



Krivoshev and Department of Human Services **[2014] AICmr 48 (29 May 2014)**

Decision and reasons for decision of
Privacy Commissioner, Timothy Pilgrim

Applicant: Mr Nicholas Krivoshev

Respondent: Department of Human Services

Decision date: 29 May 2014

Application number: MR12/00162

Catchwords: Freedom of Information — Legal professional privilege — Whether documents subject to legal professional privilege— Whether disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency — (CTH) *Freedom of Information Act 1982* ss 11A(5), 22, 42, 47E

Contents

Summary	2
Background	2
Scope of review	3
Decision under review	3
Legal professional privilege exemption (s 42)	4
Does the advice attract privilege?.....	4
Has the privilege been waived?	5
Findings	6
Operations of agencies exemption (s 47E)	6
Findings	7
Decision	7

Summary

1. I set aside the access refusal decision of the Department of Human Services (the **Department**) of 4 July 2012 (as varied on 17 October 2012) 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 27 February 2012, Mr Nicholas Krivoshev applied to the Department for access to the following documents:
 1. Copies of claim forms, all medical certificates, computer printouts and all written correspondence, relating to the payment of Newstart allowance to Nick Krivoshev from 1 Jan 1998 to date.
 2. Copies of all documents generated relating to the raising and recovery of any debts in relation to Nick Krivoshev from 1 Jan 1998 to date.
 3. Customer Archive Retrieval System: copies of all notices and advices, including medical, sent to Nick Krivoshev by Centrelink from 1 Jan 1998 to date.
 4. CRAM Reports: copies of contents and details of dates, times and the computer screens accessed by Centrelink staff in relation to Nick Krivoshev from 1 Jan 1998 to date.
 5. Batch storage: copies of documents in batch storage, including medical and any Newstart Allowance fortnightly income statements in relation to Nick Krivoshev from 1 Jan 1998 to date.
3. The Department did not make a decision on the applicant's request within the 30 day statutory time period and on 28 March 2012 the Department was deemed to have refused the request (s 15AC(1)).
4. On 8 May 2012, the Department applied under s 15AC for an extension of time until 7 June 2012 to process the applicant's request. The Office of the Australian Information Commissioner (OAIC) granted the extension of time.
5. On the same day, the applicant sought IC review of this decision under s 54L of the FOI Act.
6. The Department subsequently made five decisions in relation to Mr Krivoshev's request:
 - On 4 June 2012, in relation to Mr Krivoshev's customer paper files, the Department refused access to all documents. In making its decision, the Department relied on the legal professional privilege exemption (s 42).
 - On 6 June 2012, in relation to electronic records, digitally scanned images, current on-line advice letters, SMS messages and advices and archived records, the Department granted access to these documents in full.

- On 7 June 2012, in relation to CRAM reports and batch stored documents, the Department granted access in full to the batch stored documents but refused access to the CRAM reports under s 24A on the basis that they could not be found or did not exist.
 - On 7 June 2012, in relation to Mr Krivoshev's Centrelink customer paper file. In making its decision, the Department applied the personal privacy exemption (s 47F) to these documents.
 - On 4 July 2012, in relation to further documents in Mr Krivoshev's Centrelink Administrative Appeals Tribunal (AAT) appeal paper file, the Department released three documents in part and refused access in full to 23 documents. In making its decision, the Department applied ss 47F and 42.
7. On 17 October 2012, the Department varied its decision under s 55G of the FOI Act in relation to its 4 July 2012 decision. In making its decision, the Department released 21 documents (documents 124-137, 139-145 and 150) in part and relied on the operations of agencies exemption (s 47E). The Department continued to refuse access in full to document 138 under s 42 and to document 146 under ss 47E and 42.
 8. On 15 November 2012, Mr Krivoshev advised that he was continuing to seek IC review of the Department's decision to refuse access to documents 124-146 and 150, the CRAM reports and the batch stored documents.

Scope of review

9. On 21 January 2013, the applicant advised that he was narrowing the scope of his IC review to documents 124-137, 139-146 and 150. The applicant further clarified that he was no longer seeking access to the names and contact details of Departmental staff in these documents which the Department had exempted under s 47E.
10. I have examined unedited copies of the documents. The information that the Department deleted from documents 133, 139, 143, 144 and 150 were the names and contact details of staff members. As Mr Krivoshev is not seeking access to this information, it is not relevant to his revised request. I do not need to further consider these documents in this IC review.
11. I have also examined unedited copies of documents 129 and 131 and documents 130 and 132. These documents are duplicates of each other and I do not need to further consider documents 131 and 132 in this IC review.

Decision under review

12. The decision under review is the decision of the Department on 4 July 2012 (as varied by its decision on 17 October 2012) to refuse Mr Krivoshev's request to documents 124-130, 134-137, 140-142, 145 and 146.

Legal professional privilege exemption (s 42)

13. The Department exempted document 146 in full under s 42.
14. Section 42 of the FOI Act relevantly 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.
 - (2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.
15. Legal professional privilege (LPP) protects confidential communications between a lawyer and a client from compulsory production.
16. 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. The Guidelines 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.¹
17. For LPP 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.² Whether such a relationship exists in a particular case is a question of fact.³

Does the advice attract privilege?

18. I have examined an unedited copy of document 146. It is an email exchange between a Senior Advocate in the Department's Program Litigation and Review Branch and two Departmental officers in other sections of the Branch about the Department's management of penalties following a Stay Order issued by the AAT in proceedings commenced by Mr Krivoshev.⁴

¹ Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s93A of the Freedom of Information Act 1982 (2010)* [5.118].

² *Guidelines* [5.120].

³ *Guidelines* [5.120].

⁴ Mr Krivoshev applied to the AAT for review of a Social Security Appeals Tribunal decision affirming decisions of the Department's Authorised Review Officers (AROs) in relation to his

19. It is a requirement for staff employed as Senior Advocates in the Department to be legally qualified and the Senior Advocate in this matter was employed by the Department as a lawyer. In its decision, the Department advised that the Senior Advocate was acting in his capacity as a professional legal adviser and was independent to the matter in which he was providing the advice. I am satisfied that the Senior Advocate and the Departmental officers had a legal adviser-client relationship and that the communication between the Senior Advocate to the Departmental officers was independent.
20. I note that the AAT proceedings were between Mr Krivoshev and DEEWR and that the Department was not a party to these proceedings. However, the AAT matter was a review of a decision of the SSAT, which had in turn reviewed the decisions of the Department's AROs in relation to Mr Krivoshev's entitlement to Newstart allowance. In this instance, even though the Department was not a party to the AAT proceedings, I am satisfied that the Department had a sufficient connection with, and interest in, the proceedings to find that the communication between the Senior Advocate and the Departmental officers to be in connection with actual litigation.
21. While not always determinative of whether a communication is privileged, I note that document 146 was marked as 'in-confidence:legal'. I am satisfied that given the content and subject matter of the email, the communication in document 146 was confidential.

Has the privilege been waived?

22. Section 42(2) of the FOI Act provides that a document is not exempt if 'the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim'.
23. Legal professional privilege is sometimes called 'client legal privilege'⁵ to emphasise the fact that the client is entitled to its benefit. The client in this case — the person entitled to claim legal professional privilege in relation to the documents that are the subject of this IC review — are the two sections of the branch that received the communication. Section 42(2) will apply in this in this case if the two sections of the Branch have waived the privilege.
24. Waiver may be express or implied.⁶ None of the information before me suggests that that the sections of the Branch have done anything inconsistent with the maintenance of LPP document 146. Section 42(2) does not apply.

Newstart allowance. The respondent in the AAT proceedings was the former Department of Education, Employment and Workplace Relations (DEEWR):

<http://www.austlii.edu.au/au/cases/cth/AATA/2012/23.html>

⁵ See, for example, *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67 [35]; 201 CLR 49, 64 (Gleeson CJ, Gaudron and Gummow JJ). See also Division 1 of Part 3.10 of the *Evidence Act 1995*, though that statutory test is not applicable to s 42 of the FOI Act: *Guidelines* [5.116]; *Commonwealth v Dutton* [2000] FCA 1466; 102 FCR 168.

⁶ See *Doney and Department of Finance and Deregulation* [2012] AICmr 25 [19]–[21].

Findings

25. Document 146 is exempt under s 42(1) of the FOI Act.

Operations of agencies exemption (s 47E)

26. The Department exempted documents 124-130, 134-137, 140-142, 145 and 146 under s 47E(d).

27. Section 47E(d) of the FOI Act relevantly provides:

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:

...

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

28. The Guidelines explain that:

An agency cannot merely assert that an effect would occur following disclosure. The particulars of the predicted effect and the reasons behind the identification of those particulars should be articulated during the decision making process. Those particulars should also indicate whether the effect could reasonably be expected to occur.⁷

29. The documents under IC review are emails between a number of sections of the Department in relation to the consequences of the stay order issued by the AAT on the ongoing payment of Mr Krivoshev's Newstart allowance. The emails also discuss various provisions of the *Social Security Act 1991* and the *Social Security Administration Act 1999* in relation to the stay order.
30. In its revised decision and submissions to the OAIC, the Department said that the documents relate to communications about, and created in the course of, proceedings in AAT. The Department further submitted that disclosure would reveal considerations taken into account by the Department, and the processes it follows, in raising and recovering debts and penalties under the *Social Security Act 1991*.
31. The Department further said that disclosure of the information would potentially enable individuals to take steps to either avoid detection of debts that may be owed or impede the recovery of debts or penalties and that this could reasonably be expected to have an adverse effect on the operations of the Department.
32. Finally, the Department submitted that the willingness of its officers to provide frank advice could be adversely affected if sensitive information was released.

⁷ *Guidelines* [6.94].

33. I have examined unedited copies of the documents. The information in the documents outlines the AAT stay order and discusses the implementation and possible implications of this. Much of the commentary in the documents is statutory interpretation and discussion of the effects of the stay order on the Department's current payment processes and any payments to Mr Krivoshev.
34. I am not satisfied that the disclosure of this information would, or could reasonably be expected to, have a substantial adverse effect on the Department's operations. I do not think that disclosure of a discussion of legislation and the effects of the AAT stay order on payments will enable payment recipients to circumvent the Department's processes. In any instance, I would have thought that payment recipients would be entitled to know the effect of any such orders on their payment entitlements.
35. Further, I am not satisfied that disclosure of the documents would inhibit the willingness of staff to provide frank advice to the Department. The Department should not be dependent on the good will of its staff when undertaking statutory interpretation or considering the implementation and effects of an order of a Tribunal or other appellate body. I consider it an obligation of APS employees to assist their employer in this type of circumstance, in accordance with the APS Values and Code of Conduct.

Findings

36. The information that the Department edited from documents 124-130, 134-137, 140-142, 145 and 146 under s 47E is not conditionally exempt.
37. As I have found that the information in these documents is not conditionally exempt under s 47E, it is not necessary for me to consider the public interest test.

Decision

38. Under s 55K of the FOI Act, I set aside the Department's decision of 4 July 2012 (as varied on 17 October 2012) and decide, in substitution for that decision, that:
 - document 146 is exempt under s 42(1) of the FOI Act, but an edited copy should be provided to Mr Krivoshev under s 22 with only the first paragraph deleted. The information that the Department edited from document 146 under s 47E is not conditionally exempt
 - documents 124-130, 134-137, 140-142 and 145 are not conditionally exempt under s 47E.

Timothy Pilgrim
Privacy Commissioner

29 May 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.