



Decision and Reasons for Decision

Application Number: 210612

Applicant: R Mathews

Respondent: The University of Queensland

Decision Date: 18 December 2008

Catchwords: **FREEDOM OF INFORMATION – section 29B of the *Freedom of Information Act 1992* (Qld) – refusal to deal with application – previous application for same document – previous application the subject of external review – waiver**

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REASONS FOR DECISION

Summary

1. The applicant's freedom of information application dated 28 July 2008 (**Later Application**) seeks the same documents sought in an earlier freedom of information application dated 22 April 2005 (**Earlier Application**).¹
2. The Earlier Application has been the subject of a completed review under Part 5 of the *Freedom of Information Act 1992* (Qld) (**FOI Act**).
3. The Later Application does not disclose any reasonable basis for again seeking access to the document.
4. I affirm the decision under review.

Background

5. By email dated 28 July 2008 (**FOI Application**), the applicant sought access to:

...all the information on all documents in the possession of, or under the control of, the UQ, where that info relates to my personal affairs.

I further limit this application to the external legal opinion [ELO] that UQ obtained re my assistance dogs.

6. By letter dated 1 August 2008 to the applicant, The University of Queensland (**UQ**):

a) indicated that:

- it had considered an application seeking access to the same document in 2005 and decided the document was exempt under section 43(1) of the FOI Act
- the above decision was affirmed in a decision of the Information Commissioner on 28 February 2008²
- presumably the FOI Application was based on the applicant's belief that UQ had waived legal professional privilege (**LPP**) after 28 February 2008
- accordingly, UQ's inquiries would be limited to whether UQ had waived LPP in relation to the document sought (**ELO**) in the period since 28 February 2008

b) requested further evidence from the applicant in relation to his claim that Mr Porter had waived LPP in the ELO.

7. By letter dated 29 August 2008 (**Original Decision**), UQ:

- advised that the applicant had not provided further evidence to suggest that UQ had waived LPP in the ELO
- refused to deal with the applicant's FOI Application on the basis of section 29B of the FOI Act.

¹ Which was the subject of external review no. 657/05.

² This appears to be a typographical error as the decision was dated 28 February 2006. In any event, the preceding paragraph refers to the external review having been conducted in 2006.

8. By email dated 29 August 2008 (**Internal Review Application**), the applicant sought internal review of the Original Decision.
9. By letter dated 10 September 2008 (**Internal Review Decision**), Mr Douglas Porter, Secretary and Registrar of UQ, affirmed the Original Decision and refused to deal with the applicant's FOI Application under section 29B of the FOI Act.
10. By email dated 12 September 2008 (**External Review Application**), the applicant applied to this Office for external review of the Internal Review Decision.

Decision under review

11. The decision under review is the Internal Review Decision by Mr Porter, dated 10 September 2008.

Steps taken in the external review process

12. By email dated 16 September 2008, this Office requested copies of documents relevant to the external review from UQ.
13. By letter dated 17 September 2008, UQ provided this Office with copies of the documents requested at paragraph 12 above.
14. By letter dated 16 October 2008, I wrote to the applicant seeking submissions.
15. The applicant did not provide any submissions to this external review.
16. In making my decision in this matter, I have taken the following into consideration:
 - FOI Application
 - Original Decision
 - Internal Review Application
 - Internal Review Decision
 - External Review Application
 - the decision of Assistant Commissioner Barker of 28 February 2006 in external review no 657/05
 - relevant legislation, case law and previous decisions of this Office as referred to in this decision.

Issue for consideration in this review

17. The issue to be considered in this external review is whether the UQ was entitled to refuse to deal with the applicant's FOI Application on the basis of section 29B of the FOI Act.

Findings

Relevant law

Section 29B of the FOI Act

18. Section 29B of the FOI Act relevantly provides:

29B Refusal to deal with application—previous application for same documents

- (1) *This section applies if an applicant applies to an agency or Minister (the **later application**) for access to documents that have been the subject of an earlier application made by the same applicant to the same agency or Minister (the **earlier application**).*
...
- (3) *The agency or Minister may, to the extent the later application relates to documents sought under the earlier application, refuse to deal with the later application on a ground mentioned in subsection (4) if—*
 - (a) *the agency or Minister is satisfied the documents sought under the later application are the documents sought under the earlier application; and*
 - (b) *the later application has not disclosed any reasonable basis for again seeking access to the documents.*
- (4) *The grounds are as follows—*
 - (a) *the agency's or Minister's decision on the earlier application—*
...
 - (ii) *has been the subject of a completed review under part 5;*
...

Waiver of legal professional privilege

19. In relation to the principles relating to waiver of LPP, the High Court of Australia has previously said:³

Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege...

*Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is 'imputed by operation of the law'. This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. Thus, in *Benecke v National Australia Bank*, the client was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to a barrister in related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister's version of those instructions. She did not subjectively intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication. What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some over-riding principle of fairness operating at large.*

...

Disclosure by a client of confidential legal advice received by the client, which may be for the purpose of explaining or justifying the client's actions, or for some other purpose, will waive privilege if such disclosure is inconsistent with the confidentiality which the privilege serves to protect. Depending upon the circumstances of the case, considerations of

³ *Mann v Carnell* (1999) 74 ALJR 378, paras 28, 29 and 34.

fairness may be relevant to a determination of whether there is such inconsistency. The reasoning of the majority in Goldberg illustrates this.

Analysis

20. In the Original Decision, Mr Zgrajewski refused to deal with the FOI Application under section 29B of the FOI Act on the basis that:
- he was satisfied that the ELO requested by the applicant in the Later Application was the same advice he had sought in the Earlier Application (which was subsequently the subject of a completed review by the Information Commissioner)
 - the applicant had not disclosed any reasonable basis for again seeking access to the legal advice.
21. The Internal Review Decision affirmed the Original Decision and confirmed that the Earlier Application was the subject of a completed external review where it was found that the legal advice was exempt from disclosure under section 43 of the FOI Act. Accordingly, UQ refused to deal with the FOI Application on the basis of section 29B(4)(a)(ii) of the FOI Act.
22. For UQ to be entitled to refuse to deal with the FOI Application on the basis of section 29B(4)(a)(ii) of the FOI Act, I must be satisfied that:
- a) the documents sought under the Later Application are the documents sought under the Earlier Application
 - b) UQ's decision on the Earlier Application has been the subject of a completed review under Part 5 of the FOI Act
 - c) the Later Application has not disclosed any reasonable basis for again seeking access to the documents.
23. I consider each of these requirements below.
- a) Documents sought under the Later Application are the documents sought under the Earlier Application**
24. The FOI Application sought access to:
- ...all the information on all documents in the possession of, or under the control of, the UQ, where that info relates to my personal affairs.*
- I further limit this application to the external legal opinion [ELO] that UQ obtained re my assistance dogs.*
25. The Earlier Application sought access to:
- ... all the information on all documents in the possession of or under the control of UQ, where that info relates to my personal affairs.*
26. In response to the Earlier Application, UQ located a substantial number of documents which included confidential communications from Corrs Chambers Westgarth to UQ.⁴

⁴ Folios 75-84.

27. Accordingly, I am satisfied that:

- folios 75 to 84 are the documents to which the applicant seeks access in the Later Application.
- the documents sought in the Later Application are the same documents as those sought in the Earlier Application
- the requirement in section 29B(3)(a) of the FOI Act is satisfied.

b) UQ's decision on the earlier application has been the subject of a completed review under Part 5 of the FOI Act

28. As noted above, the Earlier Application resulted in external review number 657/05. That review was completed on 28 February 2006 when a decision was issued by Assistant Commissioner Barker.⁵

29. Accordingly, I am satisfied that the requirement in section 29B(4)(a)(ii) of the FOI Act is satisfied.

c) The later application failed to disclose any reasonable basis for again seeking access to the documents

Waiver of LPP

30. In the Later Application, the applicant did not raise any grounds for again seeking access to the documents. However, the applicant made the following written submissions to UQ in the Later Application:

Porter raises 'Client Privilege' aka 'legal professional privilege' [lpp]. I advise, as one qualified in Law, that Porter has regularly [sic] waived the privilege by his mentioning the ELO, and in fact by his relying on it and stating that he is relying upon the ELO. This is clear waiver of lpp.

...

Porter has waived lpp, albeit without doubt, unintentionally on repeated occasions, since receiving the External Legal Opinion [ELO]. He has mentioned it, and relied upon it and stated that to me, in letters and other documents that you have seen. There are many of Porter's letters and emails, waiving lpp that you have released to me.

...Porter's stating to me that he is relying upon it is the antithesis of confidentiality. He cannot in effect, wave it around in my face and say it says whatever, but say 'I'm not going to let you see it'. This is precisely what he has done. In doing so he has waived lpp. Unintentionally on his part, I believe.

31. By letter dated 16 October 2008, I wrote to the applicant seeking submissions and stating:

In your FOI application, you indicate that Mr Porter has waived legal professional privilege (LPP) in relation to the Legal Advice. You state that there are many letters and emails waiving LPP that the University has released to you and you indicate that Mr Porter 'has continued to act in ways where he was waiving LPP'.

⁵ *Mathews and The University of Queensland* (Unreported, Queensland Office of the Information Commissioner, 28 February 2006)

I note that the issue of waiver was dealt with in the Decision. To the extent that you contend that, Mr Porter or UQ have waived LPP in the Legal Advice (other than on the basis of information already considered in the Decision) and that this discloses a reasonable basis for you again seeking access to these documents, please include in/with your submissions:

- *copies of the letters and/or emails referred to or any other relevant correspondence*
- *details of the circumstances in which you say that Mr Porter has 'continued to act to waive privilege'.*

32. The applicant did not respond to my letter at paragraph 31 above.

33. In his FOI Application the applicant indicates that:

- Mr Porter has mentioned the ELO, relied on the ELO and stated that he is relying on the ELO
- there is evidence of this in many of the documents released to him.

34. In *Osland v Secretary to the Department of Justice (Osland)*⁶, the majority⁷ stated that:

Whether, in a given context, a limited disclosure of the existence, and the effect, of legal advice is inconsistent with maintaining confidentiality in the terms of advice will depend upon the circumstances of the case. As Tamberlin J said in Nine Films and Television Pty Ltd v Ninox Television Ltd, questions of waiver are matters of fact and degree ...

35. In *Osland*, the Court considered whether LPP was waived in a press release issued by the Attorney-General in which the Attorney-General stated:

On July 5, 1999, Mrs Osland submitted a petition for mercy to the then Attorney-General Jan Wade. That petition set out six grounds on which the petition should be granted.

Following consultation with the State Opposition, I appointed a panel of three senior counsel, Susan Crennan QC, Jack Rush QC and Paul Holdenson QC, to consider Mrs Osland's petition.

This week I received a memorandum of joint advice from the panel in relation to the petition. The joint advice recommends on every ground that the petition should be denied.

After carefully considering the joint advice, I have recommended to the Premier that the Governor be advised to deny the petition. The Governor has accepted this advice and denied the petition.

36. The context considered in *Osland* included *'the nature of the matter in respect of which the advice was received, the evident purpose of the Attorney-General in making the disclosure that was made, and the legal and practical consequences of limited rather than complete disclosure'*.

37. In this review the applicant has merely asserted that Mr Porter has mentioned the ELO, relied on the ELO and stated that he is relying on the ELO. There is insufficient evidence before me to establish, in the circumstances of this case, that Mr Porter's conduct was inconsistent with maintaining confidentiality in the terms of the advice. Accordingly, I am not satisfied that LPP in the ELO has been waived by Mr Porter or UQ.

⁶ 249 ALR 1 at 49.

⁷ Gleeson CJ, Gummow, Heydon and Kiefel JJ.

Reasonable basis for again seeking access to the ELO

38. In view of my conclusion at paragraph 37 above, the Later Application does not disclose any reasonable basis for the applicant again seeking access to the ELO.
39. On the basis of the information available to me, I am satisfied that:
- the Later Application fails to disclose any reasonable basis for again seeking access to the ELO
 - the requirement of section 29B(3)(b) of the FOI Act is met.

Conclusion

40. In light of the above, I am satisfied that:
- the requirements of section 29B of the FOI Act are met
 - UQ was entitled to refuse to deal with the FOI Application on the basis of section 29B of the FOI Act.

DECISION

41. I affirm the decision under review.
42. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

Acting Assistant Commissioner Jefferies

Date: 18 December 2008