



Decision and Reasons for Decision

Citation:	<i>Institute of Public Affairs and James Cook University</i> [2022] QICmr 37 (28 July 2022)
Application Number:	315776
Applicant:	Institute of Public Affairs Limited ACN 008 627 727
Respondent:	James Cook University
Decision Date:	28 July 2022
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - communications in connection with engagement of consulting firm by legal representatives - evidence summary and analysis document created by legal representatives - whether provision to consulting firm amounts to waiver - whether information exempt on basis of legal professional privilege under schedule 3, section 7 of the <i>Right to Information Act 2009</i> (Qld) - whether access to information 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 applied to James Cook University (**JCU**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to '[a]ll documents relating to the engagement of a consulting firm and/or a public relations firm in relation to [JCU's] litigation against [a former employee]'.¹
2. JCU located 24 pages and refused access on the basis that they were subject to legal professional privilege (**Privilege**) and disclosure would, on balance, be contrary to the public interest.²
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of JCU's decision. Further information was located by JCU on external review and OIC sought the views of a third party (**Consulting Firm**). Ultimately, JCU and the Consulting Firm agreed to release further information to the applicant.³

¹ Application dated 2 September 2020.

² Some information was also deleted on the basis it was irrelevant under section 73 of the RTI Act, although JCU discontinued this claim on external review.

³ 20 part and 48 full pages. The Consulting Firm is not named as a respondent to this decision as all issues pertaining to its participation were resolved during the course of the review. The information remaining in issue is only the subject of contention between the applicant and JCU.

4. For the reasons set out below, I vary JCU's decision and find that access to the information remaining in issue may be refused as it is exempt due to legal professional privilege.

Background

5. JCU retained legal representatives to act on its behalf in the legal proceedings brought against it by a former employee. While the litigation was ongoing, the Consulting Firm was retained, through JCU's legal representatives 'to protect the position and reputation of [JCU]'.⁴
6. Much of this review centred on the issue of whether communications between the Consulting Firm and JCU's legal representatives were subject to Privilege. Early in the review process, OIC conveyed a view to JCU that the involvement of lawyers in correspondence does not automatically confer Privilege, for example, where a 'communication is with a lawyer acting in a non-legal capacity and providing something other than legal advice'⁵ and that Privilege '... does not extend to advice that is purely commercial or of a public relations character'.⁶
7. OIC facilitated multiple attempts between the parties to resolve the review informally, as required under section 90 of the RTI Act. While further documents were located by JCU, and agreement reached as to their partial release, the applicant did not accept the claim of Privilege over the remaining information in issue, as described at paragraph 11 below.

Reviewable decision

8. The decision under review is JCU's decision dated 17 November 2020.

Evidence considered

9. The significant procedural steps taken during the external review are set out in the Appendix. The evidence, submissions, legislation and other material I have considered in reaching this decision are referred to in these reasons (including the footnotes and the Appendix).⁷

⁴ Page 5 of the Consulting Firm's proposal which was released to the applicant during the external review.

⁵ *Bartolo v Dousta Galla Aged Services Ltd* [2014] FCCA 1517 at [77].

⁶ *Australian Wheat Board v Cole (No. 5)* (2006) 155 FCR 30 (**AWB v Cole (No. 5)**) at [44] per Young J citing Taylor LJ in *Balabel v Air India* [1988] 1 Ch 317 at 323 and 330; [1988] 2 All ER 246 at 248 and 253 (**Balabel**); *Nederlandse Reassurantie Groep Holding NV v Bacon and Woodrow* [1995] 1 All ER 976 at 983; *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610; [2005] 4 All ER 948 at [43]–[44], [59]–[60], [114] and [120]; *Dalleagles Pty Ltd v Australian Securities Commission* (1991) 4 WAR 325 at 332–3; 6 ACSR 498 (**Dalleagles**) at 504–6.

⁷ Including the *Human Rights Act 2019 (Qld) (HR Act)*, to the extent necessary to do so. The participants in this review are not 'individuals', and only individuals have human rights under the HR Act: section 11. However, Kingham J in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33 at [90] indicated that where section 58(1) of the HR Act applies, there need be no mover to raise human rights issues because that section requires the relevant public entity to properly consider engaged human rights and to not act or make a decision that is not compatible with human rights. To the extent then that it is necessary to observe relevant rights under section 58(1) of the HR Act, I am satisfied that I have done so. This is because in observing and applying the law prescribed in the RTI Act, as I have done in this case, an RTI decisionmaker will be 'respecting and acting compatibly with' applicable human rights as stated in the HR Act (*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].) In this regard, I note Bell J's observations at [573] of XYZ on the interaction between the Victorian analogues of Queensland's RTI Act and HR Act: '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.'

Information in issue

10. As a result of further responsive documents being located, 99 pages were considered on external review. As set out above, some information in those pages was released to the applicant. The applicant also agreed not to pursue access to certain information.⁸
11. The information remaining in issue (**Information in Issue**) comprises:⁹
 - a paragraph¹⁰ of an email sent by JCU's legal representatives to JCU (**Email 1**);
 - a paragraph¹¹ of an email sent by JCU's legal representatives to the Consulting Firm (**Email 2**); and
 - a 30 page evidence summary and analysis document attached to Email 2 (**Attachment**).¹²

Issue for determination

12. The issue for determination is whether the subject paragraphs in Email 1 and Email 2 and the Attachment would be privileged from production in a legal proceeding on the ground of Privilege and therefore comprise exempt information to which access may be refused under the RTI Act.¹³

Relevant law

13. Access must be given to a document under the RTI Act unless disclosure would, on balance, be contrary to the public interest.¹⁴ Schedule 3 of the RTI Act specifies the types of information Parliament has determined is exempt because release would be contrary to the public interest.¹⁵ Relevantly, information is exempt information if it would be privileged from production in a legal proceeding on the ground of Privilege.¹⁶ This exemption reflects the requirements for establishing Privilege at common law.¹⁷
14. Privilege protects confidential communications between a legal adviser and their client, made for the dominant purpose¹⁸ of:
 - seeking or giving legal advice or professional legal assistance (advice privilege); or
 - use in legal proceedings either on foot or reasonably anticipated, at the time of the relevant communication (litigation privilege).¹⁹
15. Qualifications and exceptions to Privilege (such as waiver and improper purpose) may, in particular circumstances, affect the question of whether information attracts or remains subject to it, and therefore is exempt under the RTI Act.

⁸ Including the personal details of legal representatives and Consulting Firm staff, details of work performed for other clients, hourly rates and out of pocket expenses. Therefore, this information is not addressed in these reasons.

⁹ 20 part and 31 full pages.

¹⁰ Duplicated on pages 1, 10 and 16.

¹¹ Duplicated on pages 2, 11, 14, 18 and 21 and 25.

¹² Comprising pages 40-70.

¹³ Section 48 and schedule 3, section 7 of the RTI Act.

¹⁴ Sections 44(1) and 48 of the RTI Act.

¹⁵ Section 47(3)(a) allows refusal of access to exempt information. Section 48(2) provides that schedule 3 sets out the types of information the disclosure of which Parliament has considered would, on balance, be contrary to the public interest.

¹⁶ Schedule 3, section 7 of the RTI Act.

¹⁷ *Ozcare and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 13 May 2011) at [12].

¹⁸ *Esso Australia Resources Ltd v Commission of Taxation* (1999) 201 CLR 49 (**Esso**) at [61]-[62] and [167]-[173]; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 (**Daniels**) at [9].

¹⁹ *Esso and Daniels*.

16. Privilege is for the benefit of the client²⁰ and may be waived by intentionally disclosing a privileged communication²¹ or where a party acts inconsistently with the maintenance of confidentiality which the Privilege is intended to protect.²² Disclosure of a privileged communication to a third party for a limited purpose in a specific context may not amount to overall waiver of Privilege, i.e., it may amount to a limited waiver which otherwise allows Privilege to be maintained.²³

Findings

Email 1

17. The subject paragraph in Email 1 appears in a communication sent by JCU's legal representatives to JCU, the client. I am satisfied that Email 1 comprises a communication between a legal adviser and client. The communication is marked '*Privileged and confidential*' and there is no evidence before me to suggest that the communication was treated otherwise.
18. The next relevant question is whether the dominant purpose of the communication was to provide legal advice. The applicant contended that the legal representatives were acting '*merely as a conduit for information*' between the Consulting Firm and JCU and contested the application of advice privilege for this reason.²⁴ The applicant further submitted²⁵ that:

There is an obvious public interest in ensuring that legal professional privilege is not abused. The danger presented by the broader interpretation of the legal professional privilege is that government bodies would be able to simply engage a law firm to interact with third parties for matters unrelated to legal advice. This would be inconsistent with the objects of the Right to Information Act ... by undermining the right of the public to transparency in government and public bodies.

19. As set out above, the mere involvement of a lawyer in correspondence does not of itself confer Privilege and legal advice '*... does not extend to advice that is purely commercial or of a public relations character*'.²⁶ However, case law also indicates that the concept of advice is not to be interpreted narrowly when assessing Privilege, as demonstrated in the following statements of reasons:

- '*[t]he concept of legal advice is fairly wide. It extends to professional advice as to what a party should prudently or sensibly do in the relevant legal context...*';²⁷
- '*[l]egal advice goes beyond formal advice as to the law and extends to the continuum of communication between a solicitor and his client the object of which is the giving of legal advice.*';²⁸ and

²⁰ *Mann v Carnell* (1999) 201 CLR 1 (***Mann v Carnell***) at [28] per Gleeson CJ, Gaudron, Gummow and Callinan JJ; *Esso* at [1] per Gleeson CJ, Gaudron and Gummow JJ.

²¹ *Goldberg v Ng* (1994) 33 NSWLR 639 (***Goldberg v Ng***) at 670 per Clarke JA; *Federal Commissioner of Taxation v Coombes* (1999) 92 FCR 240 at 145 per Sundberg, Merkel and Kenny JJ.

²² *Goldberg v Ng* at 673 per Clarke JA; *Mann v Carnell* at [28] per Gleeson CJ, Gaudron, Gummow and Callinan JJ; *Osland v Secretary to the Department of Justice* (2008) 234 CLR 275 at [45] per Gleeson CJ, Gummow, Heydon and Kiefel JJ.

²³ *British Coal Corp v Dennis Rye Ltd (No 2)* [1988] 1 WLR 1113 at 1121-2; *Goldberg v Ng* (1995) 185 CLR 83 at 95-96; *Mann v Carnell* at [30]-[32]; *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275 at 283-6 per Giles J; *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (1999) 165 ALR 253 at 263 per Sackville J; *Cantor v Audi Australia Pty Ltd* [2016] FCA 1391 at [88], [123]-[125], [136]-[140].

²⁴ Submission dated 17 May 2022.

²⁵ Submission dated 17 May 2022.

²⁶ *AWB v Cole (No. 5)* at [44] citing Taylor LJ in *Balabel*; *Nederlandse Reassurantie Groep Holding NV v Bacon and Woodrow* [1995] 1 All ER 976 at 983; *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610; [2005] 4 All ER 948 at [43]-[44], [59]-[60], [114] and [120]; *Dalleagles* at 332-3; 6 ACSR 498 at 504-6.

²⁷ *Ibid.*

²⁸ *Allsop J in DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 203 ALR 348 at [38] and [41] applying *Balabel*.

- '[w]here there is a legal retainer in existence during a period when the disputed documents came into existence, it is *prima facie* reasonable to conclude that a party is seeking legal advice and guidance.'²⁹
20. Based on the evidence available to me, I am satisfied that there was a legal services retainer in existence between JCU and its legal representatives at the relevant time and that Email 1 was sent pursuant to that retainer. I am further satisfied that the subject paragraph in Email 1 constitutes professional and independent legal advice about what was recommended to be prudently and sensibly done in the relevant legal context (in connection with the litigation) and that it is not in the nature of commercial or public relations advice.
21. I find that the subject paragraph in Email 1 comprises a confidential communication between a legal adviser and client prepared for the dominant purpose of providing JCU with legal advice. Accordingly, I find it constitutes exempt information on the basis of Privilege, and access to it may therefore be refused under the RTI Act.³⁰

Email 2 and Attachment

22. The majority of Email 2 was released to the applicant, on the basis that it does not comprise a confidential, legally privileged communication. However, JCU maintains that the subject paragraph in Email 2 and the Attachment attract Privilege.
23. It is convenient to firstly deal with the Privilege claim in relation to the Attachment. On its face, the Attachment unequivocally comprises information relating to the litigation involving JCU which has been compiled by JCU's legal representatives. JCU provided submissions to OIC³¹ setting out the background circumstances to preparation of the Attachment, including the particular purpose for which it was created. While I am prevented from describing the nature of the document in detail,³² I can refer to it as an evidence summary and analysis document prepared by JCU's legal representatives in connection with the litigation brought against JCU by a former employee.
24. There is no evidence before me to indicate that the Attachment was communicated to JCU by its lawyers, e.g., in the form of a covering email or letter to constitute a 'communication'. However, the courts have interpreted what constitutes a privileged 'communication' broadly and it can include documents that do not strictly pass between lawyer and client, but otherwise meet the dominant purpose test. For example:³³

Material created by the solicitor in fulfilment of his engagement "is the result of the solicitor's mind working upon and acting as professional adviser with reference to" material communicated to him confidentially in his professional capacity (Kennedy v Lyell [1883] 23 Ch D 387 at 407) and, as such, will by its very nature tend to reveal the content of the communication in response to which it had been prepared.

²⁹ Tamberlin J in *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd* [2007] FCA 933 at [17]. See also *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd (No 2)* (2009) 180 FCR 1; 256 ALR 416 at [4].

³⁰ Section 47(3)(a) of the RTI Act.

³¹ Submission from JCU's legal representatives dated 7 July 2022.

³² Section 108(3) of the RTI Act.

³³ *Dalleagles* at 506.

25. Young J also explained that:³⁴

*As an adjunct to the first limb of the privilege, protection against disclosure has been extended to **documents that record confidential legal advice or confidential legal work**. Examples commonly given include legal research memoranda, draft pleadings, summaries of argument and draft agreements.*

[my emphasis]

26. Barwick CJ also recognised in *Grant v Downs*:³⁵

*[A] document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or **aid in the conduct of litigation**, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.*

[my emphasis]

27. In *Trade Practices Commission v Sterling*³⁶ Lockhart J found that a document prepared by a legal adviser with a view to it being used as part of a confidential communication to a client will still attract Privilege, and particularly referred to notes/records made by a legal adviser containing a record of communications or relating to information sought by the client's legal adviser to enable him to advise the client or to conduct litigation.
28. As set out above, I am prohibited from describing the Attachment in any detail but it can be generally described as an evidence summary and analysis document.³⁷ I am satisfied that it records information provided to the legal representatives by JCU for the purpose of obtaining advice and conducting litigation, and records confidential legal work undertaken by legally qualified practitioners in fulfilment of their retainer with JCU. Based on the nature of the information in the Attachment, the caselaw examined above and the submissions from JCU's legal representatives regarding the circumstances relating to its preparation, I am satisfied that the Attachment was prepared confidentially, for the dominant purpose of providing legal advice to JCU and/or in relation to ongoing/reasonably anticipated litigation.
29. Where a document would disclose privileged information, this will also be subject to Privilege.³⁸ The subject paragraph in Email 2 describes the Attachment and includes comments on its contents. I am satisfied that it reveals information communicated between JCU and its legal representatives for the purpose of providing legal advice and/or conducting litigation.
30. On this basis, I am satisfied that the subject paragraph in Email 2 and the Attachment meet the requirements for attracting Privilege and are *prima facie*, exempt information under schedule 3, section 7 of the RTI Act.

Waiver

³⁴ *AWB Ltd v Cole* (2006) 152 FCR 382 (**AWB Ltd v Cole**) at [127] citing *Daniels* at [44] per McHugh J; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 (**Propend**) at 550; *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 496 per Dawson J; *Trade Practices Commission v Sterling* (1979) 36 FLR 244 (**Sterling**) at 246 per Lockhart J; *Mostyn v West Mostyn Coal & Iron Co Ltd* (1876) 34 LT 531; *Packer v Deputy Commissioner of Taxation (Qld)* [1985] 1 Qd R 275 (**Packer**) at 284–5.

³⁵ (1976) 135 CLR 674 at 677 cited in *Kennedy v Wallace* [2004] FCAFC 337 at [230].

³⁶ (1979) 36 FLR 244 at 245–246 per Lockhart J.

³⁷ The date of the Attachment indicates that it was created over a year prior to briefing the Consulting Firm.

³⁸ *Propend* at 569 per Gummow J; *AWB v Ltd v Cole* at [128] citing *Dalleagles* at 333-4; *Packer* at 276-7.

31. Given that the Attachment was later sent to the Consulting Firm by JCU's legal representatives, in Email 2, as part of the '*key briefing materials*'³⁹ it is necessary to consider whether this communication constituted waiver of Privilege in relation to the Attachment and the subject paragraph in Email 2.⁴⁰
32. Waiver occurs where a party entitled to Privilege does something inconsistent with the confidential nature of the Privilege.⁴¹ Disclosure of privileged material to a third party will not necessarily waive Privilege if it is for a limited and specific purpose.⁴²
33. The Attachment was provided to the Consulting Firm for the purpose of the Consulting Firm preparing a strategy for JCU (the client) to consider.⁴³ Email 2 is marked '*[p]rivileged and confidential*' and states that '*[c]onsistent with the agreed privileged protocol, these documents are being provided to assist with the strategy you are considering, and remain privileged and should not be disclosed without instructions from us and consent from JCU*'.⁴⁴ The Consulting Firm also signed a 'Confidentiality and Privilege Protocol' in which '*the confidentiality obligations expressly imposed on [Consulting Firm] by the Protocol confirm that [JCU's legal representatives] and JCU still retained full control as to further dissemination of the Information*'.⁴⁵
34. On the basis of the evidence in the preceding paragraph and taking into account the relevant caselaw on the issue of waiver,⁴⁶ I am satisfied that the Attachment was sent to the Consulting Firm for a limited and specific purpose of preparing a proposal for JCU, noting that the services of the Consulting Firm were retained in connection with the associated litigation, for JCU as the client. I am further satisfied that by sending the Attachment to the Consulting Firm, and describing it as set out in Email 2, JCU (represented by its lawyers) was not acting inconsistently with the maintenance of confidentiality.
35. Therefore, I find that there has been no waiver of Privilege in relation to the Attachment or the subject paragraph of Email 2.
36. In summary, I find that the Attachment and the subject paragraph of Email 2 would be privileged from production in a legal proceeding on the ground of Privilege and are therefore exempt from disclosure under the RTI Act.⁴⁷

DECISION

37. I vary the decision under review and find that the Information in Issue is exempt information under section 48 and schedule 3, section 7 of the RTI Act and access to it may therefore be refused under section 47(3)(a) of the RTI Act.
38. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

³⁹ Description from page two of the released documents, which is the email attaching the Attachment.

⁴⁰ See Chernov JA's discussion at [20] – [24] in *Spotless Group Ltd and Others v Premier Building and Consulting Group Pty Ltd* (2006) 16 VR 1.

⁴¹ Above n 22.

⁴² Above n 23.

⁴³ As set out in the Consulting Firm's proposal dated 14 August 2020 (released to the applicant in this review).

⁴⁴ Email from JCU's legal representatives to the Consulting Firm dated 10 August 2020.

⁴⁵ Submission from JCU dated 11 February 2022.

⁴⁶ *Mann v Carnell* at [15]-[16] per Gleeson CJ, Gaudron, Gummow and Callinan JJ.

⁴⁷ Section 47(3)(a) of the RTI Act.

K Shepherd
Acting Right to Information Commissioner

Date: 28 July 2022

APPENDIX

Significant procedural steps

Date	Event
10 December 2020	OIC received the applicant's application for external review.
14 December 2020	OIC requested preliminary documents from JCU.
18 December 2020	OIC received requested preliminary documents from JCU.
5 January 2021	OIC notified the applicant and JCU that the external review application had been accepted. OIC requested the Information in Issue from JCU.
1 February 2021	OIC received the Information in Issue from JCU.
18 May 2021	OIC conveyed a preliminary view to JCU.
11 June 2021	JCU replied to OIC's preliminary view.
10 September 2021	OIC conveyed a preliminary view to JCU, its legal representatives and the Consulting Firm.
6 October 2021	JCU, its legal representatives and the Consulting Firm replied to OIC's preliminary view, proposing informal resolution.
21 October 2021	OIC conveyed the informal resolution proposal to applicant.
28 October 2021	The applicant responded to the informal resolution proposal.
4 November 2021	OIC conveyed a revised informal resolution offer to JCU, its legal representatives and the Consulting Firm and requested submissions.
19 November 2021	The Consulting Firm responded to the revised informal resolution proposal.
23 November 2021	JCU and JCU's legal representatives responded to the revised informal resolution proposal and provided further responsive documents to OIC.
23 December 2021	OIC conveyed the further revised informal resolution proposal to applicant.
21 January 2022	The applicant declined the further revised informal resolution proposal.
28 January 2022	OIC requested submissions from JCU, its legal representatives and the Consulting Firm in response to its 10 September 2021 preliminary view and further located documents.
11 February 2022	JCU, its legal representatives and the Consulting Firm replied to OIC's preliminary view.
22 February 2022	JCU and its legal representatives confirmed agreement to release some information to the applicant.
24 February 2022	The Consulting Firm confirmed agreement to release some information to the applicant. OIC informed the applicant some information would be released.
17 March 2022	The applicant confirmed it wished to proceed with the review.
14 April 2022	OIC conveyed a preliminary view to the applicant.
4 May 2022	JCU and its legal representatives agreed to release further information to the applicant.
11 May 2022	JCU released further information to the applicant.
17 May 2022	The applicant responded to OIC's preliminary view.

Date	Event
26 May 2022	OIC conveyed a further preliminary view to JCU, the Consulting Firm and JCU's legal representatives.
6 June 2022	JCU and JCU's legal representatives responded to OIC's preliminary view, agreeing to release further information.
7 June 2022	The Consulting Firm responded to OIC's preliminary view, agreeing to release further information.
10 June 2022	JCU released further information to the applicant.
16 June 2022	The applicant requested a formal written decision.
4 July 2022	OIC asked JCU's legal representatives for further information.
7 July 2022	JCU's legal representatives provided a further submission to OIC.
21 July 2022	The Consulting Firm advised it did not seek to participate any further in the review.
22 July 2022	JCU provided further information to OIC.