



Decision and Reasons for Decision

Citation: *Jones and Queensland Police Service* [2015] QICmr 15 (26 June 2015)

Application Number: 312172

Applicant: Jones

Respondent: Queensland Police Service

Decision Date: 26 June 2015

Catchwords: ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL TO DEAL WITH ACCESS APPLICATION - PREVIOUS APPLICATION FOR SAME DOCUMENTS - whether the applicant has previously applied to the same agency for the same documents - whether the later application, on its face, discloses any reasonable basis for again seeking access to the documents - agency had previously decided to refuse access to the requested documents - section 62 of the *Information Privacy Act 2009* (Qld)

ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - internal emails between agency staff and agency legal officer - whether the information would be privileged from production in a legal proceeding on the ground of legal professional privilege - section 67 of the *Information Privacy Act 2009* (Qld) - sections 47(3)(a) and 48 of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant sought access to four categories of information from the Queensland Police Service (**QPS**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) which relate generally to her pre-selection psychometric assessment.
2. QPS refused to deal with parts one and three of the application on the basis that the applicant had previously applied to QPS for the same documents and the application did not, on its face, disclose any reasonable basis for again seeking access to the documents. In relation to the other parts of the application, QPS granted full access to one page and refused access to the remaining information on several grounds.

3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of QPS' decision.
4. A number of issues were informally resolved on external review. QPS' decision in relation to the remaining issues is affirmed. For the reasons set out below, QPS was entitled to:
 - refuse to deal with parts one and three of the application as the applicant had previously applied to QPS for the same documents and the application did not, on its face, disclose any reasonable basis for again seeking access to the documents; and
 - refuse access to nine pages relating to part four of the application as the information would be privileged from production in a legal proceeding on the ground of legal professional privilege.

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 QPS' decision dated 21 August 2014.

Evidence considered

7. The evidence, submissions, legislation and other material I have considered in reaching this decision is disclosed in these reasons (including footnotes and the appendix).

Issues for determination

8. A number of issues were informally resolved on external review.¹ The remaining issues for determination are whether QPS was entitled to:
 - refuse to deal with parts one and three of the application as the applicant had previously applied for the same documents; and
 - refuse access to nine pages relating to part four of the application on the ground of legal professional privilege.
9. The applicant made submissions to OIC in support of her case.² Whilst I have carefully considered all of the applicant's submissions, not all matters raised are relevant to the issues for determination. I have addressed the applicant's submissions below to the extent they are relevant to these issues.

Previous application for same documents

10. QPS relied on section 62 of the IP Act to refuse to deal with parts one and three of the application. I am satisfied that QPS was entitled to refuse to deal with these parts of the application on this basis.

¹ The applicant accepted OIC's preliminary view that documents relating to part three of the application were nonexistent. QPS also agreed to release additional information relating to part four of the application to the applicant on external review. As these issues have been resolved informally, they are no longer in issue on external review and are not dealt with in these reasons for decision.

² In her external review application and submissions to OIC dated 5 December 2014 and 8 February 2015.

Relevant law

11. Section 62 of the IP Act applies where:³
- an applicant has made an access application under the IP Act or *Right to Information Act 2009* (Qld) (**RTI Act**)
 - the applicant makes another application under the IP Act to the same agency for access to one or more of the same documents that were sought under the first application; and
 - the later application does not, on its face, disclose any reasonable basis for again seeking access to the documents.
12. If the agency had refused access to the documents sought in the first application under section 67 of the IP Act, the agency may refuse to deal with the later application to the extent it is for the same documents sought in the first application.⁴

Findings

Has the applicant previously sought access to the same documents?

13. Yes.
14. On 19 February 2014, the applicant applied to QPS under the IP Act for access to the *'psychometric assessment completed 16 January 2014 at Psych Assessment Unit, Hershel Street, Brisbane'* and *'all associated documents including (inter alia) computer records, memos, emails, written notes'* for the period 16 January 2014 to 19 February 2014 (**First Application**).
15. In the application which is the subject of this review (**Later Application**), the applicant seeks access to the following information for the period 16 January 2014 to 17 July 2014:
- the Psychological Assessment Information Sheet and Consent Form which the applicant signed on 16 January 2014 (**Consent Form**);⁵ and
 - written notes about the assessment/interview taken on 16 January 2014 by QPS' Occupational Psychologist (**Notes**).⁶
16. I have considered the terms of both the First Application and the Later Application including the date range. I am satisfied the First Application is sufficiently broad to cover all documents associated with the applicant's psychometric assessment on 16 January 2014 due to the inclusion of the words *'all associated documents'* in the First Application. The Consent Form and Notes are both documents associated with the psychometric assessment on 16 January 2014 and I consider they clearly fall within the scope of the First Application.
17. The applicant contests the application of section 62 of the IP Act to the Consent Form and Notes and submits that she did not specifically identify the Consent Form in her First Application and this document is not a *'psychological assessment document'*.⁷

³ Section 62(1) of the IP Act.

⁴ Section 62(3)(b)(iii) of the IP Act.

⁵ Part one of the application. Given the nature of the Consent Form and the fact that the applicant had seen and signed it, OIC asked if QPS would exercise its discretion and agree to release the Consent Form to the applicant on external review. QPS did not agree to release the Consent Form and continued to rely on section 62 of the IP Act. As I am satisfied that QPS was technically entitled to refuse to deal with the Consent Form on this basis, QPS' decision is affirmed, as explained in these reasons.

⁶ Part three of the application.

⁷ External review application and submissions to OIC dated 8 February 2015.

While I accept that the First Application did not specifically identify the Consent Form or Notes, I am satisfied that these documents were nevertheless covered by the broad scope of the First Application.

18. QPS considered both the Consent Form and Notes in its decision relating to the First Application.⁸ QPS refused access to both of these documents under section 67 of the IP Act on the basis that their disclosure would, on balance, be contrary to the public interest.⁹
19. The applicant applied to OIC for external review of QPS' decision to refuse access to information relating to the First Application.¹⁰ In her external review application, the applicant identified the grounds for external review as '*Refusal to provide access to personal information, being...the psychologists' assessment notes and report [and] ...privacy agreement signed by me on 16 Jan 2014*'. This indicates that the applicant did consider her First Application covered the Consent Form and Notes and that she applied for external review of QPS' decision to refuse access to these documents.
20. The applicant's submissions on these documents relate primarily to her belief that QPS' decision on the First Application was incorrect and that access to these documents should be granted.¹¹ However, the relevant issue for determination is whether QPS was entitled to rely on section 62 of the IP Act to *refuse to deal* with these parts of the Later Application. This is a threshold issue. As I am satisfied that QPS was entitled to refuse to deal with these parts of the Later Application, the question of whether *access to these documents can be granted under the IP Act* does not arise for consideration on external review. As a result, the applicant's submissions on the issue of access to these documents are not relevant as they do not go to the application of section 62 of the IP Act. Accordingly, I have not addressed these submissions in these reasons for decision.

Does the Later Application, on its face, disclose a reasonable basis for seeking access to those same documents?

21. No.
22. In determining this question, I am not required to review QPS' decision to refuse access to this information in relation to the First Application. The applicant was required to seek internal or external review of the decision for that issue to be reviewed.¹² Rather, determining this question requires an objective analysis of whether there is a reasonable basis for the applicant to seek access to these documents again.
23. There is nothing *on the face of the application* which discloses a reasonable basis for the applicant to again seek access to the Consent Form and Notes. However, for the sake of completeness, I have also carefully considered the applicant's submissions to OIC.¹³ As noted above, the applicant's submissions on these documents relate to her belief that QPS' decision on the First Application was incorrect and that access to these documents should be granted.¹⁴ I am not satisfied that these submissions provide any evidence of a reasonable basis for the applicant to again seek access to these documents.

⁸ QPS decision dated 2 May 2014 with reference RTI/11332.

⁹ Section 47(3)(b) of the RTI Act.

¹⁰ External review application 312112. OIC decided to not accept the external review application as it had been received outside the statutory timeframe under section 101(1)(d) of the IP Act.

¹¹ External review application and submissions to OIC on 8 February 2015.

¹² As noted above, the applicant applied for external review of QPS' decision to refuse access but the application was not accepted as it was made outside the statutory timeframe.

¹³ External review application and submissions to OIC on 5 December 2014 and 8 February 2015.

¹⁴ External review application and submissions to OIC on 5 December 2014 and 8 February 2015.

Conclusion

24. I am satisfied that the applicant has made an application to QPS for access to the same documents sought under the First Application and the Later Application does not, on its face, disclose any reasonable basis for again seeking access to the documents. As the requirements of section 62(1) and section 62(3)(b)(iii) of the IP Act are met, I am satisfied that QPS was entitled to refuse to deal with these parts of the Later Application relating to the Consent Form and Notes.

Information subject to legal professional privilege

25. The applicant sought access to reports, emails, internal memos and correspondence by a particular QPS officer in relation to the applicant's pre-selection psychometric assessment. QPS refused access to nine pages on the basis that the information comprised exempt information as it would be privileged from production in a legal proceeding on the ground of legal professional privilege.

Relevant law

26. Under the IP Act, an individual has a right to be given access to documents of an agency to the extent the documents contain the individual's personal information. However, this right is subject to limitations, including grounds for refusal of access.¹⁵ An agency may refuse access to documents to the extent that they comprise exempt information.¹⁶ Information will be exempt from disclosure if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.¹⁷
27. This exemption reflects the requirements for establishing legal professional privilege at common law. Confidential communications between a lawyer and client will be privileged where the communications are for the dominant purpose of seeking or giving legal advice or use in existing or anticipated legal proceedings.¹⁸

Findings

Confidential communications

28. The information in issue comprises nine pages and can generally be described as emails between QPS officers and an in-house legal officer and an internal email between QPS staff conveying the substance of legal advice. Section 120 of the IP Act prevents me from describing the content of the emails or the nature of the communications.
29. There is no evidence the emails have been disclosed to the applicant or any other party outside of the relevant units of QPS. I am satisfied these emails can be characterised as confidential communications.

¹⁵ Section 67(1) of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent it could refuse access to the document under section 47 of the RTI Act were the document to be the subject of an access application under the RTI Act.

¹⁶ Sections 47(3)(a) and 48 of the RTI Act.

¹⁷ Sections 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act.

¹⁸ The general principles of legal professional privilege were summarised by the High Court of Australia in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at paragraph 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.'

Dominant purpose

30. The dominant purpose is ‘*the ruling, prevailing or most influential purpose*’,¹⁹ and is to be determined objectively, having regard to the evidence, the nature of the documents and the parties’ submissions. Legal advice can involve more than just advising a client about the law—it also includes advice as to ‘*what should prudently and sensibly be done in the relevant legal context*’.²⁰ However, it does not include advice that is predominantly for administrative, financial, personal, commercial or public relations purposes’.²¹
31. In relation to this issue, the applicant submits:
- *I submit that advice given by an in-house lawyer with respect to a document/memo/report by Mr Casey on matters relating to QPS procedures does not of itself mean that the document came into existence for the sole purpose of being submitted to legal advisers for legal advice or for use in litigation.*²²
 - *It is also suggested that the communications between the QPS member and the QPS legal officer was not for the dominant purpose of providing legal advice but to provide policy or other advice, such as risk management or administrative advice, which does not attract legal professional privilege.*²³
32. I do not accept the applicant’s submissions. Having carefully considered the emails, I am satisfied that the communications were made for the dominant purpose of seeking or providing legal advice or for use in existing or reasonably anticipated legal proceedings.

Professional relationship and independence

33. Legal professional privilege may protect communications between salaried employee legal advisers of a government department or statutory authority and his/her employer as the client (including communications through other employees of the same employer) provided there is a professional relationship of legal adviser and client, which secures to the advice an independent character, notwithstanding the employment.²⁴
34. The applicant refers to various decisions in other jurisdictions on this issue and submits that:²⁵
- *The issue in contention is whether in-house lawyers are sufficiently independent of their employers for a solicitor/client relationship to exist between them.*
 - *Evidence has not established that the QPS legal officer in question enjoyed a professional relationship with the QPS that secured to the advice an independent and impartial character.*
35. The legal adviser is a Principal Legal Officer within the Legal Unit of the agency. On the information available to me, there is no evidence to support the applicant’s contentions that the legal officer lacked the necessary degree of independence. Based

¹⁹ *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at page 416.

²⁰ *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357 at page 382 referring with approval to *Balabel v Air India* [1988] Ch 317 at page 330.

²¹ *Three Rivers District Council v Governor and Company of the Bank of England (No.6)* [2005] 4 All ER 948 at page 989; *Barnes v Commissioner of Taxation* [2007] FCAFC 88 at page 8 and *Waterford v Commonwealth* (1987) 163 CLR 54 (**Waterford**) at pages 77 and 85.

²² External review application.

²³ Submissions to OIC dated 8 February 2015.

²⁴ **Waterford**.

²⁵ Submissions to OIC dated 8 February 2015.

on my review of the emails, I am satisfied that there is a professional relationship of legal adviser and client, which secures to the advice an independent character, notwithstanding the employment.

Waiver of legal professional privilege

36. The emails will not be exempt under the IP Act if legal professional privilege has been waived. Legal professional privilege may be waived:

- intentionally, by disclosure of the privileged communications to persons outside the relationship of privilege; or
- through implication of law in circumstances where their conduct is inconsistent with the maintenance of the privilege.

37. The applicant submits that:²⁶

However, should it be determined that a right to privilege did exist, then I submit that this right was waived when the "client" intentionally disclosed the alleged "legal advice" to various members of the QPS via internal emails, as the disclosure was not for the dominant purpose of litigation or providing legal advice, but for administrative or other purposes. In such a case, both principle and the rationale of legal professional privilege require the conclusion that privilege in the material was waived.

38. I have addressed the applicant's submissions relating to the dominant purpose of the emails above. There is no evidence available to me of either express or implied waiver of privilege in relation to the emails. Merely communicating privileged legal advice internally within an agency will not, of itself, deprive the agency of the benefit of that privilege.²⁷ I am satisfied that the internal communications between agency officers do not result in a waiver of legal professional privilege.

Improper purpose exception

39. Legal professional privilege will not apply to legal communications made in the furtherance of a fraud or crime. 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.²⁸

40. 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.²⁹ 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'.³⁰

41. The applicant submits that:³¹

²⁶ Submission to OIC dated 8 February 2015.

²⁷ *Bulk Materials (Coal Handling) Services Pty Ltd v Coal & Allied Operations Pty Ltd* (1988) 13 NSWLR 689 at pages 691 and 696; *Thiess Contractors Pty Ltd v Terokell Pty Ltd* [1993] 2 Qd R 341; *South Australia v Peat Marwick Mitchell* (1995) 65 SASR 72 at pages 75-77; *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275 at pages 279-280; and *Southern Cross Airlines Holdings Ltd (in liq.) v Arthur Andersen & Co.* (1998) 84 FCR 472 at page 480.

²⁸ *Secher and James Cook University* (Unreported, Queensland Information Commissioner, 6 June 2012) (**Secher**) at paragraph 20. See also *Murphy and Treasury Department* (1998) 4 QAR 446 at paragraphs 31-42.

²⁹ *Secher* at paragraph 21 and *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 (**Propend**) at pages 545 and 556.

³⁰ *Propend* at pages 591 and 592.

³¹ Submission to OIC dated 8 February 2015.

Furthermore, the protection only applies where it is intended for a proper purpose—communications made in furtherance of an offence or an action that would render a person liable for a civil penalty are not protected. I submit that the communications between the QPS staff member and the QPS legal officer were made for such a purpose. (Anti-Discrimination Commission - reprisal complaint 5338472:EC)

42. There is no evidence that any of the communications were made in furtherance of any illegal or improper purpose and the applicant has provided no evidence to support her submission. I am satisfied that the improper purpose exception does not apply to the emails.

Conclusion

43. For the reasons set out above, I am satisfied that the emails meet each of the requirements of legal professional privilege. I am satisfied that the exceptions to legal professional privilege do not apply. Accordingly, I find that QPS was entitled to refuse access to these nine pages as they comprise exempt information on the basis that they would be privileged from production in a legal proceeding on the ground of legal professional privilege.

DECISION

44. For the reasons set out above, I affirm QPS' decision and find that QPS is entitled to:
- refuse to deal with parts one and three of the application under section 62 of the IP Act; and
 - refuse access to nine pages relating to part four of the application under section 67 of the IP Act and section 47(3)(a) and schedule 3, section 7 of the RTI Act.
45. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

Tara Mainwaring
A/Assistant Information Commissioner

Date: 26 June 2015

APPENDIX

Significant procedural steps

Date	Event
17 July 2014	QPS received the access application under the IP Act.
21 August 2014	QPS issued its decision to the applicant.
5 September 2014	OIC received the application for external review of QPS' decision.
9 September 2014	OIC notified QPS the external review application had been received and requested it provide relevant procedural documents to OIC by 16 September 2014.
18 September 2014	OIC received the requested procedural documents from QPS.
30 September 2014	OIC notified the applicant and QPS that the external review application had been accepted. OIC requested that QPS provide a copy of the documents located in response to the application and information relating to its previous decision by 15 October 2014.
8 October 2014	OIC received the requested information from QPS.
21 October 2014	OIC sent QPS a redacted version of the Consent Form. OIC asked QPS to advise whether it would informally resolve part of the external review by agreeing to release the redacted version of the Consent Form to the applicant.
31 October 2014	QPS advised that it did not agree to release the Consent Form to the applicant on external review and maintained its position that it was entitled to refuse to deal with the request for the Consent Form under section 62 of the IP Act.
5 December 2014	OIC received submissions from the applicant.
29 January 2015	OIC conveyed its preliminary view to the applicant and invited her to provide submissions supporting her case by 13 February 2015 if she did not accept the preliminary view.
8 February 2015	OIC received submissions from the applicant in response to the preliminary view. The applicant submitted that the external review involved questions of law and requested that OIC refer the questions of law to the Queensland Civil and Administrative Tribunal (QCAT).
13 February 2015	OIC confirmed the remaining issues for consideration on external review with the applicant and indicated that OIC would not refer the issues to QCAT as requested.
13 May 2015	OIC noted that QPS had released some information from a memorandum dated 30 June 2014 to the applicant in relation to another application. OIC asked QPS to release the same information to the applicant in this review. OIC asked QPS again to consider releasing the Consent Form to the applicant.
25 May 2015	OIC received QPS' response. QPS agreed to release the information from the memorandum to the applicant. QPS did not agree to release the Consent Form and maintained its position that it was entitled to refuse to deal with the request for the Consent Form under section 62 of the IP Act. OIC asked QPS to release the information from the memorandum to the applicant by 1 June 2015.
29 May 2015	QPS notified OIC that it had released the information to the applicant.