Philip Morris Ltd and IP Australia [2014] AICmr 28
(18 March 2014)

Decision and reasons for decision of
Freedom of Information Commissioner, Dr James Popple

Applicant: Philip Morris Ltd
Respondent: IP Australia
Decision date: 18 March 2014
Application number: MR11/00314
Catchwords: Freedom of information — Cabinet documents — Whether document brought into existence for the dominant purpose of briefing a minister on a Cabinet submission — Whether documents are drafts of a ministerial Cabinet briefing — Whether documents contain extracts from a Cabinet submission — Whether disclosure of a document would reveal a Cabinet deliberation or decision — Whether document discloses deliberative matter — Whether contrary to public interest to release conditionally exempt document — (CTH) Freedom of Information Act 1982 ss 11A(5), 22, 34, 47C

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Summary

1. I set aside the decision of IP Australia of 15 August 2011 to refuse access to documents requested under the Freedom of Information Act 1982 (the FOI Act), and substitute my decision granting access to some of the documents, modified by deletions.

2. One of the documents is exempt under s 34(1)(c), five are exempt under s 34(1)(d), and four are exempt under s 34(2) to the extent that they contain extracts from a Cabinet submission. But one of those four documents, which IP Australia said was also exempt under s 34(3) and s 47C, is not exempt under either provision.

Background

3. On 21 March 2011, Philip Morris Ltd (PML) applied to IP Australia for access to documents relating to the plain packaging of tobacco products.¹

4. On 17 June 2011, IP Australia advised that it had identified 85 documents falling within the scope of the request. Twelve documents were released in full; seven documents were released with irrelevant material removed (under s 22 of the FOI Act); 59 documents were released with exempt material removed; and seven documents were, IP Australia said, exempt from release. In making this decision, IP Australia applied exemptions under ss 33 (documents affecting national security, defence or international relations), 34 (Cabinet documents), 42 (legal professional privilege), 47C (deliberative processes) and 47F (personal privacy) of the FOI Act.

5. On 15 July 2011, PML sought internal review of this decision. On 15 August 2011, IP Australia affirmed its original decision.

¹ PML’s request was dated 17 March 2011, but it was not received by IP Australia until 21 March.
6. On 29 September 2011, PML sought IC review of this decision under s 54L of the FOI Act.

Decision under review

7. The decision under review is IP Australia’s internal review decision of 15 August 2011. PML seeks review of only those parts of the decision in which IP Australia applied s 34 or s 47C.

Cabinet documents exemption (s 34)

8. Section 34 of the FOI Act relevantly provides:

   Cabinet documents
   General rules
   (1) A document is an exempt document if:
       (a) both of the following are satisfied:
           (i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;
           (ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or
       (b) it is an official record of the Cabinet; or
       (c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or
       (d) it is a draft of a document to which paragraph (a), (b) or (c) applies.
   (2) A document is an exempt document to the extent that it is a copy or part of, or contains an extract from, a document to which subsection (1) applies.
   (3) A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.

Production of exempt documents

9. IP Australia contends that documents 6–11, 72, 79, 81 and 82 are exempt under s 34 of the FOI Act. Section 55U deals with the production of documents that are claimed to be exempt documents under s 34 (and other specified provisions\(^2\)). If the Information Commissioner is not satisfied that a document is exempt, the Commissioner may require the document to be produced for inspection (s 55U(3)).

10. After considering submissions made by IP Australia and the Department of the Prime Minister and Cabinet (PM&C), I was not satisfied that the documents were

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\(^2\) Section 33 (national security etc.) and s 45A (Parliamentary Budget Office documents).
exempt and required IP Australia to produce them for inspection. I have examined those documents.

**Briefing a minister**

11. IP Australia says that document 11 is exempt under s 34(1)(c) on the basis that it was brought into existence for the dominant purpose of briefing a minister on a document to which s 34(1)(a) applies: that is, a briefing on a document brought into existence for the dominant purpose of submission for consideration by the Cabinet, and submitted to the Cabinet for its consideration.

12. Having examined the document, I agree. Document 11 is a ministerial Cabinet briefing. It is addressed to the then Minister for Innovation, Industry, Science and Research, who was the minister responsible for IP Australia. It cites a Cabinet submission reference number. It summarises material from that Cabinet submission. It makes a recommendation about the recommendations in the Cabinet submission.

**Findings**

13. Document 11 is exempt under s 34(1)(c) of the FOI Act.

**Draft documents**

14. IP Australia says that documents 7–10 are exempt under s 34(1)(d) on the basis that they are drafts of a document (document 11) to which s 34(1)(c) applies.

15. Having examined the documents, I agree. Documents 7–10 are drafts of document 11, which is a ministerial Cabinet briefing that I have already found is exempt under s 34(1)(c).

16. IP Australia says that document 6 is exempt under s 34(3) on the basis that it contains information the disclosure of which would reveal a Cabinet deliberation or decision.

17. Document 6 is a one page file note containing ‘ideas for brief’ for the Minister on a Cabinet submission. It is short—much shorter than the final briefing. It raises only a handful of issues, not all of which appear in the final briefing. But it is, nonetheless, a rudimentary early draft of what became (three days later) the ministerial Cabinet briefing (document 11).
18. Section 34(3) does not apply to document 6: the disclosure of the information it contains would not reveal a Cabinet deliberation or decision. But s 34(1)(d) does apply: document 6 (like documents 7–10) is a draft of a document (document 11) to which s 34(1)(c) applies.3

Findings

19. Documents 6–10 are exempt under s 34(1)(d) of the FOI Act.

Copies or extracts of a document

20. IP Australia says that documents 72, 79, 81 and 82 are exempt under s 34(2) on the basis that they are copies of, or contain extracts from, a document to which s 34(1)(a) applies: that is, copies of, or extracts from, a document brought into existence for the dominant purpose of submission for consideration by the Cabinet, and submitted to the Cabinet for its consideration.4

21. As I noted in Philip Morris Ltd and Department of Finance [2014] AICmr 27, a Cabinet coordination comment, which is prepared before a Cabinet submission is considered by the Cabinet, can nonetheless be an extract from that Cabinet submission.5 PM&C advises (and, having examined the documents, I accept) that documents 72 and 79 contain coordination comments that were included in a submission that went to the Cabinet on a specified date. Those documents contain extracts from a submission which was submitted to the Cabinet for its consideration, and which was brought into existence for the dominant purpose of submission for consideration by the Cabinet.

22. IP Australia says that the Cabinet document reference numbers in documents 81 and 82 are also extracts from a Cabinet submission. It is not clear to me why IP Australia (and PM&C) decided to apply the exemption to these documents: a reference number in a Cabinet document is not sensitive information. But s 34 does not require that the decision maker be satisfied that disclosure would cause damage. It is enough for s 34(2) to apply that the document in question quotes from a Cabinet submission. Quoting a Cabinet document reference number is sufficient.

3 On internal review, IP Australia decided that document 6 was exempt in full under s 34(3). On IC review, PM&C submitted, and IP Australia agreed, that the first two sentences of the document were not exempt. I have decided that document 6 is exempt under s 34(1)(d). There is no requirement to provide access to an edited copy of a document that is exempt under s 34(1): see [29]–[30] below.

4 In its decision, IP Australia applied the exemption in s 34(3) to the Cabinet document reference numbers in documents 81 and 82. PM&C, in its submissions, took the view that they were exempt under s 34(2) and IP Australia adopted that view. I agree that s 34(2) is the more appropriate exemption to consider.

5 [2014] AICmr 27 [20], citing McKinnon and Department of Prime Minister and Cabinet [2007] AATA 1969. See also Office of the Australian Information Commissioner, Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982 [5.64]
Findings

23. Documents 72 and 79 are exempt under s 34(2) of the FOI Act to the extent that they contain extracts from a Cabinet submission (coordination comments).

24. Documents 81 and 82 are exempt under s 34(2) to the extent that they contain extracts from a Cabinet submission (Cabinet document reference numbers).

Disclosing a Cabinet deliberation or decision

25. IP Australia says that document 81 is exempt under s 34(3) on the basis that it contains information the disclosure of which would reveal a Cabinet deliberation or decision. I have already found that document 81 is exempt under s 34(2), but only to the extent that it contains extracts from a Cabinet submission (Cabinet document reference numbers).

26. IP Australia has identified two words in document 81 whose disclosure it says would reveal a Cabinet deliberation or decision. Those two words reveal the number of recommendations in a Cabinet submission. There is nothing in document 81 about the nature or content of those recommendations.

27. I do not think that disclosing the number of recommendations in a Cabinet submission reveals a Cabinet deliberation or decision.

Findings

28. Document 81 is not exempt under s 34(3) of the FOI Act.

Access to edited copies (s 22)

29. Section 22(2) of the FOI Act requires an agency to give an applicant access to an edited copy of an exempt document, with the exempt matter deleted, if reasonably practicable.

30. As I explained in *PML and Finance*, there is no requirement to provide access to an edited copy of a document that is exempt under s 34(1). The requirement does apply to documents that are exempt under other subsections of s 34.\(^6\)

Findings

31. Documents 6–10 are exempt under s 34(1)(d) of the FOI Act.

32. Document 11 is exempt under s 34(1)(c).

33. Documents 72, 79, 81 and 82 are exempt under s 34(2) to the extent that they contain extracts from a Cabinet submission. A copy of these documents should be provided to PML, edited under s 22 by deleting those extracts.

\(^6\) *Philip Morris Ltd and Department of Finance* [2014] AICmr 27 [34]–[36].
34. Document 81 is not exempt under s 34(3).

**Deliberative processes exemption (s 47C)**

35. Section 47C(1) of the FOI Act relevantly provides:

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Public interest conditional exemptions—deliberative processes

General rule

(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 ...
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36. 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 course of action.7

37. IP Australia says that document 81 is exempt under s 47C. I have already found that document 81 is exempt under s 34(2), but only to the extent that it contains extracts from a Cabinet submission (Cabinet document reference numbers).

38. Document 81 is an email, sent within IP Australia, discussing the preparation of document 11: the ministerial Cabinet briefing. IP Australia says that three paragraphs of the email are deliberative matter.

39. Having examined documents 11 and 81, I agree. Those three paragraphs of document 81 contain details of the deliberative processes involved in preparing document 11. I am satisfied that those paragraphs contain deliberative matter for the purposes of s 47C.

**Findings**

40. Document 81 is conditionally exempt under s 47C of the FOI Act.

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

41. I have found that document 81 is conditionally exempt under s 47C. Section 11A(5) provides that, if a document is conditionally exempt, it must be

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7 Guidelines [6.62].
disclosed ‘unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest’.

42. Of the factors favouring disclosure set out in s 11B(3), two are relevant to this IC review: promoting the objects of the FOI Act and informing debate on a matter of public importance. The Guidelines also include a non-exhaustive list of further factors that favour disclosure.\(^8\) Several of those factors are relevant to this IC review: disclosure would inform the community of the Government’s operations; reveal further reasons for a government decision and background or contextual information that informed that decision; and enhance the scrutiny of government decision making.

43. The Guidelines also include a non-exhaustive list of factors against disclosure.\(^9\) None of those factors is relevant to this IC review.

44. IP Australia argues that it would be contrary to the public interest to disclose deliberative matter when, as here, an exemption under s 34 has been applied to material that is the outcome of those deliberative processes. It also says that it would be contrary to the public interest to disclose material which, like that in document 81, is close to the Cabinet process because disclosure would impair the confidentiality of Cabinet processes and inhibit the full canvassing of issues in the development of Cabinet material.

45. It is important that Cabinet processes are confidential, and that issues be fully canvassed in the development of Cabinet material. This is recognised in the exemptions in s 34 of the FOI Act, which are broad in their application. But, as discussed above, document 81 is exempt under s 34 only to the extent that it contains Cabinet document reference numbers which are extracts from a Cabinet submission.

46. PML says that, despite the closeness of the material to the Cabinet process, disclosure would contribute to an informed debate on a matter of public importance. It also says that no real harm would result from disclosure because the decision to introduce plain packaging of tobacco products has already been made.

47. As noted above, Document 81 is an email, sent within IP Australia, discussing the preparation of the ministerial Cabinet briefing. The deliberative matter in the three paragraphs of the e-mail identified by IP Australia concerns the structure of the briefing, but not to the extent that it could be said to be a draft of that briefing.

48. In balancing the factors for and against disclosure I give the greatest weight in this IC review to the factors in favour of disclosure. I do not think that the disclosure of the deliberative matter in document 81 will contribute much to

\(^8\) Guidelines [6.25].
\(^9\) Guidelines [6.29].
any public debate. But IP Australia has not convinced me that that disclosure would be contrary to the public interest. And, 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’.  

Findings

49. Giving PML access to document 81 (except to the extent that it is exempt under s 34(2) because it contains Cabinet document reference numbers) would not, on balance, be contrary to the public interest.

Decision

50. Under s 55K of the FOI Act, I set aside that part of IP Australia’s decision of 15 August 2011 relating to documents 6–11, 72, 79, 81 and 82, and decide, in substitution for that part of the decision that:
   • documents 6–10 are exempt under s 34(1)(d) of the FOI Act
   • document 11 is exempt under s 34(1)(c), and
   • documents 72, 79, 81 and 82 are exempt under s 34(2), but a copy of these documents should be provided to PML, edited under s 22 by deleting extracts from a Cabinet submission.

(PML did not seek review of the remainder of IP Australia’s decision.)

James Popple
Freedom of Information Commissioner
18 March 2014

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.

Guidelines [6.12].