

## Annexure A (s 42)

### Relevant provisions of the FOI Act, FOI Guidelines, and decisions

Section 11A(4) of the FOI Act states the agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

### Legal professional privilege (s 42)

Section 42 of the FOI Act states:

- (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.
- (3) A document is not an exempt document under subsection (1) by reason only that:
  - (a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and
  - (b) the information is operational information of an agency.

As discussed in the FOI Guidelines and in IC review cases,<sup>38</sup> a document will be exempt under s 42 if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege (s 42(1)) and privilege has not been waived (s 42(2)).

Legal professional privilege protects confidential communications between a lawyer and a client from compulsory production. The FOI Guidelines relevantly explain that, at common law, determining whether a communication is privileged requires consideration of the following:

1. whether there is a legal adviser-client relationship
2. whether the communication was for the dominant purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation
3. whether the advice given is independent, and
4. whether the advice given is confidential.<sup>39</sup>

The FOI Guidelines explain that a communication may have been brought into existence for more than one purpose but will be privileged if the main purpose of its creation was for

<sup>38</sup> Generally, see FOI Guidelines at [5.144] – [5.182]; ‘VO’ and Northern Australia Infrastructure Facility (Freedom of information) [2020] AICmr 47; ‘VH’ and Australian Taxation Office (Freedom of information) [2020] AICmr 43; ‘PQ’ and Australian Taxation Office (Freedom of information) [2019] AICmr 1; ‘PO’ and Australian Federal Police (Freedom of information) [2018] AICmr 72; Chris Lewis and Australian National University (Freedom of information) [2018] AICmr 63; Rex Bashford and Department of Jobs and Small Business (Freedom of information) [2018] AICmr 55 and ‘OL’ and Department of Home Affairs (Freedom of information) [2018] AICmr 36.

<sup>39</sup> FOI Guidelines at [5.149].

giving or receiving legal advice (legal advice privilege), or for use in connection with actual or anticipated litigation (litigation privilege).<sup>40</sup>

In relation to whether a legal adviser client relationship exists, the FOI Guidelines relevantly explain:

A legal adviser-client relationship exists where a client retains the services of a lawyer for the purpose of obtaining professional advice. If the advice is received from an independent external legal adviser, establishing the existence of the relationship is usually straightforward.<sup>41</sup>

The FOI Guidelines further explain that the following factors are relevant to establishing whether a legal adviser-client relationship exists:

- the legal adviser must be acting in their capacity as a professional legal adviser
- the dominant purpose test must be satisfied
- the giving of the advice must be attended by the necessary degree of independence
- the advice must be confidential
- the fact that the advice arose out of a statutory duty does not preclude the privilege from applying
- whether the lawyer is subject to professional standards can be relevant.<sup>42</sup>

If the communications were confidential communications between a professional legal adviser and client for the dominant purpose of giving or receiving legal advice, they will attract the privilege.<sup>43</sup>

## Mini template (s 42)

### Legal professional privilege exemption (s 42)

4. Section 42 of the FOI Act exempts documents that are subject to legal professional privilege. The term 'legal professional privilege' is not defined in the FOI Act.
5. [parties' submissions]
6. The issue of whether legal professional privilege can apply to advice or communications to or from lawyers working within an agency has been examined in various decisions.<sup>44</sup> It is now well established that an independent legal adviser-client relationship can exist between an agency's in-house lawyers and other staff of the agency. Whether a true legal-adviser client relationship exists will be a question of fact, to be determined by reference to:

<sup>40</sup> FOI Guidelines at [5.160].

<sup>41</sup> FOI Guidelines at [5.150].

<sup>42</sup> FOI Guidelines at [5.154] (footnotes omitted).

<sup>43</sup> *AWB v Cole (No. 5)* (2006) 155 FCR 30 at 44; *Waterford v Commonwealth* (1986) 163 CLR 54 at 95.

<sup>44</sup> See *Ransley and Commissioner of Taxation (Freedom of information)* [2015] AATA 728; *'AEE' and Department of Defence (Freedom of information)* [2023] AICmr 69; *'ADM' and Services Australia (No.7) (Freedom of information)* [2023] AICmr 66; and *'ACV' and Tertiary Education Quality and Standards Authority (Freedom of information)* [2023] AICmr 3.

- the nature of the lawyer's involvement and the content and circumstances of the communication,<sup>45</sup> and
- the substance of the communications, subjective intentions of those making them, and objective conclusions that can be drawn from the evidence.<sup>46</sup>

7. [...]

8. [...]

9. [waiver s 42(2)]

#### Finding (s 42)

10. I find that the [document/ documents/ material] that [agency] maintains is exempt under s 42 of the FOI Act [is/ is not] exempt under that provision.

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<sup>45</sup> *Rudd and Civil Aviation Safety Authority* [2013] AICmr 56.

<sup>46</sup> *Philip Morris Ltd and Prime Minister* [2011] AATA 556.