



## Decision and Reasons for Decision

---

<b>Citation:</b>	<i>Pennisi and Queensland Building and Construction Commission</i> [2020] QICmr 58 (9 October 2020)
<b>Application Number:</b>	314958
<b>Applicant:</b>	Pennisi
<b>Respondent:</b>	Queensland Building and Construction Commission
<b>Decision Date:</b>	9 October 2020
<b>Catchwords:</b>	<p><b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - communications with agency's internal legal department - whether information would be privileged from production in a legal proceeding on the ground of legal professional privilege - waiver - whether access to information may be refused on the basis that it is exempt - sections 47(3)(a) and 48 and schedule 3, section 7 of the <i>Right to Information Act 2009</i> (Qld)</b></p> <p><b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - whether agency has taken all reasonable steps to locate documents requested by the applicant - whether access to further documents may be refused on the basis that they do not exist or cannot be located - sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009</i> (Qld)</b></p>

### REASONS FOR DECISION

#### Summary

1. The applicants applied to the Queensland Building and Construction Commission (QBCC) under the *Right to Information Act 2009* (Qld) (RTI Act) to access information concerning their application under Queensland's Home Warranty Scheme.<sup>1</sup>
2. QBCC granted the applicants access to 1298 pages and two audio recordings and decided to refuse access, on various grounds, to 365 full pages and parts of 4 pages and one audio recording.<sup>2</sup>

---

<sup>1</sup> Access application dated 14 August 2020.

<sup>2</sup> On 2 October 2019. While QBCC also deleted certain irrelevant information from the information disclosed to the applicants, this information did not form part of the information in issue on external review.

3. The applicants applied to the Office of the Information Commissioner (**OIC**) for external review of QBCC's refusal of access decision and raised concerns that QBCC had not located all relevant documents.<sup>3</sup>
4. During the review, QBCC conducted further searches which revealed additional relevant documents and some of these were disclosed (without redaction) to the applicants.
5. The applicants remain dissatisfied with the level of documentation that has been located and released to them and believe there are grounds to set aside the claim of legal professional privilege in relation to specific documents.
6. For the reasons set out below, I affirm QBCC's decision to refuse access to information on the basis that it is exempt due to legal professional privilege and find that access to any further documents may be refused on the basis they do not exist or cannot be located.

### Background

7. One of the QBCC's legislated functions is administering a statutory insurance scheme called the Queensland Home Warranty Scheme (**Scheme**).<sup>4</sup> Subject to certain limitations and restrictions, the Scheme covers consumers for loss suffered if a contractor fails to complete a contract for residential work or fails to rectify defective work.<sup>5</sup>
8. Schedule 6 of the *Queensland Building and Construction Commission Regulation 2018* (**Regulation**) sets out the terms of cover for the Scheme.
9. The applicants made a claim under the Scheme for non-completion of residential construction work.<sup>6</sup> By a letter dated 7 August 2019, QBCC declined the claim, on the basis the applicants' contract termination did not satisfy the requirements of Schedule 6 of the Regulation (**Decline Notice**).<sup>7</sup>

### Reviewable decision and evidence considered

10. The decision under review is QBCC's decision dated 2 October 2019.
11. Significant procedural steps taken during the external review are set out in the Appendix to this decision.
12. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and the Appendix).
13. During the review, the applicants provided extensive submissions (together with supporting information). I have considered all this material and have extracted those parts which have relevance to the issues to be determined in this external review.

---

<sup>3</sup> External review application dated 30 October 2019.

<sup>4</sup> <<https://www.qbcc.qld.gov.au/home-warranty-insurance/home-warranty-insurance-explained>>.

<sup>5</sup> Refer to <[https://www.qbcc.qld.gov.au/sites/default/files/QBCC\\_QHWS\\_-\\_Product\\_Disclosure\\_A4\\_LR\\_final.pdf](https://www.qbcc.qld.gov.au/sites/default/files/QBCC_QHWS_-_Product_Disclosure_A4_LR_final.pdf)>.

<sup>6</sup> On 13 March 2019.

<sup>7</sup> A copy of the Decline Letter was attached to the access application. In their submissions on external review, the applicants refer to an internal review decision issued by QBCC on 2 August 2019, confirming that QBCC declined the applicants' Scheme claim. That internal review decision is not before me. I also note that, in separate external review, the applicants provided OIC with a copy of Directions issued in proceedings that are before the Queensland Civil and Administrative Tribunal, however, it is unclear on the information before me whether those proceedings relate to the Decline Notice or the internal review decision referenced by the applicants.

14. I have also had regard to the *Human Rights Act 2019* (Qld),<sup>8</sup> particularly the right to seek and receive information.<sup>9</sup> I consider a decision-maker will be '*respecting and acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the RTI Act.<sup>10</sup> I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation<sup>11</sup>: '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.*'<sup>12</sup>

### Information in issue

15. Some issues were resolved during the course of the review.<sup>13</sup>
16. The information remaining in issue (**Information in Issue**) comprises:
- 359 pages to which QBCC decided to refuse access, on the basis of legal professional privilege; and
  - 121 pages QBCC located on external review which duplicate, or are of the same nature, as the documents QBCC initially refused on the basis of legal professional privilege.
17. While I am unable to provide a detailed description of the Information in Issue,<sup>14</sup> I can confirm that it comprises requests for legal advice on issues pertaining to the applicants' Scheme claim, documents attached to those requests, and the corresponding legal advice provided by QBCC's internal lawyers. There is also a significant level of duplication within the Information in Issue.

### Issues for determination

18. The issues to be determined are whether:
- the Information in Issue comprises exempt information on the basis that it is subject to legal professional privilege;<sup>15</sup> and
  - access to further relevant documents may be refused on the basis they do not exist or cannot be located.<sup>16</sup>

### Exempt information

#### *Relevant law*

19. Section 23 of the RTI Act confers upon an applicant a general right to access documents of an agency, however, this right is subject to limitations, including grounds for refusal of access.<sup>17</sup> Access to exempt information<sup>18</sup> may be refused and information will comprise

---

<sup>8</sup> Referred to in these reasons as the **HR Act**, and which came into force on 1 January 2020.

<sup>9</sup> Section 21 of the HR Act.

<sup>10</sup> *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

<sup>11</sup> *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>12</sup> **XYZ** at [573].

<sup>13</sup> As noted in paragraph 4 above, QBCC released to the applicant some of the additional documents located on external review (comprising 7 pages). The applicants also confirmed on 24 March 2020 that they did not seek access to information which QBCC refused on grounds other than legal professional privilege.

<sup>14</sup> Section 108(3) of the RTI Act.

<sup>15</sup> Section 48 and schedule 3, section 7 of the RTI Act.

<sup>16</sup> Sections 47(3)(e) and 52 of the RTI Act.

<sup>17</sup> Section 47 of the RTI Act.

<sup>18</sup> Schedule 3 to the RTI Act identifies the types of information which comprise exempt information.

exempt information if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.<sup>19</sup>

20. Legal professional privilege protects confidential communications between a lawyer and their client, made for the dominant purpose of seeking or giving legal advice or professional legal assistance, or, for use in legal proceedings either on foot or reasonably anticipated, at the time of the relevant communication.<sup>20</sup> The privilege:
  - will extend to copies of unprivileged documents made for the dominant purpose of obtaining legal advice;<sup>21</sup> and
  - 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.<sup>22</sup>
21. Qualifications and exceptions to legal professional privilege<sup>23</sup> may, in particular circumstances, affect the question of whether information attracts or remains subject to it, and therefore whether it comprises exempt information under the RTI Act.

## Findings

### Legal professional privilege

22. There is no evidence before me to indicate that the Information in Issue has been disclosed outside of the lawyer-client relationship. I am therefore satisfied that the Information in Issue is confidential. I am also satisfied that the necessary professional relationship exists between QBCC (as the client) and its legal advisers, and that the communications were created for the dominant purpose of seeking or providing legal advice, or for use in existing or reasonably anticipated legal proceedings.
23. The applicants assert that legal professional privilege cannot apply to any request for legal advice within the Information in Issue because, under QBCC's internal processes, requests for legal advice are not addressed to a particular lawyer but are instead sent to 'an unallocated email box' that may be reviewed by a 'non legal employee' whose job it is to allocate the request.<sup>24</sup> In support of this assertion, the applicants rely on the following statements appearing in sections 12.2 and 12.3 of a document titled 'Claims Procedures Manual Resolution Services' (**Claims Manual**):<sup>25</sup>

#### **12.2 Requests for Legal Advice**

*All requests for legal advice must be made through your manager. The requests are then to be submitted to Legal on a Request for Legal Advice template, available in ActiveDocs or on Trevor. This form should be completed by your Manager.*

*The form provides the legal staff with an understanding of precisely what advice is required and the documents that are relevant to the request. Requests for legal advice are to be*

<sup>19</sup> Schedule 3, section 7 of the RTI Act. This exemption reflects the requirements for establishing legal professional privilege at common law.

<sup>20</sup> *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 552. These principles were recently confirmed by the High Court in *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 at [23]-[25].

<sup>21</sup> As confirmed by the High Court in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

<sup>22</sup> *Waterford v Commonwealth* (1987) 163 CLR 54 at 95 per Mason and Wilson JJ.

<sup>23</sup> Such as waiver or improper purpose.

<sup>24</sup> External review application. The applicant does not contest that the remaining Information in Issue meets the requirements for legal professional privilege.

<sup>25</sup> QBCC disclosed a copy of this document to the applicants in response to the application.

*forwarded by email to legal@qbcc.qldgov.au which is constantly monitored, logged and allocated for action.*

*Do not send requests for Legal Advice to any individual people in Legal.*

### **12.3 Process for Legal Advice Requests**

*Once the request for advice is received by Legal, it is logged into the system for the purposes of reporting and monitoring of workloads. The requests are then reviewed by the Team Leaders once a week (every Monday) and allocated to a Legal Officer for action. Legal Officers will strive to action the request within two (2) weeks from the date of allocation.*

24. I consider that any request for legal advice sent to the nominated email address for QBCC's Legal Services Branch (that is, QBCC's inhouse legal department) meets the requirements for legal professional privilege, as it will comprise a confidential communication to QBCC's inhouse legal officers which was made for the dominant purpose of seeking legal advice. The internal processes referenced above are not substantially different to how a written request for legal advice would be dealt with by an external legal firm—while the request may not be initially addressed to, or opened by, a specific legal adviser, it is actioned by the legal adviser allocated to address it. On this basis, I am satisfied that the referenced internal QBCC processes do not, of themselves, prevent legal professional privilege attaching to any request for legal advice within the Information in Issue.
25. The applicant also argues that any request for legal advice in this matter involves an 'administrative question' and not a legal advice question.<sup>26</sup> Specifically, the applicants argue that the words 'properly done' in the following statement confirm that the request posed to QBCC's legal department was administrative in nature:<sup>27</sup>
- Request will be for the purpose of establishing if contract termination has been properly done by the owner, at the default of the contractor.*
26. Having carefully considered the Information in Issue, I am satisfied it comprises confidential communications with QBCC's inhouse legal officers which have been made for the dominant purpose of seeking and providing legal advice.
27. Accordingly, I find that the elements of legal professional privilege are established in relation to the Information in Issue.

### **Waiver**

28. The Information in Issue will not be exempt if legal professional privilege has been waived. At common law, a person who would otherwise be entitled to the benefit of legal professional privilege (in this case, QBCC) may waive the privilege.<sup>28</sup> Privilege may be expressly waived by the deliberate and intentional disclosure of the privileged communication to persons outside the relationship of privilege.<sup>29</sup> It may also be impliedly

---

<sup>26</sup> External review application. This argument contrasts with the applicants' subsequent submission on 23 March 2020 that 'it is not possible for the QBCC to consider the analysis of eligibility of the insurance without legal advice because the question is fundamentally a legal one relying simply on the legal question of whether or not the contract was validly terminated'.

<sup>27</sup> External review application, referencing disclosed page 312 in file titled '493579 Claims', which appears to be an internal document that was created to track the applicants' Scheme claim.

<sup>28</sup> *Mann v Carnell* (1999) 201 CLR 1 (**Mann**) at [28].

<sup>29</sup> *Goldberg v Ng* (1994) 33 NSWLR 639 at page 670. However, merely communicating privileged legal advice internally within an agency will not, of itself, deprive the agency of the benefit of that privilege. See *Bulk Materials (Coal Handling) Services Pty Ltd v Coal & Allied Operations Pty Ltd* (1988) 13 NSWLR 689 at pages 691 and 696; *Thiess Contractors Pty Ltd v Terokell Pty Ltd* [1993] 2 Qd R 341; *South Australia v Peat Marwick Mitchell* (1995) 65 SASR 72 at pages 75-77; *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275 at pages 279-280; and *Southern Cross Airlines Holdings Ltd (in liq.) v Arthur Andersen & Co.* (1998) 84 FCR 472 at page 480.

waived where the conduct of the person entitled to the benefit of privilege is inconsistent with the maintenance of privilege.<sup>30</sup>

29. The relevant legal principles for determining whether legal professional privilege has been waived were recently summarized as follows by Justice Flanagan in *Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors (Sanrus)*.<sup>31</sup>

*Waiver is an intentional act done with knowledge whereby a person abandons a right or privilege by acting in a manner inconsistent with that right or privilege. In determining whether legal professional privilege has been waived, the question is whether the conduct by the person entitled to the benefit of the privilege said to amount to waiver is inconsistent with the maintenance of the privilege. The Court will impute an intention to waive privilege where the actions of the party are plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. Whether there is such plain inconsistency is to be determined in "the context and circumstances of the case, and in the light of any considerations of fairness arising from that context or those circumstances."*

[footnotes omitted]

30. The party asserting that privilege has been waived also bears the onus of establishing the waiver of privilege.<sup>32</sup>
31. The applicants submit that QBCC has waived legal professional privilege over 'the legal advice it received on or about 6 August 2019' because:
- the reasons set out in the Decline Notice were 'in fact practically legal advice' and those reasons 'consisted of significant parts of the legal advice';<sup>33</sup> and
  - QBCC has 'deliberately' disclosed that legal advice was being sought and the conclusion of that legal advice in certain documents (including documents disclosed in response to the access application).<sup>34</sup>
32. There is no evidence before me which indicates that QBCC has expressly waived privilege in the Information in Issue (by disclosure of that information outside of QBCC or in any other manner).
33. Under schedule 6 of the Regulation, QBCC is required to provide a written notice of its decision about a claim for assistance under the Scheme, including the reasons for that decision.<sup>35</sup> As noted in paragraph 9 above, QBCC issued the Decline Notice on 7 August 2018.<sup>36</sup> In accordance with the legislative requirements, the Decline Notice set out the reason for QBCC's decision, namely, that the applicants' contract termination did not satisfy the requirements of Schedule 6 of the Regulation.
34. Taking into account the content of the Decline Notice and the legislative requirements referenced above, I am satisfied that the Decline Notice cannot be properly characterised as legal advice. I am also satisfied that, although it confirms the basis upon which QBCC declined the applicants' Scheme claim, this does not disclose the content of legal advice

<sup>30</sup> *Osland v Secretary to the Department of Justice* [2008] HCA 37 (**Osland**) at [45] and *Mann* at [28]. See also *Jones and Queensland Police Service* [2015] QICmr 15 (26 June 2015) at [36].

<sup>31</sup> [2019] QSC 144 at [27]. These principles were also quoted with approval by Smith DCJA in *CDPP v Leach (No 2)* [2020] QDCPR 2 at [66].

<sup>32</sup> *Sanrus* at [28], citing *New South Wales v Bettfair Pty Ltd* (2009) 180 FCR 543 at 556 [54].

<sup>33</sup> Submissions dated 23 March 2020. These submissions also refer to a number of statements in 'internal review' reasons dated 2 October 2019. As previously noted, that document is not before me, however, the internal review statements referenced in the applicants' submissions all relate to QBCC's determination that the contract had not been validly terminated.

<sup>34</sup> External review application and submissions dated 23 March 2020.

<sup>35</sup> Schedule 6, section 69 of the Regulation. It is noted that this requirement is similar to section 157(2)(b) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (**QCAT Act**), which is referenced in the applicants' submissions dated 23 March 2020.

<sup>36</sup> QBCC disclosed copies of the Decline Notice to the applicants (for example, pages 1-3 in the file titled '493579 additional' and pages 1-3 in the file titled '493579 Claims').

which QBCC obtained or waive legal professional privilege in any of the Information in Issue.

35. The applicants acknowledge<sup>37</sup> that disclosing a mere reference to the existence of legal advice would not amount to waiver of its contents.<sup>38</sup> However, the applicants contend that the *substance* of the received legal advice, in addition to its existence, has been disclosed by QBCC.<sup>39</sup> In these circumstances, the applicants submit that QBCC's refusal to disclose the full legal advice to them is a '*contradiction*' of its earlier release of the reasons for declining their claim and is conduct inconsistent with the maintenance of legal professional privilege.<sup>40</sup> They also submit that QBCC is required to provide all reasons for its decision declining the Scheme claim, including the obtained legal advice which QBCC identified that they had relied on, and it was '*not fair conduct to provide part of the reasons*'.<sup>41</sup>
36. In support of these contentions, the applicants rely on:
- the reasons given in the Decline Notice (namely, that the Scheme claim did not meet the requirements of Schedule 6, section 4(1)(a) of the Regulation, as the applicants did not validly terminate the fixed residential contract)
  - a number of similar statements in the 'internal review' reasons<sup>42</sup>
  - the words '*Update from Legal: Request for legal advice on the contract termination has been reassigned to [Mr D] who will endeavour to have the advice completed next week*' in a Case Comment dated 18 July 2019;<sup>43</sup> and
  - the words '*Rec'd assessment from [Mr D] re: building contract termination. Conclusion has determined the contact has not been validly terminated*' in a Case Comment document dated 6 August 2019.<sup>44</sup>
37. In deciding whether the limited disclosures referenced above are inconsistent with QBCC maintaining confidentiality of received legal advice, I have considered the particular circumstances of this matter.<sup>45</sup>
38. As noted above, the Decline Notice simply notified the applicants of the basis upon which QBCC declined their Scheme claim. It did not contain the detailed reasoning of QBCC's received legal advice.
39. I note that the 18 July 2019 Case Comment referenced above simply confirms that legal advice had been requested. That document does not disclose the *substance* of the legal advice that QBCC received.
40. In these circumstances, I am satisfied that the limited disclosures relied upon by the applicant are *not* inconsistent with the maintenance of confidentiality in QBCC's received legal advice. Therefore, I find that the privilege in Information in Issue, including the legal advice received by QBCC, has not been impliedly waived.

---

<sup>37</sup> Submissions dated 23 March 2020.

<sup>38</sup> *Ampolex Ltd v Perpetual Trustee Company (Canberra) Ltd* (1996) 137 ALR 28 at [34] and *Federal Commissioner of Taxation v Devereaux Holdings Pty Ltd* [2007] FCA 821 at [8].

<sup>39</sup> Submissions dated 23 March 2020.

<sup>40</sup> Submissions dated 23 March 2020.

<sup>41</sup> Submissions dated 23 March 2020.

<sup>42</sup> Refer to footnote 33 above.

<sup>43</sup> The Case Comment comprises page 1255 in the file titled '*493579 CLAIMS*', which QBCC disclosed to the applicant.

<sup>44</sup> The Case Comment comprises page 1262 in the file titled '*493579 CLAIMS*', which QBCC disclosed to the applicant.

<sup>45</sup> Consistent with the High Court's comments in *Osland* at [49], including that '*questions of waiver are matters of fact and degree*'.

41. For these reasons, I find that the Information in Issue is exempt information under the RTI Act, as it is subject to legal professional privilege which has not been waived, and access may be refused on this basis.<sup>46</sup>
42. To the extent the applicants' submissions raise other reasons why QBCC's received legal advice should be disclosed,<sup>47</sup> I am unable to take them into account. This is because Parliament has determined that disclosure of exempt information is contrary to the public interest in all circumstances and I have no discretion to decide that the information should be released, once the information is established as exempt information.<sup>48</sup>

### Nonexistent or unlocatable documents

43. The functions of the Information Commissioner on external review include investigating and reviewing whether an agency has taken reasonable steps to identify and locate documents applied for by applicants.<sup>49</sup> However, access to a document may be refused if it is nonexistent or unlocatable.<sup>50</sup>
44. To be satisfied that documents are **nonexistent**, an agency must rely on their particular knowledge and experience and have regard to a number of key factors.<sup>51</sup> If searches are relied on to justify a finding that documents do not exist, all reasonable steps must be taken to locate the documents. What constitutes reasonable steps will vary from case to case, depending on which of the key factors are most relevant in the particular circumstances.
45. To determine whether a document exists, but is **unlocatable**, the RTI Act requires consideration of whether there are reasonable grounds for the agency to be satisfied that the requested document has been or should be in the agency's possession; and whether the agency has taken all reasonable steps to find the document. In answering these questions, regard should again be had to the circumstances of the case and the relevant key factors.<sup>52</sup>

### Findings

46. On external review, the applicants raised concerns that there should be additional internally created documents relevant to the access application and that QBCC had not searched any email system. The applicants identified the further documents which, in their view, existed (or may exist) and should have been located by QBCC as follows:<sup>53</sup>
  - (i) additional electronic and paper records held by 8 identified QBCC officers

---

<sup>46</sup> Sections 47(3)(a) and 48 and schedule 3, part 7 of the RTI Act.

<sup>47</sup> For example, the applicants' 23 March 2020 submission that QBCC's legal advice should be disclosed because it presents 'the full picture fairly'.

<sup>48</sup> Sections 48(2) and 105(2) of the RTI Act. Refer also to *BL v Office of the Information Commissioner, Department of Communities* [2012] QCATA 149 at [15] and *Dawson-Wells v Office of the Information Commissioner & Anor* [2020] QCATA 60 at [17].

<sup>49</sup> Section 130(2) of the RTI Act.

<sup>50</sup> Sections 47(3)(e) and 52 of the RTI Act.

<sup>51</sup> These factors are identified in *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (*Pryor*) at [19] as including the administrative arrangements of government; the agency structure; the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it); the agency's practices and procedures (including but not exclusive to its information management approach); and other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested document/s and the nature of the government activity to which the request relates. These factors were more recently considered in *Van Veendendaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017).

<sup>52</sup> *Pryor* at [21].

<sup>53</sup> External review application.



- (ii) additional audio recordings, including audio recordings of conversations between one of the applicants and [Mr H] on 29 March 2019 and 9 August 2019 and additional recordings between QBCC and the applicants' contractor<sup>54</sup>
  - (iii) additional relevant guidance statements and termination checklists
  - (iv) additional documents recording why their contractor was given a one day extension to provide a response to QBCC
  - (v) additional documents recording how an inspection report was considered by QBCC; and
  - (vi) drafts of a site inspection report.
47. OIC requested that QBCC conduct further searches for relevant information (including information of the types identified by the applicants) and, as noted in paragraph 4 above, QBCC located additional documents and released some of these to the applicants. QBCC relies on searches conducted by its officers to justify its position that reasonable steps have been taken to locate documents relevant to the application.
48. Despite the release of additional information, the applicants maintain that QBCC's searches were insufficient and that QBCC has failed to give reasonable justification for not providing:<sup>55</sup>
- the Termination Checklist for a Master Builders Contract (**Checklist**)
  - the Legal Guidance Statement titled '*How to Protect Legal Professional Privilege*' (**Privilege Guidance Statement**)
  - an audio recording of a 9 August 2019 conversation between one of the applicants and [Mr H]; and
  - additional internal emails and documents between [Mr O] and any other QBCC officer, including [Mr H] and [Ms P].
49. OIC sought information from QBCC about its record keeping practices, recording policies and the searches it conducted for information requested in the access application. QBCC provided the following information:<sup>56</sup>
- Electronic Content Manager (**ECM**) is QBCC's records management system
  - in processing the application, QBCC searched ECM, its case management system (called Salesforce) and its email systems (including the legal email inbox and the email records of two QBCC officers<sup>57</sup>) and these searches were conducted using a variety of search terms relevant to the application<sup>58</sup>
  - on external review, further searches were conducted of its electronic databases (including ECM, Salesforce, HPE Content Manager, OneDrive and Windows File Explorer), hard copy files and email records (including the outlook folders of QBCC officers,<sup>59</sup> Mimecast and QBCC's internal review mail inbox)
  - while QBCC does generally record calls made to the QBCC Contact Centre, calls relating to compliance investigations and site visits by QBCC inspectors, QBCC does not record phone calls relating to defective work complaints or Home Warranty Insurance claims and there is no general QBCC policy requiring all internal and external conversations to be recorded; and
  - internal guidance statements are not saved to individual cases if they are relied upon and although a termination checklist is saved to a file if it is used, a termination checklist was not used in relation to the applicants' matter.

<sup>54</sup> The applicants specifically referenced an audio recording of a conversation they believe occurred on 27 March 2019.

<sup>55</sup> Applicants' submissions dated 30 June 2020.

<sup>56</sup> QBCC's submissions dated 20 December 2019 and 14 April 2020, which included search records and certifications.

<sup>57</sup> Being two of the officers identified in the applicants' sufficiency of search concerns.

<sup>58</sup> Such as the applicants' last name, the contractors name and the allocated claim number.

<sup>59</sup> The searched outlook folders included those of the 8 officers referenced in the external review application.

50. On external review, the question I must determine is whether QBCC has taken reasonable steps to locate documents relevant to the access application.<sup>60</sup> In making a determination on this issue, I have carefully considered each of the specific documents that the applicant contends to be missing, in conjunction with the submissions provided by QBCC in relation to its usual record keep practices, and the steps that it has now taken to identify the requested documents.
51. I am satisfied, on the information before me (including QBCC's search certifications and submissions<sup>61</sup>) that QBCC has undertaken comprehensive searches of locations where it would be reasonable to expect that the types of information requested in the access application would be stored. I am also satisfied that staff with working knowledge of the relevant areas made targeted searches and enquiries to locate relevant information.
52. Although the applicants contend that it is '*extraordinary*' that their conversation with QBCC on 9 August 2019 was not recorded,<sup>62</sup> it is not the kind of conversation which QBCC generally records. In these circumstances, there is no evidence before me, apart from the applicants' submissions, which supports a reasonable expectation that a record of this conversation was in fact created.
53. The RTI Act requires an applicant to give sufficient information concerning the documents sought to enable a responsible officer of the agency to locate the relevant documents.<sup>63</sup> In this matter, item 3 of the application seeks any policy, procedure or document that '*confirms the process of consideration that was actually applied in connection with [the applicants' Scheme] application and the [Decline Letter]*'.
54. The applicants submit that:
- it is unfair for QBCC to assert that the Checklist was not used as it would have in fact been used by a prudent QBCC administrator to review their Scheme claim;<sup>64</sup> and
  - on the balance of probability, the Privilege Guidance Statement was used '*even though there is no actual searchable evidence that it was actually used*'.<sup>65</sup>
55. The applicants' belief that QBCC would have used the Checklist and Privilege Guidance Statement in reviewing their Scheme claim does not mean that these documents were in fact used.
56. On the information before me, I am satisfied that, had a Checklist been used in relation to the applicants' matter, it would have been saved with other records relevant to the applicants' Scheme Claim and would have been located by the searches conducted by QBCC. On this basis, I am satisfied that a Checklist relevant to the access application does not exist.
57. QBCC determined that only one of the legal guidance statements listed in the Claims Manual (titled '*Contract Termination*') was relevant to the application and this document was disclosed the applicants. In support of their position that the Privilege Guidance Statement is also relevant to the application, the applicants assert that the statement was '*artificially used to exaggerate a high percentage (and quantity) of denied ("exempt") material*' and, as access has not been granted to the Information in Issue, they require

---

<sup>60</sup> Section 130(2) of the RTI Act.

<sup>61</sup> Including search records and certifications.

<sup>62</sup> Applicants' submissions dated 30 June 2020.

<sup>63</sup> Section 24(2)(b) of the RTI Act.

<sup>64</sup> Applicants' submissions dated 5 August 2020.

<sup>65</sup> Applicants' submissions dated 5 August 2020.

that policy document 'to consider the 'dominant purpose' argument that is used to prevent access'.<sup>66</sup> I have set out above the reasons for my finding that the Information in Issue meets the requirements of legal professional privilege. Nothing before me indicates that the Privilege Guidance Statement was actually applied in QBCC's consideration of the applicants' Scheme Claim or the Decline Notice. Nor is there any evidence before me supporting the applicants' claim that QBCC used the Privilege Guidance Statement to 'avoid the ambit of the RTI act'<sup>67</sup> or inflate the number of exempt documents. Having carefully considered the terms of the application, the documents located by QBCC and the applicants' submissions, I am not satisfied that the Privilege Guidance Statement is relevant to the application.

58. The applicants submit that this interpretation of the application is '*unfairly narrow and not consistent with the evidence nor the broad legislative intent of the RTI Act*'.<sup>68</sup> However, assessing the application scope objectively and without undue technicality,<sup>69</sup> I am satisfied that it seeks to access QBCC policy and procedure documents which were *actually used* by QBCC in its consideration of the applicants' Scheme Claim and the Decline Notice.<sup>70</sup>
59. In view of the above, and taking into account the documents that were located, there is nothing before me, other than the applicants' assertions, to support an expectation that further relevant documents exist. Accordingly, I am satisfied that QBCC has taken all reasonable steps to locate information relevant to the access application and access to any further information may be refused on the basis that it does not exist or cannot be located.<sup>71</sup>

## DECISION

60. For the reasons set out above, I affirm QBCC's decision to refuse access to the Information in Issue as it comprises exempt information.<sup>72</sup> I also find that access to any further information may be refused on the basis it is nonexistent or unlocatable.<sup>73</sup>
61. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

---

**S Martin**  
**Assistant Information Commissioner**

**Date: 9 October 2020**

---

<sup>66</sup> The applicants' contentions are primarily based upon 21.8% of documents initially located being refused on the basis they comprised exempt information. (external review application and submissions dated 30 June 2020, 5 August 2020).

<sup>67</sup> Applicants' submissions dated 30 June 2020.

<sup>68</sup> Applicants' submissions dated 5 August 2020.

<sup>69</sup> *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491 at [8] and *O80PCE and Department of Education and Training* (Unreported, Queensland Information Commissioner, 15 February 2010) at [33].

<sup>70</sup> I also note that this decision does not prevent the applicants making a further application to access the Checklist and the Privilege Guidance Statement.

<sup>71</sup> Section 47(3)(e) of the RTI Act.

<sup>72</sup> Under sections 47(3)(a) and 48 of the RTI Act.

<sup>73</sup> Under sections 47(3)(e) and 52 of the RTI Act.

## APPENDIX

### Significant procedural steps

Date	Event
31 October 2019	OIC received the external review application.
2 December 2019	OIC notified the applicants and QBCC that the external review had been accepted and asked QBCC to provide information.
20 December 2019	OIC received the requested information from QBCC.
21 February 2020	OIC asked QBCC to provide further information. OIC conveyed a preliminary view to the applicants and invited the applicants to provide submissions if they did not accept the preliminary view.
23 March 2020	The applicants provided further submissions which contested OIC's preliminary view that information was exempt from disclosure.
24 March 2020	The applicants confirmed their acceptance of OIC's preliminary view about the other grounds upon which access had been refused.
14 April 2020	OIC received requested information from QBCC.
14 May 2020	OIC asked QBCC to release certain information to the applicants. OIC conveyed a further preliminary view to the applicants and invited the applicants to provide submissions if they did not accept the preliminary view.
30 June 2020	OIC received further submissions from the applicants.
15 July 2020	OIC confirmed the preliminary view to the applicants and received the applicants' submissions.
16 July 2020	OIC wrote to the applicants.
5 August 2020	OIC received the applicants' further submissions.