The second sentence in paragraph 4 of page 3 contains a summary of the findings of the preliminary legal advice. As this sentence reveals the content of the legal advice which I have found attracts legal professional privilege, I am satisfied that sentence is exempt from disclosure under s 42.

### **Findings**

29. Page one is exempt under s 42(1) of the FOI Act.
30. Pages 3 and 4 are not exempt under s 42(1) of the FOI Act, except for the second sentence in paragraph 4 of page 3 which is exempt under s 42(1). An edited copy of page 3, with that sentence deleted, would not be exempt under s 42(1).

### **Waiver of legal professional privilege**

31. Section 42(2) of the FOI Act provides that a document is not exempt under s 42(1) if 'the person entitled to claim legal professional privilege in relation to the production of that document waives that claim.'
32. The person entitled to claim legal professional privilege is the client in the lawyer-client relationship in which the communication was made. In this IC review, the client is the AFP. The AFP is an emanation of the Commonwealth.<sup>6</sup> Section 42(2) will apply in this case if the Commonwealth has waived the privilege.
33. Privilege can be waived intentionally (express waiver) or by implication of law (implied waiver). Implied waiver takes place where the client acts in a way that is inconsistent with maintaining the confidentiality the privilege is intended to protect.<sup>7</sup>
34. The High Court considered the issue of waiver of legal professional privilege in *Mann v Carnell* [1999] HCA 66, where it explained:

It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege...

Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is 'imputed by operation of the law'. This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege...What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.<sup>8</sup>

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<sup>6</sup> See *NSW Council for Civil Liberties Inc. v Classification Review Board (No. 1)* [2006] FCA 1409, 31.

<sup>7</sup> *Mann v Carnell* (1999) 201 CLR 1 [13] (Gleeson, Gaudron, Gummow and Callinan JJ).

<sup>8</sup> (1999) 201 CLR 1, 13.

35. The High Court has more recently confirmed that the test for inconsistency outlined in *Mann v Carnell* remains the appropriate test for determining whether privilege has been waived.<sup>9</sup> In *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, the High Court said that a decision about whether the client's conduct is inconsistent with the maintenance of privilege 'is to be made in the context and circumstances of the case, and in light of any considerations of fairness arising from that context or those circumstances.'<sup>10</sup>
36. The case law emphasises a distinction between a party undertaking a voluntary act which is inconsistent with the maintenance of privilege, even if this was not the intent of the act<sup>11</sup> and an inadvertent or unauthorised disclosure, the effect of which is that privilege is not waived.<sup>12</sup>
37. Mr Thomson submits that the privilege over page 1 has been waived because the AFP provided the legal advice to another Commonwealth agency, Comcare.
38. The AFP has acknowledged that in May 2012, the legal advice (page 1) was mistakenly provided to Comcare following a disclosure request under s 71 of the *Safety, Rehabilitation and Compensation Act 1988*. Comcare subsequently provided Mr Thomson with the advice.
39. In September 2012, the AFP became aware of the mistaken disclosure and contacted Mr Thomson's solicitors to advise of the error and assert the maintenance of privilege over the document. The AFP have said that Mr Thomson's solicitors did not accept the claim of privilege as they considered the privilege had been waived when the AFP disclosed the advice to Comcare.
40. I accept the AFP's submission that it inadvertently disclosed the legal advice to Comcare and that as soon as it became aware of this error the AFP took steps to assert its claim of privilege over the document.
41. However, a decision as to whether privilege has been waived must be made in light of any consideration of fairness arising from the context or circumstances of the matter.<sup>13</sup> In the circumstances of this IC review, I do not think that the purpose of the disclosure was to secure any advantage to the AFP; the AFP mistakenly provided the document to Comcare following a request for information from Comcare. Further, the AFP has advised that it has not disclosed the advice to any other person or Commonwealth agency. The actions of the AFP involved no unfairness to Mr Thomson.
42. I do not consider that the AFP has acted inconsistently with the maintenance of privilege. I do not consider that privilege in page 1 has been waived.

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<sup>9</sup> *Osland v Secretary, Department of Justice* (2008) 234 CLR 275.

<sup>10</sup> *Ibid* [297]

<sup>11</sup> *Benecke v National Australia Bank* (1993) 35 NSWLR 110.

<sup>12</sup> *Boensch v Pascoe* [2007] FCA 632.

<sup>13</sup> *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, 297.

## ***Findings***

43. Privilege over page 1 has not been waived and page 1 is exempt from disclosure under s 42 of the FOI Act.
44. Privilege over the second sentence in paragraph 4 of page 3, which contains reference to the legal advice in page 1, has also not been waived and is exempt from disclosure under s 42 of the FOI Act.

## **Personal privacy exemption (s 47F)**

45. The AFP found that parts of pages 7, 8 and 11 were exempt under s 47F of the FOI Act because it contained the personal information of other AFP employees.

46. Section 47F(1) of the FOI Act provides:

### **Public interest conditional exemptions — personal privacy**

#### *General rule*

- (1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).
47. Section 4 provides that personal information means ‘information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.’
  48. The Guidelines explain that:

The personal privacy exemption is designed to prevent the unreasonable invasion of third parties’ privacy. The test of ‘unreasonableness’ implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals. The test does not however amount to the public interest test of s 11A(5), which follows later in the decision making process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again when assessing the public interest balance.<sup>14</sup>
  49. The information that the AFP decided was exempt under s 47F includes correspondence between another AFP officer and the AFP about whether the officer was also the subject of the AFP’s investigation into whether Mr Thomson had breached the AFP Act.
  50. The personal information that the AFP says is conditionally exempt under s 47F is personal information relating to AFP employees. The Guidelines state:

Documents held by agencies or ministers often include personal information about public servants. For example, a document may include a public servant’s

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<sup>14</sup> *Guidelines* [6.127] (footnotes omitted).

name, work email address, position or title, contact details, decisions or opinions.

Where public servants' personal information is included in a document because of their usual duties or responsibilities, it would not be unreasonable to disclose unless special circumstances existed. This is because the information would reveal only that the public servant was performing their public duties.<sup>15</sup> Such information may often also be publicly available, such as on an agency website.

A document may, however, be exempt for another reason, for example, where the disclosure would, or could reasonably be expected to, endanger the life or physical safety of any person (s 37(1)(c)). In addition, where an individual has a propensity to pursue matters obsessively and there is no need for them to contact a particular public servant in the future, disclosure of the public servant's name may be unreasonable.<sup>16</sup>

51. I consider it would be unreasonable to release the personal information of the AFP staff members. The disclosure of information about another AFP employee and whether that employee was also being investigated by the AFP is the personal information of that employee, the disclosure of which is unreasonable because of the potential damage the information may have on the employee's professional reputation.

## Findings

52. The information exempted by the AFP in pages 7, 8 and 11 is conditionally exempt under s 47F.

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

53. I have found that pages 7, 8 and 11 that are the subject of this IC review are conditionally exempt under s 47F 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'. As the Guidelines explain, '[t]he pro-disclosure principle declared in the objects of the FOI Act is given specific effect in the public interest test, as the test is weighted towards disclosure.'<sup>17</sup>
54. Of the factors favouring disclosure set out in s 11B(3), 1 is relevant to this IC review: promoting the objects of the FOI Act. The Guidelines also include a non-exhaustive list of further factors that favour disclosure.<sup>18</sup> None of those factors are relevant to this IC review.
55. The Guidelines also include a non-exhaustive list of factors against disclosure.<sup>19</sup> One of those factors is relevant to this IC review: disclosure of the information

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<sup>15</sup> See *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606.

<sup>16</sup> *Guidelines* [6.139]-[6.141].

<sup>17</sup> *Guidelines* [6.12].

<sup>18</sup> *Guidelines* [6.25].

<sup>19</sup> *Guidelines* [6.29].

could reasonably be expected to prejudice the protection of an individual's right to privacy.

56. In its decision, the AFP gave greater weight to the protection of the privacy of those AFP officers whose personal information is contained in the documents. I agree with the AFP that the disclosure of the personal information of another AFP employee, particularly where it contains sensitive information such as whether that employee is under investigation by the AFP, would be contrary to the public interest.
57. In balancing these factors — for and against disclosure— I give the greatest weight in this IC review to the factors against disclosure.

## Findings

58. Giving Mr Thomson access to the documents the subject of this IC review would, on balance, be contrary to the public interest.

## Decision

59. Under s 55K of the FOI Act, I set aside the AFP's decision of 9 February 2012 (as varied), and decide in substitution for that decision that:
  - page 1 and the second sentence of paragraph 4 of page 3 are exempt under s 42 of the FOI Act
  - pages 3 (with the second sentence of paragraph 4 deleted under s 22) and 4 are not exempt under s 42 of the FOI Act
  - pages 7, 8 and 11 are exempt in part under s 47F.

Timothy Pilgrim  
Privacy Commissioner  
22 November 2013

## 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](http://www.aat.gov.au)) or by telephoning 1300 366 700.