



Decision and Reasons for Decision

Application Number: 311022

Applicant: Bedran

Respondent: Gold Coast City Council

Decision Date: 22 January 2013

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION – GROUNDS ON WHICH ACCESS MAY BE REFUSED – EXEMPT INFORMATION – information subject to legal professional privilege – correspondence passing between the agency and its legal advisers – information accessed by agency employee – whether the information would be privileged from production in a legal proceeding on the ground of legal professional privilege – waiver of privilege – sections 47(3)(a) and 48 of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to Gold Coast City Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to the content and viewing history of a number of documents held in Council's document management system.
2. Council identified 149 pages responsive to the access application and decided to grant access to 22 full pages and 10 part pages, and refuse access to the balance of the information on the basis that it was exempt on the grounds of legal professional privilege.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Council's decision to refuse access to information. On external review, Council located 36 additional pages responsive to the access application and submitted these pages were also exempt on the grounds of legal professional privilege.
4. The documents consists of communications between Council and its legal advisers about various issues primarily relating to the applicant, who was a Council employee.
5. The viewing history for the relevant documents shows that the applicant accessed the documents through Council's electronic document management system before making the access application under the RTI Act. Council had previously directed the applicant to confine her access of Council documents to those directly related to her work duties.

6. In the circumstances of this review, Council is entitled to refuse access to the relevant information as it would be privileged from production in a legal proceeding on the ground of legal professional privilege.

Background

7. Significant procedural steps relating to the application and the external review are set out in the appendix to this decision.

Reviewable decision

8. The decision under review is Council's decision dated 17 April 2012.

Evidence considered

9. Evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).
10. Council and the applicant provided OIC with copies of correspondence exchanged between them and their respective legal advisers in the context of legal proceedings involving Council and the applicant. I have considered the content of this correspondence where it is relevant to the issues under consideration in this external review.

Information in issue

11. As set out in paragraph 4, the information in issue in this review consists of communications between Council and its legal advisers and the titles of these documents as they appear in the viewing history for the documents (**Information in Issue**). The Information in Issue is located on 10 part pages and 153 full pages.¹

Relevant law

12. Under the RTI Act, a person has a right to be given access to documents of an agency.² However, this right is subject to other provisions of the RTI Act including the grounds on which an agency may refuse access to documents.³ Relevantly, the RTI Act provides that access may be refused to documents to the extent that they comprise exempt information.⁴ Schedule 3 sets out categories of information the disclosure of which Parliament has deemed to be contrary to the public interest, and therefore exempt from disclosure.⁵
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 of legal professional privilege. This exemption reflects the requirements for establishing legal professional privilege at common law.⁶

¹ In addition to requesting review of Council's decision to refuse access to information, the applicant also raised a sufficiency of search concern in her external review application. Council identified the additional documents during the external review, and accordingly, the sufficiency of Council's searches is no longer in issue in this review.

² Section 23 of the RTI Act.

³ As set out in section 47 of the RTI Act.

⁴ Section 47(3)(a) of the RTI Act.

⁵ Section 48(2) of the RTI Act.

⁶ *Ozcare and Department of Justice and Attorney-General* (Unreported, Information Commissioner of Queensland, 13 May 2011) at [12].

14. The general principles of legal professional privilege were summarised by the High Court of Australia in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*⁷ 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.⁸ 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.⁹ Litigation privilege attaches to confidential communications between a legal adviser and client in relation to current or reasonably anticipated litigation.¹⁰
16. In some cases, communications may not be subject to legal professional privilege because privilege has been waived, either expressly or impliedly, or the improper purpose exception applies.

Findings

Is the Information in Issue subject to legal professional privilege?

17. Yes for the reasons that follow.
18. The RTI Act prohibits the Information Commissioner from including information that is claimed to be exempt in reasons for a decision on external review.¹¹ This prevents me from describing the actual content of the Information in Issue in these reasons. However, the Information in Issue can be described generally as correspondence between Council and its legal advisers, both from within Council and its external legal advisers. The correspondence is about:
- various issues relating to the applicant and her employment with Council
 - proceedings before the Queensland Industrial Relations Commission (**QIRC**); and
 - an issue unrelated to the applicant under consideration by Council.
19. I am satisfied that the relevant legal advisers within Council and Council's external legal adviser have the necessary degree of independence required to attract legal professional privilege.

Dominant purpose

20. The dominant purpose is '*the ruling, prevailing, paramount or most influential purpose*'¹² and is to be determined objectively, having regard to the evidence, the nature of the document and the parties' submissions.¹³ Legal advice can involve more

⁷ (2002) 213 CLR 543 at [9].

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

⁹ *AWB v Cole (No.5)* (2006) 155 FCR 30 at [41]; *Waterford v Commonwealth* (1987) 163 CLR 54 (**Waterford**) at [95]; *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357 (**Pratt Holdings**).

¹⁰ *Mitsubishi*.

¹¹ Section 108(3) of the RTI Act.

¹² *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at [416].

¹³ *Grant v Downs* (1976) 135 CLR 674 at [692].

than just advising a client about the law—it also includes advice as to *‘what should prudently and sensibly be done in the relevant legal context’*.¹⁴ However, it does not include advice that is predominantly for administrative, financial, personal, commercial or public relations purposes.¹⁵

21. The applicant submits that the dominant purpose of the communications was not to provide legal advice *‘but to investigate the matter, to identify causes of the matter and establish the circumstances’*.¹⁶ The applicant’s legal adviser states that the Information in Issue *‘relate[s] to management strategies designed to disadvantage’* the applicant.¹⁷
22. Having carefully reviewed the Information in Issue, I am satisfied that the dominant purpose of the communications was:
 - to seek or provide legal advice about various matters under consideration by Council; or
 - to provide legal services to Council in relation to current, or reasonably anticipated legal proceedings, including proceedings before the QIRC.

Confidential communications

23. Legal professional privilege will only apply to communications which are confidential. The applicant has said that she, and other Council employees, were able to access the Information in Issue through Council’s electronic document management system ‘iSpot’.¹⁸ Council has provided¹⁹ a copy of the iSpot viewing history for the Information in Issue which indicates the applicant accessed the documents through iSpot prior to making an access application under the RTI Act. While iSpot enables access to documents to be restricted to certain users, the access controls on the Information in Issue were set to enable all users within Council to access the documents for a period of time.
24. The applicant submits that the communications in the Information in Issue were not confidential as they were stored on iSpot without restrictions on access. She further submits.²⁰
 - not all of the Information in Issue included the word *‘privileged’* in the document titles
 - confidentiality cannot be established *‘because the documents were about my employment and events of which I was aware because I was involved in’*
 - the Information in Issue was saved in the same shared document management system as other Council documents, rather than on a separate document management system
 - *‘[a]s a general user of iSpot I had general entitlement to access Council’s information’*
 - *‘I already have knowledge of the content of the material and able to recall the contents or purport of the same’*; and

¹⁴ *Balabel v Air India* [1988] Ch 317 per Lord Justice Taylor at [330] and referred to with approval in *Pratt Holdings* at [382].

¹⁵ *Three Rivers District Council v Governor and Company of the Bank of England (No.6)* [2005] 4 All ER 948, 989; *Barnes v Commissioner for Taxation* [2007] FCAFC 88 [8]; *Waterford* at [77], [85].

¹⁶ In her application for external review dated 22 April 2012.

¹⁷ In correspondence to Council, a copy of which was provided to OIC by the applicant on 3 July 2012.

¹⁸ Applicant’s submission to OIC dated 16 September 2012.

¹⁹ As part of its submission to OIC dated 7 December 2012.

²⁰ Applicant’s submissions to OIC dated 16 September 2012 and 6 November 2012.

- *'I am the opponent and I became familiar with the contents of the [Information in Issue] because [it was] saved inappropriately and now access cannot be denied on the grounds that they are confidential.'*
25. In response, Council submits that when entering the Information in Issue into iSpot, an attempt was made to confine access to a single user but due to *'the configuration of the system, the [Information in Issue] defaulted to being generally accessible, during overnight processing'*.²¹ Council submits that it became aware of the error with the user settings during QIRC proceedings in which the applicant produced parts of the Information in Issue. Council has provided evidence that it changed the user settings to restrict access to the Information in Issue as soon as it became aware of the issue.²²
26. Council also submits that it wrote to the applicant in September 2010 and February 2011 about her accessing Council documentation outside the requirements of her role, and which she was not entitled to access.²³ The applicant was directed to confine her access of Council documents, including those on iSpot, to those directly related to her work duties. The iSpot viewing history for the Information in Issue indicates the applicant accessed the Information in Issue on iSpot after the two directions were issued by Council.
27. I do not consider that Council is required to include the word *'privileged'* in the title of documents for the information to be subject to legal professional privilege. Most of the communications within the Information in Issue were clearly marked *'private and confidential'*. I am also satisfied that Council is not required to store privileged information on a separate computer system in order for the Information in Issue to be confidential. Council stored the Information in Issue on iSpot, access to which is restricted to Council employees.
28. I acknowledge that Council's document management system did enable a broad number of users within Council to access the Information in Issue for a period of time. However, access was at all times restricted to Council employees. I do not accept the applicant's argument that as a user of iSpot, she had a general right to access all Council documents. The applicant has herself stated that the iSpot training manual *'states that access to shared documents in iSpot is on the "need to know basis"'*.²⁴ I am satisfied that Council employees are under an obligation to only access those Council documents which are relevant to the performance of their duties. The applicant was reminded of these obligations on two occasions prior to accessing the Information in Issue. The Information in Issue was not relevant to the applicant's performance of her work duties.
29. I do not consider the applicant's argument that she was a party to some of the events which are the subject of the Information in Issue is relevant to determining if the communications are confidential.
30. The applicant has also referred to a number of websites, articles and case law which she says support her argument that the Information in Issue was not confidential, or alternatively, that privilege has been waived. In particular, the applicant refers to the Federal Court of Australia's decision in *Australian Competition and Consumer*

²¹ Council's submission dated 7 December 2012.

²² The iSpot viewing history for the Information in Issue, provided to OIC as part of Council's submission dated 7 December 2012.

²³ Council provided OIC with a copy of this correspondence in its submission dated 7 December 2012.

²⁴ In the applicant's correspondence to Council's legal advisers, a copy of which was provided to OIC by the applicant on 3 July 2012.

*Commission v Cadbury Schweppes Pty Ltd*²⁵ (**Cadbury**) in which the Court said ‘one element of confidentiality is essential, namely non-disclosure to one’s opponent’.²⁶

31. In *Cadbury*, the Court considered whether the relevant information was confidential in circumstances where it had been served on the opposing side in earlier litigation between the parties. I consider that the circumstances of this review can be distinguished from those in *Cadbury*, where the relevant party knowingly and voluntarily disclosed the relevant information. In the circumstances of this review, I am satisfied that Council did not voluntarily or knowingly provide the Information in Issue to the applicant. Rather, the applicant searched the iSpot system for documents which were not relevant to her work duties and accessed those documents even though many were marked private and confidential.
32. As soon as it became aware that the applicant had accessed the Information in Issue, Council changed the iSpot user settings to restrict access to the Information in Issue and took steps to attempt to recover the Information in Issue. The applicant and Council have provided OIC with copies of a number of letters from Council’s legal advisers to the applicant and her legal adviser in which Council asserts privilege over the Information in Issue and requests that the applicant return the Information in Issue.
33. The applicant also submits that the communications were between, or forwarded to, a broad range of areas within Council and are therefore no longer confidential.²⁷ I have carefully examined the Information in Issue and am satisfied that the privileged communications involved only those officers within Council who were directly involved in the matters under consideration. In any event, merely communicating privileged legal advice internally within a corporation or agency will not of itself deprive the agency or corporation of the benefit of that privilege.²⁸
34. For the reasons set out above, I am satisfied that the communications in the Information in Issue were confidential communications between Council and its independent legal advisers, made for the dominant purpose of either obtaining or providing legal advice, or providing legal services in relation to current or reasonably anticipated legal proceedings. Accordingly, I find that the Information in Issue satisfies the elements of legal professional privilege.

Has Council waived legal professional privilege?

35. No, for the reasons that follow.
36. Legal professional privilege may be waived either:
 - intentionally, by the client or the client’s agent disclosing a privileged communication to persons outside of the privileged relationship (**express waiver**);²⁹ or
 - by implication of law, in circumstances where there is conduct by, or on behalf of, the client which is inconsistent with the maintenance of the privilege, whether the client intended that result or not (**implied waiver**).³⁰

²⁵ [2009] FCAFC 32.

²⁶ *Cadbury* at [37].

²⁷ In her application for external review dated 22 April 2012.

²⁸ *N55WLN and Department of Health* [2012] QICmr 19 at [29].

²⁹ *Goldberg v Ng* (1994) 33 NSWLR 639 (**Goldberg**) at [670].

³⁰ *Osland v Secretary to the Department of Justice* [2008] HCA 37 at [45].

37. Legal professional privilege will be expressly waived when the client, or agent of the client, deliberately and intentionally discloses the confidential communications.³¹ The applicant has provided³² a copy of Council's *Fact Sheet on Fraud Prevention and Security* which indicates that Council's computers and communication systems may be intercepted, monitored, audited, inspected and disclosed to a third party. The applicant submits that legal professional privilege was '*automatically waived*' by virtue of this policy as the Information in Issue was stored on a computer system that was subject to audit by a third party.³³
38. I do not consider that Council's policy acknowledging that its computer systems may be audited by a third party constitutes an automatic or express waiver of privilege. I am satisfied that Council has not deliberately or intentionally disclosed the Information in Issue to the applicant and accordingly, I find there has been no express waiver of legal professional privilege.
39. In *Mann v Carnell*³⁴ (**Mann**) the High Court of Australia considered circumstances in which legal professional privilege will be impliedly waived:
- Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is 'imputed by operation of the law'. This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege ...*³⁵
40. The question of implied waiver must be considered in the context of the relevant circumstances and the facts of the particular case.
41. The applicant argues that Council waived privilege firstly by not restricting access to the Information in Issue on iSpot. For the reasons outlined at paragraphs 25 to 31 above, I am satisfied that Council did not knowingly or intentionally disclose the Information in Issue to the applicant. While Council may have enabled the applicant to gain access to the Information in Issue through the user settings on its iSpot system, I am satisfied that this was inadvertent and unintentional.
42. The applicant has referred in her submissions to cases such as *Cadbury* in which:
- communications were voluntarily and knowingly disclosed to the opponent, or to other persons outside of the privileged relationship; but
 - the person disclosing the information did not intend to waive privilege or did not appreciate that their actions would constitute waiver.
43. However, I consider the circumstances of this review are more analogous to circumstances in which privileged information is mistakenly or inadvertently disclosed to the opponent or to other persons. In *Director of Public Prosecutions (Commonwealth) v Kane and Others*³⁶ (**Kane**) the Supreme Court of New South Wales found that waiver should not be implied or imputed in circumstances where there was no intention to waive privilege because the disclosure was inadvertent or mistaken.

³¹ *Goldberg* at [670].

³² As part of her submission to OIC dated 4 October 2012.

³³ Submission to OIC dated 28 October 2012.

³⁴ (1999) 201 CLR 1.

³⁵ *Mann* at [13]

³⁶ (1997) 140 FLR 468.

44. In *Kelly and Department of Justice and Attorney-General*³⁷ (**Kelly**), the Assistant Information Commissioner considered whether privilege had been waived in circumstances where the Freedom of Information Unit had mistakenly allowed the applicant to view privileged information. In finding that the inadvertent disclosure did not constitute waiver, the Assistant Information Commissioner stated:

I do not consider that the Department's inadvertent disclosure constitutes conduct inconsistent with the maintenance by the client of confidentiality in the documents in question. The Department always maintained that the documents in question were subject to a claim of privilege. It was not a question of the Department disclosing the documents and then realising that a claim of privilege ought to have been made.

45. I consider the circumstances of this review are similar to those in *Kane and Kelly*. Council has always maintained privilege over the Information in Issue. As noted at paragraph 32, since becoming aware that the applicant had accessed the Information in Issue, Council, through its legal advisers, has taken repeated steps to recover the Information in Issue.
46. I do not consider that Council's conduct was inconsistent with the maintenance of privilege as:
- Council's actions in enabling the applicant to access the Information in Issue through iSpot were inadvertent and unintentional
 - the applicant accessed the Information in Issue after being provided with two directions about accessing Council information outside of that required for performance of her role; and
 - on becoming aware that the Information in Issue had been accessed by the applicant, Council immediately took steps to secure the documents and assert privilege over them.
47. The applicant also contends that Council waived privilege over the Information in Issue in the context of QIRC proceedings involving Council and the applicant. In particular, the applicant submits that Council included two of the documents in the Information in Issue on their Amended List of Documents filed with the QIRC and delivered these two documents to her and the QIRC in the context of the QIRC proceedings. She states that the Information in Issue was '*read out by parties and used for cross-examinations*' at a hearing before the QIRC and a transcript of this hearing is publicly available through the State Recording Bureau.³⁸
48. In response, Council acknowledges that some of the Information in Issue was disclosed to the applicant's legal adviser and the QIRC but submits that this was for the limited purpose of the proceedings before the QIRC. Council has provided copies of relevant correspondence to the applicant's legal adviser which states that Council maintains privilege over these documents. I have reviewed the QIRC's decision³⁹ in this matter in which Deputy President Swan concludes that legal professional privilege has not been waived over the documents under consideration in that matter.
49. For the reasons set out above, I am satisfied that Council's actions in relation to the Information in Issue have not been inconsistent with its claim of privilege over the Information in Issue. Accordingly, I find that privilege has not been waived over the Information in Issue.

³⁷ (Unreported, Queensland Information Commissioner, 13 March 2002).

³⁸ Applicant's submission dated 6 November 2012.

³⁹ *Bedran and Gold Coast City Council* (TD/2011/61), Queensland Industrial Relations Commission, 11 January 2013.

Does the improper purpose exception apply?

50. There is no information before me that suggests that the communications in the Information in Issue were made in furtherance of any illegal or improper purpose.

Conclusion

51. Based on the above, I find that the Information in Issue meets the requirements for legal professional privilege and that privilege has not been expressly or impliedly waived over the Information in Issue. Accordingly, I find that Council is entitled to refuse access to the Information in Issue as it is exempt under schedule 3, section 7 of the RTI Act.

DECISION

52. I affirm the decision under review and find, for the reasons set out above, that Council is entitled to refuse access to the Information in Issue under sections 47(3)(a) and 48 of the RTI Act.
53. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Lisa Meagher
Acting Assistant Information Commissioner

Date: 22 January 2013

APPENDIX**Significant procedural steps**

Date	Event
4 March 2012	The applicant applied to Council for access to documents.
12 March 2012	The applicant amended her access application to request additional documents.
14 March 2012	Council clarified the scope of the access application with the applicant.
17 April 2012	Council issued its decision to the applicant.
23 April 2012	OIC received the applicant's external review application.
26 April 2012	OIC notified the applicant and Council that OIC had accepted the external review application. OIC asked Council to conduct further searches for the additional documents the applicant identified in her external review application.
15 May 2012	Council provided a copy of the Information in Issue, including the additional responsive documents located by Council.
10 June 2012	The applicant provided a submission to OIC.
3 July 2012	The applicant provided a submission to OIC.
11 September 2012	OIC conveyed a preliminary view to the applicant and invited the applicant to make submissions if she did not agree with the view.
16 September 2012	The applicant provided a submission to OIC.
4 October 2012	The applicant provided a submission to OIC.
19 October 2012	The applicant made oral submissions to OIC.
25 October 2012	OIC conveyed the applicant's submission to Council. Council provided oral submissions in response.
27 October 2012	The applicant provided a submission to OIC.
28 October 2012	The applicant provided attachments to her submission dated 27 October 2012.
5 November 2012	The applicant provided a submission to OIC indicating that parts of the Information in Issue had been read out during the QIRC proceedings. OIC asked the applicant to confirm if other access was available to the Information in Issue.
6 November 2012	The applicant advised OIC that other access was not available to the Information in Issue and made a further submission.
14 November 2012	The applicant provided a submission to OIC.
14 November 2012	OIC requested Council provide a submission on legal professional privilege.
14 November 2012	The applicant provided a further submission to OIC.
7 December 2012	Council provided a submission to OIC.
13 December 2012	The applicant provided a submission to OIC.
17 January 2013	The applicant provided a submission to OIC.