



Decision and Reasons for Decision

Citation: *Carter and Department of Justice and Attorney-General* [2017] QICmr 43 (11 September 2017)

Application Number: 312972

Applicant: Carter

Respondent: Department of Justice and Attorney-General

Decision Date: 11 September 2017

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - information about the applicant's pardon application and legal proceedings - communications between the agency's internal legal advisers and client or counsel - whether the improper purpose exception to legal professional privilege is enlivened - whether information would be privileged from production in a legal proceeding on the ground of legal professional privilege - sections 47(3)(a) and 48 and schedule 3, section 7 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - IRRELEVANT INFORMATION - whether information may be deleted on the basis it is irrelevant to the terms of the application - section 73 of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Justice and Attorney-General (**Department**) under the *Right to Information Act* (Qld) (**RTI Act**) for access to documents concerning his March 2015 pardon application to the Governor of Queensland and his 'case *in general*'.¹
2. The Department decided to release 196 full pages and 29 part pages and refused access to the remaining information (**Remaining Information**) on the basis that it was exempt from disclosure on the grounds of legal professional privilege.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review.

¹ Access application dated 20 July 2016.

4. For the reasons set out below, I vary the Department's decision and find that:
 - information on five part pages of the Remaining Information² is irrelevant to the terms of the access application and may be deleted under section 73 of the RTI Act; and
 - access to the balance of the Remaining Information is refused on the grounds that it is subject to legal professional privilege and accordingly is exempt from disclosure under sections 47(3)(a) and 48 and schedule 3 section 7 of the RTI Act.

Background

5. The applicant, a prisoner, had applied in November 2010 (**First Petition**) to the Governor of Queensland (**Governor**) for a pardon. That application was refused and the Attorney-General decided under section 672A of the *Criminal Code Act 1899* (Qld) (**Criminal Code**) not to refer the case to the Queensland Court of Appeal.³ The applicant applied to the Supreme Court for judicial review of the Attorney-General's decision. The Supreme Court refused the judicial review application. The Court of Appeal later dismissed the applicant's appeal against the Supreme Court's decision.
6. In March 2015, the applicant lodged a further pardon application (**Second Petition**) to the Governor, requesting that his case be referred to the Court of Appeal. The Governor declined to grant a pardon and the Attorney-General decided not to refer the Second Petition to the Court of Appeal. In September 2015, the applicant applied to the Supreme Court for judicial review of the Attorney-General's decision.⁴ That application has not yet been determined.⁵
7. The applicant seeks access to documents concerning the Second Petition and his case generally.
8. Significant procedural steps in the external review are set out in the Appendix to this decision.

Reviewable decision

9. The decision under review is the Department's decision dated 9 September 2016.

Evidence considered

10. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and appendices).

Issues for determination

11. In this review, the question for consideration is whether:
 - certain parts of the Remaining Information are irrelevant to the terms of the access application;⁶ and

² Being segments of information on pages 158, 161, 162, 266 and 267 of File 1.

³ Under section 672A of the Criminal Code, the Attorney-General is authorised to refer a convicted person's petition for a pardon to the Court of Appeal, for it to be heard and determined as an appeal or for the Court of Appeal to give its opinion on any point arising in the case.

⁴ Proceeding BS10138/15

⁵ The Department informed OIC on 22 August 2017 that the application is in progress.

⁶ Section 73 of the RTI Act.

- the balance of the Remaining Information comprises exempt information on the basis that it is subject to legal professional privilege.⁷

Remaining Information

12. The Remaining Information in this review comprises information in 1289 full pages and 18 part pages.
13. As previously noted, information on five part pages of the Remaining Information is irrelevant to the terms of the access application.⁸ The information does not concern the applicant's petitions, trials, or court proceedings and is not about the applicant or any matters involving him. It concerns the listing for mention or trial of other court proceedings, not involving the applicant (**Court Listing Information**). On this basis, I am satisfied that the Court Listing Information does not relate to the subject matter of the applicant's access application and may be considered to be irrelevant to the access application under section 73(1) of the RTI Act.⁹
14. I discuss below the balance of the Remaining Information (**Information in Issue**).

Does the Information in Issue comprise exempt information on the basis that it is subject to legal professional privilege?

15. Yes, for the reasons that follow.
16. The Information in Issue consists of information in Crown Law files concerning the applicant's First and Second Petitions and various court proceedings involving the applicant.

Relevant law

17. The RTI Act gives a right to access documents of government agencies.¹⁰ However, this right is subject to limitations, including grounds for refusal of access.¹¹ Access may be refused to documents to the extent that they comprise exempt information.¹² Schedule 3 of the RTI Act sets out categories of information the disclosure of which Parliament has determined to be contrary to the public interest, and therefore exempt from disclosure.¹³
18. Schedule 3, section 7 of the RTI Act provides that information will be exempt from disclosure if it would be privileged from production in a legal proceeding on the ground of legal professional privilege. This exemption reflects the requirements for establishing legal professional privilege at common law.¹⁴
19. Legal professional privilege attaches to confidential communications between a lawyer and client made for the dominant purpose of seeking or giving legal advice or

⁷ Sections 47(3)(a), 48 and schedule 3 section 7 of the RTI Act.

⁸ Comprising the following segments: in File 1 – one segment on each of pages 161 and 266; three segments on each of pages 158 and 267; and four segments on page 162.

⁹ Under section 73 of the RTI Act, an agency may delete from a copy of a document, prior to giving access to that document, information which it reasonably considers is not relevant to the access application. RTI Commissioner Smith explained in *Wyeth and Queensland Police Service* [2015] QICmr 26 (18 September 2015) at paragraph [12] that this is not a ground for refusal of access, but a mechanism to allow irrelevant information to be deleted from documents which are identified for release to an applicant.

¹⁰ Section 23 of the RTI Act.

¹¹ The grounds for refusal are set out in section 47(3) of the RTI Act.

¹² Section 47(3)(a) of the RTI Act.

¹³ Section 48(2) of the RTI Act.

¹⁴ *Ozcare and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 13 May 2011) at [12].

professional legal assistance (advice privilege), or preparing for, or for use in or in relation to, existing or reasonably anticipated legal proceedings (litigation privilege).¹⁵

20. Legal professional privilege may protect communications between salaried employee legal advisers of a government department or statutory authority and his/her employer as the 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.¹⁶
21. The privilege also extends to copies of unprivileged documents made for the dominant purpose of obtaining legal advice.¹⁷

Analysis

22. The Information in Issue consists of:
 - correspondence and file notes recording communications between Crown Law and its client, the Attorney-General
 - correspondence with and file notes recording communications between Crown Law and counsel
 - details listing the nature of legal work undertaken on behalf of the Attorney-General
 - research notes and materials, including copies of various decisions and advices; and
 - drafts of legal advices and court documents.
23. The Attorney-General engaged the services of Crown Law in relation to the First and Second Petitions, and related court proceedings. While Crown Law is a unit of the Department overseen by the Attorney-General, its client in this matter, Crown Law operates under the Crown Solicitor as an independent provider of legal services to Government Ministers and agencies, taking instructions, advising and representing the Government on a fee-for-service basis. Given this, I consider that there exists between Crown Law and its client, the Attorney-General, a professional relationship of legal adviser and client which secures the necessary degree of independence in the advice and legal services provided. I have carefully examined the Information in Issue and am satisfied it was, and remains, confidential.
24. The Information in Issue consists of documents relating to legal proceedings involving the applicant. These legal proceedings include proceedings concerning the First and Second Petitions and, additionally, various earlier court proceedings relating to the offence for which the applicant is imprisoned.¹⁸ In proceedings involving the Attorney-General, the Attorney-General was represented by Crown Law. I am satisfied that the documents relating to legal proceedings involving the applicant comprise either legally privileged original documents from files within Crown Law where it was acting on behalf of the Attorney-General, made for the dominant purpose of providing legal advice or for use in legal proceedings, or are copies of original documents, which copies were brought into existence for the dominant purpose of use in providing legal advice in relation to the Second Petition, or other proceedings involving the applicant, and attract legal professional privilege on this basis.¹⁹

¹⁵ *Esso Australia Resources Ltd v Commission of Taxation* (1999) 201 CLR 49; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [9].

¹⁶ *Waterford v Commonwealth* (1987) 163 CLR 54 at 95 per Mason and Wilson JJ.

¹⁷ *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 (**Propend**).

¹⁸ The applicant's initial conviction for the offence for which he is imprisoned was set aside on appeal by the Queensland Court of Appeal. On retrial, he was convicted of the offence. The Court of Appeal dismissed his appeal against that conviction and the High Court refused the applicant's application for special leave to appeal.

¹⁹ *Propend*.

25. The applicant submits that *'the example used in the RTI Act is one involving a private company not a tax payer funded public service'*. It is unclear what example the applicant refers to, as the RTI Act does not provide an example of the application of schedule 3, section 7 of the RTI Act. I understand the applicant to be making a submission that the schedule 3, section 7 exemption of the RTI Act cannot be claimed by a body of Government. However, legal professional privilege arises where the criteria set out above²⁰ are met and is not constrained by whether the client is a private entity or a government department.
26. Based on the above, I am satisfied that the Information in Issue comprises confidential communications between Crown Law and its client and counsel made for the dominant purpose of seeking or giving legal advice or for use in or in relation to, the then existing or reasonably anticipated legal proceedings.

Improper purpose exception

27. The applicant submits²¹ that an affidavit filed by the Crown Solicitor on behalf of the Attorney-General in the judicial review application relating to the Second Petition attaches an incomplete version of the applicant's Second Petition.²² The applicant contends that, in representing the attachment to be a copy of the Second Petition, the Crown Solicitor acted improperly.
28. Legal professional privilege will not apply to legal communications made in the furtherance of a fraud or crime. This exception operates to displace legal professional privilege where evidence exists that the relevant client has embarked on a deliberate course of action knowing that the proposed actions were contrary to law, and has made the relevant communications in furtherance of that illegal or improper purpose.²³
29. The person alleging that privilege has been displaced by reason of an alleged illegal or improper purpose must show that it is made out in the circumstances.²⁴ In establishing improper purpose, the standard of proof is high. The High Court has observed that it *'is a serious thing to override legal professional privilege where it would otherwise be applicable'* and, as a result, *'vague or generalised contentions of crimes or improper purposes will not suffice'*.²⁵
30. I have carefully reviewed the Information in Issue. While I am prohibited by section 108(3) of the RTI Act from disclosing the content of this information, on the information before me, there is no evidence that the affidavit was made in furtherance of any illegal or improper purpose. The applicant's contention, that the version of the Second Petition attached to the affidavit filed by the Crown Solicitor omits information that was included in the applicant's Second Petition, is not supported by the Information in Issue. Accordingly, I am satisfied that the improper purpose exception does not apply to the Information in Issue.
31. For the reasons set out above, I am satisfied that the Information in Issue meets each of the requirements of legal professional privilege and that the improper purpose exception to legal professional privilege does not apply. Accordingly, I find that the Information in Issue is exempt information, on the basis that it would be privileged from production in a legal proceeding on the ground of legal professional privilege, and access to it may be refused under section 47(3)(a) of the RTI Act on that basis.

²⁰ In paragraph [18].

²¹ Submission dated 25 May 2017.

²² As Exhibit 'MPG 1' to the affidavit of Michael Prowse dated 22 January 2016.

²³ *Secher and James Cook University* (Unreported, Queensland Information Commissioner, 6 June 2012) (**Secher**) at paragraph 20. See also *Murphy and Treasury Department* (1998) 4 QAR 446 at paragraphs 31-42.

²⁴ *Secher* at paragraph 21 and *Propend* at pages 545 and 556.

²⁵ *Propend* at pages 591 and 592.

DECISION

32. I vary the decision under review and find that:

- the Court Listing Information is irrelevant to the terms of the access application and may be deleted under section 73 of the RTI Act; and
- the Information in Issue comprises information which would be privileged from production in a legal proceeding on the ground of legal professional privilege and accordingly is exempt from disclosure under sections 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act.

33. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Assistant Information Commissioner Corby

Date: 11 September 2017

APPENDIX**Significant procedural steps**

Date	Event
22 September 2016	OIC received the external review application. OIC notified the applicant and the Department that it had received the external review application. OIC also asked the Department to provide a copy of relevant procedural documents.
27 September 2016	OIC received the procedural documents from the Department.
5 October 2016	OIC notified the applicant and the Department that it had accepted the external review application. OIC also asked the Department to provide a copy of the information in issue.
10 October 2016	OIC received the information in issue from the Department.
9 November 2016	OIC asked the Department for copies of the attachments to the access application. OIC received the requested information from the Department.
1 December 2016	OIC asked the Department for clarification about the number of responsive pages and pages the Department contended were irrelevant.
5 December 2016	OIC received the requested clarification from the Department.
4 April 2017	OIC asked the Department for further information about the status of the applicant's Court proceedings. OIC received the requested information from the Department.
8 May 2017	OIC wrote to the applicant conveying the preliminary view that some information was exempt from disclosure on the basis of legal professional privilege and the Department was entitled to remove the remaining information from information released to the applicant on the ground it was irrelevant. OIC invited the applicant, if he did not accept the preliminary view, to provide submissions in response.
26 May 2017	OIC received the applicant's correspondence informing OIC that he did not accept the preliminary view and providing submissions.
14 June 2017	OIC wrote to the applicant noting that the next step in the review process would be to issue a formal written decision.