



Decision and Reasons for Decision

Citation:	<i>Stanway and Queensland Police Service</i> [2017] QICmr 22 (26 June 2017)
Application Number:	312887
Applicant:	Stanway
Respondent:	Queensland Police Service
Decision Date:	26 June 2017
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL TO DEAL WITH APPLICATION - EXEMPT CLASS OF DOCUMENTS - applicant seeking documents concerning the replacement of weapons regulations and associated consultation with stakeholders - whether access application expressed to relate to a stated subject matter - whether all documents to which the application relates appear to comprise exempt information - whether agency may refuse to deal with the application - section 40 and schedule 3, sections 2, 3 and 7 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Queensland Police Service (**QPS**)² under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to all documents³ relating to:
 - ‘the rewriting’ of the *Weapons Categories Regulation 1997* (Qld) and the *Weapons Regulation 1996* (Qld) (**Weapons Regulations**) ‘including QPS suggestions for policy changes relating thereto’ (**Part One of the Application**); and
 - consultation with stakeholders on ‘the rewriting’ of the *Weapons Regulations*, ‘including QPS suggestions for policy changes relating thereto’ (**Part Two of the Application**).
2. QPS refused to deal with the application⁴ under section 40 of the RTI Act, on the basis that the application sought access to all documents that contain information concerning a stated subject matter and that all of the requested documents comprised exempt information under schedule 3, sections 1 and 2 of the RTI Act. Additionally, QPS

¹ On 6 May 2016.

² The access application was processed by the Public Safety Business Agency (**PSBA**) on behalf of QPS and PSBA initially acted on behalf of QPS in this external review. However, following the tabling in Parliament of the report into the review of PSBA on 17 February 2016, PSBA ceased to act on behalf of QPS in this external review, with responsibilities moving to a QPS decision-maker in late July 2016. In the circumstances, in this decision I will refer to QPS as being the relevant processing and external review entity.

³ The access application identified the types of documents sought as internal memos, emails, talking points, agendas, minutes, exposure drafts and consultation drafts.

⁴ By decision dated 23 May 2016.

confirmed that identified stakeholders had not been consulted at the time the access application was received.

3. The applicant sought internal review of the decision. On internal review, QPS affirmed its original decision.⁵
4. The applicant applied⁶ to the Office of the Information Commissioner (**OIC**) for external review of QPS's decision.
5. For the reasons set out below, I vary QPS's decision and find that section 40 of the RTI Act applies, as all the documents to which the access application relates would be exempt under schedule 3, sections 2, 3 and/or 7 of the RTI Act.

Background

6. Significant procedural steps relating to the application and the external review are set out in the Appendix.
7. The Minister for Police is responsible for administering the *Weapons Act 1990* (Qld) (**Weapons Act**) and the Weapons Regulations are subordinate legislation made under the Weapons Act. The *Weapons Regulation 1996* was required to be replaced by 1 September 2016.⁷
8. At the time the applicant lodged the access application, the QPS website contained the following statement:⁸

On 1 September 2016, the Weapons Regulation 1996 will expire. The Office of Queensland Parliamentary Counsel is conducting a review of the legislation to ensure that the language used in the regulation meets modern legislative drafting standards.

In conjunction with the remake of the regulation, the Queensland Police Service is proposing a small number of changes to both the Weapons Regulation 1996 and the Weapons Categories Regulation 1997. The review includes a consultation phase with key stakeholders who have an interest in or who are affected by the proposed changes. It is envisaged consultation will commence in May 2016.

9. The *Weapons Regulation 2016 (2016 Regulation)* replaced the *Weapons Regulation 1996*.⁹ The explanatory notes to the 2016 Regulation confirm that it does not change the policy position of the *Weapons Regulation 1996*. The *Weapons Categories Regulation 1997* has not yet been amended.
10. For brevity, I will use the terminology of the access application and refer to the processes of replacing the *Weapons Regulation 1996* and proposing changes to the Weapons Regulations (as described in the website extract above) as the '*rewriting of the Weapons Regulations*'.

⁵ On 29 June 2016.

⁶ On 8 July 2016.

⁷ Part 7 of the *Statutory Instruments Act 1992* contains provisions about staged automatic expiry of subordinate legislation. The *Weapons Regulation 1996* had not been renewed since being made in 1996 and, following extensions of its expiry date, was due to expire on 1 September 2016. The *Weapons Categories Regulation 1997* is exempt from automatic expiry under the *Statutory Instruments Act 1992*.

⁸ This statement was referenced in Annexure B of the access application. The statement appeared on a website extract obtained by OIC on 20 July 2016 but is no longer available.

⁹ The 2016 Regulation commenced on 1 September 2016.

11. The first 'Weapons Consultation Forum' took place on 30 June 2016.¹⁰ Accordingly, documents relating to consultation with that forum fall outside the scope of the access application.¹¹

Reviewable decision

12. The decision under review is QPS's internal review decision dated 29 June 2016.

Evidence considered

13. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).
14. The applicant provided a number of submissions to OIC during the external review.¹² I have summarised and addressed the applicant's submissions below, to the extent they are relevant to the issue for determination. On 5 November 2016, the applicant withdrew his submissions concerning the discretion to release exempt information contained in section 44(4) of the RTI Act.¹³ Accordingly, the matters raised in those submissions are not dealt with in these reasons for decision.
15. In progressing this review:
 - OIC spoke with staff of specialised units within QPS, including the Weapons Licensing Branch and the Legislation Branch; and
 - considered a sample of documents within the scope of the access application,¹⁴ which were, at OIC's request, located and provided by QPS to enable OIC to determine whether such documents comprised exempt information.

Issues to be determined

16. During the external review, the applicant accepted OIC's view that the documents he seeks to access in Part Two of the Application either do not exist¹⁵ or, if they exist, they would comprise exempt information.¹⁶ Accordingly, QPS's decision to refuse to deal with Part Two of the Application is not in issue in this review and is not dealt with in these reasons for decision.
17. The remaining issue to be determined is whether Part One of the Application may be the subject of a refusal to deal decision under section 40 of the RTI Act.

Relevant law

18. Parliament intends that an agency receiving an access application will deal with that application unless dealing with the application would, on balance, be contrary to the

¹⁰ Refer to <http://statements.qld.gov.au/Statement/2016/6/30/new-weapons-advisory-forum-meets>.

¹¹ Under section 27(1) of the RTI Act, an access application is taken only to apply to documents that are, or may be, in existence on the day the application is received.

¹² As set out in the Appendix.

¹³ Being paragraphs 10-37 of the external review application.

¹⁴ I am constrained as to the level of information I can provide regarding these documents as section 108(1) of the RTI Act provides that OIC may not disclose information that is claimed to be exempt information or information considered to be protected by legal professional privilege. I therefore cannot be more particular in describing these documents.

¹⁵ Sections 47(3)(e) and 52(1)(a) of the RTI Act.

¹⁶ OIC conveyed a preliminary view to the applicant on 27 February 2017. The applicant was advised that if OIC did not receive a response to the preliminary view within a specified period, the applicant would be taken to have accepted the preliminary view. The applicant did not respond to OIC's preliminary view regarding this issue within the specified period, and has not since provided a response.

public interest.¹⁷ The limited circumstances in which dealing with an access application will be contrary to the public interest are set out in sections 40, 41 and 43 of the RTI Act.

19. Section 40 of the RTI Act permits an agency to refuse to deal with an access application where:
- the application requests all documents, or all documents of a particular class, that contain information of a stated kind or relate to a stated subject matter; and
 - it appears to the agency that all of the documents to which the application relates are comprised of 'exempt information', as defined in section 48 of the RTI Act and described in schedule 3 of the RTI Act.¹⁸
20. If an agency relies on section 40 of the RTI Act, it is not required to identify any or all of the documents.¹⁹ The agency is, however, required under section 54(2)(f) of the RTI Act to set out:
- the provision of schedule 3 of the RTI Act under which it is said the information in the documents sought would comprise exempt information; and
 - why the documents sought would comprise exempt information under such provision.
21. External review by the Information Commissioner²⁰ is merits review, which is an administrative reconsideration of a case that can be described as 'stepping into the shoes' of the primary decision-maker, to determine what is the correct and preferable decision. As such, the Information Commissioner has the power to decide any matter in relation to an application that could have been decided by the agency, under the RTI Act.²¹ After conducting an external review of a decision, the Information Commissioner must make a decision affirming, varying, or setting aside and making a decision in substitution for, the decision under review.²²

Findings

22. To enliven section 40 of the RTI Act, the following issues must be considered:
- (a) whether Part One of the Application is expressed to relate to all documents, or to all documents of a stated class, that contain information of a stated kind or relate to a stated subject matter; and
 - (b) whether all of the documents to which Part One of the Application relates comprise exempt information.

Is Part One of the Application expressed to relate to all documents that contain information of a stated kind or relate to a stated subject matter?

23. Yes, for the reasons that follow.

¹⁷ Section 39 of the RTI Act.

¹⁸ Section 48(2) of the RTI Act confirms that schedule 3 sets out categories of information the disclosure of which Parliament has deemed to be contrary to the public interest, and are therefore exempt from disclosure.

¹⁹ Section 40(2) of the RTI Act. However, in the circumstances of a specific case, it may be appropriate and necessary to consider the relevant documents to be satisfied that the documents requested comprise exempt information.

²⁰ Or delegate.

²¹ Section 105(1)(b) of the RTI Act. However, this does not apply to the discretion in section 44(4) of the RTI Act to give access to a document to which access can be refused, as the Information Commissioner does not have power to direct that access be given to a document which is exempt or contrary to public interest to disclose: section 105(2) of the RTI Act.

²² Section 110(1) of the RTI Act.

24. I have closely examined the terms of Part One of the Application. The application is framed as a request for access to *all* documents concerning the rewriting of the Weapons Regulations.
25. I am satisfied that the application is expressed to relate to all documents that contain information of a *stated kind*, namely, information concerning the rewriting of the Weapons Regulations. Accordingly, the first limb of section 40 of the RTI Act is satisfied.

Does it appear that all the requested documents would comprise exempt information?

26. Yes, for the reasons that follow.
27. I have divided my consideration of whether the requested documents comprise exempt information into two parts. Firstly, I have considered whether the documents would be exempt information under schedule 3, section 2(1) of the RTI Act (**Cabinet exemption**)²³ and/or schedule 3, section 3(1) of the RTI Act (**Executive Council exemption**). I have then considered whether a particular category of requested documents would comprise exempt information under schedule 3, section 7 of the RTI Act (**legal professional privilege exemption**).

Cabinet and Executive Council exemptions

Relevant law

28. Under schedule 3, section 2(1) of the RTI Act, information will be exempt information for a period of 10 years if:
- it was brought into existence on or after commencement of the RTI Act for consideration²⁴ of Cabinet
 - its disclosure would reveal a consideration of Cabinet or would otherwise prejudice the confidentiality of Cabinet; or
 - it was brought into existence in the course of the State's budgetary process.²⁵
29. 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.²⁶
30. There are three exceptions to the Cabinet exemption:
- if the information was brought into existence before 1 July 2009²⁷
 - if it is more than 10 years after the information's 'relevant date';²⁸ and
 - if the information has been officially published by a decision of Cabinet.²⁹
31. Under schedule 3, section 3 of the RTI Act, information will be exempt information if:

²³ As the access application sought information created between 1 July 2015 and 6 May 2016, the exemption in schedule 3, section 1 of the RTI Act, which relates to cabinet matter brought into existence before commencement of the RTI Act, is not relevant in this review.

²⁴ The term '*consideration*' is defined in schedule 3, section 2(5) of the RTI Act to include discussion, deliberation, noting (with or without discussion) or decision and consideration for any purpose, including, for example, for information or to make a decision.

²⁵ I am satisfied that the information sought in the access application will not comprise information brought into existence in the course of the State's budgetary process and it is therefore not necessary to consider the exemption contained in schedule 3, section 2(1)(c) of the RTI Act.

²⁶ Schedule 3, section 2(3) of the RTI Act.

²⁷ Schedule 3, section 2(2)(a) of the RTI Act.

²⁸ As that term is defined in schedule 3, section 2(5) of the RTI Act.

²⁹ Schedule 3, section 2(2)(b) of the RTI Act.

- it has been submitted to Executive Council
 - it was brought into existence for submission to Executive Council (and was submitted or was proposed to be submitted to Executive Council by a Minister)
 - it was brought into existence for a briefing, or the use of, the Governor, a Minister or a chief executive in relation to information submitted to Executive Council or which was proposed to be submitted to Executive Council by a Minister
 - it forms part of an official record of Executive Council
 - its disclosure would reveal a consideration³⁰ of Executive Council or otherwise prejudice the confidentiality of Executive Council; or
 - it is a draft of any such information.
32. An exception to the Executive Council exemption arises where information is officially published by decision of the Governor in Council.³¹

The regulatory environment for the rewriting of the Weapons Regulations

33. I have reviewed the regulatory environment in which the rewrite of the Weapons Regulations occurred and note as follows:
- (a) Section 172 of the Weapons Act provides that the Governor in Council may make regulations for the purposes of the Weapons Act. The Governor in Council (which is the Governor acting on the advice of the Executive Council) is the principal authority for the making of subordinate legislation in Queensland.³²
 - (b) The Executive Council, established under section 48 of the *Constitution of Queensland 2001*, exists to advise the Governor on the exercise of powers of the Governor in Council. Cabinet is the principal decision-making body of Executive Government. In Queensland, it is customary for Executive Councillors to be the same persons who comprise the Ministry and Cabinet. The Queensland Government Handbooks³³ detail Cabinet and Executive Council processes and the links between them.
 - (c) Certain matters must be considered by Cabinet before their submission to the Governor in Council.³⁴ Relevantly, this includes significant subordinate legislation³⁵ and significant or sensitive policy issues, including new policy development and variations to existing policies.
 - (d) Subordinate legislation must be prepared and approved in accordance with the requirements contained in the Queensland Government Handbooks.³⁶ Generally, the Office of the Queensland Parliamentary Counsel (**OQPC**) drafts subordinate legislation. Once the drafting process is finalised, OQPC provides certified copies of the subordinate legislation for submission to Executive Council.
 - (e) Matters requiring approval by the Governor in Council are submitted in the form of a Minute, which comprises a recommendation from the Executive Council to the Governor, and are generally accompanied by an explanatory memorandum

³⁰ The term '*consideration*' is defined in section 3(3) of the RTI Act in the same terms as set out in footnote 24.

³¹ Schedule 3, section 3(2) of the RTI Act.

³² Subject to the overriding power of Parliament.

³³ Refer to <https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks.aspx>.

³⁴ Section 1.5 of the Queensland Cabinet Handbook.

³⁵ This is also confirmed in section 5.2.7 of the Queensland Executive Council Handbook.

³⁶ Specific drafting and approval requirements for subordinate legislation appear in the Queensland Cabinet Handbook, the Queensland Executive Council Handbook and the Queensland Legislation Handbook.

and the legislation for which approval is sought. When approved, the Minute becomes the official record of the decision taken.

Submissions

34. QPS submits that all the documents sought in Part One of the Application would relate to the preparation of Executive Council Minutes and are Cabinet-in-confidence.
35. The applicant submits that the Cabinet and Executive Council exemptions cannot apply to all requested documents because:
 - QPS cannot make Cabinet submissions and can only prepare material for consideration of the Police Minister, who is in turn receiving and considering material from a variety of stakeholders³⁷
 - this matter is analogous to the circumstances discussed in *Quandamooka Yoolooburrabee Aboriginal Corporation and Department of Natural Resources and Mines; Sibelco Australia Ltd (Third Party)*³⁸ (**Quandamooka**);³⁹ and
 - he suspects that certain source material about the renewal of the Weapons Regulations, passing between the QPS Legislation Branch and other QPS units, will not be drafts of Executive Council material.⁴⁰

Analysis

36. As the *Weapons Regulation 1996* was due to expire on 1 September 2016, Part One of the Application seeks access to documents within a date range which encompasses the period in which the *Weapons Regulation 1996* were in the process of being reviewed. As documents falling within the scope of Part One of the Application were created after the review process for subordinate legislation had commenced and while that review process was ongoing, I am satisfied that all such documents were created for the purpose of making subordinate legislation.
37. On the information before me, I am also satisfied that:
 - the requested documents relate to matters which would require approval by Cabinet prior to submission of the relevant Executive Council Minutes; and
 - the exceptions to the exemptions, referred to in paragraphs 30 and 32 above, do not apply to those requested documents.⁴¹
38. While I am constrained as to the level of detail that I can provide regarding the information OIC obtained from QPS as referred to in paragraph 15 above,⁴² documents within the parameters of Part One of the Application comprise information brought into existence for briefing or use by a Minister or chief executive in relation to information that was submitted or proposed to be submitted to Executive Council.

³⁷ External review application dated 8 July 2016.

³⁸ [2014] QICmr [47] (19 November 2014) at paragraphs 52 to 54.

³⁹ External review application.

⁴⁰ Submissions dated 7 March 2017. In his submissions dated 1 June 2017, the applicant confirmed this submission as follows: *'there would be suggestions and negotiation about the potential Regulations that was material never to be in scope as Executive Council Material.*

⁴¹ The requested documents were not brought into existence before 1 July 2009, it is not more than 10 years after the relevant date of the information and there is no evidence they have been officially published by a decision of Cabinet or the Governor in Council.

⁴² Section 108(1) of the RTI Act.

Documents comprised exclusively of exempt information

39. Executive Council Minutes (and their attachments), associated Ministerial Briefing Notes and drafts of these documents are the types of documents that are taken to be comprised exclusively of exempt information under schedule 3, sections 3(1)(a), (b), (c) and (f) of the RTI Act. Accordingly, I find that Executive Council Minutes, associated Ministerial Briefing Notes and drafts of these documents which fall within the parameters of Part One of the Application are exempt from disclosure under schedule 3, section 3(1) of the RTI Act.
40. The applicant contends that QPS cannot themselves make a Cabinet submission or even decide what might be included in a cabinet submission and, therefore, requested documents which were created by QPS cannot fall within the Cabinet exemption. Whilst the applicant's submission that Ministers make Cabinet submissions is correct, in practice it is the Minister's agency, in this case QPS, which prepares the relevant submissions for the approval of, and subsequent submission by, the Minister. Therefore documents created by QPS on behalf of the Minister for submission to Cabinet which fall within the parameters of Part One of the Application are exempt from disclosure under schedule 3, section 2(3) of the RTI Act.
41. Accordingly, I am satisfied that Executive Council Minutes and associated Ministerial Briefing Notes (and drafts of these documents) within the parameters of Part One of the Application, are exempt information under the Cabinet and/or Executive Council exemptions.

Remaining requested documents

42. The remaining documents within the parameters of Part One of the Application generally comprise content and drafting considerations and instructions coordinated by the QPS Legislation Branch and subsequently conveyed to OQPC, consultation between OQPC, the QPS Legislation Branch and relevant QPS units regarding the new regulations and their content and drafts of the new regulations.⁴³
43. The applicant contends that requested documents which were created by QPS cannot fall within the Cabinet exemption. In support of this submission, the applicant refers⁴⁴ to certain observations in *Quandamooka*.⁴⁵
44. Under the processes outlined in the Queensland Government Handbooks:
 - the relevant government department (in this case, QPS) will provide drafting instructions to OQPC for the subordinate legislation
 - consultation will occur between OQPC and the relevant department about the content of the subordinate legislation, during which drafts of the subordinate legislation are likely to be produced, considered and discussed; and
 - where Cabinet approval is required for subordinate legislation (as is the case here), the relevant government department is required to prepare the Minister's submission to Cabinet and supporting information, such as the explanatory notes for the subordinate legislation.
45. A significant portion of the remaining requested documents will therefore necessarily comprise documents prepared by QPS.

⁴³ Given the requirements of section 108(1) of the RTI Act, I cannot be more particular in describing these documents.

⁴⁴ External review application.

⁴⁵ Being the observations appearing at [52]-[54].

46. In terms of the applicant's reliance on the decision in *Quandamooka*, I note that the Information Commissioner in that matter considered whether eight categories of documents comprised exempt information under the Cabinet exemption.⁴⁶ In that decision, the Information Commissioner decided that four of the eight document categories comprised exempt information under schedule 3, sections 2(1)(b) and 2(3) of the RTI Act. The applicant's submissions in this review refer specifically to the following observations in *Quandamooka*,⁴⁷ which relate to the four document categories which the Information Commissioner found did not comprise exempt information:

While I acknowledge that Sibelco is of the belief that such facilitation extended to its provision of the documents to the Department for the purpose of their inclusion in submissions to Cabinet or the RCC, the reality is that, as a key stakeholder in the issue of mining on North Stradbroke Island, Sibelco could only create documents for consideration by the Department, which was ultimately responsible for consultation with stakeholders as part of its preparation of submissions to Cabinet. It is the role of a Department in such circumstances to then determine what, if any, of the information provided by stakeholders to include in those submissions. In other words, the fact that information within the Sibelco documents may possibly have found its way into departmental documents that were created for the purpose of consideration by Cabinet does not make Sibelco's documents themselves exempt.

(footnotes omitted)

47. I consider that the remaining requested documents in this matter are quite different to the documents which were the subject of the *Quandamooka* observations referred to above. In particular, I note the Information Commissioner's following observations in *Quandamooka* concerning the document categories which she found to comprise exempt information under schedule 3, section 2(1)(b) of the RTI Act.⁴⁸

... I am satisfied that, for information to be exempt under schedule 3, section 2(1)(b) of the RTI Act, it is simply necessary to determine whether, if a person viewed the information, a Cabinet consideration would be revealed to them, or the confidentiality of the Cabinet consideration would be prejudiced.

On careful consideration of the information before me, I am satisfied that the documents contain information that, if disclosed to a person, would directly (in the case of the Attachments) or indirectly (in the case of Department Emails, and draft versions of the Attachments) reveal information provided to the RCC or Cabinet to that person. I am satisfied that the particular nature of this information could reasonably be expected to reveal the RCC or Cabinet's noting of some information, and the focus of its discussions, deliberations and decisions regarding other information. In this regard, I note that the Attachments are not reports of a type that should usually be released in response to an RTI application, if not by administrative release beforehand. Further, I am satisfied that disclosure of the documents would prejudice the confidentiality of Cabinet considerations, as awareness of their contents would reduce or remove the confidentiality of RCC or Cabinet considerations occurring in relation to information in the RCC Documents and ATP Submission. Accordingly, I find that these documents are exempt from disclosure under the second limb of schedule 3, section 2(1)(b) of the RTI Act.

(footnotes omitted)

48. As noted in paragraph 42 above, the requested documents in this review will include consultation between OQPC, the QPS Legislation Branch and relevant QPS units and drafts of the new regulations.⁴⁹ I consider that these types of documents are more

⁴⁶ One category related to material submitted to a Cabinet committee, namely, the Resources Cabinet Committee (**RCC**).

⁴⁷ At [54].

⁴⁸ At [59]-[60].

⁴⁹ As previously noted, given the requirements of section 108(1) of the RTI Act, I cannot be more particular in describing these documents.

analogous to the Attachments⁵⁰ and Department emails⁵¹ which were found to comprise exempt information in *Quandamooka*. Here, staff of a Queensland government agency (that is, QPS) prepared relevant Ministerial Briefing Notes and Executive Council documents for submission to Cabinet and Governor in Council, in accordance with the processes specified in relevant Queensland Government Handbooks. In preparing documents for submission, relevant information was obtained from within QPS and the relevant subordinate legislation for which approval was sought was drafted by OQPC.

49. By contrast, the information which was found not to be exempt information in *Quandamooka* was information provided by a private corporation (that is, an external stakeholder) to a Queensland government agency. In that decision, the Cabinet submission was subsequently prepared by the relevant agency, in accordance with its role as specified in relevant Queensland Government Handbooks, and the private corporation neither determined, nor was privy to, its contents.
50. Accordingly, I am satisfied that the decision in *Quandamooka* does not support the applicant's contention that documents sought in Part One of the Application which were created by QPS cannot fall within the Cabinet exemption.
51. The issue of 'source' documents was discussed in *Sunshine Coast Environment Council Inc and Department of National Parks, Sport and Racing; Springborg MP (Third Party) (SCEC)*.⁵² In that decision, the Information Commissioner considered whether certain assessment reports relating to a proposed motorsports park were exempt information under the Cabinet exemption in circumstances where there was an intention that Cabinet be briefed in future about the project (and that the reports would have been provided with that briefing), however, this did not occur due to a change in Government. The Information Commissioner relevantly noted:⁵³

*The Leader of the Opposition's reference to information **contained in the Documents in Issue** raises the question of 'source' documents. It is conceivable that content from the Documents in Issue was used as source information when the supporting documentation referred to by the Leader of the Opposition was drafted, or during any Cabinet discussions that occurred when Cabinet noted that documentation. However, I am not satisfied that 'source' documents of this kind can be said to comprise information brought into existence for the consideration of Cabinet...*

52. Based on my consideration of the information and documents provided by QPS, as referred to in paragraph 15 above, I am satisfied that the documents sought in Part One of the Application do not include 'source' documents of the nature considered in *SCEC*. The Information Commissioner in that decision found no evidence that the assessment reports were prepared for the consideration of Cabinet. In this review all the documents requested in Part One of the Application were created for the purpose of making subordinate legislation. I also note that the QPS website extract referred to in paragraph 8 above records that there was an intention, in making the subordinate legislation, to include changes to the Weapons Regulations. While I am constrained as to the level of detail I can provide,⁵⁴ the requested documents include information obtained from within QPS for the purpose of enabling QPS to prepare the documents required under the subordinate legislation approval processes.

⁵⁰ Described in *Quandamooka* at [40] as attachments to RCC briefing notes and agenda papers, including drafts, and an Authority to Prepare legislation submission to Cabinet, including drafts.

⁵¹ Described in *Quandamooka* at [40] as emails, being primarily intra-departmental emails, containing information being considered by the RCC.

⁵² [2016] QICmr 10 (4 March 2016).

⁵³ At [39].

⁵⁴ Section 108(1) of the RTI Act.

53. In respect of the applicant's submission that not all requested documents would be Executive Council material, I note that the Cabinet and Executive Council exemptions are not limited to documents that are taken to be comprised exclusively of exempt information under schedule 3, sections 2(3) and 3(1)(a) of the RTI Act. Information will also be exempt if its disclosure would reveal a consideration or otherwise prejudice the confidentiality of Cabinet or Executive Council considerations or operations. As relevantly observed in *Quandamooka*, in deciding whether disclosure of information would have these consequences, I must determine whether, if a person viewed the information, a Cabinet consideration would be revealed to them, or the confidentiality of the Cabinet consideration would be prejudiced.
54. While all the requested documents which record communications between the QPS Legislation Unit and other QPS units about the rewrite of the Weapons Regulations⁵⁵ may not have been included in Executive Council Minutes or approval submissions, I am satisfied on the evidence before me that such documents:
- were brought into existence for briefing or use by a Minister or chief executive in relation to information that was submitted or proposed to be submitted to Executive Council;⁵⁶ or
 - disclosure of such documents would reveal the considerations of Cabinet and/or the Executive Council or otherwise prejudice the confidentiality of Cabinet and/or Executive Council considerations or operations.⁵⁷

Conclusion

55. For the reasons set out above, I find that the documents sought in Part One of the Application are exempt information under the Cabinet and Executive Council exemptions.

Legal professional privilege exemption

Relevant law

56. Under schedule 3, section 7 of the RTI Act, information which would be privileged from production in a legal proceeding on the ground of legal professional privilege (**LPP**) is exempt information.⁵⁸
57. Section 9A of the *Legislative Standards Act 1992* (Qld) (**LS Act**) provides that confidential communications between the OQPC⁵⁹ and its clients are subject to LPP if they are:
- communications made in or for the performance of OQPC's functions under sections 7(a) to (7)(i) of the LS Act (**OQPC Specified Functions**); or
 - communications made in or for the performance of a function incidental to the OQPC Specified Functions.
58. Under section 9A(4), this provision has effect despite any other law.
59. Relevantly, the OQPC Specified Functions include:

⁵⁵ Given the requirements of section 108(1) of the RTI Act, I cannot be more particular in describing these documents.

⁵⁶ Schedule 3, section 3(1)(c) of the RTI Act.

⁵⁷ Schedule 3, sections 2(1)(b) and 3(1)(e) of the RTI Act.

⁵⁸ Section 48 of the RTI Act.

⁵⁹ The OQPC is established by the LS Act.

- section 7(e) of the LS Act - drafting proposed subordinate legislation (other than exempt subordinate legislation)
- section 7(g) of the LS Act - providing advice to Ministers and government entities on alternate ways of achieving policy objectives and the application of fundamental legislative principles;⁶⁰ and
- section 7(i) of the LS Act - providing advice to the Governor in Council, Ministers and government entities on the lawfulness of proposed subordinate legislation.

Submissions

60. As noted in paragraph 42 above, the documents requested in Part One of the Application include communications between OQPC, QPS Legislation Branch and relevant QPS units (**Communication Documents**). In respect of these types of documents, the applicant submits that:
- the ‘*intricate set of statutory definitions flowing as far as the Public Service Act*’ undermine the potential for any privilege between OQPC and QPS⁶¹
 - as OQPC’s clients were limited to members of Parliament and government entities,⁶² the LPP contained in section 9A(2) of the LS Act cannot be claimed by QPS in respect of communications between OQPC, the QPS Legislation Branch and relevant QPS units which would be responsive to the access application, as QPS is not a government entity;⁶³ and
 - in the alternative, the LPP contained in section 9A(2) of the LS Act can only be claimed in respect of communications with OQPC which involve no uniformed member of QPS and/or the LPP attaching to communications with OQPC which involve no uniformed member of QPS has been waived where uniformed members of QPS have received the documents.⁶⁴
61. The term ‘government entities’ is defined in Schedule 1 of the LS Act by reference to section 24 of the *Public Service Act 2008*. Section 24(2)(h) of the *Public Service Act 2008* relevantly provides that the police service is not a government entity ‘*to the extent that it does not include staff members mentioned in the Police Service Administration Act 1990, section 2.5(1)(a)*’. The staff members mentioned in section 2.5(1)(a) of the *Police Service Administration Act 1990* are officers of the public service assigned to perform duties in the police service, that is, non-uniformed QPS staff.

Analysis

62. I have carefully considered the applicant’s detailed submissions in support of his position that QPS ‘*is not a government entity*’ and, therefore, the privilege created by section 9A(2) of the LS Act cannot apply to the Communication Documents.
63. The privilege created under section 9A(2) of the LS Act only applies to confidential communications between OQPC and a client made in or for the performance of the OQPC Specified Functions. In determining whether the Communication Documents comprise exempt information, I must therefore consider whether the Communication Documents:

⁶⁰ In performing OQPC’s functions under section 7(a), (c), (e) and (f) of the LS Act.

⁶¹ Submission dated 1 June 2017.

⁶² Submission dated 21 March 2017. The applicant had previously submitted on 7 March 2017 that, for the purpose of section 9A(2) of the LS Act, OQPC’s clients were limited to members of Parliament.

⁶³ Submission dated 21 March 2017.

⁶⁴ Submission dated 21 March 2017.

- were made in or for the performance of an OQPC Specified Function or a function incidental to an OQPC Specified Function; and
 - comprise confidential communications between OQPC and its client.
64. Certain OQPC Specified Functions do relate to services being provided for or to Members of Parliament and government entities. As an example, section 7(g) of the LS Act (to which the applicant refers) concerns the provision of specified advice to Ministers and government entities. For such OQPC Specified Functions, the privilege created by section 9A(2) of the LS Act will not apply to communications between OQPC and entities which are not government entities.
65. However, other OQPC Specified Functions relate to services that are not confined by reference to Members of Parliament and government entities, such as section 7(e) of the LS Act (to which the applicant also refers) which provides for the drafting of proposed subordinate legislation and contains no limit as to who such a service is provided. I consider that the wording of section 7(e) of the LS Act clearly indicates that Parliament did not intend this drafting function to be limited to the drafting of subordinate legislation for Ministers or government entities.
66. Having considered the information referred to in paragraph 15 above, I am satisfied that the Communication Documents relate to the rewrite of the Weapons Regulations, which are subordinate legislation.⁶⁵ For the reasons set out above, I find that QPS's status as a 'government entity' is not relevant to the application of section 7(e) of the LS Act. Therefore, the Communication Documents comprise communications that were made in or for the performance of the OQPC Specified Function contained in section 7(e) of the LS Act.
67. The applicant submits⁶⁶ that QPS is not a client of OQPC.⁶⁷ The LS Act does not define who is a 'client' for the purpose of section 9A of the LS Act. I consider it is reasonable to assume that Parliament intended that the section 9A(2) privilege would apply to the Members of Parliament and other persons and entities to whom OQPC provides the various services that are listed in the OQPC Specified Functions. As the relevant function in this review, namely section 7(e) of the LS Act, is not limited to the drafting of subordinate legislation for government entities, it is open for me to conclude that QPS could be a client in these circumstances.
68. However, notwithstanding this, I note that in communicating with OQPC about the rewrite of the Weapons Regulations, QPS was acting on behalf of the Minister and under the Minister's instructions. This is standard practice in legislative drafting. On this basis, the communications were made by QPS, as agent for the Minister, who is a client for the purpose of section 9A of the LS Act.
69. On the information before me, it appears that the Communication Documents have been treated as confidential by both QPS and OQPC and therefore comprise confidential communications between OQPS and its client. There is also nothing before me to indicate that the privilege created under section 9A(2) of the LS Act has been waived by QPS.⁶⁸

⁶⁵ On the information before me, I am also satisfied that the Weapons Regulations are not exempt subordinate legislation.

⁶⁶ Submission dated 21 March 2017.

⁶⁷ The applicant submits that Ministers and Members of Parliament can be clients of OQPC and that government entities can also be clients of OQPC, in respect of the preparation of regulations.

⁶⁸ The client is the beneficiary of legal professional privilege and, therefore, only the client or their agent may waive privilege. Thus, in this case, only QPS may waive legal professional privilege in the Communication Documents.

Conclusion

70. For these reasons, I am satisfied that the Communication Documents are subject to LPP pursuant to section 9A(2) of the LS Act and are, therefore, exempt information.⁶⁹

DECISION

71. I vary the decision of QPS and find that section 40 of the RTI Act applies on the basis that the access application is expressed to relate to all documents containing information of a stated kind and all the documents to which the application relates comprise exempt information under schedule 3, sections 2, 3 and/or 7 of the RTI Act.
72. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Assistant Information Commissioner Corby

Date: 26 June 2017

⁶⁹ Under section 48 and schedule 3, section 7 of the RTI Act.

APPENDIX**Significant procedural steps**

Date	Event
6 May 2016	QPS received the access application.
23 May 2016	QPS issued its decision.
15 June 2016	QPS received the application for internal review.
29 June 2016	QPS issued its internal review decision.
8 July 2016	The applicant applied to OIC for external review of QPS's internal review decision.
21 July 2016	OIC informed the applicant and QPS that the applicant's external review application had been accepted.
October 2016	OIC spoke with staff of specialised units in QPS.
13 October 2016	OIC requested certain documents from QPS.
4 November 2016	OIC received the requested documents from QPS.
5 November 2016	OIC received the applicant's withdrawal of submissions appearing at paragraphs 10-37 of the external review application.
27 February 2017	OIC conveyed a preliminary view to the applicant and invited him to provide submissions if he did not accept the preliminary view.
7 March 2017	OIC received the applicant's submissions.
21 March 2017	OIC received the applicant's further submissions.
24 May 2017	OIC conveyed a further preliminary view to the applicant and invited him to provide further submissions if he did not accept the preliminary view.
1 June 2017	OIC received the applicant's further submissions.