



## **Decision and Reasons for Decision**

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**Application Number:** 210637

**Applicant:** Janelle Young

**Respondent:** Department of Justice and Attorney General

**Decision Date:** 26 February 2009

**Catchwords:** **FREEDOM OF INFORMATION – section 28A(1) of the *Freedom of Information Act 1992* (Qld) – Refusal of Access – Agency or Minister is satisfied the document does not exist**

**FREEDOM OF INFORMATION – section 43(1) of the *Freedom of Information Act 1992* (Qld) – whether matter in issue would be privileged from production in a legal proceeding on the ground of legal professional privilege**

## **Contents**

REASONS FOR DECISION .....	2
Summary .....	2
Background.....	2
Decision under review .....	3
Steps taken in the external review process .....	3
Matter in issue .....	4
Findings .....	4
DECISION .....	6

## REASONS FOR DECISION

### Summary

1. For the reasons set out below, I find that:
  - the matter in issue in this review is exempt from disclosure under section 43(1) of the *Freedom of Information Act* 1992 (**FOI Act**)
  - applying section 28A(1) of the FOI Act, there are reasonable grounds upon which I am satisfied that no further documents exist that are responsive to the FOI application.

### Background

2. By letter dated 3 April 2008 the Applicant applied to the Department of Justice and Attorney-General (**JAG**) for:

*“a copy of the document in which Linda Lavarch - the then Attorney-General (**AG**)- states her reasons for changing the charges from stealing to conspiracy in the court case against my sons and I “ (**FOI Application**).*

3. By letter dated 27 June 2007, JAG advised the Applicant that it had located 7 documents responsive to the FOI Application which consisted of:
  - a five page report (folios 2047, 2048, 2048A, 2049, 2050) prepared by Michael Cowan, DPP Legal Officer, to the Director of Public Prosecutions (**DPP**) for application to the AG seeking consent to commence a prosecution for conspiracy to steal in R v Young et al (**DPP Application**)
  - a one page covering memorandum from Michael Cowen to the DPP (**Covering Note**)
  - a one page consent document by the AG (folio 1578), consenting to the DPP Application (**AG Consent**).

As required by section 541(2) of the Criminal Code<sup>1</sup>, the only role for the AG in this process is to provide consent to the DPP Application.

JAG decided to:

- (a) release the Covering Note in full
- (b) partially release the AG Consent on the basis that the page contained some information that was exempt from disclosure under section 44(1) of the FOI Act
- (c) refuse access to the DPP Application as it was subject to legal professional privilege and is therefore exempt from disclosure under section 43 of the FOI Act (**Original Decision**).

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<sup>1</sup> Section 541(2) of the Criminal Code requires that a prosecution for an offence defined in this section (Chapter 56 Conspiracy) shall not be instituted without the consent of the Attorney General.

4. By letter dated the 25 August 2008, the Applicant sought internal review of the Original Decision thanking JAG for the documents sent, adding:

*"However I would like a copy of the documents in which Linda Lavarch states her reasons for changing the charges against me from stealing (insufficient evidence) to conspiracy."*

5. By letter dated 29 September 2008, JAG affirmed its Original Decision (**Internal Review Decision**)

6. By letter dated 7 October 2008, the Applicant applied for external review of the Internal Review Decision, reiterating:

*"I repeat again. I would like a copy of the documents in which Linda Lavarch states her reasons for charging me with conspiracy. Why should Linda Lavarch need legal advice when she is a legal person herself"*

### **Decision under review**

7. The decision under review is the Internal Review Decision of JAG dated 29 September 2008.

### **Steps taken in the external review process**

8. By letter dated 27 November 2008, I advised the Applicant of the preliminary view that:

- there are no reasonable grounds to believe that JAG has in its possession or control any further documents which are responsive to the Applicant's FOI application (including a document in which the AG states her reasons for charging the Applicant with conspiracy); and
- the DPP Application attracts legal professional privilege and on that basis is exempt from disclosure under section 43 of the FOI Act (**Preliminary View**).

9. By letter dated 8 December 2008, the Applicant responded to the Preliminary View and stated that:

- she had the impression from the Preliminary View that there was no document in which the AG states her reasons for charging the Applicant with conspiracy. If so, did that mean the AG could declare a case against any person, whether they were innocent or guilty, without giving any reasons. Further, the Applicant stated, if there was no document, what proof had the public prosecutor that the AG actually agreed to the request for the charge to be made.
- if she had read the Preliminary View incorrectly and there was such a document then she was entitled to see it
- she would like a copy of the document in which Michael Cowan asked the AG for permission to charge the Applicant with conspiracy and his reasons

10. By letter dated 9 February 2009, I wrote to the Applicant to:

- answer the questions raised in the Applicant's letter dated 8 December 2008
- confirm the Preliminary View.

11. By letter dated 14 February 2009, the Applicant again requested a copy of the DPP Application.
12. In reaching this decision, I have taken the following into account:
  - the Applicant's FOI Application
  - the Original Decision
  - the Internal Review Decision
  - the Applicant's letters dated 25 August 2008 and 7 October 2008
  - the Preliminary View
  - the Response to the Preliminary View
  - the Further Response
  - the Matter in Issue
  - relevant legislation and case law.

### **Matter in Issue**

13. The matter in issue in this review is the DPP Application (**Matter in Issue**).

### **Findings**

#### ***Section 43(1) of the FOI Act***

14. The Applicant seeks access to the Matter in Issue.

15. Section 43(1) of the FOI Act provides:

#### **43 Matter affecting legal proceedings**

*(1) Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.*

16. The section 43(1) exemption turns on the application of those principles of Australian common law which determine whether matter is subject to legal professional privilege.
17. Legal professional privilege protects confidential communications between a lawyer and client, including communications through their servants or agents, made for the dominant purpose of:
  - seeking or giving legal advice or professional legal assistance, or
  - use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication<sup>2</sup>
18. Legal professional privilege also protects confidential communications between the client or the client's lawyers (including communications through their servants or agents) and third parties, provided the communications were made for the dominant purpose of use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication<sup>3</sup>

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<sup>2</sup> *Esso Australia Resources Ltd v Commission of Taxation* (1999) 74 ALJR 339.

<sup>3</sup> *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217.

19. The High Court of Australia has established that legal professional privilege may protect communications between salaried employee legal advisers of a government department or statutory authority and his/her employer as client (including communications through other employees of the same employer) provided there is a professional relationship of solicitor and client, which secures to the advice an independent character notwithstanding the employment<sup>4</sup>
20. On the information available to me, I am satisfied that:
  - the DPP Application, which comprises the Matter in Issue, is a confidential communication between relevant parties created for the dominant purpose of providing legal advice
  - the requisite degree of independence exists between lawyer and client
  - the Matter in Issue qualifies for exemption from disclosure under section 43(1) of the FOI Act.

### **Section 28A of the FOI Act**

21. The Applicant seeks access to a further document "*in which [the former AG] states her reasons for charging me with conspiracy*".
22. Section 28A(1) of the FOI Act provides:

#### **28A Refusal of access –document nonexistent**

*(1) An agency or Minister may refuse access to a document if the agency or Minister is satisfied the document does not exist.*

*Example –  
Documents that have not been created*

23. The question to be asked when applying section 28A(1) of the FOI Act is: *Are there reasonable grounds for the agency to be satisfied that the requested documents do not exist?*<sup>5</sup>
24. Section 541(2) of the Criminal Code outlines the process to be followed in order to commence a prosecution for a charge of conspiracy. It states a prosecution for an offence defined in that section (Chapter 56 Conspiracy) shall not be instituted without the consent of the AG.
25. On the information available to me, I am satisfied that:
  - the DPP applies to the AG for consent to commence the prosecution
  - there are only two documents required in this process - the DPP Application and the AG Consent.
26. Accordingly, on the basis of the matters set out above, I am satisfied that:
  - no further documents exist that are responsive to the FOI Application
  - access is therefore refused in accordance with section 28A of the FOI Act.

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<sup>4</sup> *Waterford v Commonwealth of Australia* (1987) 163 CLR 54

<sup>5</sup> *PDE and University of Queensland*, 210631, para 43, unreported, February 2009

## **DECISION**

27. For the reasons set out above, I affirm the Internal Review Decision dated 29 September 2009.
28. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

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**Assistant Commissioner Henry**

**Date: 26 February 2009**