



Decision and Reasons for Decision

Citation:	<i>OY76VY and Board of Professional Engineers of Queensland</i> [2019] QICmr 1 (24 January 2019)
Application Number:	313999
Applicant:	OY76VY
Respondent:	Board of Professional Engineers of Queensland
Decision Date:	24 January 2019
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - expert engineer report obtained by professional body in course of investigation into member conduct and contemplated disciplinary action - dominant purpose of obtaining report from expert engineer - whether disciplinary proceedings constitute reasonably anticipated litigation - whether report attracts legal professional privilege - whether report is exempt under schedule 3, section 7 of the <i>Right to Information Act 2009</i> (Qld) - whether access may be refused under section 47(3)(a) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Board of Professional Engineers of Queensland (**BPEQ**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to a report and associated correspondence regarding the engagement by BPEQ, of an expert engineer to inspect and report upon a seawall built at Toogoom, near Hervey Bay, Queensland.
2. BPEQ decided to refuse access to the requested report on the basis that it comprised exempt information as its disclosure would found an action for breach of confidence.² BPEQ also decided to refuse to deal with the part of the application seeking access to associated correspondence, on the basis that the applicant had previously applied to BPEQ to access the same documents.
3. The applicant then applied to the Office of the Information Commissioner (**OIC**) for external review of BPEQ's decision.³ During the external review, the applicant confirmed that he wished to pursue access only to the report prepared by the expert engineer (**Expert Report**).

¹ Access application dated 25 April 2018.

² Section 47(3)(a) and schedule 3, section 8 of the RTI Act. Decision dated 18 June 2018.

³ Application dated 25 June 2018.

4. For the reasons set out below, I affirm BPEQ's decision to refuse access to the Expert Report under section 47(3)(a) of the RTI Act as it comprises exempt information. I find that the Expert Report is exempt on the ground of legal professional privilege.⁴

Background

5. Construction of the seawall at Toogoom began in 2013 to protect coastal properties from erosion. The applicant, a local resident, is concerned that the seawall is unstable and has made a number of complaints requesting investigations into the construction of the seawall. In 2016, BPEQ conducted an 'own-motion' investigation into the conduct of engineers involved in construction of the seawall; during this investigation, the Expert Report was prepared.
6. BPEQ is a statutory authority established under the *Professional Engineers Act 2002* (Qld) (**PE Act**) to regulate the profession of engineering in Queensland. BPEQ is empowered to investigate and take disciplinary action against engineers in breach of the PE Act or who demonstrate unsatisfactory professional conduct or service. In investigating the conduct of an engineer, BPEQ is permitted to engage a person with relevant qualifications or experience to help conduct an investigation, including the provision of a written report.⁵
7. The decision under review is BPEQ's decision dated 18 June 2018 refusing access to the Expert Report under section 47(3)(a) of the RTI Act.
8. Significant procedural steps taken by OIC in conducting the external review are set out in the Appendix. Evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).

Information in issue

9. The Expert Report is the only document remaining in issue.⁶ I am limited in the extent to which I can describe the content of the Expert Report as to do so would disclose information that is claimed to be exempt.⁷ Broadly, the Expert Report documents the assistance provided to BPEQ by the expert helper in investigating the conduct of engineer/s in relation to construction of the Toogoom seawall.
10. The issue for determination is whether access to the Expert Report may be refused on the basis that it is exempt information. As noted above, BPEQ decided that the Expert Report was exempt on the basis that its disclosure could reasonably be expected to found an action for breach of confidence. However, for the reasons set out below, I have found that the document is subject to legal professional privilege and is therefore, exempt on that basis.⁸

⁴ Schedule 3, section 7 of the RTI Act.

⁵ Section 45 of the PE Act.

⁶ The applicant excluded the associated correspondence from the scope of the review in a telephone conversation with OIC on 26 November 2018.

⁷ Section 108 of the RTI Act.

⁸ The Information Commissioner has the power, under section 105 of the RTI Act, to decide any matter in relation to an application that could have been decided by the agency. After conducting an external review, section 110 of the RTI Act requires the Information Commissioner to make a decision affirming, varying, or setting aside and substituting a new decision for, the decision under review. In doing so, the Information Commissioner is conducting merits review, i.e. an administrative reconsideration of a case which can be described as '*stepping into the shoes*' of the primary decision maker to determine the correct and preferable decision: see *SH8Z9M & Ors and Department of Child Safety, Youth and Women* [2018] QICmr 40 (27 September 2018) at [10].

Relevant law

11. Under the RTI Act, an individual has a right to be given access to documents of an agency.⁹ However, this right is subject to some limitations, including grounds for refusal of access.¹⁰ Access may be refused to documents which comprise exempt information.¹¹
12. Information will be exempt from disclosure if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.¹² This exemption mirrors the requirements for establishing legal professional privilege at common law.¹³ In summary, confidential communications between a lawyer and their client will be privileged where the communications were prepared for the dominant purpose of seeking or giving legal advice or professional legal assistance, or, for use in current or reasonably anticipated litigation.¹⁴ Proceedings in administrative tribunals, such as the Queensland Civil and Administrative Tribunal (**QCAT**), have been found to be analogous to 'litigation' and, therefore, capable of attracting legal professional privilege.¹⁵
13. The courts have also recognised that legal professional privilege will extend to certain communications between a lawyer and a third party relating to litigation. In *Trade Practices Commission v Sterling*,¹⁶ the Federal Court explained that legal professional privilege includes:

Communications and documents passing between the party's solicitor and a third party if they are made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it, or information which may result in the obtaining of such evidence.

[emphasis added]

14. In *Misubishi Electric Australia Pty Ltd v Victorian WorkCover Authority*,¹⁷ the Victorian Court of Appeal applied the above principle and stated that:

*...the element essential to [the litigation] aspect of privilege, being a privileged for communications to and from third parties, is that there be litigation either pending or in contemplation and, I would add, that the communication come into existence for use in or in relation to the litigation. That purpose must of course be the sole or dominant purpose. The rationale for litigation privilege is, as it seems to me, that the communications to the solicitor are, as Cotton LJ said in *Wheeler v Le Marchant*, the brief in the litigation, and the communications by the solicitor are for the purpose of preparing that brief.*¹⁸

15. The dominant purpose for which a document has been created is a question of fact.¹⁹ The purpose is usually determined by reference to the intent of the author, however,

⁹ Section 23 of the RTI Act.

¹⁰ The grounds for refusal of access are set out in section 47 of the RTI Act.

¹¹ Sections 47(3)(a) and 48 of the RTI Act.

¹² Sections 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act.

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

¹⁴ *Esso Australia Resources Ltd v Federal Commission of Taxation* (1999) 201 CLR 49; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 552.

¹⁵ See *SZHUY v Minister for Immigration and Citizenship* (2007) 159 FCR 1; *Re Farnaby and Military Rehabilitation and Compensation Commission* (2007) 97 ALD 788; *Re VCA and Australian Prudential Regulation Authority* (2008) 105 ALD 236 (regarding proceedings in the Administrative Appeals Tribunal); and *Cianfrano v Director General, Attorney General's Department* [2008] NSWADTAP 10 at [16] (regarding proceedings in the former Administrative Decisions Tribunal of NSW).

¹⁶ (1979) 36 FLR 244 (***Sterling***) at 246. See also *Ensham Resources Pty Ltd v AIOI Insurance Company Ltd* (2012) 295 ALR 99 at 107-108.

¹⁷ (2002) 4 VR 332.

¹⁸ *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* (2002) 4 VR 332 (***Mitsubishi Electric***) at 336 (footnotes omitted).

¹⁹ *Hartogen Energy Ltd (In liq) v Australian Gas Light Co* (1992) 36 FCR 557 (***Hartogen Energy***) at 568.

where a lawyer requests a third party to prepare a document, it is the intention of the lawyer in requesting the document that determines the dominant purpose.²⁰

16. In *Mitsubishi Electric*, Batt JA explained that ‘*In its ordinary meaning “dominant” indicates that purpose which was the ruling, prevailing, or most influential purpose*’ and further that ‘*the element of clear paramountcy should be the touchstone*’.²¹ Batt JA also found that ‘*litigation is reasonably anticipated or in contemplation if its initiation is likely or reasonably probable*’.²²

Findings

17. The applicant questions how the Expert Report can attract legal professional privilege when it was prepared by an engineer, not a lawyer.²³ The applicant also rejects the argument that litigation was reasonably anticipated at the time that the Expert Report was commissioned.²⁴
18. As demonstrated by the case law referred to above, in certain circumstances, confidential²⁵ documents prepared by *third parties* for the dominant purpose of reasonably anticipated litigation can attract legal professional privilege. In *Mitsubishi Electric*, the relevant issues to consider when deciding whether privilege attaches to third party documents, were framed as follows:
- when the third party document was commissioned, litigation was reasonably anticipated or in contemplation; and
 - the third party document was relevantly, for use in relation to such prospective litigation and in particular the furnishing of legal advice about it, and that was the dominant purpose of the legal advisors commissioning the third party document.²⁶
19. BPEQ provided OIC with a copy of correspondence it sent to the expert engineer, essentially comprising the instructions to the expert and the brief to prepare the Expert Report (**Helping Brief**). However, to avoid waiver of legal professional privilege and to safeguard the privacy of individuals involved, I am limited in the extent to which I can describe the specific content of the Helping Brief.²⁷
20. Having reviewed the evidence available to OIC, I am satisfied it demonstrates that:
- BPEQ notified a registered professional engineer that it was conducting an investigation into the engineer’s conduct in relation to the Toogoom seawall and that BPEQ may, after the investigation, decide to start disciplinary proceedings; and
 - BPEQ’s lawyers prepared the Helping Brief and sent it to the expert engineer to engage their services under section 45(1) of the PE Act to help BPEQ in conducting the investigation, and in determining whether to start disciplinary proceedings in QCAT.

²⁰ *Hartogen Energy* at 568-569.

²¹ At 336, citing *FCT v Spotless Services Ltd* (1996) 186 CLR 404 at 416 and *Waugh v British Railways Board* [1980] AC 521 at 536.

²² At 340.

²³ Submission dated 1 November 2018.

²⁴ *Ibid*.

²⁵ I am satisfied that the details of the investigation and any document created by the expert helper were intended to be kept confidential by both parties. Also, there is nothing available to OIC to suggest that the Expert Report was not treated confidentially.

²⁶ At 337.

²⁷ Further, the Helping Brief does not fall within the scope of the access application and therefore, is not a document in issue in this review.

21. I am satisfied that BPEQ's lawyers called the Expert Report into existence by providing instructions to, and briefing the expert helper, through the Helping Brief. Therefore, in deciding the dominant purpose, the intent of BPEQ's lawyers in requesting the Expert Report is relevant. I am satisfied that the dominant purpose of BPEQ's lawyers commissioning the Expert Report was to assist BPEQ's internal lawyers in providing legal advice to BPEQ about whether disciplinary proceedings should be commenced in QCAT, and for later use in any such proceedings.
22. While disciplinary proceedings were not ultimately commenced, I am satisfied that the *prospects* of BPEQ commencing proceedings in QCAT against the engineer proceeded beyond a 'mere possibility'. It is evident from BPEQ's correspondence to the registered professional engineer and the Helping Brief that:
 - disciplinary proceedings were a prospective outcome of the investigation into the engineer's conduct which was commenced by BPEQ on its 'own motion'; and
 - the expert's findings in the Expert Report would be used by BPEQ in deciding whether to commence such proceedings.
23. For these reasons, I am satisfied that disciplinary proceedings against the engineer were in reasonable contemplation at the time the Expert Report was created. I am also satisfied that disciplinary proceedings in QCAT are analogous to 'litigation' in the context of legal professional privilege.²⁸
24. The applicant submits²⁹ that BPEQ has sought to improperly cloak the Expert Report with privilege, thereby raising the improper purpose exception.³⁰ As set out above, I have examined BPEQ's lawyers' brief to the expert helper which clearly enunciates the purpose of requesting the Expert Report. I find that evidence supports the claim of legal professional privilege and there is no other evidence available to OIC to indicate an improper purpose.
25. For the reasons set out above, I am satisfied that the Expert Report attracts legal professional privilege and constitutes exempt information under schedule 3, section 7 of the RTI Act. I find that access to it may therefore, be refused under section 47(3)(a) of the RTI Act.
26. During the review, the applicant also made submissions regarding public interest factors favouring disclosure of the Expert Report.³¹ I acknowledge that the subject matter of the Expert Report concerns a matter of significant importance to the applicant and that generally, the impact of public infrastructure on private citizens may raise legitimate public interest factors. However, where information is found to be exempt, the RTI Act precludes consideration of such factors.³² For this reason, I have not considered the applicant's submissions in this regard, nor have I taken into account any public interest factors in reaching my finding at paragraph 25 above.

²⁸ *Re Farnaby and Military Rehabilitation and Compensation Commission* (2007) 97 ALD 788 at [3].

²⁹ In the telephone discussion with OIC on 26 November 2018.

³⁰ A person alleging that privilege has been displaced because of alleged illegal or improper purpose must demonstrate that the claim is made out and the standard of proof required to establish improper purpose is high. In *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 591-592, the High Court observed that it "*is a serious thing to override legal professional privilege where it would otherwise be applicable*" and "*vague or generalised contentions of crimes or improper purposes will not suffice.*"

³¹ In his submission dated 1 November 2018 and in the telephone discussion with OIC on 26 November 2018.

³² Section 48(2) of the RTI Act provides that exempt information is a category of information which the Queensland Parliament has decided would, on balance, be contrary to the public interest to disclose. Therefore, public interest factors which may favour disclosure cannot be taken into account.

DECISION

27. For the reasons set out above, I affirm BPEQ's decision to refuse access to the Expert Report under section 47(3)(a) of the RTI Act as it comprises exempt information.
28. I have made this decision under section 110 of the RTI Act, as a delegate of the Information Commissioner under section 145 of the RTI Act.

K Shepherd
Assistant Information Commissioner

Date: 24 January 2019

APPENDIX

Significant procedural steps

Date	Event
26 June 2018	OIC received the external review application dated 25 June 2018. OIC notified BPEQ and the applicant that the review application had been received and requested procedural documents from BPEQ.
28 June 2018	OIC received the requested documents from BPEQ.
17 July 2018	OIC notified BPEQ and the applicant that the external review had been accepted and requested further documents from BPEQ.
25 and 26 July 2018	The applicant provided oral submissions to OIC.
27 July 2018	OIC received the requested documents from BPEQ.
22 August 2018	OIC conveyed an oral preliminary view to BPEQ that it was not entitled to refuse to deal with part of the application.
23 August 2018	OIC confirmed its preliminary view in writing to BPEQ that it was not entitled to refuse to deal with part of the application and requested that BPEQ locate and provide the responsive documents to OIC along with submissions regarding disclosure.
24 August 2018	The applicant provided oral submissions to OIC.
30 August 2018	OIC received the requested documents from BPEQ.
3 September 2018	BPEQ requested and was granted an extension to provide submissions.
12 September 2018	BPEQ provided submissions regarding its views on disclosure of the information in issue.
9 October 2018	OIC requested that BPEQ provide to OIC documents referred to in its submissions.
12 October 2018	BPEQ provided the requested documents.
25 October 2018	OIC conveyed a preliminary view to the applicant that access to the requested information may be refused on the basis that it is exempt due to legal professional privilege and invited the applicant to provide submissions if he contested the view.
29 October 2018	The applicant provided oral submissions to OIC.
1 November 2018	The applicant provided written submissions to OIC.
26 November 2018	The applicant narrowed the scope of the external review solely to the issue of access to the Expert Report and provided oral submissions to OIC on that issue.
27 November 2018	OIC advised BPEQ by telephone that the applicant had limited the scope of the external review to the issue of access to the Expert Report and conveyed OIC's view that access to the Expert Report may be refused as it is protected by legal professional privilege. BPEQ advised it did not intend to make submissions in response to OIC's preliminary view.
10 December 2018	BPEQ confirmed to OIC, by telephone, that it is a statutory body and therefore, the relevant agency under the RTI Act.
9 January 2019	OIC provided the applicant with an update on the review.