



Office of the Attorney-General

AGOFOI23/465; CM24/23807

Waldek Lupinski

By email: foi+request-10639-a449ee8f@righttoknow.org.au

Dear Mr Lupinski

Freedom of Information Request AGOFOI23/465 – Decision letter

The purpose of this letter is to give you a decision about your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) which you submitted to the Attorney-General.

Your request

On 30 August 2023, you requested access to:

Under the FOI Act 1982 I request any and all documents in your possession relating to the Commonwealth's involvement in the false imprisonment of the applicant in Stradford (a pseudonym) v Judge Vasta [2023] FCA 1020, including documents setting out the cost to the Commonwealth of defending the matter.

On 31 August 2023, the Attorney-General's Department (the department) acknowledged your request.

On 15 September 2023, the department accepted transfer of this request from the Office of the Attorney-General (the Office) under s 16 of the FOI Act.

On 23 July 2024, the Office of the Australian Information Commissioner (OAIC) advised the Office that it did not consider the transfer of the FOI request to the department to be validly made. The OAIC provided the Office with a notice of Information Commissioner (IC) review and request for documents in relation to this FOI request.

The purpose of this correspondence is to provide you with a decision for your FOI request. A copy of this correspondence will be provided to the OAIC, and forms the Office's submission to respond to your IC review request.

My decision

I am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to freedom of information requests made to the Attorney-General.

I have identified six documents that fall within the scope of your request. I did this by arranging for relevant staff in the Office to take comprehensive steps to locate documents within the scope of your request.

In making my decision regarding access to the relevant documents, I have taken the following material into account:

- the terms of your request

- the content of the documents identified as within scope of your request
- the provisions of the FOI Act
- the views of the Federal Court of Australia, and
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines).

I have decided to refuse access to four documents in full, grant access to one document in part and grant access to one document in full.

Additional information

Documents of a court and application of s 12(1) of the FOI Act

I have considered whether court documents captured within the scope of your request should be excluded under s 12(1)(b) of the FOI Act.

Section 12(1)(b) of the FOI Act states that:

Part not to apply to certain documents

(1) A person is not entitled to obtain access under this Part to:

(b) a document that is open to public access, as part of a public register or otherwise, in accordance with an enactment or a Norfolk Island law, where that access is subject to a fee or other charge; or

For documents to be exempt from the FOI Act under 12(1)(b), all three of the following criteria must be met:

- the documents must be open to public access, and
- the documents must be part of a public register or otherwise, and
- the documents must be able to be applied for, subject to a fee.

Documents 2.1, 2.2 and 2.3 captured within the scope of your request are documents of the Federal Court of Australia (the Court). I am satisfied that this Court meets the definition of ‘public register or otherwise’ as outlined in s 12(1)(b) of the FOI Act. I am also satisfied that individuals are able to make an application to the court to request access to the documents after paying the relevant application fee. However, I am not satisfied that the documents are “open to public access”. This is because these documents are not documents that a person (who is not a party to the proceeding) is entitled to access to under rule 2.32 of the *Federal Court Rules 2011* (the Rules). This is because giving access to the documents, which refer to Mr Stradford’s real name, would be in breach of an order made by the Court on 30 August 2023 that the applicant be given the pseudonym, ‘Mr Stradford’. Documents, such as documents 2.1, 2.2 and 2.3, that are subject to non-publication and suppression orders fall within the category of documents that are prohibited or restricted from publication under Part VAA of the *Federal Court of Australia Act 1976*.

Accordingly, these documents have been included in the scope of your request as I am not satisfied that this material is exempt from the FOI Act under s 12(1)(b).

I have refused access to documents 2.1, 2.2 and 2.3 as these documents are exempt under s 46 of the FOI Act (documents disclosure of which would be contempt of Parliament or in contempt of court). I note it is open to a non-party to the proceedings to request leave of the Court to access court documents. More information about this can be found at:

<https://www.fedcourt.gov.au/forms-and-fees/forms/administrative-forms>

Publicly available documents

I note that I have decided to release document 3 in full. This document is the Court’s reasons for

judgment in the *Stradford (a pseudonym) v Judge Vasta & Ors* proceeding (*Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020). This document has been published in full by the Court and is publicly available to view on the Court's website. Notwithstanding the document is already publicly available I am of the view that it is subject to the FOI Act. As outlined in *Mills and Department of Immigration and Border Protection* and paragraph 2.41 of the FOI Guidelines, there is no provision in the FOI Act to refuse access to a document solely on the ground that it is publicly available. The table of contents (pages 13 to 15 of document 3) set out the relevant paragraphs which relate to the liability of the Commonwealth.

Scope of your request

In your FOI request, you requested access to:

Under the FOI Act 1982 I request any and all documents in your possession relating to the Commonwealth's involvement in the false imprisonment of the applicant in Stradford (a pseudonym) v Judge Vasta [2023] FCA 1020, including documents setting out the cost to the Commonwealth of defending the matter.

According to the Court's reasons for judgment, the Commonwealth's involvement in the *Stradford* proceeding related to its vicarious liability for the conduct of the court security guards in detaining Mr Stradford.¹

As this request is subject to an IC review request, a copy of this decision has been shared with the OAIC. The OAIC should contact you about this IC review in due course.

The schedule of documents at **Attachment A** sets out brief information about each document within the scope of your request and my decision in relation to access to each of those documents.

The statement of reasons at **Attachment B** sets out the reasons for my decision to refuse access to certain material to which you have requested access.

The documents to which I have decided to grant full or partial access under the FOI Act are at **Attachment C**.

Questions about this decision

If you wish to discuss this decision, please contact the Freedom of Information team at the Attorney-General's Department who can be reached on (02) 6141 6666 or by email to foi@ag.gov.au.

Yours sincerely



Mathew Jose
Chief of Staff
Office of the Attorney-General, the Hon Mark Dreyfus KC MP

19/09/2024

Attachments

Attachment A: Schedule of documents
Attachment B: Statement of reasons
Attachment C: Documents

¹ *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at paragraphs 376-377.



Attachment A - Schedule of documents - Freedom of Information Request AGOFOI23/465

Doc no.	Date	No. pgs	Description	Access decision	Exemption/s applied
1	7 December 2020	2	Departmental document	Grant access in part	Section 22(1): Irrelevant material Section 42(1): Documents subject to legal professional privilege
2	10 October 2022	2	Email	Refuse access	Section 42(1): Documents subject to legal professional privilege
2.1	7 December 2020	22	Attachment to document 2	Refuse access	Section 46(a): Documents disclosure of which would be contempt of Parliament or contempt of court
2.2	6 April 2021	17	Attachment to document 2	Refuse access	Section 46(a): Documents disclosure of which would be contempt of Parliament or contempt of court
2.3	6 April 2021	20	Attachment to document 2	Refuse access	Section 46(a): Documents disclosure of which would be contempt of Parliament or contempt of court
3	30 August 2023	225	Reasons for judgment - <i>Stradford (a pseudonym) v Judge Vasta</i> [2023] FCA 1020	Grant access in full	Nil – document publicly available



Attachment B - Statement of reasons - AGOFOI24/465

This document, when read in conjunction with the schedule of documents at **Attachment A**, provides information about the reasons I have decided not to disclose certain material to you in response to your request for documents under the *Freedom of Information Act 1982* (FOI Act).

Section 22: Access to edited copies with exempt or irrelevant matter deleted

Section 22 of the FOI Act provides that if an agency decides to give access to a document that would disclose information that would reasonably be regarded as irrelevant to the request, and it is possible for the agency to prepare a copy (an *edited copy*) of the document, modified by deletions, the agency must prepare the edited copy and give the applicant access to it. On this basis, I have arranged for Document 1 to be edited by applying s 22 (irrelevant to the scope of the request) redactions to the document.

Exemptions

An agency or minister is not required to give access to a document or part of a document that is exempt from disclosure under Division 2 of Part IV of the FOI Act. Documents for your request which are exempt under Division 2 of Part IV relate to the following categories:

- documents subject to legal professional privilege (s 42), and
- documents disclosure of which would be contempt of Parliament or in contempt of court (s 46).

These exemptions are not subject to an overriding public interest test. Accordingly, where a document meets the criteria to establish a particular exemption, it is exempt and the decision-maker is not required to weigh competing public interests to determine if the document should be released.

Brief information about each of the exemptions applied when making a decision about disclosure of each of the documents to which you have requested access is set out below. Additional information about each of these exemptions can be obtained from the Guidelines (the Guidelines) available at: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-5-exemptions>.

Section 42: Documents subject to Legal Professional Privilege

Section 42(1) of the FOI Act provides that 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.

As outlined in paragraph 5.149 of the Guidelines, at common law, determining whether a communication is privileged requires a consideration of the four factors listed below. I am satisfied that all these factors apply to the material withheld under s 42(1):

- a) a legal adviser-client relationship exists,
- b) the advice was provided independently,
- c) the communication was for the purpose of giving or receiving legal advice or for use in connection with actual or anticipated litigation, and
- d) the advice was provided on a confidential basis.

Against these criteria, I have formed the view that there was a legal adviser-client relationship, the communication was in connection with actual litigation, and that the advice was confidential and independent. I am therefore satisfied that the documents are exempt under section 42 of the FOI Act.

I also note that paragraph 5.156 of the Guidelines states:

In the AAT case of Ransley and Commissioner of Taxation (Freedom of information) [2015] AATA 728, Tamberlin DP summarised the principles set out above at [5.154] and discussed that 'communications and information between an agency and its qualified legal advisers for the purpose of giving or receiving advice will be privileged whether the legal advisers are salaried officers [or not], provided they are consulted in a professional capacity in relation to a professional matter and the communications arise from the relationship of lawyer-client.

Section 42(2) confirms that a document is not exempt if the person entitled to claim legal professional privilege waives the privilege.

Paragraph 5.170 of the Guidelines states that:

Waiver of privilege may be express or implied. For example, privilege may be waived in circumstances where:

- *the communication in question has been widely distributed,*
- *the content of the legal advice in question has been disclosed or*
- *a person has publicly announced their reliance on the legal advice in question in a manner that discloses the substance of the legal advice.*

I am satisfied that none of the factors outlined in the paragraph 5.170 apply in this instance. Legal professional privilege in relation to the material in scope of your request has not been, and should not be waived.

Accordingly, I am satisfied that the relevant material is exempt from disclosure under s 42(1) of the FOI Act.

Section 46: Documents disclosure of which would be contempt of Parliament or contempt of court

Section 46 of the FOI Act provides that a document is an exempt document if public disclosure of the document would, apart from this Act and any immunity of the Crown:

- (a) be in contempt of court;*
- (b) be contrary to an order made or direction given by a Royal Commission or by a tribunal or other person or body having power to take evidence on oath; or*
- (c) infringe the privileges of the Parliament of the Commonwealth or of a State or of a House of such a Parliament or of the Legislative Assembly of the Northern Territory.*

Paragraph 5.215 of the Guidelines states:

A contempt of court is an action which interferes with the due administration of justice. It includes, but is not limited to, a deliberate breach of a court order.

In addition, paragraph 5.216 of the Guidelines states:

Documents protected under s 46(a) include documents that are protected by the courts as part of their power to regulate their own proceedings. For example, a court may prohibit or limit publication of the names of parties or witnesses in litigation, or statements and evidence presented to the court. Because public disclosure of such documents would be a contempt of court, the documents will be exempt.

I am satisfied that there are real and substantial grounds for expecting disclosure of the relevant material to be in contempt of court (s 46(a)). Furthermore, I have arranged for the relevant court to be consulted and the court has objected to the disclosure of the relevant material marked s 46(a) in Attachment A – Schedule of documents.

Accordingly, I am satisfied that this material is exempt from disclosure under s 46 of the FOI Act.