



Decision and Reasons for Decision

Citation:	<i>Shaw and Department of Justice and Attorney-General</i> [2014] QICmr 33 (5 August 2014)
Application Number:	312064
Applicant:	Shaw
Respondent:	Department of Justice and Attorney-General
Decision Date:	5 August 2014
Catchwords:	ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – LEGAL PROFESSIONAL PRIVILEGE – correspondence passing between the agency and its solicitors – whether information is exempt under schedule 3, section 7 of the <i>Right to Information Act 2009</i> (Qld) – whether access can be refused under section 47(3)(a) and 48 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Justice and Attorney-General (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to correspondence passing between the Department's Ethical Standards Unit (**ESU**) and its solicitors relating to a complaint made by the applicant to Workplace Health and Safety Queensland (**WHSQ**).
2. The Department decided to refuse the applicant access to 200 pages in full on the basis that the information was exempt from disclosure because it was subject to legal professional privilege.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision.
4. For the reasons set out below, I affirm the Department's decision and find that access to the information may be refused under section 47 of the RTI Act on the ground that it is exempt under schedule 3, section 7 of the RTI Act.

Background

5. The applicant complained to WHSQ about workplace bullying by a business (**Employer**) of one of its employees.¹ WHSQ, through the Department, administers the *Work Health and Safety Act 2011* (Qld) (**Work Health and Safety Act**) and responds

¹ Noting that the employee is not the applicant.

to workplace bullying complaints made in certain situations that fall within the scope of the Act.²

6. The applicant is dissatisfied with the outcome of his complaint and related issues connected to the Employer. His submissions³ allege criminal conduct and conspiracy on the part of the Employer, WorkCover Queensland and the Department's ESU, WHSQ, the former Q-COMP⁴ and Office of Fair and Safe Work Queensland. He is also dissatisfied with the response of his Queensland state member of Parliament.
7. OIC has advised the applicant on two occasions⁵ that OIC does not have jurisdiction to investigate his allegations and that the Crime and Corruption Commission (CCC) is the appropriate agency for him to contact about his concerns of criminal conduct.
8. Significant procedural steps relating to the application and the external review process are set out in the Appendix.

Reviewable Decision

9. The decision under review is the Department's decision dated 6 June 2014.

Evidence considered

10. Evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).

Information in issue

11. The information to which the Department refused the applicant access (**Information in Issue**) comprises 200 pages, being:
 - correspondence and attachments from the Department's ESU to its solicitors; and
 - correspondence from the solicitors to the Department's ESU.

Relevant law

12. Under the RTI Act, a person has a right to be given access to documents of an agency.⁶ However, this right is subject to other provisions of the RTI Act including the grounds on which an agency may refuse access to documents.⁷ Relevantly, the RTI Act provides that access may be refused to documents to the extent that they comprise exempt information.⁸ Schedule 3 of the RTI Act sets out categories of information the disclosure of which Parliament has deemed to be contrary to the public interest, and therefore exempt from disclosure.⁹
13. 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

² Refer to information accessible on the Department's website: <http://www.deir.qld.gov.au/workplace/hazards/harassment-bullying/tool/index.htm>.

³ Dated 12 June 2014, 17 June 2014, 7 July 2014 and 23 July 2014.

⁴ Q-COMP is now called the Workers' Compensation Regulator since recent legislative change via the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2013* (Qld) merged Q-COMP into the Office of Fair and Safe Work Queensland.

⁵ By correspondence dated 9 and 29 July 2014, noting that the correspondence dated 9 July 2014 included for the applicant's information a printout from the Crime and Corruption Commission's website about reporting corruption.

⁶ Section 23 of the RTI Act.

⁷ As set out in section 47 of the RTI Act.

⁸ Section 47(3)(a) of the RTI Act.

⁹ Section 48(2) of the RTI Act.

of legal professional privilege. This exemption reflects the requirements for establishing legal professional privilege at common law.¹⁰

14. The general principles of legal professional privilege were summarised by the High Court of Australia in *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*¹¹ as follows:

It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.

15. Legal professional privilege is generally divided into two categories, advice and litigation privilege.¹² Advice privilege attaches to confidential communications between a legal adviser and client or third party which are made for the dominant purpose of obtaining or providing legal advice.¹³ Litigation privilege attaches to confidential communications between a legal adviser and client in relation to current or reasonably anticipated litigation.¹⁴

16. In some cases, communications may not be subject to legal professional privilege because privilege has been waived¹⁵ or the improper purpose exception applies. For the latter to apply a communication must be made in pursuit of an illegal or improper purpose.¹⁶ In summarising an established line of relevant case law¹⁷ the Assistant Information Commissioner in *Secher and James Cook University*¹⁸ explained that:

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.

.... 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."

Findings

Is the Information in Issue subject to legal professional privilege?

17. Yes, for the reasons that follow.
18. As stated in paragraph 11, the Information in Issue comprises correspondence exchanged between the Department's ESU and its solicitors relating to the applicant's complaint made to WHSQ. Another way of describing the Information in Issue is that it embodies a request by the Department's ESU for legal advice about workplace law issues and the advice supplied in response.

¹⁰ *Ozcare and Department of Justice and Attorney-General* (Unreported, Information Commissioner of Queensland, 13 May 2011) at [12].

¹¹ (2002) 213 CLR 543, 552 [9].

¹² *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 322 at [8]-[9] (**Mitsubishi**).

¹³ *AWB v Cole (No.5)* (2006) 155 FCR 30 at [41]; *Waterford v Commonwealth* (1987) 163 CLR 54 at [95]; *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357.

¹⁴ *Mitsubishi* at [16].

¹⁵ Either expressly or impliedly.

¹⁶ *R v Bell; Ex Parte Lees* (1980) 146 CLR 141.

¹⁷ *Commissioner of Australian Federal Police and Another v Propend Finance Limited and Others* (1997) 188 CLR 501 at 591-592 and *Murphy and Treasury Department* (1998) 4 QAR 446 at 31-42.

¹⁸ (Unreported, Queensland Information Commissioner, 6 June 2012) at [20] and [21].

19. I am unable to give further detail about the Information in Issue because section 108(3) of the RTI Act prohibits the Information Commissioner from including information that is claimed to be exempt in reasons for a decision on external review.
20. Having carefully reviewed the Information in Issue, I am satisfied that it:
- comprises confidential communications between the Department's ESU and its legal advisers
 - the communications were made during the course of lawyer-client relationship between the Department's ESU and the legal advisers; and
 - the communications were made for the dominant purpose of seeking and providing legal advice.
21. Accordingly, I find that the Information in Issue is subject to legal professional privilege.

Does the improper purpose exception apply?

22. No, for the reasons that follow.
23. The applicant alleges¹⁹, in summary, that particular officers of the Department's ESU and Office of Fair and Safe Work Queensland²⁰, along with WorkCover Queensland and the Employer corruptly conspired to frustrate his complaint to WHSQ and protect the Employer from prosecution under the *Work Health and Safety Act* and criminal investigation.
24. He contends²¹ that a failure to expose 'these crimes and offences' by OIC means that it does '*condone these criminal offences of Bribery, Perversion in the course of Justice, Denial, Defeat and Obstruction of Justice and Official Misconduct in Public Office*'.
25. The applicant also submits²², in summary, that any legal advice provided by the Department's solicitors is tainted because the request for advice by the Department's ESU:
- omitted '*vital evidence*', including '*the all important list of questions*' which he put to WHSQ when seeking independent review of the complaint outcome; and
 - was made without the applicant's '*knowledge or input*'.
26. The applicant also contends that his 15 requests for a '*Dispute Resolution or Mediation*' to be held with all parties and conducted by the Office of Fair and Safe Work Queensland at its office have been ignored. He submits²³ that:
- The only rational inference that can be drawn from these fifteen (15) attempts at a resolution from being accepted is that the Corruption Collusion and Criminality is so deeply embedded in all of these Government Departments that it will be explosive to allow it to reach the Court of Public Opinion.*
27. As noted in paragraph 7, the applicant has been advised in writing by OIC on two occasions that he should refer any concerns about criminal conduct, corruption and conspiracy to the CCC. I reject the applicant's assertion that OIC is '*duty bound to expose these crimes and offences*'.²⁴ The Information Commissioner has no power

¹⁹ In submissions dated 12 June 2014, 17 June 2014, 7 July 2014 and 23 July 2014.

²⁰ Noting that the Office of Fair and Safe Work Queensland includes WHSQ and the Workers' Compensation Regulator (formerly Q-COMP).

²¹ Applicant's submission dated 23 July 2014.

²² Applicant's application for external review dated 12 June 2014.

²³ Submission dated 23 July 2014.

²⁴ Applicant's submission dated 23 July 2014 which relevantly repeats the earlier submission dated 7 July 2014.

under the RTI Act to investigate allegations such as those raised by the applicant.

28. I have carefully assessed the Information in Issue and the applicant's submissions. I am satisfied that the contents of the Information in Issue do not evidence the applicant's view that the Department hid relevant information from its solicitors in continuation of a corrupt conspiracy to frustrate prosecutions under the *Work Health and Safety Act* or otherwise hide illegal activity. None of the Information in Issue records or otherwise evidences an illegal or improper purpose.
29. There is no evidence in the information before me that the particular communications that comprise the Information in Issue were made in preparation for, or in furtherance of an illegal or improper purpose. Accordingly, I find that the improper purpose exception does not apply to preclude the application of legal professional privilege to the Information in Issue. I therefore find that the Information in Issue comprises exempt information to which the Department is entitled to refuse access.²⁵

DECISION

30. For the reasons set out above, I affirm the decision under review and find that access to the Information in Issue can be refused on the basis that it is subject to legal professional privilege under sections 47(3)(a) and 48 and schedule 3 section 7 of the RTI Act.
31. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

L Lynch
Assistant Information Commissioner

Date: 5 August 2014

²⁵ Under sections 47(3)(a) and 48 and schedule 3 section 7 of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
6 May 2014	The Department received the applicant's access application under the <i>Information Privacy Act 2009</i> (Qld).
16 May 2014	The Department wrote to the applicant suggesting the application be processed under the RTI Act.
20 May 2014	The applicant advised the Department that he wished to make the application under the RTI Act.
26 May 2014	The RTI Act application became compliant.
6 June 2014	The Department issued its decision, refusing access to the Information in Issue.
16 June 2014	OIC received the application for external review of the Department's decision.
17 June 2014	OIC received a submission from the applicant in support of his external review application.
17 June 2014	OIC requested the Department provide procedural documents to assist OIC in assessing jurisdiction.
23 June 2013	The Department provided OIC with the procedural documents.
4 July 2014	OIC accepted the application for external review.
7 July 2014	The applicant provided OIC with a further submission.
9 July 2014	The Department provided OIC with a copy of the Information in Issue.
9 July 2014	OIC wrote to the applicant advising him that the Information Commissioner did not have jurisdiction to deal with some issues he raised.
21 July 2014	OIC issued the applicant with a preliminary view that the Information in Issue was exempt from disclosure on the basis that it was subject to legal professional privilege. OIC invited the applicant to make submissions by 4 August 2014 if he contested the preliminary view.
23 July 2014	OIC received the applicant's submission contesting the preliminary view.
29 July 2014	OIC wrote to the applicant advising that his submission had not changed the preliminary view and that the next step would be a formal decision.