



## Decision and Reasons for Decision

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<b>Citation:</b>	<i>Ringland and Queensland Building and Construction Commission [2017] QICmr 60 (20 December 2017)</i>
<b>Application Number:</b>	313142
<b>Applicant:</b>	Ringland
<b>Respondent:</b>	Queensland Building and Construction Commission
<b>Decision Date:</b>	20 December 2017
<b>Catchwords:</b>	<p><b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - EXEMPT INFORMATION - EXECUTIVE COUNCIL INFORMATION - research, internal discussions and Board meeting minutes - whether documents are exempt - sections 47(3)(a) and 49 and schedule 3, section 3 of the <i>Right to Information Act 2009</i> (Qld)</b></p> <p><b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - EXEMPT INFORMATION - CABINET INFORMATION - draft briefing note - draft speaking points - table summarising provisions of a Bill - whether documents are exempt - sections 47(3)(a) and 49 and schedule 3, section 2 of the <i>Right to Information Act 2009</i> (Qld)</b></p> <p><b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - information related to policy documentation - whether documents are exempt - sections 47(3)(a) and 49 and schedule 3, section 7 of the <i>Right to Information Act 2009</i> (Qld)</b></p>

## REASONS FOR DECISION

### Summary

1. The applicant applied<sup>1</sup> to the Queensland Building and Construction Commission (**QBCC**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for:

*Any and all information in regards to the preparation, discussion, review, consultation & finalisation of the MFR policy [Minimum Financial Requirement Policy] dated 1/10/14 (and as per attached).*

*Type of documents: All internal paperwork regarding the above along with external paperwork & file notes.*

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<sup>1</sup> Application received on 29 August 2016.

*Time period: 31 March 2010 (Version 1.2) FRL [Financial Requirements for Licencing Policy] til (sic) 1st October 2014 (New policy).*

2. QBCC initially located 593 pages of information relating to the application (**Initial Information**). QBCC decided<sup>2</sup> to release 215 pages in full<sup>3</sup> and refuse access to:
  - 372 full pages<sup>4</sup> on the basis that they consist of Executive Council information and therefore are exempt information<sup>5</sup>
  - 6 part pages on the basis that their disclosure would, on balance, be contrary to the public interest;<sup>6</sup> and
  - additional information sought by the applicant on the basis that it was nonexistent or unlocatable.<sup>7</sup>
3. The applicant applied for an internal review of the initial decision.<sup>8</sup> On internal review, QBCC affirmed its initial decision.<sup>9</sup>
4. The applicant applied<sup>10</sup> to the Office of the Information Commissioner (**OIC**) for external review of QBCC's decision.
5. On external review, QBCC undertook further searches and located an additional 4429 pages of information in the archived email of former QBCC employees (**Additional Information**) and released a small number of pages to the applicant.
6. Given the additional material located and considered during the external review, I vary QBCC's decision and find that access to the information in issue in the review may be refused on the basis that it is exempt information.

## Background

7. As noted above, the applicant seeks access to information related to the preparation, discussion, review, consultation and finalisation of the Minimum Financial Requirement Policy (**MFR Policy**).
8. Information before me in this review confirms that the MFR Policy formed part of the Government of the day's 'Ten Point Action Plan'<sup>11</sup> which outlined actions to be progressed as a matter of priority, which expressly included a review of licencing and compliance, particularly the *'financial audit regime and the ratios used to determine financial sustainability to ensure the financial audit scheme is meeting its stated objectives'*.<sup>12</sup>
9. The MFR Policy replaced an earlier version of the Queensland Building and Construction Board (**QBCB**) policy about financial requirements for licence applicants and licence

<sup>2</sup> In an initial decision dated 3 November 2016.

<sup>3</sup> On OIC's count, QBCC has released 202 pages in full.

<sup>4</sup> On OIC's count, QBCC has refused access to 385 pages.

<sup>5</sup> Under sections 47(3)(a) and 48 and schedule 3, section 3 of the RTI Act.

<sup>6</sup> Under sections 47(3)(b) and 49 of the RTI Act.

<sup>7</sup> Under sections 47(3)(e) and 52(1) of the RTI Act.

<sup>8</sup> On 23 November 2016.

<sup>9</sup> On 22 December 2016, QBCC issued a notice confirming (pursuant to section 83(2) of the RTI Act) that it had not made a decision within the timeframe stipulated in the RTI Act for internal review and consequently was deemed to have made a decision affirming the original decision.

<sup>10</sup> OIC received the application on 23 December 2016, however, the letter is dated 28 December 2016.

<sup>11</sup> The Ten Point Plan is outlined in the Queensland Government Response to Inquiry into the Operation and Performance of the Queensland Building Services Authority 2012, dated May 2013 and available here: <http://www.parliament.qld.gov.au/documents/tableoffice/tabledpapers/2013/5413t2705.pdf>.

<sup>12</sup> Page 8, of the Queensland Government Response to Inquiry into the Operation and Performance of the Queensland Building Services Authority 2012, dated May 2013.

holders under the QBCC Act.<sup>13</sup> The former policy was titled '*Financial Requirements for Licensing (FRL) and Guidelines for the Application of the Financial Requirements for Licensing (Guidelines)*' which was made by the former Queensland Building Services Board on 19 July 2012.

10. The *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**) provided that a function of QBCB was to decide the operational, administrative and financial policies to be followed by the QBCC.<sup>14</sup>
11. At the time when the MFR Policy was made, the QBCC Act also empowered the QBCB to make policies governing the administration of the QBCC Act<sup>15</sup> including the policies setting out the requirements for a person or an organisation to be issued with and maintain a licence.<sup>16</sup>
12. At the time the MFR policy was made, the QBCC Act provided that QBCB's policies did not take effect until they had been approved by regulation (otherwise known as subordinate legislation).<sup>17</sup> The regulations, and therefore the policies, did not take effect until they were approved by the Governor in Council.<sup>18</sup>
13. The MFR policy was approved by the QBCB on 20 June 2014 and was subsequently given effect to by the passage of the *Queensland Building and Construction Commission Amendment Regulation (No. 2) 2014 (Amendment Regulation)* which was approved by the Governor in Council on 9 October 2014. It has since been amended with the most recent update effective from 8 October 2015.

### Reviewable decision

14. The decision under review is QBCC's internal review decision dated 22 December 2017.

### Evidence considered

15. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).
16. Significant procedural steps relating to the application and the external review are set out in the Appendix.
17. The applicant provided a number of submissions to OIC during the external review. I have summarised and addressed the applicant's submissions to the extent they are relevant to the issues for determination.

### Information in issue

18. During the external review the applicant elected not to seek access to the following types of information:<sup>19</sup>
  - details about draft legislation, including instructions, and copies of draft legislation

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<sup>13</sup> Except applicants for, or holders of, a nominee supervisor's licence, site supervisor's licence or any occupational licence

<sup>14</sup> Section 11 of the QBCC Act.

<sup>15</sup> Section 19 of the QBCC Act. This section has since been repealed.

<sup>16</sup> Part 2, division 2 of the QBCC Act provides that an applicant for a licence of must satisfy the relevant financial requirements state in the QBCB's policies and part 3, division 9A details the monitoring in relation to the minimum financial requirements for existing licence holders .

<sup>17</sup> Section 19(3) of the QBCC Act. This section has since been repealed.

<sup>18</sup> Section 116 of the QBCC Act authorised the Governor in Council to make regulations in this regard.

<sup>19</sup> Confirmed by letter dated 7 April 2017 from OIC to applicant.

- information relating to the social media campaign regarding the MFR Policy
- training slides relating to the MFR Policy; and
- draft versions of the MFR Policy.

19. Accordingly, the information which remains in issue is:

- **Category A Information**<sup>20</sup> which consists of research, internal discussions and QBCB meeting minutes concerning the MFR Policy
- **Category B Information**<sup>21</sup> which consists of versions of Cabinet briefing material (including draft briefing notes and speaking points for the Minister); and
- **Category C Information**<sup>22</sup> which consists of internal QBCC communications.

### Issued to be determined

20. The issues to be determined in this review are whether the:

- **Category A Information** is exempt information on the basis it is Executive Council information
- **Category B Information** is exempt information on the basis it is Cabinet Information; and
- **Category C Information** is exempt information on the basis that it is subject to legal professional privilege.

### Category A Information

#### Relevant law

21. Under the RTI Act, a person has a right to be given access to documents of an agency. There are some limitations on this right of access, including where grounds exist to refuse access to information.<sup>23</sup> One such ground is that the information is exempt information.<sup>24</sup>

22. Schedule 3, section 3(1) of the RTI Act (referred to as the **Executive Council exemption**) states:

#### **3 Executive Council information**

(1) *Information is exempt information if—*

- (a) *it has been submitted to Executive Council; or*
- (b) *it was brought into existence for submission to Executive Council and is proposed, or has at any time been proposed, to be submitted to Executive Council by a Minister; or*
- (c) *it was brought into existence for briefing, or the use of, the Governor, a Minister or a chief executive in relation to information—*

<sup>20</sup> The Category A Information consists of 1924 pages—specifically 297 pages of Initial Information (pages 3-67, 74-174, 375-382, 427-469, and 514-593); and 1627 pages of Additional Information (pages 1-172, 176-296, 298-381, 385-442, 469-682, 728-736, 787-799, 847-851, 900-903, 935-953, 1376-1379, 1791-1800, 2114-2121, 2405-2408, 2834-2943, 2988-2998, 3043-3200, 3202-3209, 3212-3219, 3237-3266, 3518-3525, 3543-3544, 3547-3626, 3631-3633, 3678, 3683-3684, 3686-3705, 3750-4045, 4048-4051, 4066-4074, 4083-4134, 4139-4141, 4160, 4208-4237, 4243-4267, 4313, and 4325-4364).

<sup>21</sup> The Category B Information consists of 25 pages of Additional Information (pages 1801-1825).

<sup>22</sup> The Category C Information consists of 32 pages of Additional Information (pages 173-175, 297, 382-384, 4238-4239, 4365-4366, and 4411-4429).

<sup>23</sup> Set out in section 47(3) of the RTI Act.

<sup>24</sup> Under section 47(3)(a) and section 48 of the RTI Act. Schedule 3 of the RTI Act sets out the types of exempt information.

- (i) *submitted to Executive Council; or*
  - (ii) *that is proposed, or has at any time been proposed, to be submitted to Executive Council by a Minister; or*
  - (d) *it is, or forms part of, an official record of Executive Council; or*
  - (e) *its disclosure would involve the disclosure of any consideration of Executive Council or could otherwise prejudice the confidentiality of Executive Council considerations or operations; or*
  - (f) *it is a draft of matter mentioned in any of paragraphs (a) to (e); or*
  - (g) *it is a copy of or extract from, or part of a copy of or extract from, information mentioned in any of paragraphs (a) to (f).*
23. 'Consideration' is defined as including discussion, deliberation, noting (with or without discussion) or decision; and consideration for any purpose, including, for example, for information or to make a decision.<sup>25</sup>
24. Schedule 3, section 3(2) of the RTI Act sets out the exception to the exemption, namely when information has been officially published by decision of the Governor in Council.<sup>26</sup>

### **Approval process of the MFR Policy**

25. In relation to the process of adoption of the MFR Policy through subordinate legislation<sup>27</sup>, it is my understanding that:<sup>28</sup>
- The Amendment Regulation which amended the *Queensland Building and Construction Commission Regulation 2003 (Regulation)* was drafted by the Office of the Queensland Parliamentary Council (**OQPC**), in accordance with the processes set out in the Queensland Executive Council Handbook<sup>29</sup> and the Queensland Cabinet Handbook.<sup>30</sup>
  - Given the Minister for Housing and Public Works sponsored the Amendment Regulation, the Department of Housing and Public Works (**DHPW**) acted on the Minister's behalf to prepare the Executive Council Minute to be submitted with the Amendment Regulation, in order to accord with Executive Council procedures.<sup>31</sup> This required that the DHPW consult with QBCC and OQPC, in order to obtain and clarify drafting instructions for preparation of the Regulation. When OQPC finalised the drafting of the Regulation, the proposed Amendment Regulation and Executive Council Minute material were prepared by DHPW for the consideration of Ministers in their capacity as Executive Council, and then considered by the Governor in Council.
  - On receiving the Governor in Council's approval, the Amendment Regulation commenced and resulted in amendment of the Regulation.

<sup>25</sup> Schedule 3, section 3(3) of the RTI Act.

<sup>26</sup> I have made the relevant checks that the Category A Information has not been officially published by decision of the Governor in Council, and I am satisfied that the Category A Information has not been published.

<sup>27</sup> As detailed in the Background at paragraphs 7-13.

<sup>28</sup> Confirmed in a telephone conversation on 14 November 2017 with Mr Peter Bayliss, Principal Adviser in Executive Services at DHPW.

<sup>29</sup> The Queensland Executive Council Handbook details the process and practices associated with the Executive Council, including the role of Executive Council in policy development, and the process of drafting and approving legislation. It is available here: <<https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/exec-council-handbook.aspx>>.

<sup>30</sup> The Queensland Cabinet Handbook details the process and practices associated with the Cabinet, including the role of Cabinet in policy development, drafting and approving legislation. It is available here: <<https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/cabinet-handbook.aspx>>.

<sup>31</sup> See Queensland Executive Council Handbook at paragraphs 8.2.

- The MFR Policy took effect at the specified commencement time, namely upon Governor in Council approval, which was 9 October 2014. The most recent version of the policy appears on the QBCC website.<sup>32</sup>

### ***Applicant's submissions***

26. The applicant has made a number of submissions pertinent to the release of the Category A Information. I have summarised these submissions as follows:

- information related to the subordinate legislation was provided to the Minister or Executive Council by DHPW and not QBCC<sup>33</sup>
- not all of the Category A Information was submitted to Executive Council and therefore was not considered by Executive Council<sup>34</sup>
- most of the information, specifically QBCB Minutes and discussions between officers of QBCC,<sup>35</sup> were not brought into existence for briefing or for the use of the Minister and it was not proposed to be submitted to Executive Council;<sup>36</sup> and
- the information should be released in the public interest to ensure the transparency and accountability of the QBCC.<sup>37</sup>

27. I have considered these submissions below.

### ***Findings***

28. In relation to the applicant's concern that information related to the subordinate legislation was provided to the Minister or Executive Council by DHPW and not QBCC, on the information before me, it is evident that:

- DHPW acted as a conduit for communications between the Minister, QBCC and OQPC in relation to preparing the relevant documents for submission to Executive Council and then to the Governor in Council; and
- QBCC did not directly liaise with the Minister or Executive Council.

29. However, intermediary action by DHPW does not preclude information in the possession of QBCC from being subject to the Executive Council exemption. It is not unusual for a Department, rather than entities overseen by a Department, to be the primary point of contact with the relevant Minister in relation to preparing material for Cabinet and Executive Council. This is in keeping with the protocols set out in the Queensland Executive Council Handbook and Queensland Cabinet Handbook. Also, it occurs for reasons of convenience and efficiency, given departments are usually better resourced and more experienced in such matters and in more frequent and direct contact with their Minister.

30. I consider that the provisions of the RTI Act do not expressly or impliedly restrict an agency from claiming the Executive Council exemption if an agency did not itself provide information to the Minister and Executive Council for consideration. The RTI Act applies to documents in an agency's possession. Accordingly, the same information may be exempt in a number of agencies.

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<sup>32</sup> At <[http://www.qbcc.qld.gov.au/sites/default/files/Minimum\\_Financial\\_Requirements\\_Policy.pdf](http://www.qbcc.qld.gov.au/sites/default/files/Minimum_Financial_Requirements_Policy.pdf)>.

<sup>33</sup> In the applicant's submission to QBCC dated 23 November 2016, and 23 June 2017.

<sup>34</sup> Written submission of 23 June 2017 and 7 December 2017.

<sup>35</sup> Oral submissions during a telephone conversation with an officer of OIC on 12 September 2017.

<sup>36</sup> Written submission to QBCC of 23 November 2016 and written submission to OIC of 5 June 2017.

<sup>37</sup> Written submission dated 5 June 2017. Similar submissions were made by email on 29 December 2016 and 23 August 2017.

31. In the present circumstances, on the material before me, I am satisfied that the roles played by DHPW and QBCC in bringing about the passage of the Amendment Regulation through Executive Council do not alter the status of the Category A Information in that it meets the criteria of exempt information under schedule 3, section 3(1) of the RTI Act. That is, the Category A Information was either:
- prepared for the consideration of Executive Council
  - brought into existence for briefing, or the use of the Governor or a Minister or a chief executive in relation to information submitted to Executive Council; or
  - its disclosure would involve the disclosure of any consideration of Executive Council or could otherwise prejudice the confidentiality of Executive Council considerations.
32. The applicant argues that not all of the Category A Information was submitted to Executive Council for its consideration and therefore the Executive Council exemption cannot apply. The particular regulatory requirements in place at the time of the making of the Amendment Regulation obliged the QBCB to consider the MFR Policy before it was subsequently considered by Executive Council and brought into force by regulation. For this reason, although some of the Category A information was not submitted to Executive Council, its disclosure would, nonetheless, involve the disclosure of a consideration of Executive Council or could otherwise prejudice the confidentiality of Executive Council considerations.
33. The applicant also submits<sup>38</sup> that the QBCB Meeting Minutes and discussions between officers of QBCC were not brought into existence for briefing, or use by the Governor or Minister in relation to information submitted to Executive Council. As noted above, while a small amount of the Category A information appears to have been submitted to Executive Council, it has not all been submitted to Executive Council. However, as also noted above, schedule 3, sections 3(b) and (c) of the RTI Act may apply to documents that are not submitted to Executive Council.
34. The particular regulatory requirements relevant to the MFR Policy necessitated that the QBCB must consider a policy related to the financial requirements of applicants and licence holders under the QBCC Act before it was approved by the Executive Council and the Governor in Council. While the QBCB meeting minutes and discussions between QBCC officers were not brought into existence specifically for the purpose of briefing the Minister or Executive Council they, nonetheless, form part of the information that, if revealed, would reveal a consideration of Executive Council or would otherwise prejudice the confidentiality of Executive Council considerations or operations.
35. The applicant submits that the Category A Information should be disclosed to ensure the transparency and accountability of the QBCC as the MFR Policy has not achieved its objective of serving the public interest and does not assist consumers.<sup>39</sup> To support his submission the applicant provided<sup>40</sup> OIC with a copy of a media release entitled '*Immediate review of building financial reporting*' released by QBCC on 8 February 2017.<sup>41</sup> This media release states:

*The financial-reporting requirements for members of the building industry will be immediately reviewed amid harsh criticism that a policy introduced by the previous QBC Board has*

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<sup>38</sup> The applicant's submissions on internal review to QBCC dated 23 November 2016 and in a telephone conversation on 29 November 2017.

<sup>39</sup> Oral submission to OIC of 23 June 2017.

<sup>40</sup> Written submission of 23 June 2017.

<sup>41</sup> Available on the QBCC website: <<http://www.qbcc.qld.gov.au/media-releases/immediate-review-building-industry-financial-reporting>>.

*weakened the industry regulator's effectiveness in monitoring the financial health of its licensees.*

*Chair of the current [QBCB], Dick Williams, said the [MFR Policy] introduced by the previous board had significant flaws that decreased protection for home owners and industry members against the financial failure of licensees, and building company collapses.*

36. The applicant has also provided OIC with an excerpt of the introductory speech by the Honourable Mick de Brenni, the Minister for Housing and Public Works and Minister for Sport in relation to the introduction of the *Building Industry (Security of Payment) Bill* on 22 August 2017 in support of his submissions.<sup>42</sup> I have noted that the speech refers to reforming the then current financial reporting requirements of licensees and this Bill has since received assent<sup>43</sup> and become the *Building Industry Fairness (Security of Payment) Act 2017*.
37. Additionally, the applicant provided OIC with letters from:
- the Subcontractors Alliance<sup>44</sup> in relation to the Subcontractors Alliance's views on the MFR Policy changes; and
  - the Queensland Ombudsman<sup>45</sup> indicating the decision had been made not to investigate the applicant's concerns about the MFR Policy, as it was, at the time, under review.<sup>46</sup>
38. While I acknowledge that the RTI Act is administered on a pro-disclosure basis, the exemptions in schedule 3 of the RTI Act set out the types of information which Parliament has decided would, on balance, be contrary to the public interest to disclose. When the requirements of an exemption, such as the Executive Council exemption, have been established, I am precluded from considering any public interest factors, no matter how compelling.<sup>47</sup>
39. For that reason, while I acknowledge the public interest considerations raised by the applicant, they are not matters that I am able to consider under the RTI Act, given the nature of the Category A Information.

## **Conclusion**

40. I find that access to the Category A Information can be refused under section 47(3)(a) of the RTI Act as it is subject to the Executive Council Exemption in schedule 3, section 3 of the RTI Act.

## **Category B Information**

41. As noted in paragraph 19, the Category B Information<sup>48</sup> consists of various versions of Cabinet briefing material—specifically, a briefing note, drafts of speaking points for the Minister, a table summarising provisions in the *Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014 (Bill)* and emails circulating these documents between DHPW and QBCC

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<sup>42</sup> A full record of proceedings for the first session of the fifty-fifth parliament sitting on 22 August 2017 is available on the Queensland Parliament website here: <[https://www.parliament.qld.gov.au/documents/hansard/2017/2017\\_08\\_22\\_WEEKLY.pdf](https://www.parliament.qld.gov.au/documents/hansard/2017/2017_08_22_WEEKLY.pdf)> with specific reference to the *Building Industry (Security of Payment) Bill* on pages 2237-2238 and 2284-2287.

<sup>43</sup> On 10 November 2017.

<sup>44</sup> Dated 28 July 201 (sic), received by OIC on 7 December 2017.

<sup>45</sup> Dated 19 September 2017, received by OIC on 7 December 2017.

<sup>46</sup> As stated in the media statement referred to in paragraph 35.

<sup>47</sup> Section 105(2) of the RTI Act.

<sup>48</sup> Additional Information pages 1801-1825.



## **Relevant law**

42. Schedule 3, section 2(1) of the RTI Act (referred to as the **Cabinet Exemption**) states:

### **2 Cabinet information brought into existence on or after commencement**

(1) *Information is exempt information for 10 years after its relevant date if—*

- (a) *it has been brought into existence for the consideration<sup>49</sup> of Cabinet; or*
- (b) *its disclosure would reveal any consideration of Cabinet or would otherwise prejudice the confidentiality of Cabinet considerations or operations; or*
- (c) *it has been brought into existence in the course of the State's budgetary processes.*

43. Certain types of documents are taken to be comprised exclusively of exempt information, namely, Cabinet submissions, Cabinet briefing notes, Cabinet agendas, notes of discussions in Cabinet, Cabinet minutes, Cabinet decisions and a draft of any such document.<sup>50</sup>

44. Schedule 3, section 2(2) of the RTI Act provides an exception to the Cabinet Exemption if:

- information was brought into existence before the commencement of schedule 3, section 2(1); or
- information has been officially published by decision of Cabinet.

## **Findings**

45. While the applicant has not made submissions specifically addressing the application of the Cabinet Exemption to the Category B Information, I have nonetheless considered the application of this exemption in these reasons.

46. In Queensland, unlike the procedure in respect of the amendment of subordinate legislation (Regulations), proposed Acts (otherwise known as Bills) require the approval of Cabinet, and must be passed by the Queensland Parliament.

47. The Queensland Cabinet Handbook sets out the protocols to be followed for the preparation and presentation of Bills to Parliament. Generally, these protocols require that Cabinet briefing notes are prepared by departments for their respective Minister to lodge with the Cabinet Secretariat for distribution to Cabinet members. In this case, it is evident on the face of the various documents<sup>51</sup> comprising the Category B Information that they were circulated between QBCC and DHPW for review prior to provision to the relevant Minister.

48. I have considered the nature and content of the Category B Information and I am satisfied that the disclosure of this information would reveal considerations of Cabinet regarding the Bill. Given this position, I am of the opinion that the disclosure of the Category B Information would reveal considerations of Cabinet or otherwise prejudice the

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<sup>49</sup> In respect of this section, 'consideration' is defined in schedule 3, section 2(5) of the RTI Act as 'including discussion, deliberation, noting (with or without discussion) or decision; and consideration for any purpose, including, for example, for information or to make a decision'

<sup>50</sup> Schedule 3, section 2(3) of the RTI Act.

<sup>51</sup> Described in paragraph 41.

confidentiality of those considerations and therefore the Category B Information is exempt from disclosure under the Cabinet Exemption.

49. I have considered whether either of the exceptions to the Cabinet exemption apply to the Category B Information. On the information before me, I am satisfied that neither exceptions apply, as the Category B Information:

- was brought into existence after 1 July 2009; and
- has not been officially published by decision of Cabinet.

### **Conclusion**

50. I find that access to the Category B Information can be refused under section 47(3)(a) of the RTI Act as it is exempt information under schedule 3, section 2 of the RTI Act.

### **Category C Information**

#### **Relevant law**

51. The RTI Act provides that information will be exempt information if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.<sup>52</sup> This exemption reflects the requirements for establishing legal professional privilege at common law.<sup>53</sup> Accordingly, for information to be subject to legal professional privilege it must comprise, or record, a communication:

- made in the course of a lawyer-client relationship
- that was and remains confidential; and
- which was made for the dominant purpose of seeking or providing legal advice or for use in existing or reasonably anticipated legal proceedings.<sup>54</sup>

52. It is also settled law that legal professional privilege can be lost if it is expressly<sup>55</sup> or impliedly<sup>56</sup> waived.<sup>57</sup>

#### **Applicant's submissions**

53. The applicant submits that QBCC should not be able to claim legal professional privilege in relation to in-house legal advice on the basis that QBCC is a 'self-represented litigant'<sup>58</sup> in that:

- QBCC is unable to claim costs orders on an indemnity basis
- QBCC do not have client/lawyer contracts in place; and
- QBCC's legal department has several facets of its operations including that of managers, licenses, industry stakeholders and the QBCC.

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<sup>52</sup> Section 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act.

<sup>53</sup> The Electoral and Administrative Review Commission, *Report on Freedom of Information*, Report No 90/R6 (1990) at [7.152] states that '[t]he exemption incorporates the common law concept of legal professional privilege'. This statement was confirmed in the context of the RTI Act in *Ozcare and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 13 May 2011) at [12].

<sup>54</sup> Legal professional privilege is established when each of these requirements are met. Qualifications and exceptions to legal professional privilege may, in particular circumstances, affect the question of whether information attracts or remains subject to legal professional privilege. It is my view that no qualifications or exceptions are relevant here.

<sup>55</sup> *Goldberg v Ng* (1994) 33 NSWLR 639 at page 670.

<sup>56</sup> *Osland v Secretary to the Department of Justice* [2008] HCA 37 at paragraph 45.

<sup>57</sup> There is no evidence before me to suggest that QBCC has expressly or impliedly waived legal professional privilege.

<sup>58</sup> Oral submission on 29 November 2017 and written submission of 7 December 2017.

54. I understand this submission to mean that the applicant considers QBCC's Legal Services lacks the requisite degree of independence to provide legal advice in relation to the MFR Policy.

### **Findings**

55. It is well established that legal professional privilege will only attach to confidential communications between a legal adviser and a client if:

- the advice is provided by the legal adviser in his or her capacity as a professional legal adviser; and
- the legal adviser is competent and independent.<sup>59</sup>

56. In the case of *Waterford and Commonwealth*<sup>60</sup>, the High Court of Australia established that legal professional privilege may protect communications between salaried employee legal advisers of a government department or statutory authority and his or her employer as 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.

57. Legal professional privilege cannot be claimed by an agency over communications with an in-house legal adviser if the in-house legal adviser does not have the required degree of independence, that is, if their advice is affected by their personal loyalties, duties and interests.<sup>61</sup>

58. In *Potter and Brisbane City Council*,<sup>62</sup> the Information Commissioner found that the Brisbane City Council's City Solicitor and the professional staff of the City Solicitor's office:

- were appropriately qualified legal practitioners
- conducted their practice with the requisite degree of independence from their employing organisation; and
- had given legal advice to the Council which attracted legal professional privilege.

59. On the information before me in this review, I am satisfied that:

- the Category C Information comprises legal advice; and
- the advice was provided by a suitably qualified legal practitioner acting in the capacity of an in-house legal adviser.

60. Having reviewed the Category C Information, I note that the legal advice was sent directly between QBCC Legal Services and QBCC officers. There is no evidence before me to suggest that the QBCC officer who provided the legal advice (or anyone else in QBCC's Legal Services area) were answerable to other persons in respect of the advice they provided in relation to the MFR Policy. Furthermore, there is no evidence before me to indicate that the advice was provided in a manner that differed from the usual practice of obtaining and/or providing in-house legal advice.

61. I am satisfied that the officer in QBCC's Legal Services who provided the legal advice (which comprises Category C Information) was an appropriately qualified legal

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<sup>59</sup> *Proudfoot v Human Rights and Equal Opportunity Commission* (1992) 28 ALD 734 at 740.

<sup>60</sup> (1987) 163 CLR 54 at page 62

<sup>61</sup> *Seven Network News v News Ltd* (2005) 225 ALR 672 at 674.

<sup>62</sup> (1994) QAR 37.

practitioner<sup>63</sup> who provided the advice with the requisite degree of independence from QBCC.

62. On the face of the Category C information, it is clear that, the communication satisfies all three elements of the legal professional privilege exemption, as it:
- was made in the course of a lawyer-client relationship
  - was and has remained confidential; and
  - was for the dominant purpose of seeking and providing legal advice.

### **Conclusion**

63. As all three elements of the legal professional privilege exemption have been met, I am satisfied that the Category C Information attracts legal professional privilege, and is exempt information.

### **DECISION**

64. For the reasons set out above, I vary the decision under review and find that:
- access to the Category A Information may be refused under section 47(3)(a) and schedule 3, section 3 of the RTI Act
  - access to the Category B Information may be refused under section 47(3)(a) and schedule 3, section 2 of the RTI Act; and
  - access to the Category C Information may be refused under section 47(3)(a) and schedule 3, section 7 of the RTI Act.
65. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act

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**Assistant Information Commissioner Corby**

**Date: 20 December 2017**

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<sup>63</sup> OIC confirmed that the officer's name appears on Queensland Law Society's Register of Solicitors.

## APPENDIX

### Significant procedural steps

Date	Event
23 December 2016	OIC received the applicant's external review application.
29 December 2016	OIC received the applicant's submissions.
4 January 2017	The applicant requested that OIC join the DHPW to the external review.
10 January 2017	OIC officer spoke with the applicant about the external review process including that the DHPW would not be joined to the external review.
13 January 2017	OIC notified the applicant and QBCC that the external review application had been accepted. OIC asked QBCC to provide a copy of the documents located in response to the access application and a copy of its searches.
20 January 2017	OIC received requested documents from QBCC.
9 and 17 February 2017	OIC requested further information from QBCC.
28 February 2017	OIC received requested documents from QBCC.
7 March 2017	OIC received requested documents from QBCC.
31 March 2017	OIC received general, publicly available information from QBCC in relation to the introduction of the MFR Policy.
6 April 2017	In a conversation with an OIC officer, the applicant agreed to narrow the scope of his application and requested DHPW be added to the application.
7 April 2017	OIC confirmed the information to which the applicant no longer sought access and that DHPW would not be added to a third party to the external review.
11 April 2017	OIC received the applicant's further submissions including a further request that DHPW be added as a party to the external review.
28 April 2017	OIC requested confirmation from QBCC in relation to the redactions in the Initial Information.
5 May 2017	QBCC confirms the redactions in respect of the Initial Information.
5 June 2017	OIC received the applicant's further submissions.
23 June 2017	OIC received the applicant's further submissions.
17 July 2017	The applicant notified OIC that he would be unavailable to participate in the review for 4 to 8 weeks for personal reasons.
28 July 2017	The applicant notified OIC that he could again participate in the review.
4 August 2017	OIC requested and received further information from QBCC.
8 August 2017	The applicant provided OIC with further information relating to his separate information request to DHPW.

Date	Event
23 August 2017	OIC received further submissions from the applicant.
12 September 2017	The applicant again requested DHPW to be added as a party to the external.
20 September 2017	OIC requested further documents from QBCC.
27 September 2017	OIC received further documents from QBCC.
10 October 2017	OIC received further documents from QBCC.
31 October 2017	OIC conveyed its preliminary view to QBCC that a document should be disclosed and QBCC accepted that view.
10 November 2017	OIC conveyed its preliminary view to QBCC.
16 November 2017	OIC conveyed its preliminary view to the applicant.
22 November 2017	OIC received a submission from the applicant.
7 December 2017	OIC received the applicant's further submissions.