



Decision and Reasons for Decision

Citation: *Mathews and Department of Transport and Main Roads*
[2014] QICmr 37 (19 September 2014)

Application Number: 312103

Applicant: Mathews

Respondent: Department of Transport and Main Roads

Decision Date: 19 September 2014

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – LEGAL PROFESSIONAL PRIVILEGE – communication between agency’s officers and internal legal advisers – summary of resulting advice – whether information would be privileged from production in a legal proceeding on the ground of legal professional privilege – section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(a) and 48 and schedule 3, section 7 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – LAW ENFORCEMENT OR PUBLIC SAFETY – SERIOUS ACT OF HARASSMENT OR INTIMIDATION – information identifying individuals – applicant’s previous conduct – offensive and abusive remarks on website – whether disclosure could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation – section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(a) and 48 and schedule 3, section 10(1)(d) of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Transport and Main Roads (**Department**), under the *Information Privacy Act 2009* (Qld) (**IP Act**), for access to information and documents that are specific to a certain comment made about him.
2. The Department located 7 pages, and decided to refuse access to 1 full and 4 part pages on the basis that certain information was subject to legal professional privilege, and that disclosing the remaining information (namely, Departmental officers’ names and signatures) could reasonably be expected to result in a person being subjected to

a serious act of harassment or intimidation. The decision was affirmed on internal review.

3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's internal review decision.
4. For the reasons set out below, I affirm the Department's decision.

Background

5. Significant procedural steps relating to the application and the external review process are set out in the Appendix.

Reviewable decision

6. The decision under review is the Department's internal review decision dated 15 July 2014.

Evidence considered

7. Evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including the footnotes and Appendix)

Information in issue

8. The information to which the Department refused the applicant access (**Information in Issue**) comprises 1 full and 4 part pages,¹ and is divided into two categories in these reasons:
 - 1 full and 1 part page² to which the Department refused access on the basis of legal professional privilege (**Legal Information**); and
 - 4 part pages³ (comprising Departmental officers' names and signatures) the disclosure of which the Department found could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation (**Public Safety Information**).

Relevant law

9. Under the IP Act, an individual has a right to be given access to documents of an agency to the extent they contain the individual's personal information.⁴ However, this right is subject to other provisions of the IP Act and *Right to Information Act 2009* (Qld) (**RTI Act**),⁵ including the grounds on which access may be refused to documents. Relevantly, the RTI Act provides that access may be refused to documents to the extent that they comprise exempt information.⁶ Schedule 3 of the RTI Act sets out categories of information the disclosure of which the Parliament has considered would, on balance, be contrary to the public interest, and therefore exempt from disclosure.⁷

¹ Page 7 and pages 1, 4, 5 and 6, respectively.

² Page 7 and page 4, respectively.

³ Pages 1, 4, 5 and 6.

⁴ Section 40 of the IP Act.

⁵ Section 67(1) of the IP Act provides that access to a document may be refused in the same way and to the same extent access may be refused to the document under section 47 of the RTI Act.

⁶ Section 47(3)(a) of the RTI Act.

⁷ Section 48(2) of the RTI Act.

Information subject to legal professional privilege

10. Schedule 3, section 7 of the RTI Act provides that information is exempt from disclosure if it would be privileged from production in a legal proceeding on the ground of legal professional privilege. This exemption reflects the requirements for establishing legal professional privilege at common law.⁸
11. The general principles of legal professional privilege were summarised by the High Court in *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*⁹ as follows:

It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.

12. Legal professional privilege is generally divided into two categories: advice and litigation privilege.¹⁰ Advice privilege attaches to confidential communications between a legal adviser and client or third party which are made for the dominant purpose of obtaining or providing legal advice.¹¹ Litigation privilege attaches to confidential communications between a legal adviser and client in relation to current or reasonably anticipated litigation.¹² Legal professional privilege may protect communications between government legal officers and their employers, provided there is a professional relationship of legal adviser and client which secures to the advice an independent character notwithstanding the employment.¹³
13. In some cases, communications may not be subject to legal professional privilege because privilege has been waived (either expressly or impliedly) or the improper purpose exception applies. For the latter to apply, a communication must be made in pursuit of an illegal or improper purpose.¹⁴ In summarising an established line of relevant case law¹⁵ the Assistant Information Commissioner in *Secher and James Cook University*¹⁶ explained that:

This exception operates to displace legal professional privilege where evidence exists that the relevant client ... has embarked on a deliberate course of action knowing that the proposed actions were contrary to law, and has made the relevant communications in furtherance of that illegal or improper purpose.

The person alleging that privilege has been displaced by reason of an alleged illegal or improper purpose must show that it is made out in the current circumstances. In establishing improper purpose, the standard of proof is high. The High Court has observed that it "is a serious thing to override legal professional privilege where it would otherwise be applicable" and as a result "vague or generalised contentions of crimes or improper purposes will not suffice."

⁸ The Electoral and Administrative Review Commission, *Report on Freedom of Information*, Report No 90/R6 (1990) [7.152] states that '[t]he exemption incorporates the common law concept of legal professional privilege'. This was subsequently confirmed in *Ozcare and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 13 May 2011) [12].

⁹ (2002) 213 CLR 543 [9] (citations omitted).

¹⁰ *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* (2002) 4 VR 332 [8]-[9].

¹¹ *Waterford v Commonwealth of Australia* (1987) 163 CLR 54, 95; *Eso Australia Resources Limited v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49 [35]; *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30 [41].

¹² *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* (2002) 4 VR 332 [16].

¹³ *Waterford v Commonwealth of Australia* (1987) 163 CLR 54, 62.

¹⁴ *R v Bell; Ex parte Lees* (1980) 146 CLR 141, 145.

¹⁵ *Murphy and Queensland Treasury* (1998) 4 QAR 446 [31]-[42]; *Commissioner of Australian Federal Police v Propend Finance Pty Limited* (1997) 188 CLR 501, 514, 546-547 and 591-592.

¹⁶ (Unreported, Queensland Information Commissioner, 6 June 2012) [20]-[21] (citations omitted).

Serious act of harassment or intimidation

14. Schedule 3, section 10(1)(d) of the RTI Act provides that information is exempt if its disclosure could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation. The RTI Act does not define '*serious act of harassment or intimidation*'—therefore, the terms should be given their ordinary meanings. The Information Commissioner has previously indicated that:¹⁷
- a serious act of harassment is an action that attacks, disturbs or torments a person and that causes concern or apprehension or has undesired consequences; and
 - a serious act of intimidation is an action that induces fear or forces a person into some action by inducing fear or apprehension and that causes concern or apprehension or has undesired consequences.
15. Further, the Information Commissioner has noted that some degree of harassment or intimidation is contemplated as permissible before the right to access documents is removed.¹⁸ In *Sheridan*, the Information Commissioner considered the phrase '*could reasonably be expected to*' and found that, depending on the circumstances of the particular review, a range of factors may be relevant in determining whether an act could reasonably be expected to occur. These factors may include, but are not limited to:¹⁹
- past conduct or a pattern of previous conduct
 - the nature of the relevant matter in issue
 - the nature of the relationship between the parties and/or third parties; and
 - relevant contextual and/or cultural factors.
16. A previous decision which considered this exemption found that the following two requirements must be present for it to apply:²⁰
- an apprehended serious act of harassment or intimidation; and
 - a reasonable basis for expecting that that act would occur if the information in issue were disclosed.
17. This exemption is subject to the exceptions contained in schedule 3, section 10(2) of the RTI Act.

Findings

Is the Legal Information subject to legal professional privilege?

18. Yes, for the reasons that follow.

¹⁷ *Richards and Gold Coast City Council* (Unreported, Queensland Information Commissioner, 28 March 2012) [13], applying *Sheridan and South Burnett Regional Council* (Unreported, Queensland Information Commissioner, 9 April 2009) (***Sheridan***) [199]-[200]. The decision in *Sheridan* concerned section 42(1)(ca) of the now repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**). Schedule 3, section 10(1)(d) of the RTI Act is drafted in substantially the same terms as the provision considered in *Sheridan*. Therefore, the Information Commissioner's findings in *Sheridan* are relevant in interpreting schedule 3, section 10(1)(d) of the RTI Act.

¹⁸ *Sheridan* [187].

¹⁹ *Sheridan* [193].

²⁰ *Mathews and The University of Queensland* (Unreported, Queensland Information Commissioner, 21 September 2012) (***Mathews and UQ***) [27].

19. The Legal Information comprises correspondence from Departmental officers to the Department's internal legal advisers, and a summary of the Department's internal legal advisers' resulting advice. I am satisfied that the officers responsible for providing the legal advice worked within the Department's legal services team and were acting in a professional and independent capacity.
20. Having reviewed the Legal Information, I am satisfied that the initial correspondence comprises a confidential communication between the Department and its internal legal advisers made for the dominant purpose of seeking legal advice, and is accordingly subject to legal professional privilege. As the summary replicates the substance of the legal advice received, I am satisfied that this information is also subject to legal professional privilege.

Does the improper purpose exception apply?

21. No, for the reasons that follow.
22. The applicant submits that OIC is '*protecting wrong doers in the public sector*' and '*permitting public sector entities to do so*'.²¹
23. I have carefully assessed the Legal Information and the applicant's submissions. I am satisfied that none of the Legal Information records or otherwise evidences an illegal or improper purpose. Accordingly, I find that the improper purpose exception does not apply to preclude the application of legal professional privilege to the Legal Information.
24. I therefore find that the Legal Information comprises exempt information to which the Department is entitled to refuse access.²²

Could disclosing the Public Safety Information reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation?

25. Yes, for the reasons that follow.
26. The Public Safety Information comprises only Departmental officers' names and signatures.
27. The applicant maintains a website on which he publishes material about various individuals. Previous decisions of OIC—namely, *Mathews and UQ*²³ and *Mathews and Department of Transport and Main Roads*²⁴—provide an overview of the website's content in this regard.

Is there an apprehended serious act of harassment or intimidation?

28. Yes, for the reasons that follow.
29. The applicant's website contains information identifying various individuals (in many cases, public sector employees), accompanied by offensive and abusive remarks directed at those individuals.²⁵ The website explicitly notes that it is the applicant's intention to adversely affect the future employment prospects of individuals named

²¹ Applicant's submission dated 8 August 2014. It appears that this submission relates more to the Public Safety Information; however, I will deal with it in relation to the Legal Information for the sake of completeness.

²² Under section 67(1) of the IP Act and sections 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act.

²³ [3], [30]-[43], [46]-[49] and [52].

²⁴ (Unreported, Queensland Information Commissioner, 28 August 2013) (*Mathews and DTMR*) [37]-[47].

²⁵ Examples of such remarks are listed in (albeit in the context of a different agency's employees) in *Mathews and UQ* [30].

within it.²⁶ The applicant hopes this will occur by potential future employers of such individuals conducting internet searches of their names and being directed to comments on his website.

30. I am satisfied that these actions constitute both harassment and intimidation. They are actions that attack, disturb or torment other persons and that induce fear among individuals regarding their current employment and future career prospects.²⁷ While the posting of offensive and abusive remarks alone may be insufficient to reach the threshold of a **serious** act of harassment or intimidation, I have considered these remarks in conjunction with the stated malicious intention of causing professional detriment to those referred to on the website.²⁸ Accordingly, I am satisfied that these actions constitute a serious act of harassment or intimidation, as this malicious intention is sufficient to show that the applicant's actions could cause concern or have undesired consequences for the targeted individuals.
31. I am therefore satisfied that the act of publishing material on the applicant's website that targets individuals is a serious act of harassment or intimidation against those individuals.

Is there a reasonable basis for expecting that the serious act of harassment or intimidation would occur if the Public Safety Information were disclosed?

32. Yes, for the reasons that follow.
33. The applicant's website has previously targeted individuals whose identities have been disclosed to him under the FOI and IP Acts.²⁹ Therefore, it is reasonable to conclude that the applicant's past acts of serious harassment or intimidation resulted directly from disclosure of identifying information similar to the Public Safety Information.
34. Given the applicant's past conduct, and also the nature of the Public Safety Information (being public sector employees' names and signatures), I consider it is highly likely that he would, if granted access to this information, target the individuals identified in it, by posting material about them on his website.³⁰ Accordingly, I am satisfied that serious acts of harassment or intimidation could reasonably be expected to occur as a result of disclosing the Public Safety Information.

Applicant's submissions

35. The applicant submits that OIC is '*protecting wrong doers in the public sector by expunging their names*', '*permitting public sector entities to do so*'³¹ and '*concealing the names of criminals*'.³² The applicant states that the names of Departmental officers are relevant information to the judicial process regarding alleged breaches of legislation, and indicates his intention to take legal action against employees of public entities.³³ The applicant submits that the more actions he takes against such employees, the less likely it is that public servants (and possibly members of the community) will treat him detrimentally.³⁴

²⁶ See also *Mathews and UQ* [32]-[33]; and *Mathews and DTMR* [39].

²⁷ *Mathews and DTMR* [40].

²⁸ See also *Mathews and UQ* [37]; and *Mathews and DTMR* [41].

²⁹ *Mathews and UQ* [42] and [47]; and *Mathews and DTMR* [39] and [42].

³⁰ See also *Mathews and UQ* [48].

³¹ Applicant's submission dated 8 August 2014.

³² Applicant's submission dated 27 August 2014.

³³ Applicant's submission dated 8 August 2014.

³⁴ Applicant's submission dated 8 August 2014.

36. The applicant appears to be contending that he requires the Public Safety Information for the purpose of commencing proceedings under other legislation. If I were required to consider whether disclosing the Public Safety Information would, on balance, be contrary to the public interest,³⁵ it may be relevant to consider whether public interest factors favouring disclosure relating to the contribution to the administration of justice³⁶ arose in this instance.
37. However, where (as is the case here) information falls into one of the categories of information which Parliament has decided are exempt from release,³⁷ public interest factors favouring disclosure cannot be taken into account. Accordingly, I cannot take these submissions into account when considering whether the Public Safety Information is exempt.

Do any of the exceptions to this exemption apply?

38. I have carefully considered the exceptions contained in schedule 3, section 10(2) of the RTI Act, and am satisfied that none apply in this instance.
39. I therefore find that the Public Safety Information comprises exempt information to which the Department is entitled to refuse access.³⁸

DECISION

40. For the reasons set out above, I affirm the decision under review and find that access to the Information in Issue can be refused under section 67(1) of the IP Act and sections 47(3)(a) and 48 of the RTI Act on the basis that:
- the Legal Information is subject to legal professional privilege under schedule 3, section 7 of the RTI Act; and
 - disclosing the Public Safety Information could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation under schedule 3, section 10(1)(d) of the RTI Act.
41. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

L Lynch
Assistant Information Commissioner

Date: 19 September 2014

³⁵ Under sections 47(3)(b) and 49 of the RTI Act.

³⁶ Schedule 4, part 2, items 16 and 17 of the RTI Act.

³⁷ Set out in schedule 3 of the RTI Act.

³⁸ Under section 67(1) of the IP Act and sections 47(3)(a) and 48 and schedule 3, section 10(1)(d) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
17 May 2014	The Department received the applicant's access application.
18 June 2014	The Department issued its decision, refusing access to the Information in Issue.
18 June 2014	The Department received the applicant's internal review application.
15 July 2014	The Department issued its internal review decision, refusing access to the Information in Issue.
15 July 2014	OIC received the application for external review of the Department's decision.
16 July 2014	OIC notified the Department of the external review application and requested procedural documents in relation to the application.
18 July 2014	The Department provided OIC with the requested procedural documents.
22 July 2014	OIC notified the applicant and the Department that OIC had accepted the external review application. OIC requested that the Department provide copies of the documents located in response to the access application, including the Information in Issue.
22 July 2014	OIC received a copy of the located documents, including the Information in Issue.
5 August 2014	OIC issued the applicant with a preliminary view that the Information in Issue was exempt from disclosure. OIC invited the applicant to make submissions by 20 August 2014 if he contested the preliminary view.
8 August 2014	OIC received a submission from the applicant.
27 August 2014	OIC wrote to the applicant, advising him that: <ul style="list-style-type: none"> • issues unconnected to this review which had been raised in his submission had been addressed in separate correspondence from OIC; and • OIC's preliminary view remained as set out in the letter dated 5 August 2014. OIC invited the applicant to provide submissions supporting his case by 5 September 2014 if he did not accept the preliminary view.
27 August 2014	OIC received a submission from the applicant, which again raised other issues unconnected to this review.
5 September 2014	OIC wrote to the applicant, advising him that his submissions did not alter OIC's preliminary view, and that OIC would proceed to prepare a formal decision.
5 September 2014	OIC advised the Department that OIC would proceed to prepare a formal decision.
5 September 2014	OIC received a response from the applicant, which again raised other issues unconnected to this review.