



## Decision and Reasons for Decision

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<b>Citation:</b>	<i>Taylor and Queensland Treasury</i> [2015] QICmr [14] (2 June 2015)
<b>Application Number:</b>	312253
<b>Applicant:</b>	Taylor
<b>Respondent:</b>	Queensland Treasury
<b>Decision Date:</b>	2 June 2015
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – LEGAL PROFESSIONAL PRIVILEGE – whether letter of advice is exempt on the basis of legal professional privilege – waiver – sections 47(3)(a) and 48 and schedule 3, section 7 of the <i>Right to Information Act 2009</i> (Qld)</b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied to Queensland Treasury (**QT**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to ‘...any or all internal/external advice to Under Treasurer by DLA Piper for RQ relating to... [the applicant] personally (not subject to any confidentiality) dated on or about 13/14 May 2014’.
2. QT located an eight-page letter of advice, dated 14 May 2014 (**Letter**). QT refused the applicant access to the Letter, on the basis the document comprised exempt information as information attracting legal professional privilege (**LPP**).<sup>1</sup>
3. The applicant<sup>2</sup> applied for external review of QT’s decision, contending that if the Letter does attract LPP, LPP has been waived, as the Letter has been the subject of press reportage.
4. QT’s decision is affirmed. For the reasons explained below, I am satisfied that the Letter attracts LPP, that LPP has not been waived, and that the Letter therefore comprises exempt information, to which access may be refused.

#### Background

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

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<sup>1</sup> In accordance with section 47(3)(a), section 48 and schedule 3, section 7 of the RTI Act.

<sup>2</sup> Through his solicitors.

## Reviewable decision

6. QT made a decision<sup>3</sup> refusing access to the Letter on the basis of LPP. The applicant applied for internal review of that original decision.<sup>4</sup> QT's purported internal review decision,<sup>5</sup> however, was made outside the timeframe prescribed in section 83(2) of the RTI Act.<sup>6</sup>
7. The decision under review is therefore the decision QT is taken to have made under section 83(2) of the RTI Act, affirming the original decision.<sup>7</sup>

## Evidence considered

8. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).

## Information in issue

9. The information in issue comprises the Letter – an eight-page letter from DLA Piper to the Under Treasurer dated 14 May 2014.

## Relevant law

10. Section 23 of the RTI Act confers a general right of access to documents of an agency. This right, however, is subject to a number of exclusions and limitations, including grounds for refusal of access prescribed in section 47 of the RTI Act. Relevantly, an agency may refuse access to documents to the extent that they comprise exempt information.<sup>8</sup> Schedule 3 of the RTI Act sets out categories of exempt information.<sup>9</sup>
11. 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 LPP. This exemption reflects the requirements for LPP at common law.<sup>10</sup> At common law, LPP attaches to confidential communications between a lawyer and client made for the dominant purpose of, relevantly, seeking or giving legal advice or professional legal assistance.<sup>11</sup>
12. Qualifications and exceptions to LPP may, in particular circumstances, affect the question of whether information attracts or remains subject to LPP. Relevant in this case is the question of possible waiver of LPP (discussed below).

## Findings

13. The Letter comprises a confidential communication made by an independent legal adviser<sup>12</sup> for the dominant – if not sole – purpose of conveying legal advice to the

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<sup>3</sup> Dated 28 August 2014.

<sup>4</sup> By email dated 17 September 2014.

<sup>5</sup> Dated 17 October 2014.

<sup>6</sup> Being 20 business days.

<sup>7</sup> OIC explained these procedural points to the applicant in our letter dated 10 December 2014. They are of little to no practical consequence, as the purported internal review decision was to the same effect as the decision deemed to have been made under section 83(2) of the RTI Act: ie, to affirm the original decision refusing access to the Letter, on the basis the document attracted LPP. For the sake of completeness, I should also note that the applicant's application to OIC for external review was received outside the statutory timeframe of 20 business days for making such application. The Right to Information Commissioner decided, however, to exercise the discretion under section 88(1)(d) of the RTI Act to accept that application outside of this time: letter dated 10 December 2014.

<sup>8</sup> Section 47(3)(a) of the RTI Act.

<sup>9</sup> Section 48(2) of the RTI Act.

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

<sup>11</sup> *Esso Australia Resources Ltd v Commission of Taxation* (1999) 201 CLR 49.

<sup>12</sup> DLA Piper, as detailed in internal review decision of 17 October 2014.

Under Treasurer. I am satisfied the Letter therefore attracts LPP.<sup>13</sup> Subject to the question of waiver, the document therefore comprises exempt information to which access may be refused.

### **Waiver of LPP**

14. LPP can be waived intentionally (express waiver) or by implication of law (implied waiver). Express waiver occurs where the privilege holder<sup>14</sup> deliberately and intentionally discloses a privileged communication. Implied waiver occurs when the privilege holder performs an act inconsistent with the maintenance of the confidentiality LPP is intended to protect.<sup>15</sup>
15. The applicant contends that the Letter was the subject of a newspaper article,<sup>16</sup> resulting in a waiver of the LPP attaching to the Letter.
16. OIC referred the applicant's contentions to QT via correspondence<sup>17</sup> comparing the Letter and the relevant article, and requesting further information. In reply, QT advised OIC that no action had been taken to waive privilege in the Letter, and that the Letter has not, to the best of QT's knowledge, been circulated or disclosed beyond QT.<sup>18</sup>
17. I accept QT's advice, which in my view eliminates the possibility of express waiver, refuting as it does any suggestion QT disseminated the Letter outside of the privileged relationship of solicitor and client with the deliberate intention of waiving LPP.
18. I also consider that both QT's account and a careful examination of relevant evidence negate any suggestion of an implied waiver of LPP.
19. There is nothing in the information before me establishing conclusively that the Letter, or its substance, has been disseminated. Crucially, however, even if it *could* be categorically established that the Letter *had* been disseminated beyond the privileged relationship of solicitor and client,<sup>19</sup> this would not of itself result in a waiver of privilege. This is because while a privilege holder may waive LPP unintentionally,<sup>20</sup> the relevant disclosure alleged to give rise to the waiver must have occurred voluntarily.<sup>21</sup>
20. In this case, as noted above, QT – the client – has advised OIC that the Letter has not, to QT's knowledge, been disclosed to any person outside of QT. There is nothing before me to cause me to question QT's advice on this point. I therefore consider that, even if it could be shown that the Letter had been disseminated, such disclosure would not, in view of QT's position that it has not disclosed the Letter nor taken any other steps to waive privilege, have occurred as a result of a voluntary act on the part of – or

<sup>13</sup> Parts of the submissions accompanying the applicant's application for external review appear to contest the existence of LPP. In my letter to the applicant's solicitors dated 19 March 2015, I explained the nature of the Letter, its authorship, the circumstances of its communication as set out in this paragraph, and my preliminary view that it therefore attracted LPP. While the applicant in subsequent submissions has continued to maintain that any LPP has been waived (an issue discussed further below), the applicant has not directly challenged the actual existence of LPP. I further note that elsewhere in the submissions accompanying the applicant's application for external review, and again in submissions dated 22 May 2015, the applicant appears to contend that the balance of the public interest favours disclosure of the Letter (see for example pages 21-22 and 25-28 of the submissions accompanying his application for external review, and references to 'natural justice' in his 22 May 2015 submissions). As I explained to the applicant in my letter dated 19 March 2015, schedule 3, section 7 of the RTI Act does not contain a public interest balancing test. Public interest considerations may not, therefore, be taken into account in applying this provision.

<sup>14</sup> For present purposes, QT.

<sup>15</sup> *Mann v Carnell* (1999) 201 CLR 1; *Osland v Secretary to the Department of Justice* (2008) 234 CLR 275 (**Osland**).

<sup>16</sup> Specifically, an article in the *Courier-Mail* dated 21 May 2014.

<sup>17</sup> Dated 11 February 2015.

<sup>18</sup> QT submissions dated 25 February 2015 and 18 March 2015.

<sup>19</sup> As asserted in the submissions accompanying the applicant's application for external review dated 14 November 2014, and further submissions dated 24 April 2015.

<sup>20</sup> The test for implied waiver being objective: *Osland*.

<sup>21</sup> See generally *BW and Commonwealth Ombudsman* [2014] AICmr 46 (28 May 2014) citing and discussing *College of Law Ltd v Australian National University* [2013] FCA 492 and *Boensch v Pascoe* [2007] FCA 532, including the court's observation in the latter case that 'what is required is a voluntary act which is inconsistent with the purpose of maintaining confidentiality. An inadvertent or unintentional act will not be sufficient to amount to waiver' (*BW*, at [19]).

authorised by – QT. Any such disclosure would not, therefore, amount to an act resulting in an implied waiver of privilege.

### **Applicant's submissions**

21. I conveyed the substance of my reasoning as expressed at paragraphs 13-20 to the applicant, by letter dated 19 March 2015.<sup>22</sup> In reply, the applicant maintained his contention that QT must have disclosed the Letter to the newspaper, thereby waiving LPP in the document.<sup>23</sup> The applicant's submissions, in essence, amount to a speculative argument that the newspaper would not have published what might otherwise be potentially defamatory material, without being certain of its truth – such certainty having had to have been based on access to the Letter.
22. The applicant's submissions as outlined in the preceding paragraph do not dissuade me from my view that the Letter continues to attract LPP. QT's uncontroverted advice<sup>24</sup> is that it has not, as recorded in paragraph 16, circulated or disseminated the Letter. Accordingly, even if it could be demonstrated that dissemination outside the privileged relationship of solicitor and client had occurred,<sup>25</sup> this would not amount to the intentional, authorised and voluntary act that, on my understanding of the relevant principles, is necessary to establish a finding of waiver.

### **DECISION**

23. I affirm the decision under review. I find that access to the Letter may be refused under section 47(3)(a) of the RTI Act, on the basis the information is exempt information under section 48 and schedule 3, section 7 of the RTI, as information which would be privileged from production in a legal proceeding on the ground of legal professional privilege.
24. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

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**Clare Smith**  
**Right to Information Commissioner**

**Date: 2 June 2015**

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<sup>22</sup> This letter inadvertently referred to the decision under review as QT's purported internal review decision dated 17 October 2014, rather than the deemed decision actually under review (see paragraphs 6-7). This is a clerical error of no consequence, for the reasons explained at note 7: ie, the deemed decision and purported internal review decision were each to the same effect – to affirm the original decision refusing access on the grounds of LPP.

<sup>23</sup> Applicant's submissions dated 24 April 2015 and 22 May 2015. These latter submissions also expressed concern as to aspects of QT's participation in this review. Specifically, the applicant stated he was 'dismayed' that QT had not provided additional submissions in reply to OIC's preliminary view letter dated 19 March 2015 and the applicant's 24 April 2015 submissions responding to that preliminary view. While QT was invited to lodge such submissions, given that OIC's preliminary view was not adverse to QT, the fact it did not do so was not unexpected. QT's participation in this review has been entirely appropriate.

<sup>24</sup> Noting that it is an offence to knowingly give false or misleading information to OIC: section 177(1) of the RTI Act.

<sup>25</sup> Such as by way of a 'leak', as suggested in the applicant's 22 May 2015 submissions.

## APPENDIX

### Significant procedural steps

Date	Event
5 August 2014	QT received the RTI access application.
28 August 2014	QT issued its initial decision to the access applicant.
17 September 2014	The applicant applied for internal review of QT's initial decision.
16 October 2014	The time for making an internal review decision expired. Under section 83(2) of the RTI Act, QT was taken to have made a decision affirming the original decision to refuse access.
17 October 2014	QT issued its purported internal review decision.
17 November 2014	The time for lodging an external review application expired.
19 November 2014	The applicant applied to OIC for external review of QT's deemed internal review decision. OIC notified QT that the external review application had been received and requested procedural documentation.
25 November 2014	OIC received requested procedural documents from QT.
2 December 2014	OIC requested a copy of the Letter in issue from QT
4 December 2014	OIC received a copy of the Letter in issue from QT.
10 December 2014	OIC notified the applicant and the Department that the Right to Information Commissioner had exercised the discretion under section 88(1) of the RTI Act, to accept the external review application outside of the statutory timeframe of 20 business days.
11 February 2015	OIC wrote to QT, summarising the applicant's submissions as to waiver and requesting further information from QT.
25 February 2015	OIC received QT's reply to our 11 February 2015 letter.
10 March 2015	OIC requested additional information from QT.
16 March 2015	The applicant requested an update on the status of the review. OIC contacted QT, following-up OIC's 10 March 2015 request for additional information.
17 March 2015	OIC updated the applicant on the status of the review.
18 March 2015	QT supplied OIC with additional requested information.
19 March 2015	OIC conveyed to the applicant our preliminary view that access to the Letter may be refused, on the ground the document comprised exempt information as information subject to LPP. OIC invited the applicant to provide submissions in reply by 9 April 2015.
9 April 2015	The applicant requested an extension of time to reply to OIC's preliminary view to 24 April 2015. OIC granted the extension.
24 April 2015	The applicant provided submissions in support of his case for access.
30 April 2015	OIC notified QT of OIC's preliminary view, and the applicant's position in response. QT was asked to make any further submissions it may wish to make in the review by 14 May 2015. No further submissions were received from QT.
21 May 2015	OIC updated the applicant on the status of the review.
22 May 2015	The applicant provided further submissions, reiterating his case for access and raising certain procedural issues.