



Decision and Reasons for Decision

Application Number: 210472

Applicant: Mr A Ward

Respondent: Department of Corrective Services

Decision Date: 30 January 2009

Catchwords: FREEDOM OF INFORMATION – section 43(1) of the *Freedom of Information Act 1992* – legal professional privilege – waiver

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REASONS FOR DECISION

Summary

1. For the reasons set out below, I am satisfied that the matter in issue in this external review is exempt from disclosure under section 43(1) of the *Freedom of Information Act* 1992 (**FOI Act**).
2. Accordingly, that part of the decision under review that relates to the matter in issue, is affirmed.

Background

3. By application dated 11 January 2007 (received 18 January 2007) (**FOI Application**), the applicant applied to the Department of Corrective Services (**DCS**) for:

All emails, memorandums or other communications between Ms D Taylor, Director Offender Programs and Services and Mr G Perrett Senior Legal Advisor re complaint made by myself re Sky in relation to status of Mr C Thomas and Mr M Rallings in relation to that complaint from 17-05-05 to present date.

4. This FOI Application was given reference number 50.07.23.2 by the DCS and was processed by the DCS along with the applicant's freedom of information application reference number 50.06.23.44 which was considered to be similar in character.¹
5. By letter dated 31 January 2008 (**Original Decision**), Ms Susan Barker, Manager, FOI & Privacy, Legal Services Branch, DCS, advised the applicant that she had located 7 emails which responded to the applicant's applications 50.07.23.2 and 50.06.23.44 and she had decided to refuse access to all 7 emails on the basis that the emails were exempt from disclosure under section 43(1) of the FOI Act.
6. By letter dated 14 February 2008 (received by the DCS on 18 February 2008), the applicant sought internal review of the Original Decision (**IR Application**).
7. In a letter dated 17 March 2008 (**IR Decision**), Ms Kylie Warlow, Assistant Director, Legal Service Branch, DCS, advised the applicant of her decision to:
 - allow access to three emails² (**2005 Emails**)
 - refuse access to four emails relating to applicant's FOI Application.
8. By letter received by this Office on 3 April 2008, the applicant sought external review of the IR Decision to refuse access to documents relating to the FOI Application (**ER Application**).

¹ In that earlier application (received by the DCS on 14 November 2006), the applicant had applied for 'All emails, memorandums, working notes etc. between B Story and G Perrett re: self and Sky complaint between 1 June 2005 and 30 August 2005'.

² As a result of investigations undertaken by the DCS following receipt of the applicant's IR Application, the DCS established that copies of the 2005 Emails had been given to the applicant previously and that the claim of exemption under section 43(1) of the FOI Act could no longer be sustained. Two of those emails related to application 50.06.23.44 and one email related to the FOI Application. Copies of those emails were provided to the applicant with the IR Decision. Accordingly, the latter email is not in issue in this review.

Decision under review

9. Under section 52(6) of the FOI Act, if on internal review, an agency does not decide an application and notify the applicant of the decision within 28 days after receiving the application, the agency's principal officer is taken to have made a decision at the end of the period affirming the original decision.
10. A decision on internal review was to be notified to the applicant by 17 March 2008 (28 days from receipt of the IR Application). The IR Decision is dated 17 March 2008 and was sent to the applicant by post either on or after this date.³ Accordingly, in the ordinary course of post, the applicant would have been notified of the IR Decision on 18 March 2008 at the earliest.
11. The principal officer of the DCS is therefore taken to have affirmed the Original Decision, and on this basis, the deemed affirmation of that part of the Original Decision refusing access to the matter in issue under section 43(1) of the FOI Act is the decision under review (**Affirmed Decision**).
12. I have treated the IR Decision as if it were submissions received from the DCS for the purposes of this review.

Steps taken in the external review process

13. Copies of the matter in issue were obtained from the DCS and reviewed.
14. A staff member of this Office contacted the DCS on 10 June 2008 and 1 July 2008 to clarify issues relating to the matter in issue.
15. By letter dated 8 October 2008, I indicated to the applicant that it was my preliminary view that the matter in issue in this review qualified for exemption from disclosure under section 43(1) of the *Freedom of Information Act* 1992 (**FOI Act**) and invited the applicant to make submissions in respect of that preliminary view.
16. The applicant provided submissions in response to the preliminary view during a telephone conversation with me on 15 October 2008 and in writing by letter dated 20 October 2008 (collectively the **Applicant's Submissions**).
17. On 6 November 2008, a staff member of this Office spoke with Ms Barker to confirm Mr Perrett's role at the time the matter in issue was created. The searches undertaken by the DCS to ascertain whether the matter in issue had been given to the applicant previously were also discussed, as were the circumstances in which the 2005 Emails had been initially disclosed to the applicant.
18. On 7 November 2008, a staff member of this Office spoke with the applicant to request further information about the circumstances in which the applicant considered he had previously been given copies of the matter in issue and invited the applicant to make any further submissions in relation the review.
19. By letter dated 19 November 2008, I wrote to the DCS requesting the DCS:
 - confirm the searches undertaken to determine whether or not the matter in issue had previously been given to the applicant

³ As discussed with the DCS during a telephone conversation on 18 December 2008.

- undertake further searches necessary to determine whether or not the matter in issue had previously been given to the applicant as part of a release of documents relating to any of the applicant's earlier freedom of information applications to the DCS, and advise me of the outcome of the searches
 - confirm that Mr Perrett was employed by the DCS as a legal practitioner admitted to practice and was acting in that capacity at the time the matter in issue was created.
20. By letter dated 4 December 2008, Ms Barker responded to the request at paragraph 19 above:
- setting out the searches the DCS had undertaken
 - confirming Mr Perrett's qualifications and role at the time the matter in issue was created.
21. On 18 December 2008, a staff member of this Office contacted the DCS to confirm matters relating to the review including the date on which the IR Decision was notified to the applicant and that the Affirmed Decision was the decision under review.
22. Following a further telephone conversation with a staff member of this Office on 23 December 2008 regarding the subject matter of the matter in issue, the DCS provided submissions on the issue of waiver by letter dated 9 January 2009.⁴
23. In reaching a decision in this external review, I have taken into account the following:
- the FOI Application and Original Decision
 - the IR Application and IR Decision
 - the ER Application
 - the Applicant's Submissions
 - file note of discussion with the applicant on 7 November 2008
 - file note of discussions with the DCS on 10 June 2008, 1 July 2008, 6 November 2008, 18 December 2008 and 23 December 2008
 - the letters from the DCS dated 4 December 2008 and 9 January 2009
 - the matter in issue
 - relevant provisions of the FOI Act
 - relevant case law and previous decisions of this Office.

Matter in issue

24. The matter in issue in this review consists of:

- an email from D Taylor to G Perrett dated 14 August 2006⁵
- an email from G Perrett to D Taylor dated 14 August 2006⁶
- an email from D Taylor to G Perrett dated 15 August 2006⁷
- an email from G Perrett to D Taylor dated 15 August 2006.

⁴ As those submissions discuss matter claimed to qualify for exemption in detail, a copy was not provided to the applicant. I am satisfied that during the course of this review, the applicant has been given sufficient opportunity to provide submissions relating to the application of section 43(1) of the FOI Act to the matter in issue.

⁵ A further email was attached to this email.

⁶ It is not clear whether another document was in fact attached to this email.

⁷ A further email was attached to this email.

Findings

25. Pursuant to section 21 of the FOI Act, a person has a legally enforceable right to be given access under the FOI Act to documents of an agency and official documents of a Minister. This right of access is subject to other provisions of the FOI Act, in particular, section 28 of the FOI Act, which provides that an agency may refuse access to exempt matter or an exempt document.
26. As set out in paragraph 11 of this decision, the DCS refused access to the matter in issue under section 43(1) of the FOI Act. My findings with respect to the application of that provision to the matter in issue are set out below.

Section 43(1) of the FOI Act

27. Section 43(1) of the FOI Act relevantly provides

43 Matter affecting legal proceedings

(1) Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.

28. The general principles of legal professional privilege were summarised in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*⁸ 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.

29. The legal professional privilege exemption set out in section 43(1) of the FOI Act reflects the requirements for establishing legal professional privilege at common law. In other words, it protects communications passing between a lawyer and a client where:

- a) *the communication is made in the course of a professional relationship of lawyer and client; and*
- b) *the communication is confidential; and*
- c) *the communication is:*
 - (i) *from the client to the lawyer for the dominant purpose of seeking legal advice; or*
 - (ii) *from the lawyer to the client for the dominant purpose of providing legal advice; or*
 - (iii) *from a third party at the client's request for the dominant purpose of use in assisting the lawyer to provide legal advice;*⁹ *or*
 - (iv) *from the lawyer or the client, or a third party at the request of the lawyer or the client, for the dominant purpose of use in or in relation to existing or anticipated legal proceedings.*

Paragraphs (c)(i), (ii) and (iii) describe the 'advice limb' of privilege, whereas paragraph (c)(iv) describes the 'litigation limb'.¹⁰

⁸ [2002] HCA 49; (2002) 213 CLR 543 at paragraph 9, per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

⁹ *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357.

30. Section 43(1) of the FOI Act applies to communications which fall under either the 'advice privilege' or the 'litigation privilege', as both of these types of communications would be privileged from production in a legal proceeding.
31. Legal professional privilege may also apply to copies of privileged and non-privileged documents depending on the purpose for which the copy was created.¹¹ As McHugh J stated in *Propend*:

... legal professional privilege turns on purpose ...

... The privilege attaches whenever the communication or material is made or recorded for the purpose of confidential use in litigation or the obtaining of confidential legal advice. The protected communication or material may be a telephone conversation between a solicitor and client, a research memo of the legal adviser on an issue pertinent to the client's affairs or, as in the present case, the collection and collation of material and documents for the purpose of litigation or obtaining legal advice. As long as the communication was made or the material recorded for the [dominant purpose] of legal advice or pending litigation and was intended to be confidential, the actual form of the communication or recording is irrelevant.¹²

32. Further, in *Barnes v Commissioner of Taxation*¹³ the court said:

To attract privilege, therefore, it is necessary to show that the copy was created for the dominant purpose of seeking legal advice or assistance. The consequence of this may be that an original document which is not created for the dominant purpose of seeking legal advice and assistance, and thus was not privileged, may become privileged if a copy of it is created for that purpose. On the other hand, for example, where a document is privileged, but a copy of it is created for the purpose of commercial negotiation, this may result in the copy not being privileged.

Waiver of legal professional privilege

33. The legal professional privilege which exists in a communication may be waived by the person who is entitled to benefit from the privilege (ie. a client). This waiver may be either express or implied.¹⁴
34. The question of whether legal professional privilege, which attached to particular communications, was lost by subsequent disclosure of those communications, was considered by the High Court of Australia in *Mann v Carnell*.¹⁵ The majority justices¹⁶ noted that:

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 ...

¹⁰ Eimilios Kyrou, 'Under Attack: Legal professional privilege' (2007) 81(3) LIJ 32 at 34. See also *Esso Australia Resources Ltd v Commissioner of Taxation (Esso)* (1999) 201 CLR 49.

¹¹ See *Commissioner of Australian Federal Police v Propend Finance Pty Ltd (Propend)* (1997) 188 CLR 501. See also *AWB Ltd v Cole and Another* (No 5) [2006] FCA 1234.

¹² At 552 – 553. Following the decision of the High Court in *Esso*, the 'dominant purpose' test has replaced the 'sole purpose' test.

¹³ [2007] FCAFC 88 at paragraph 11, per Tamberlin, Stone and Siopsis JJ.

¹⁴ *Mann v Carnell* (1999) 201 CLR 1 at paragraph 29.

¹⁵ (1999) 201 CLR 1.

¹⁶ Gleeson CJ, Gaudron, Gummow and Callinan JJ at paragraphs 28 – 29.

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 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 ... 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 overriding principle of fairness operating at large.

35. In general terms then, legal professional privilege may be waived either:

- intentionally,¹⁷ by the client or the client's agent disclosing a privileged communication to persons outside the privileged relationship (referred to as 'express waiver')
- by implication of law¹⁸ (sometimes referred to as 'implied waiver'), in circumstances where there is conduct by, or on behalf of, the client which is inconsistent with the maintenance of the privilege, whether the client intended that result or not.

Application of section 43(1) of the FOI Act to the matter in issue

Confidential communications

36. Legal professional privilege 'is concerned with communications, either oral, written or recorded, and not with documents per se'.¹⁹ The privilege also attaches to documents that record communications. As McHugh J stated in *Esso*,

*When privilege is claimed for a document, it is because it records or constitutes a communication prepared, given or received for the purpose of obtaining legal advice or assistance.*²⁰

37. The matter in issue consists of email 'communications' as set out above. Having regard to the content of the emails, and on the basis of the copies of the emails provided to this Office no other parties were copied into the emails, I am satisfied that the matter in issue consists of communications which have the requisite degree of confidentiality to be confidential communications.

Lawyer/client relationship

38. Legal professional privilege may protect communications between a salaried employee legal adviser of a government department or statutory authority and his/her employer

¹⁷ As was noted by the Information Commissioner in paragraph 19 of *Queensland Law Society Inc. and Legal Ombudsman; Hewitt (Third Party)* (1998) 4 QAR 328.

¹⁸ In the recent case of *Osland v Secretary to the Department of Justice* [2008] HCA 37, at paragraph 45 the majority of the High Court noted:

Waiver of the kind presently in question is sometimes described as implied waiver, and sometimes as waiver 'imputed by operation of law'. It reflects a judgment that the conduct of the party entitled to the privilege is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. Such a judgment is to be made in the context and circumstances of the case, and in the light of any considerations of fairness arising from that context or those circumstances.

¹⁹ *Propend*, McHugh J at 552.

²⁰ *Esso*, McHugh J at paragraph 80.

as client provided there is a professional relationship of lawyer and client, '*which secures to the advice an independent character notwithstanding the employment*'.²¹

39. Importantly, the communications must be made in the course of a professional relationship of lawyer and client, that is, '*in the lawyer's capacity as a lawyer rather than any other capacity*'.²² For instance, in *Osland v Secretary to the Department of Justice*,²³ Kirby J noted that:

It would be a mistake to assume that all communications with government lawyers, no matter what their origins, purpose and subject matter, fall within the ambit of the State's legal professional privilege. Advice taken from lawyers on issues of law reform and public policy does not necessarily attract the privilege.

40. In my letter dated 8 October 2008, I indicated to the applicant that it was my preliminary view that the matter in issue comprised confidential communications occurring within the course of a professional relationship between lawyer and client, in particular, between Mr Perrett as 'legal advisor', and Ms Taylor (or the DCS) as 'client'.

Applicant's submissions

41. In his submissions dated 20 October 2008, the applicant stated:

...

I would also question as to the qualifications of Mr Perrett at the time of providing the response in the documents if he was as an employee of the Corrective Services Department employed as a solicitor qualified and registered to practice as such or as departmental employee working in the Corrective Services legal department and if the response was provided for the purposes of litigation.

...

42. In response to these submissions, a staff member of this Office made enquiries with the DCS to confirm Mr Perrett's position at the time the communications were made. In my letter of 19 November 2008, I also asked the DCS to provide written confirmation of Mr Perrett's role.
43. By letter dated 4 December 2008, the DCS confirmed that at the time the emails were written, Mr Perrett was admitted to practice as a solicitor in Queensland, was the Acting Director, Legal Services, and that it was a requirement of that position that he provide legal advice and representation to the DCS. Ms Barker also provided a copy of the Position Description for the 'Director, Legal Services'.
44. I am satisfied that at the time the emails were communicated, Mr Gordon Perrett was admitted to practice as a solicitor and, having regard to the matter in issue, was acting in the capacity of a 'legal advisor' in respect of those communications.

Dominant purpose

45. The third element of the test for legal professional privilege requires that the confidential communication be made for a dominant purpose which falls within either the 'advice privilege' or 'litigation privilege'.

²¹ *Waterford v Commonwealth of Australia* (1987) 163 CLR 54, Mason and Wilson JJ at page 62.

²² Eimilios Kyrou, 'Under Attack: Legal professional privilege' (2007) 81(3) LIJ 32 at 34.

²³ [2008] HCA 37 at paragraph 89.

46. There is no evidence to suggest that the communications which comprise the matter in issue were made for the purpose of legal proceedings which were current at that time, or anticipated. Accordingly, for the dominant purpose test to be satisfied in these circumstances, the confidential communication must have been made between a client and the client's legal advisor for the dominant purpose of obtaining or providing legal advice.
47. In *AWB Ltd v Cole*,²⁴ Young J said that 'A "dominant purpose" is one that predominates over other purposes; it is the prevailing or paramount purpose'.
48. While I am unable to discuss in any detail the nature of the communications, having regard to my obligations under section 87 of the FOI Act,²⁵ I have examined the matter in issue and am satisfied that the communications between Mr Perrett and Ms Taylor can be characterised as confidential communications made for the dominant purpose of obtaining or providing legal advice.
49. As noted above, 'copies' or 'attachments' of other communications or documents were attached to the matter in issue. Having regard to the applicable law, I consider that the 'attachments' or 'copies' which form part of the matter in issue can be characterised as either:
- copies of privileged communications or documents made and communicated for the dominant purpose of obtaining or providing legal advice; or
 - copies of non-privileged communications or documents made and communicated for the dominant purpose of obtaining or providing legal advice.
50. Accordingly, I am satisfied that those parts of the matter in issue which could be considered to be 'attachments' or 'copies' form part of the dominant purpose of obtaining or providing legal advice.

Applicant submissions

51. In the ER Application, the applicant submits that:

Although privilege is now claimed in respect of these requested documents as they were documents of internal correspondence relevant at that time to the Department's conduct of matters that were not at that time, and had not at that time been subject of legal proceedings.

...

²⁴ [2006] FCA 1234 at paragraph 44.

²⁵ Subsections 87(1) and (3) of the FOI Act provide as follows:

87 Commissioner to ensure non-disclosure of particular matter

- (1) *On a review, the commissioner may give the directions the commissioner considers necessary to avoid the disclosure to an access participant or an access participant's representative of –*
- (a) *matter that is claimed to be exempt matter; or*
 - (b) *...*
- ...
- (3) *The commissioner must not, in a decision on a review or in reasons for a decision on review, include matter or information of a kind mentioned in subsection (1).*
- ...

I would also contend that the stated declaration of legal privilege is part of the standard opening of most correspondence emanating from the office of Mr Perrett whether relative to the content or not and as the documents did not relate to any proceedings either in progress or at that time contemplated it is irrelevant and does not justify the application of s43(1) to deny access to those documents.

52. In his submissions dated 20 October 2008, the applicant also questioned whether Mr Perrett's response was provided for the purposes of litigation. During a telephone conversation with the applicant on 7 November 2008, a staff member of this Office reiterated the view stated in the preliminary view letter, that legal professional privilege may apply to communications made for the dominant purpose of seeking or providing legal advice, and it was not necessary for the communications to relate to litigation.
53. Under section 43(1) of the FOI Act, matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege. As outlined above, this section will apply to communications which fall within either the 'advice limb' or 'litigation limb' of legal professional privilege.
54. As I am satisfied that the matter in issue falls within the 'advice limb', that is, the communications were made for the dominant purpose of obtaining or providing legal advice, it is not a requirement that the communications be made in relation to legal proceedings.

Waiver

55. As stated above, in general terms, legal professional privilege may be either expressly waived (that is, intentionally), or impliedly waived by conduct that is inconsistent with maintaining the privilege.
56. The applicant has maintained during the course of this review that the DCS has previously provided him with copies of the matter in issue. Accordingly, it is necessary for me to consider whether there is sufficient evidence to conclude that the matter in issue has previously been given to the applicant and subsequently, whether the legal professional privilege which the DCS claims exists in the matter in issue, has been either expressly or implied waived.

Applicant submissions

57. The applicant has indicated that he received copies of the matter in issue:
- in respect of the DCS' response to an application for judicial review (as stated in the IR Application and ER Application)
 - as part of a release of documents under a freedom of information application (as stated during a telephone conversation with a staff member of this Office on 7 November 2008).
58. In the ER Application, the applicant stated:

I would draw to your attention that I was previously supplied with copies of these documents that I now request by the Department in respect of the Department's response to an application for Judicial Review.

While the initial supply of the requested documents by the Department may have been inadvertent it seems that a document box containing these and a number of other documents mostly relating to the same or similar matters has been misplaced either at

Wolston Correctional Centre prior to my discharge from that centre or at some time shortly after my discharge ...

As I had been previously supplied with the requested documents I question the application of s43(1) of the Freedom of Information Act 1992 to deny access to these documents.

...

It was noted by Ms Barker that two of the requested documents compiled by Mr G Perrett started with an explicit statement that their content was subject of Legal Privilege, I contend that such a claim of privilege would become void when I was originally supplied with copies of those documents regardless of if that release was intentional or otherwise and those documents would from that time be deemed as documents at large having been released into the public area and therefore no longer subject to privilege.²⁶

59. In light of the applicant's submissions in his ER Application which stated that he had previously been given copies of the matter in issue (perhaps inadvertently), a staff member of this Office made enquiries with the DCS regarding the possibility that the matter in issue was previously given to the applicant. The DCS advised this Office that it had undertaken searches to ascertain whether the matter in issue had been provided to the applicant previously and had been unable to confirm by these searches that copies of the matter in issue had or had not been provided.
60. In the preliminary view letter dated 8 October 2008, I indicated to the applicant that without further evidence, I was unable to form the view that the DCS had previously given copies of the matter in issue to the applicant and in doing so either expressly or impliedly waived any legal professional privilege over those communications.
61. During a telephone conversation with me on 15 October 2008, the applicant indicated that he had the copies of the matter in issue in a box with other documents he intended using in legal proceedings against the DCS, which the DCS knew and removed from his possession without his consent. The applicant also indicated that he could not provide evidence of this.
62. In his written submissions dated 20 October 2008, the applicant stated:

I do not accept the preliminary view as set out in your letter on the basis that it would seem that these documents copies of which had previously been supplied to myself whether intentionally or inadvertently were in would seem together with a number of other documents removed from my possession prior to my discharge from the prison.

...

It would seem that the application of section 43(1) of the Freedom of Information Act 1992 to deny further access to these documents which were previously supplied to myself then it would seem removed from my possession without my knowledge or consent presumably by employees of the department is of questionable legality.

²⁶ In the Original Decision, Ms Barker noted that 'two of the emails (from Mr Perrett) start with an explicit statement that their content is subject to legal professional privilege. While this is not always a deciding factor in determining whether a document attracts legal privilege, it clearly indicates the purpose for which the author of the document believed s/he was writing it. In this case, the two emails are from Mr Perrett to Executive Directors of QCS, providing advice on the application of the law in a particular situation.' I note that the two emails referred to were emails released to the applicant at the internal review stage, and accordingly, it has not been necessary for me to address this issue in the course of this review.

Any application of section 43(1) would have been rendered irrelevant at the time that these documents came into my possession originally and my further application for copies of these was made following my discovering that they were missing.

63. Following receipt of the applicant's written submissions dated 20 October 2008, a staff member of this Office again contacted the DCS on 6 November 2008 to discuss the applicant's views that he had previously been provided with copies of the matter in issue. The DCS again confirmed during this telephone call that they had undertaken extensive searches of the applicant's legal files and had been unable to ascertain that this was the case.
64. A staff member of this Office spoke with the applicant on 7 November 2008 to ask the applicant to provide further detail about the circumstances in which he believed he came to be in possession of copies of the matter in issue. On this occasion, the applicant stated that he had been provided with copies of the matter in issue as part of a release of documents in response to a freedom of information application he made to the DCS. The applicant indicated that he had not expected to receive the copies and thought they may have been accidentally released to him. However, the applicant was unable to:
- provide any detail about the specific freedom of information application under which he considered the release of the matter in issue was made to him
 - give an approximate time at which the matter in issue was released to him
 - provide any specific detail about the content of the matter in issue.²⁷
65. By letter dated 19 November 2008, I asked the DCS to:
- detail the searches undertaken to determine whether or not the documents in issue were previously supplied to the applicant
 - undertake any further searches necessary to determine whether or not the documents in issue were previously supplied to the applicant as part of a release of documents relating to any of the applicant's previous freedom of information applications to the DCS, and advise me of the outcome of such searches.
66. Ms Barker of the DCS responded to this request by letter dated 4 December 2008. In summary, Ms Barker indicated that:
- on the basis of the dates supplied by the applicant – that is, that the matter in issue was in his possession prior to the applicant's release from custody – if the applicant did have access to the matter in issue (which the DCS contends that he has not), the matter in issue would have been released to him no earlier than 15 August 2006 (when the last of the four emails came into existence) and no later than the end of March 2007 (when the box in which Mr Ward claims the matter in issue was stored, was lost or misplaced)
 - Ms Barker and Ms Warlow conducted searches of the applicant's legal files following his IR Application²⁸

²⁷ When asked, the applicant indicated that the documents were in relation to comments he had made about certain facts and about dealing with it.

²⁸ Ms Barker noted that as a result of those searches, it was discovered that a letter quoting and attaching copies of the '2005 emails' had been attached as exhibits to one of the applicant's applications for statutory review. DCS indicated that while it was not clear how these emails came to be in the applicant's possession, it was accepted that they had been disclosed to the applicant and the DCS could no longer sustain a claim of privilege in respect of those documents.

- no copies of, or references to, the matter in issue were located in the file searches and there was nothing to indicate that the matter in issue had been disclosed to the applicant during the course of any of the legal actions which were the subject of those files
 - she had identified 22 freedom of information applications (including applications 50.07.23.2 and 50.06.23.44) made by the applicant during the relevant time period²⁹
 - she had concluded, following searches of the relevant FOI files, that the matter in issue would not have been released to the applicant in each case due to one (or more) of the following:
 - the application did not result in disclosure of any documents
 - the application was deemed to have been withdrawn and no documents were released
 - the release of documents consisted of only 1 or 2 pages of relevant documents and there was nothing to indicate that additional pages were inadvertently forwarded to the applicant
 - the application related to documents not located on files containing material the subject of the matter in issue
 - the application was for documents sourced from an electronic database or from files which did not hold material relating to the matter in issue, or which predated the matter in issue by several years.
 - the matter in issue was not within the scope of the application and Ms Barker was satisfied that copies of the matter in issue could not have been released inadvertently as part of the application.
67. In the letter of 9 January 2009, the DCS also provided submissions relating to 'waiver', having regard to the subject matter of the matter in issue.
68. I have considered the submissions made by both the applicant and the DCS in relation to the matter in issue.
69. I acknowledge that the applicant claims that the DCS has previously given copies of the matter in issue to him, either in the course of a judicial review proceeding or as part of a release of documents under a freedom of information application.
70. The DCS has provided details about the searches it has undertaken to determine whether the matter in issue may have been released to the applicant either in the course of a judicial review proceeding or as part of a release of documents under a freedom of information application. The DCS contends that there is nothing to indicate that the matter in issue has been disclosed to the applicant previously.
71. I am satisfied that the searches conducted by the DCS have been appropriate, having regard to the submissions made by the applicant.
72. I am also satisfied that had the DCS been able to identify that the matter in issue had previously been provided to the applicant, the DCS would have released copies of those documents to him. This was the approach the DCS took in relation to the 2005 Emails when the DCS discovered, as a result of its investigations at the internal review stage, that the 2005 Emails had previously been provided to the applicant. The DCS

²⁹ That is, between August 2006 and April 2007. (During a telephone conversation with Ms Barker on 18 December 2008, a staff member of this Office confirmed that the reference on page 2 of Ms Barker's letter of 4 December 2008 to 'August 2007 to April 2008' was intended to be a reference to 'August 2006 to April 2007'.)

concluded that they were unable to sustain a claim of privilege in respect of the 2005 Emails, and subsequently provided copies of those documents to the applicant with the IR Decision.

73. Accordingly, there is insufficient evidence available to me to enable me to conclusively establish that the matter in issue has previously been given to the applicant. I am therefore unable to make a finding, on the basis of the information which I have been provided, that the DCS has:
- intentionally waived legal professional privilege in the matter in issue by providing copies of the documents in issue to the applicant
 - engaged in conduct that was inconsistent with the maintenance of legal professional privilege by inadvertently providing copies of the documents in issue to the applicant, such that waiver of the legal professional privilege in those documents can be implied
 - otherwise waived legal professional privilege.

Summary – application of section 43(1) of the FOI Act

74. Having examined the matter in issue in this review with regard to the applicable law and the submissions made by the parties to this review, I am satisfied that the matter in issue in this review:
- consists of confidential communications between a legal advisor and client made for the dominant purpose of either obtaining or providing legal advice
 - would be privileged from production in a legal proceeding on the ground of legal professional privilege
 - qualifies for exemption from disclosure under section 43(1) of the FOI Act.

DECISION

75. I affirm that part of the decision under review that relates to the matter in issue by finding that the matter in issue in this review is exempt from disclosure under section 43(1) of the *Freedom of Information Act 1992* (Qld).
76. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

S Jefferies
Acting Assistant Commissioner

Date: 30 January 2009