

Position Paper Internal Audit Documents and FOI

Introduction

Many internal auditors work in government departments and agencies. The documents produced by internal auditors - such as audit reports, interview transcripts, emails and other materials - are subject to freedom of information legislation.

If an applicant seeks access to audit documents, the documents must be disclosed unless an exemption applies under the relevant freedom of information legislation. Commonwealth Government agencies are subject to the Freedom of Information Act 1982 (Cth) ('Act'). Corresponding legislation exists in each Australian jurisdiction, with differing degrees of variation.

This document has been prepared to assist internal auditors in understanding how the disclosure exemptions may operate under the Act. It provides guidance as to the tests which will be applied, as well as the public interest arguments referred to in case law. This document is a guide, not legal advice, and should not be relied upon in making formal decisions under statute.

What is an internal audit document?

In the course of their role, internal auditors work across all areas of an organisation. In addition to the core areas of financial control and IT, they review the tangible aspects of operations, such as an organisation's supply chain or IT systems; as well as more intangible aspects such as organisational culture and ethics. In fact, any system that has an impact on the effective operation of an organisation may be included in internal audit's scope.

Case law has recognised that:

...the term 'audit' carries the connotation of a systemic, broad ranging examination of specified activities of the organisation the subject of the audit. While the expression is most commonly used in connection with the conduct of audits of the financial affairs and operations of an organisation, it is now often used to describe examinations of non-financial aspects of an organisation's activities, for example the level of compliance of the organisation with regulatory standards or best practice standards (a form of audit sometimes called a compliance audit or quality audit).¹

However, a document will not necessarily meet the definition because it is called an 'audit report', or has been prepared by an internal audit unit.

Conditional exemptions

For internal audit documents, the most relevant exemption is contained in section 47E of the Act. This is a 'conditional exemption', meaning that where the terms of the section are satisfied, a further test - the 'public interest test' - must also be met.

Two thresholds must therefore be crossed in order to satisfy the exemption. Firstly, that disclosure of the relevant document could reasonably be expected to have one of the following effects:

¹ *Director General, Department of Education and Training v Mullett and Randazzo (No. 2)* [2002] NSWADTAP 29.

- to prejudice the effectiveness of methods or procedures for conducting internal audits; or
- to prejudice the attainment of the objects of a particular audit; or
- to have a substantial adverse effect on the proper and efficient conduct of the relevant agency's operations.

Once the above threshold is met, the second threshold is that disclosure 'would, on balance, be contrary to the public interest'. This is the public interest test.

The 'public interest test'

Recent changes to the Act mean there is a presumption that disclosure of conditionally exempt information is in the public interest, unless other public interest considerations against disclosure outweigh those in favour.

The test works by balancing competing considerations, followed by a decision as to where the balance lies. The Act sets out several considerations in favour of disclosure, including promoting the objects of the Act, informing debate on matters of public importance, and promoting effective oversight of public expenditure (section 11B(3)). This is a non-exhaustive list.

Agencies are also required to have regard to guidelines issued by the Information Commissioner. These guidelines are available on the Commissioner's website (see below). They list several factors favouring disclosure, including revealing or substantiating that an agency or official has engaged in misconduct, or in negligent, improper or unlawful conduct.

The Act lists no factors weighing against disclosure. These will only be apparent in the circumstances of the particular document.

Considerations

There is no 'blanket' exemption for internal audit documents. Each document must be considered on its individual content and particular circumstances. That said, case law from various jurisdictions has provided some considerations in determining if the information should be released including:

- will the disclosure prejudice the effectiveness of the audit process e.g. if staff would be less forthright with auditors if the information they provided was to be made public?²;
- the extent to which an agency's functions are overseen by an external body such as the Ombudsman or the Audit Office or if the agency professes to adhere to 'international standards for the professional practice of internal auditing established by the Institute of Internal Auditors' - the level of external scrutiny may factor against disclosure³; and
- if there is a risk of prejudicing the agency's ability to obtain information in similar circumstances in the future⁴

Further information

Information Commissioner's Guidelines are available at oaic.gov.au/publications/guidelines

For further information, please contact Stephanie Koehn, Manager – Technical at The Institute of Internal Auditors-Australia on +61 2 9267 9155.

² *Challita v NSW Department of Education and Training* [2010] NSWADT 175

³ *ibid*

⁴ *Re Bennet and Chief Executive Officer of Customs* (2005) 89 ALD 370