



Decision and Reasons for Decision

Citation:	<i>Pluta and Queensland Rail</i> [2017] QICmr 4 (16 February 2017)
Application Number:	312807
Applicant:	Pluta
Respondent:	Queensland Rail
Decision Date:	16 February 2017
Catchwords:	ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – LEGAL PROFESSIONAL PRIVILEGE – whether report prepared by solicitors is exempt on the basis of legal professional privilege – sections 47(3)(a) and 48 and schedule 3, section 7 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to Queensland Rail (**QR**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to ‘...the Minter Ellison Review of the Sunlander replacement/14 project undertake circa November 2013 to Feb 2014...’.¹
2. QR decided to refuse access to the requested information, on the ground it is subject to legal professional privilege (**LPP**) and is therefore exempt information, to which access may be refused.²
3. For the reasons explained below, I consider that the requested information attracts LPP. It therefore comprises exempt information, to which access may be refused under the RTI Act.

Reviewable decision

4. The decision under review is QR’s decision dated 18 March 2016.

¹ The access application also included a request for an additional document; the applicant has not sought review of QR’s decision as it relates to this latter document and this aspect of QR’s decision is not in issue in this review: see OIC’s letters to the applicant dated 15 April 2016 and 3 May 2016, and the applicant’s email dated 6 May 2016.

² In accordance with section 47(3)(a), section 48 and schedule 3, section 7 of the RTI Act. QR did, during the course of this review, raise additional grounds for refusing access; as I am satisfied that the requested information is legally privileged and therefore exempt information, it is not necessary to analyse those grounds.

Evidence considered

5. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).

Information in issue

6. The information in issue comprises a 63-page report, together with four lever-arch volumes of annexures and attachments.

Relevant law

7. The RTI Act confers a right to access documents of government agencies.³ This right is subject to other provisions of the RTI Act, including grounds on which access may be refused. Access may be refused to information, to the extent the information comprises 'exempt information'.⁴ 'Exempt information' includes information that would be privileged from production in a legal proceeding on the ground of legal professional privilege (LPP).⁵
8. LPP attaches to confidential communications between a lawyer and client or third party, made for the dominant purpose of seeking or giving legal advice or professional legal assistance, or preparing for, or for use in or in relation to, existing or reasonably anticipated legal proceedings.⁶

Facts

9. In this case, the QR board (**Board**) resolved to engage Minter Ellison (**Minters**), a prominent national legal firm, to assist in the provision of legal assistance.⁷ QR retained Minters to this end, leading to the production of the information in issue.

Analysis

10. I have carefully considered the information in issue, and the circumstances in which it was commissioned. I am satisfied that it attracts LPP, as material brought into existence for the dominant purpose⁸ of communicating professional legal assistance.
11. My findings in this regard extend to all documents contained in the four lever-arch volumes of annexures to the report prepared by Minters; as I explained to the applicant by letter dated 30 November 2016,⁹ these materials form part of a communication prepared for the dominant purpose of conveying legal advice, and/or comprise documents used for the dominant purpose of preparing that advice. While originals of these documents may not themselves all comprise legally privileged documents, as copies made for the privileged purpose of obtaining or communicating legal advice, the copies in issue in this review attract legal professional privilege.¹⁰

³ Section 23 of the RTI Act.

⁴ Section 47(3)(a) of the RTI Act.

⁵ Section 48 and schedule 3, section 7 of the RTI Act. QR did, during the course of this review, raise additional grounds for refusing access; as I am satisfied that the requested information is legally privileged, it is not necessary to analyse those grounds.

⁶ *Esso Australia Resources Ltd v Commission of Taxation* (1999) 201 CLR 49 (**Esso**); *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 552.

⁷ QR letter and attachments dated 12 July 2016 and QR submissions and relevant attachments dated 14 October 2016.

⁸ The 'ruling, prevailing, paramount or most influential purpose': *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at [416].

⁹ The applicant had agreed to exclude these annexures from the scope of his application and this external review, and to press for access to Minters' 63-page report only; by email dated 28 November 2016 he withdrew this agreement. It was therefore necessary to write to him and explain my preliminary view in terms as set out in the balance of this paragraph.

¹⁰ *Commissioner of Australian Federal Police v Propend Finance* (1997) 188 CLR 501.

12. I did originally harbour reservations as to whether the information in issue could be said to satisfy the test for LPP set out above. My initial preliminary view was that the information did not meet the requirements for LPP. I am constrained in the level of detail I can relay as to the particulars of the information in issue.¹¹ For the purposes of these reasons, however, it is sufficient to note that I queried¹² the dominant purpose for the creation of Minters' report, questioning whether it could be said to comprise legal (as opposed to factual and/or commercial) advice, the production of which did not necessarily require legal qualifications.¹³

13. Following further scrutiny of the information in issue, and consideration by me of applicable legal principles (particularly as expounded in QR's comprehensive submissions on the point),¹⁴ I now consider that this information can be properly characterised as material attracting LPP. Relevant authorities make clear that:

- where there is a *'legal retainer in existence during a period when the disputed documents came into existence, it is prima facie reasonable to conclude that a party is seeking legal advice and guidance'*,¹⁵
- 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'*;¹⁶ and
- communications between a lawyer and a client:

relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as a legal advisor.

14. Additionally, the courts have stressed that LPP is a relatively expansive concept, apt to encompass a broad range of communications between lawyer and client beyond mere formal advice as to the law. LPP:¹⁷

...extends beyond a communication that constitutes advice...in any narrow sense. The expression 'legal advice' in this context is to be broadly construed to encompass communications including some that might not, at first glance, constitute legal advice per se, but which are nevertheless protected because they are sufficiently connected with the giving or obtaining of such legal advice.

15. As has been further stated:¹⁸

[LPP]...will not be allowed to be undermined by an overly narrow or technical approach to questions involved, such as the identification of the relevant advice in question.

....

¹¹ Section 108(3) of the RTI Act.

¹² In correspondence to QR dated 14 June and 1 September 2016.

¹³ Analogous to the investigative report found not to be subject to LPP in *Wirth v State of Queensland (Mackay Hospital and Health Service)* [2015] QIRC 035, endorsed in *Wirth v Mackay Hospital and Health Service & Anor* [2016] QSC 039 at [114] to [121]. (I should note that courts in other contexts have found that investigative reports may attract LPP: see, for example, *Bartolo v Doutra Galla Aged Services Ltd* [2014] FCCA 1517).

¹⁴ Dated 14 October 2016.

¹⁵ *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd* [2007] FCA 933 at [15]. See also *Brookfield Multiplex Ltd v ILF Partners Pte Ltd (No 2)* [2009] FCA 449 at [4], and *AWB v Cole (No. 5)* 155 FCR 30 (**AWB v Cole**), Young J in the latter stating that where *'...communications take place between a client and his or her independent legal advisers, or between a client's in-house lawyers and those legal advisers, it may be appropriate to assume that legitimate legal advice was being sought, absent any contrary indications.'* (At [44].)

¹⁶ *Balabel v Air India* [1988] Ch 317 per Lord Justice Taylor at [330].

¹⁷ *Australian Mud Company Pty Ltd v Coretell Pty Ltd* [2014] FCA 200, at [15] (Nicholas J). See also *AWB v Cole*, where Young J stated that the *'concept of legal advice is fairly wide. It extends to professional advice as to what a party should prudently or sensibly do in the relevant legal context, but it does not extend to advice that is purely commercial or of a public relations character.'* (At [44].)

¹⁸ *DSE (Holdings) Pty Ltd v InterTAN Inc* [2003] FCA 1191, at [31] and [45] (Allsop J).

...what legal advice is, however, goes beyond formal advice as to the law. This recognition does not see the privilege extend to pure commercial advice. In any given circumstance, however, it may be impossible to disentangle the lawyer's views of the legal framework from other reasons that all go to make up the 'advice as to what should be prudently and sensibly done in the relevant legal framework'...

16. The courts have also recognised that when dealing with LPP:

...a purist approach is not to be taken to what constitutes legal advice and it extends beyond 'formal advice as to the law' to incorporate 'advice as to what should prudently and sensibly be done in the relevant legal framework'.

...

*Ultimately, the advice must be characterised as a whole and if it comprises integrated legal and commercial advice that cannot be disentangled, it will be characterised as legal advice.*¹⁹

17. In this case, the Board had, as noted above, expressly resolved to seek legal advice and retain Minters to assist in that regard.²⁰ The information in issue was collated or created and communicated as a consequence of and in the course of that retainer, and, on my understanding of the principles noted above, may therefore be presumed to have been prepared for the dominant purpose of conveying privileged legal advice.
18. The production of the information in issue also entailed, as QR submits,²¹ application of professional legal skills by way of gathering and marshalling documentary and oral evidence, taking statements,²² analysing relevant issues and drawing a comprehensible report expressing various conclusions based upon Minters' analysis of the underlying evidence – work discharged by independent lawyers in a professional legal capacity. All of this activity was undertaken within the relevant legal context of the governance and probity obligations imposed on QR by various statutory and policy instruments,²³ and the result of that work – the information in issue – can be fairly characterised as 'advice as to what should be prudently and sensibly done in the relevant legal framework'.
19. In the circumstances, and having given relevant matters careful consideration, I am satisfied that the information in issue was brought into existence for the dominant purpose of obtaining or communicating legal advice or professional legal assistance in the broad sense as enunciated by the courts. There is no objective evidence²⁴ before me to suggest that the information in issue is anything other than confidential against the applicant. Accordingly, I consider that the correct and preferable decision in this case is that the information in issue comprises a legally privileged communication.
20. As information that would be privileged from production in a legal proceeding on the ground of LPP, the information in issue therefore comprises exempt information, to which access may be refused under section 47(3)(a) of the RTI Act.

¹⁹ *X and Y v Z* [2015] SASC 96 at [31], per Blue J.

²⁰ QR's explicit request that it be provided with legal advice is not of itself determinative of the issue of motivating purpose: *AWB Ltd v Cole (No. 1)* [2006] FCA 571 at [110], citing *Commissioner of Taxation of the Commonwealth of Australia v Pratt Holdings Pty Ltd* [2005] FCA 1247. The subjective intention of a communication's creator (or the person who requested its creation) will, nevertheless, 'always be relevant and often decisive': *Esso*, [172], per Callinan J.

²¹ Submissions dated 14 October 2016.

²² Both of which have been cited as examples of legal assistance: *Three Rivers District Council v Governor and Company of the Bank of England (No.6)* [2005] 1 AC 610, at paragraphs 113 and 114 (Lord Carswell).

²³ Such as the *Government Owned Corporations Act 1993* (Qld), *Queensland Rail Transit Authority Act 2013* (Qld), the State Procurement Policy and QR's internal procurement policies.

²⁴ As discussed further below, the applicant has speculated as to the contents of the information in issue, and in an email dated 18 December 2016 implied that he had knowledge of this information, stating '...do not assume that I do not know the contents of the report or the general structure.' Beyond this rather oblique intimation, however, there is nothing probative before me suggesting that he has accessed the document.

Applicant's submissions

21. The substance of the above reasoning was conveyed to the applicant by letter dated 3 November 2016. By emails dated 7 and 18 December 2016,²⁵ the applicant submitted that:
 - the information in issue '*did not start its life as a legally privileged report*', but was an accounting and/or engineering investigation, with LPP '*claimed for incorrect and not for the primary purpose of litigation but to protect the position of former executives...the dominant position was to protect the face of public servants*';²⁶
 - QR's '*policy of using legal privilege*' '*is in breach of public interest tests*';²⁷ and
 - by '*allowing*' QR's claim that access to the information in issue may be refused on the ground of legal professional privilege, OIC is '*protecting*' various persons.²⁸
22. The applicant also speculated as to the contents of the information in issue, stating that he would accept redaction of those '*parts*' that are '*truly legal privilege*', and requesting that he and OIC come to a '*sensible negotiated position*' as regards release of this information.²⁹
23. The applicant made further submissions by email dated 30 January 2017,³⁰ basically reiterating the arguments summarised in the first dot point in paragraph 21 above, ie, querying the dominant purpose for the creation of the information in issue. The applicant stated that he had listened to recordings of interviews conducted by Minters staff with QR personnel,³¹ the '*common theme*' of which was that the project the subject of the Review was '*mismanaged, management would not make a decision, or executive would not return the issues to government.*' Having earlier stated that the '*sole...purpose*' QR retained Minters was '*...to provide an umbrella of privilege to protect their own mismanagement...*', the applicant went on to submit that:

This is not a document that under any circumstances was produced under the dominant purpose test, if there was a dominant purpose it was to protect the "So called still employed"...the Dominate purpose was to keep the document out of the presses hands and protect those who are still there.

Purpose for creation of information in issue

24. The submissions summarised in both the first dot point of paragraph 23 and paragraph 23 above are adequately dealt with the reasoning set out at paragraphs 10-20. Specifically, I have noted at paragraph 12 my own initial reservations as to the nature of the information in issue and the dominant purpose for its creation. Objective scrutiny of the information in issue and a careful consideration of applicable principles has led me to be satisfied that that purpose was a privileged purpose – not, in this case, for use in litigation,³² but for the communication of professional legal assistance.
25. I would also make clear that, insofar as relevant submissions might be read as intimating that the information in issue was created for some collateral or improper purpose that

²⁵ The applicant forwarded two emails to OIC on 18 December 2016; only one appears to relate to the issues to be determined in this review.

²⁶ Email dated 18 December 2016.

²⁷ Email dated 7 December 2016.

²⁸ As above.

²⁹ As above.

³⁰ The applicant forwarded numerous emails to the Office of the Information Commissioner between 26 December 2016 and 12 February 2017. Only this 30 January 2017 email, however, raises substantive matters relevant to the issues I am required to determine in this review.

³¹ Presumably during the course of Minters discharging its retainer. There is nothing before me verifying the applicant's assertions in this regard.

³² A point stressed by the applicant, with which I have no reason to disagree; as noted above, this is not, however, the only basis on which LPP may be established.

might preclude the application of LPP, there is no objective material before me to sustain such an assertion.

Legal professional privilege and the public interest

26. As to the submissions summarised at the second dot point above, it is not clear to me whether the applicant is here contending that the balance of the public interest favours disclosure of the information in issue under the RTI Act or, more broadly, that QR's reliance upon LPP is itself in some way improper or an abuse of process of some kind. In either case, his submissions in this regard are misconceived.
27. Firstly, as I advised the applicant by letter dated 15 December 2016, the exemptions set out in schedule 3 to the RTI Act – including the LPP exemption – do not require or allow consideration of public interest issues. Parliament has determined that disclosure of these categories of information can be considered to be contrary to the public interest.³³ Accordingly, if information falls within one of the categories of exempt information prescribed in schedule 3, its disclosure is presumed to be contrary to the public interest, and no further consideration is permitted.
28. Turning to the second possible interpretation of the applicant's submissions on this point, I only note that government owned corporations such as QR are as entitled as any other member of the community to assert LPP over communications between themselves and their legal advisers. As the High Court has stated in relation to 'in-house' or government legal advisers:³⁴

The proper functioning of the legal system is facilitated by freedom of consultation between the client and the legal adviser. In Grant v Downs (56), Stephen, Mason and Murphy JJ., in a much-cited passage, said:

The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available.

To our minds it is clearly in the public interest that those in government who bear the responsibility of making decisions should have free and ready confidential access to their legal advisers. . . .

Office of the Information Commissioner's role on external review

29. As regards the applicant's submission that the Office of the Information Commissioner (**OIC**) is 'allowing' QR to refuse access, OIC's role on external review is to independently assess the merits of decisions made by agencies under the RTI Act. In this case, such an assessment entails determining whether QR has correctly applied the general law of LPP – law which Parliament has decreed may be legitimately relied upon by agencies such as QR to refuse access to information requested under the RTI Act.
30. After close scrutiny of QR's claims in this regard, I have, as explained above, formed the view that QR's decision to refuse the applicant access to the information in issue was

³³ Section 48(2) of the RTI Act.

³⁴ *Waterford v Commonwealth* (1986) 163 CLR 54, per Mason and Wilson JJ (p. 66).

legally justified. In doing so, I am not *'allowing'* QR to *'protect'* any person or persons, but simply making a determination in accordance with the general law and that as enacted by the legislature, as I am obliged to do under the RTI Act.

Contents and nature of the information in issue

31. In relation to the applicant's conjecture as to the structure and contents of the information in issue, I again note that I am prohibited from relating information claimed to be exempt, and therefore offer no comment as to the accuracy of the applicant's postulations in this regard. I can only record once more that I am satisfied the information in issue attracts LPP, for the reasons articulated above.
32. I would, however, note that even if the applicant's suppositions as to the contents of the information in issue were entirely accurate, it would seem to me that on his own submissions those contents would – as *'legal advice'* or *'legal comment'* etc.³⁵ – comprise professional legal advice or assistance subject to LPP.³⁶

Request for negotiated outcome

33. Finally, there remains only to address the applicant's request that he and OIC reach a *'sensible negotiated position'* in relation to release of at least part of the information in issue. OIC has no discretion to engage in any such negotiation; the Information Commissioner has no power to direct that access to information be given where its status as exempt information is, as here, established.³⁷

DECISION

34. I affirm the decision under review. I find that access to the information in issue may be refused under section 47(3)(a) of the RTI Act, on the basis the information is exempt information under section 48 and schedule 3, section 7 of the RTI, as information which would be privileged from production in a legal proceeding on the ground of legal professional privilege.

JS Mead
Acting Information Commissioner

Date: 16 February 2017

³⁵ As set out in the applicant's email dated 7 December 2016.

³⁶ There being, as alluded to in note 23 above, no objective material before me to suggest that any such supposition on the applicant's part has been informed by his having accessed the information in issue, let alone having done so as a result of an intentional, authorised and/or voluntary release to him by QR of the document of a kind that might give rise to a question of waiver.

³⁷ Section 105(2) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
13 April 2016	OIC received the external review application.
15 April 2016	OIC notified the applicant and QR that the external review application had been accepted. OIC advised the applicant that unless the applicant advised to the contrary by 29 April 2016, the ambit of the external review would be limited to the information in issue only. OIC asked QR to provide additional documentation, including the information in issue, by 29 April 2016.
22 April 2016	OIC received the information requested from QR.
14 June 2016	OIC requested submissions from QR concerning its LPP claims by 28 June 2016.
22 June 2016	QR requested an extension of time to 12 July 2016 in which to provide requested submissions.
23 June 2016	OIC granted the requested extension of time.
12 July 2016	OIC received further submissions from QR.
28 July 2016	OIC provided the applicant with an update on the status of the review.
25 August 2016	The applicant agreed to exclude documents forming part of the information in issue.
1 September 2016	OIC conveyed a preliminary view to QR that the information in issue did not attract LPP. QR was invited to provide submissions in reply by 15 September 2016.
8 September 2016	QR requested and was granted an extension of time to 30 September 2016 to provide submissions in reply to OIC's 1 September 2016 preliminary view.
22 September 2016	QR requested a further two weeks' extension of time to reply to OIC's preliminary view.
23 September 2016	OIC granted QR a further extension of time to 14 October 2016.
14 October 2016	OIC received submissions from QR.
3 November 2016	OIC conveyed a preliminary view to the applicant that the information in issue attracted LPP and therefore comprised exempt information, to which access may be refused. The applicant was invited to provide submissions supporting his case for access by 17 November 2016.
7 November 2016	The applicant requested an extension of time to 7 December 2016 to reply to OIC's preliminary view.
8 November 2016	OIC granted the applicant the requested extension of time.
28 November 2016	The applicant advised OIC that he wished to press for access to documents excluded by agreement on 25 August 2016.

Date	Event
30 November 2016	OIC advised the applicant of the preliminary view that documents excluded by agreement on 25 August 2015 also attracted LPP, and therefore comprised exempt information to which access may be refused.
7 December 2016	OIC received submissions from the applicant.
15 December 2016	OIC wrote to the applicant, reiterating the preliminary view that the information in issue attracted LPP. OIC advised the applicant that the next formal step in the review would comprise a formal decision. OIC asked the applicant to advise, by 22 December 2017, whether he wished to proceed to formal decision.
18 December 2016	OIC received submissions from the applicant, and confirmation that he wished for the review to be determined by way of formal decision.
20 December 2016	OIC advised the participants that the next step in the review would comprise a formal decision.
30 January 2017	OIC received submissions from the applicant.
8 February 2017	The applicant contacted OIC requesting an update on the status of the review. OIC advised the applicant of an impending decision and reiterated its preliminary view as to the application of LPP.