
Appendix A: Legal Opinions Provided by the Attorney General or Crown Solicitor

I have included all recent legal opinions obtained from the Attorney General or Crown Solicitor under section 33 of the *Public Finance and Audit Act 1983*.

The Auditor-General is required by section 52(2) of the *Public Finance and Audit Act 1983* to publish any requests for a legal opinion submitted to the Attorney General or the Crown Solicitor under section 33 of the Act. He is also required to publish their responses.

The legal opinions related to:

- (a) Cianfrano R - Freedom of Information Request - Flemington Markets - Reports to Parliament

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Mr Ian V Knight
The Crown Solicitor
The Crown Solicitor's Office
Level 5
60-70 Elizabeth street
SYDNEY NSW 2000

14 September 2007

Dear Ian

**FREEDOM OF INFORMATION REQUEST
MR ROBERT CIANFRANO**

As discussed in our telephone conversation today, I would appreciate your advice regarding the attached Freedom of Information (FOI) request from Mr Robert Cianfrano, received by fax on 12 September 2007.

The request is in relation to matters regarding the Flemington Markets, which were reported on in the Auditor-General's Report to Parliament Volume One and Seven of 2001 and Volume Six of 2002.

The information sought forms part of our working papers and as such, in my view, falls within the provision of section 38 of the Public Finance and Audit Act 1983 (PF&A Act). I have attached a list of the documents concerned.

As you are aware, the Office is listed in Schedule 2 of the FOI Act as an exempt body under section 9 of the Act regarding investigative, audit and report functions.

I seek your advice as to whether the Office:

1. can rely on section 38 of the PF&A Act to deny access to these documents, and if not
2. rely on the Office being scheduled under section 9 of the FOI Act.

If neither of the above options are available to the Office, then in accessing each document, are we required to consider the views of the originator of the document?

Yours sincerely

A T Whitfield
Deputy Auditor-General

Documents Forming Part of the Audit Office Work papers regarding Crown Property Portfolio for year ended 30 June 2000

1. Variation of Lease - Sydney Markets Sale
2. Facsimile from DPWS re sale of Sydney Markets
3. Valuation by AVO of Sydney Markets
4. Letter of offer for the purchase of Sydney Markets site
5. Letter from OSR re disposal of Flemington Markets site
6. Excerpt - Bennett's valuation re Sydney Markets
7. Contract for sale of land - Flemington Markets
8. Notes from DPWS meeting of Flemington Markets Taskforce - 26.10.1999, 29.11.1999, 24.7.2000
9. Letter from Crown Solicitor to Premier's re Sydney Markets Limited dated 3.10.2000
10. Letter from Premier's to Sydney Markets Limited dated 5.10.2000x



Crown Solicitor's Office

NEW SOUTH WALES

Advice

Cianfrano R - FOI Request - Flemington Markets - Reports to Parliament

1. Summary of advice

- 1.1. Please note this is a summary of the central issues and conclusions in my advice. Other relevant or significant matters may be contained in the advice, which should be read in full.
- 1.2. The Office of the Auditor-General is, in relation to its report function, exempt from the operation of the Freedom of Information Act 1989 ("FOI Act") by virtue of s. 9 and Schedule 2 of the FOI Act. As you instruct that the documents sought by Mr Cianfrano relate to the Office's report function (being documents "in relation to" three Auditor-General Reports to Parliament), the Office need only respond by advising that it is outside the operation of the Act by reason of those facts - it cannot make a determination under s. 24 of the FOI Act.
- 1.3. In my view, cl.12 of Schedule 1 would be available as an exemption in the circumstances here, based on recent Court of Appeal and Administrative Decision Tribunal Appeal Panel authorities. It would, however, require the making of a determination under s. 24 and compliance otherwise with the FOI Act.
- 1.4. It is unnecessary to consider whether the Office needs to consult with any persons in relation to the application.

2. Advice sought

- 2.1. You seek my advice as to:
 1. Whether the Office can rely on s. 38 of the *Public Finance and Audit Act 1983* ("PF&A Act"); and, if not
 2. Whether the Office can rely on being scheduled under s. 9 of the *FOI Act*:
 3. Whether, if neither option above is available, you are required to consider the views of the originators of the documents.

3. Background

- 3.1. Mr Cianfrano has sought access to the following five categories of documents:
 1. "All documents and or other material relied upon by the Auditor General's office and or personnel and or agents etc, going to the supporting and instructing documents going to the Ministerial Holding Corporation etc and or any other government instrumentalities etc. This is in relation to Auditor General's Report to Parliament 2001 Volume One page 189 Crown Property Portfolio."
 2. "All documents and or any other material relied upon by the Auditor General's office and or personnel and or agents etc, going to the Auditor General's Report to Parliament 2001 Volume Seven page 665. The documents sought are the supporting documents relied upon and provided. This would encompass documents going to the Ministerial Holding Corporation and any other government organization etc. The documents in question are in relation to Auditor General's Report presented to Parliament 2001 Volume Seven page 665."
 3. "All documents and or other material relied upon by the Auditor General's office and or personnel and or agents etc, going to the Auditor General's Report to Parliament 2002, Volume Six 521 Crown Property Portfolio."
 4. "The FOI Requests documents and or any other material relied upon by the Auditor General's office and or personnel and or agents etc, going to the supporting documents such as any Orders and or statutory instruments as to the overriding specified legislative provisions of the *Sydney Market Authority Dissolution Act 1907*."
 5. "All documents and or other material relied upon by the Auditor General's office and or personnel and or agents etc, going to the supporting documents going to the supporting documents such as any Orders and or statutory instruments."
- 3.2. After noting that he is "fully conversant" with Schedule 2 of the FOI Act, Mr Cianfrano states:

"The applicant is not seeking any investigative, or audit and report functions of the office of Auditor-General, as the documents requested are merely archival and of significant historical importance relating to statutory instruments used to overriding specified legislative provisions of the *Sydney Market Authority Dissolutions Act 1997*."
- 3.3. You have provided me with a list of documents coming within the scope of the application and instruct that they form part of the Office's Working papers and, as such, fall within s. 38 of the PF&A Act.
- 3.4. You also instruct that you do not hold any documents falling within the last two categories of documents 4 and 5 referred to above. Notice should be given under s.28 (l) (b) of the FOI Act of this fact.

4. Relevant legislation

Freedom of Information Act 1989 ("FOI Act"):

4.1. Section 9, cl. 12 of Sch. 1 and Sch. 2 relevantly provide:

9 Certain bodies etc exempt from operation of Act

Any body or office specified or described in Schedule 2 is, in relation to such of the functions of the body or office as are so specified or described, exempt from the operation of this Act ...

12 Documents the subject of secrecy provisions

(1) A document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act, whether or not the provision that creates the offence is subject to specified qualifications or exceptions.

(2) A document is not an exempt document by virtue of this clause unless disclosure of the matter contained in the document, to the person by or on whose behalf an application for access to the document is being made, would constitute such an offence ...

Schedule 2 Exempt bodies and offices

(Section 9)

The office of Auditor-General-investigative, audit and report functions."

Public Finance and Audit Act 1983 ("PF&A Act")

4.2. Sections 38 and 62 provide:

38 Secrecy

(1) The Auditor-General, an auditor and an authorised person shall preserve and aid in preserving secrecy with respect to all matters and things that come to the knowledge of the Auditor-General, auditor or authorised person in the exercise of the functions of the Auditor-General, auditor or authorised person under this Act and the prescribed requirements and shall not communicate to any person any such matter or thing.

(2) Nothing in subsection (1) applies to or in respect of:

- (a) the conduct of any matter necessary for the proper administration of this Act or the prescribed requirements, or
- (b) proceedings for an offence relating to public money, other money, public property or other property or for the recovery of public money, other money, public property or other property, or
- (c) disciplinary proceedings brought against an officer of an authority, or
- (d) a report or communication authorised or required to be made by or under this Act or the prescribed requirements, or
- (e) a report or communication that the Treasurer authorises the Auditor-General to make to a person for the purposes of a due diligence or similar process relating to the sale of any government undertaking.. .

62 Offences generally

A person who contravenes or fails to comply with any provision of this Act or the prescribed requirements is guilty of an offence and liable, where a penalty is not otherwise expressly provided, to a penalty not exceeding 20 penalty units."

5. Advice

As to question 2

5.1. You have instructed me that the documents sought in paragraphs 1 to 3 of the request relate to the Office's report functions. On the face of it, that appears to be a correct characterisation. Accordingly, the effect of s. 9 and Schedule 2 of the FOI Act is that the Office is, in relation such function, "exempt from the operation of the FOI Act".

5.2. What is meant by being "exempt from the operation of FOI Act" was recently considered by the Supreme Court in *Independent Commission Against Corruption v McGuirk* [200] NSW SC 147. In those proceedings, the respondent conceded that the relevant documents fell within the Schedule 2 functions of the appellant but the Appeal Panel of the Administrative Decisions Tribunal held that s. 9 was a "general provision" and that, because ICAC was an agency, it was subject to all the provisions of the FOI Act relating to agencies including s. 24 (which required it to make a determination). The Supreme Court rejected that view because it was inconsistent with the plain words of s. 9 so that, "once the documents are categorised as s.9 documents, the FOI Act has no further application to the body or office" (para 19). It followed that the Tribunal had no jurisdiction.

5.3. Similarly, in my view, the agency has no power to make a determination under s. 24. Accordingly, if the documents sought relate to the Office's report function, as the documents referred to in paragraphs 1 to 3 of the request appear to, the Office cannot make a determination. Mr Cianfrano should be advised accordingly.

As to question 1

- 5.4. Strictly, my conclusion in relation to question 2 makes it unnecessary to consider question 1. However, I shall address that question briefly.
- 5.5. Clause 12 of Sch 1 is set out above under the heading Legislation. It is a difficult provision to interpret and has recently been the subject of consideration by the Appeal Panel of the Tribunal and the NSW Court of Appeal.
- 5.6. In the Court of Appeal decision, *General Manager, Workcover Authority of NSW v Law Society* [2006] 65 NSWLR 502; [2006] NSWCA 84 ("*WorkCover*"), the Court considered a secrecy provision which had a "lawful excuse" exception. McColl JA said at paras 176-179:
- "176 Ms Allars [counsel for WorkCover] accepted that disclosure of the disputed documents because of a requirement under the *FOI Act* would be a disclosure 'with lawful excuse' within s243(1)(f) of the *Workplace Injury Management and Workers Compensation Act 1998*. She also accepted that such a disclosure would not, therefore, constitute an offence. She accepted that the consequence of this was that the disputed documents fell within cl 12(2)(quoted at [17]) but asserted that cl 12(1) was, prima facie, applicable and the documents were exempt.
- 177 The Law Society argued that WorkCover's proposal construction would produce absurd consequences and impermissibly read down cl 12(2)
- 178 In my view the tension between cl 12(1) and cl 12(2) which concerned the Appeal Panel is more apparent than real. Clause 12 (1) is a general provision which establishes that a document is prima facie exempt if its disclosure would constitute an offence, whether or not the provision creating the offence is subject to defeasance by virtue of one or more qualifications or exceptions.
- 179 Clause 12(2) is a specific provision which provides that if disclosure of the documents would not constitute an offence because it would fall within some qualification, exception or excuse, they are not exempt."
- 5.7. *WorkCover* was applied by the Appeal Panel in *Commissioner for Fair Trading v The Australian Wine Consumers Cooperative Society Ltd* [2007] NSWADTAP 14. In that case, there was no "lawful excuse" or FOI exception in s. 431 of the *Cooperatives Act*, which was a "crucial difference" [para 12] from *WorkCover*. After referring to the judgment of McColl JA set out above and reconsidering its own decision in *Law Society NSW v General Manager, Workcover Authority of NSW* (No 2) [2005] NSW ADTAP 33, the Appeal Panel disavowed some of its earlier reasoning and concluded at paragraph 38:
- "38 In summary, we agree with the submissions put by counsel for the Commissioner that the proper approach to the interpretation of cl 12 is to be found in the approach employed by the Court of Appeal in the *Workcover Appeal*. The agency must first determine whether the 'matter' for which exempt status is claimed is 'matter' of a kind that it is an offence to disclose; and then examine whether there is any exception or qualification in the offence provision allowing for disclosure under the *FOI Act*. That is clearly the case where there is an express exception in the secrecy provision permitting disclosure under the *FOI Act* (as in the *Casino Control Act*, see further *St Vincent Welch v Casino Control Authority* [2001] NSWADT 89). The *WorkCover Appeal* makes it clear that a less specifically expressed exception such as 'with lawful excuse' may be treated as an exception or qualification providing a basis for FOI disclosure."
- 5.8. Applying that decision to s. 38 of the *PF&A Act*, it appears that s. 38 prohibits "communication" of "all matters and things that come to the knowledge of the Auditor General ... in the exercise of the functions of the Auditor General" and s. 62 makes breach of such prohibition an offence. The next step is to consider whether there is any exception or qualification allowing for disclosure under the *FOI Act*. There does not appear to be such an exception or qualification. Accordingly, cl 12 is available as an exemption.
- 5.9. The exemption, however, need not be availed in circumstances where s. 9 and Schedule 2 apply to exempt the Office entirely from the operation of the Act.

As to question 3

- 5.10. Having regard to my conclusions above, it is unnecessary to answer this question.

6. Conclusion

- 6.1. See Summary.

Signed
John McDonnell
A/Deputy Crown Solicitor
for Crown Solicitor