



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>Stafford and Queensland Police Service</i> [2016] QICmr 7 (18 February 2016)</b>
<b>Application Number:</b>	<b>312400</b>
<b>Applicant:</b>	<b>Stafford</b>
<b>Respondent:</b>	<b>Queensland Police Service</b>
<b>Decision Date:</b>	<b>18 February 2016</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – LEGAL PROFESSIONAL PRIVILEGE – whether document is exempt on the basis of legal professional privilege – 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 the Queensland Police Service (**QPS**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for the report prepared by QPS documenting its review (**Review**) of the investigation into the 1991 murder of Leanne Holland (**Report**).
2. QPS submits that legal professional privilege (**LPP**) applies to the Report, a ground for refusing access under the RTI Act.
3. For the reasons explained below, I consider that the Report attracts LPP. It therefore comprises exempt information, to which access may be refused.

#### Background

4. Significant procedural steps are set out in the appendix to this decision. It is convenient, however, to briefly canvass the procedural background to this matter.
5. The applicant originally applied for access to ‘all documents in relation’ to QPS’ Review, and relied upon by QPS in ‘consideration of the matter’ and used as the basis for QPS media commentary at the conclusion of the Review. QPS considered that the work involved in processing the application in this original form would substantially and unreasonably divert its resources, and therefore sought to refuse to deal with the access application under section 41 of the RTI Act. QPS did not, however, make a decision in this regard within the relevant processing period.<sup>1</sup> QPS was therefore

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<sup>1</sup> Set out in section 18 of the RTI Act. By letter dated 13 February 2015, QPS purported to issue a decision refusing to deal with the access application; OIC treated this purported decision as a submission on external review.

taken<sup>2</sup> to have made a decision refusing access to information as requested by the applicant (**Deemed Refusal**).

6. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of QPS' Deemed Refusal. Having conducted an initial assessment of relevant issues, OIC formed the view that the work involved in dealing with the applicant's application would substantially and unreasonably divert QPS resources.<sup>3</sup> OIC twice wrote to the applicant's representative conveying this preliminary view. The applicant then agreed to narrow his application to the Report only.
7. QPS subsequently submitted, however, that the Report comprised exempt information, as information subject to LPP, and that access to the entirety of the Report may therefore be refused on this basis.

### Reviewable decision

8. The decision under review is the Deemed Refusal QPS is taken to have made under section 46(1)(a) of the RTI Act, refusing access to the Report.

### Evidence considered

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

### Information in issue

10. The information in issue comprises the Report, a 531-page document.

### Relevant law

11. Section 23 of the RTI Act confers a general right of access to documents of an agency. This right is, however, 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>4</sup> Schedule 3 of the RTI Act sets out categories of exempt information, and includes information that would be privileged from production in a legal proceeding on the ground of LPP.<sup>5</sup>
12. 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>6</sup> For present purposes, it is relevant to note that the Director of Public Prosecutions (**DPP**) may '*stand in a professional relationship of legal adviser to client, in respect of clients, such as...a government agency, who seek legal advice, or provide instructions, in respect of a criminal prosecution matter.*'<sup>7</sup>

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<sup>2</sup> Under section 46(1)(a) of the RTI Act.

<sup>3</sup> Enlivening the ground for refusing to deal with an application prescribed in section 41(1) of the RTI Act.

<sup>4</sup> Section 47(3)(a) of the RTI Act.

<sup>5</sup> Section 48 and schedule 3, section 7 of the RTI Act. This exemption reflects the requirements for LPP at common law: *Ozcare and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 13 May 2011), at [12].

<sup>6</sup> *Esso Australia Resources Ltd v Commission of Taxation* (1999) 201 CLR 49; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 552.

<sup>7</sup> *Price and Director of Public Prosecutions*, (1997) 4 QAR 157 at [37], citing relevant authorities. See also *Adamas v O'Connor* [2011] FCA 948, at [11].

## Relevant facts

13. QPS undertook a review of the original investigation into the murder of Leanne Holland, and subsequent prosecution of the applicant. This review resulted in the production of the Report. QPS then referred the Report to the DPP for advice.<sup>8</sup>

## Submissions

14. QPS' case<sup>9</sup> is that the dominant purpose for the creation of the Report was, by the time of its production, submission to the DPP for the purpose of obtaining legal advice. The Report is confidential and QPS therefore contends that it attracts LPP, in accordance with the principles set out above.
15. The applicant submits that the dominant purpose motivating the Report's creation was not the seeking of legal advice, '*but rather to formalise and summarise the findings of the review of the murder of Leanne Holland.*'<sup>10</sup> The applicant points to press reportage covering the commencement of the review which eventually culminated in production of the Report, and submits that:

*In discussing the purpose of the review, the Police Commissioner...said officers would forensically re-examine all of the evidence and re-interview witnesses, as well as search for fresh clues...We submit that such a review would be entirely redundant if there was no intention by QPS to create a formal document, such as the Report, which brings together and summarises the findings of the review and investigation. This is consistent with statements made by...[the Police Commissioner] in 2010, which state that 'we won't hold back on anything and we will let the public know the outcome.' We submit that it would not be possible for QPS to fulfil this promise without production of a report upon which to summarise and justify the findings from the review.*

*Therefore we submit that the dominant purpose of the creation of the Report was not...seeking legal advice...but instead for the creation of a formal document which was required to be completed on the review of the murder of Leanne Holland. (Footnotes omitted.)<sup>11</sup>*

16. The applicant's submissions also appear to contest the proposition that the DPP can stand in the position of independent legal adviser to the QPS:

*...any assumption that...QPS was intending to obtain legal advice from DPP at the time the Report was being produced is factually incorrect and relies upon a mischaracterisation of not only the relationship between the DPP and QPS in these circumstances but also the different roles that QPS and the DPP play in the administration of justice in Queensland.*

*The commission of the Report was the fulfilment of QPS's role to conduct investigations so as to establish whether in fact a crime has occurred and to gather evidence to support an arrest and, if applicable, to substantiate charges being proven in court, beyond a reasonable doubt. The completion of the Report and the referral of the findings of the Report to the DPP is in line with this role of the QPS to provide the findings of their*

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<sup>8</sup> The DPP, in turn, apparently forwarded the report to independent counsel for additional advice, a fact of which I advised the applicant in my letter dated 1 December 2015. The applicant's submissions dated 15 January 2016 seek in part to address whether the DPP's depositing of the Report with counsel could give rise to LPP; my findings are not, however, based upon this communication by DPP to counsel, but are premised on my review of relevant contents of the Report and its communication by QPS to the DPP. I have, however, considered the entirety of the applicant's submissions, and taken into account those parts that are relevant to the material issues before me (such as, for example, the question of dominant purpose, the applicant's strongest submissions in relation to which appear in that part of his submissions directed toward the DPP's use of the Report in seeking advice from counsel).

<sup>9</sup> See, principally, QPS's submissions dated 23 November 2015.

<sup>10</sup> Submissions dated 15 January 2016.

<sup>11</sup> As above.

*investigations and accompanying evidence to the DPP, who then have the power to prosecute a case, not the QPS.*

*To that end, the fundamental question here is what possible legal advice could QPS be seeking to obtain from the DPP regarding the Report at the time of the production of the Report. In answering this question, we submit that there is no conceivable legal advice upon [which] QPS could be seeking to obtain from the DPP at the time the Report was produced. Therefore, the Report could not have been produced for the purpose of obtaining legal advice by QPS.<sup>12</sup>*

## Findings

17. As noted in paragraph 12 above, the courts have recognised that the DPP may stand in the position of professional legal advisor to agencies such as QPS, and field instructions from same. Any suggestion on the applicant's part to the contrary is incorrect. Consequently, communications to or from the DPP may attract LPP, provided they otherwise meet the requirements for the privilege.
18. There is no question that the Report is confidential as against the applicant. The key question, then, is the identifying the dominant purpose<sup>13</sup> for the Report's creation. In this case, I accept that the dominant purpose motivating the initiating of the review which led to the Report may well have been a non-privileged purpose of the kind identified by the applicant in the submissions extracted above. Having carefully scrutinised the Report, however, I consider that the dominant purpose for its creation or production was, by the time of that production, a privileged purpose: submission to the DPP so as to enable legal advice.
19. In reaching this conclusion, I have had regard to the decision of Holmes J<sup>14</sup> in *Galway & Anor v. Constable & Ors*,<sup>15</sup> involving broadly analogous circumstances to those applying in this review. In that case, a company retained consultants to prepare a report for various purposes. Obtaining legal advice was not the dominant purpose for which the report was initially sought (ie, at the time the consultants were retained to prepare the report). By the time of the report's actual creation, however, the company had formed a 'firm purpose'<sup>16</sup> to use it to seek legal advice.
20. Having reviewed relevant authorities, Her Honour concluded that the relevant time for assessing purpose was the time of a given communication's production.<sup>17</sup> Holmes J was satisfied that the dominant purpose for the production of the report in question before her was communication of the report to solicitors, so as to obtain advice on the issues it canvassed.<sup>18</sup>
21. Adopting Her Honour's reasoning in *Galway*, I am, as noted in paragraph 18 above, satisfied that the dominant purpose for the creation of the Report was, *by the time of its production*, a privileged purpose. I am constrained in the level of detail I can relate as to the Report's contents.<sup>19</sup> It is sufficient to note, however, that it contains express conclusions firmly pointing towards its future use in the obtaining of legal advice (such use which, as noted, subsequently transpired).

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<sup>12</sup> As above.

<sup>13</sup> The 'ruling, prevailing, paramount or most influential purpose': *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at [416].

<sup>14</sup> As Her Honour then was.

<sup>15</sup> [2001] QSC 180.

<sup>16</sup> At [36].

<sup>17</sup> At [35].

<sup>18</sup> At [36].

<sup>19</sup> Section 108(3) of the RTI Act.

22. Accordingly, my view is that the Report attracts LPP. There being no submissions before me contending that any exception to LPP arises,<sup>20</sup> I therefore consider the Report to be exempt information to which access may be refused.

## **DECISION**

23. I vary the decision QPS was deemed to have made refusing access to the Report under section 46(1)(a) of the RTI Act, and find that access to the Report may be refused under section 47(3)(a) of the RTI Act.
24. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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

**Date: 18 February 2016**

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<sup>20</sup> Such as waiver or improper purpose.

## APPENDIX

## Significant procedural steps

Date	Event
13 October 2014	QPS received the access application.
29 January 2015	The timeframe prescribed in the RTI Act for making a decision on the access application expired.
13 February 2015	QPS issued a decision to the applicant, purporting to refuse to deal with the access application.
<b>10 March 2015</b>	<b>OIC received the external review application.</b> OIC notified QPS of the external review application and requested procedural documents in relation to the application.
8 April 2015	QPS provided OIC with the requested procedural documents.
19 May 2015	OIC wrote to the applicant's representative, and explained that in OIC's view, the scope of the application would substantially and unreasonably divert QPS' resources. OIC asked the applicant's representative to confirm with OIC by 26 May 2015 if the applicant wished to continue with the application.
26 May 2015	The applicant's representative confirmed with OIC that the applicant wished to continue with the review.
15 June 2015	OIC notified the applicant and QPS that OIC had accepted the application for external review. OIC advised QPS that its purported decision dated 13 February 2015 was made outside the statutory processing period, and would be treated as a submission in the review.
30 July 2015	OIC wrote to the applicant, again conveying the preliminary view that dealing with the access application would substantially and unreasonably divert QPS' resources. The applicant was invited to narrow his application, and/or provide submissions supporting his case, by 13 August 2015.
13 August 2015	OIC received the applicant's submissions, outlining the terms of a reframed application.
20 August 2015	OIC notified the applicant that the terms of the reframed application were no narrower than those of the original access application. OIC reiterated its preliminary view that QPS was entitled to refuse to deal with the application, on the basis of substantial and unreasonable diversion of resources
31 August 2015	OIC received the applicant's submissions, narrowing the scope of the access application to the Report ( <b>Narrowed Application</b> ).
1 September 2015	OIC referred the Narrowed Application to QPS for advice as to whether the application could now be processed without substantially and unreasonably diverting agency resources.
22 September 2015	QPS submitted that the Report attracted LPP and was therefore exempt information, to which access may be refused. OIC requested that QPS provide OIC with a copy of the Report.
28 September 2015	OIC received the Report from QPS.
8 October 2015	OIC conveyed a preliminary view to QPS that the Report did not attract LPP.
15 October 2015	OIC wrote to the applicant's representative. OIC explained that QPS claimed that the Report was subject to LPP, and OIC's preliminary view that the Report did not comprise exempt information on this basis.
23 November 2015	QPS advised OIC that it maintained its claim that the Report attracted LPP, providing further submissions in support of its case for refusing access.

1 December 2015	<p>OIC conveyed a preliminary view to the applicant's representative. OIC explained that after considering QPS' further submissions dated 23 November 2015 and again reviewing the content of the Report, OIC was of the preliminary view that the Report attracted LPP. OIC invited the applicant to provide submissions supporting his case by 15 December 2015.</p> <p>The applicant's representative requested an extension of time to respond to the preliminary view. QPS also lodged additional material in support of its case.</p>
2 December 2015	OIC granted the applicant an extension of time until 12 January 2016.
15 January 2016	The applicant's representative advised OIC that the applicant did not accept OIC's preliminary view, and providing submissions in support of the applicant's case for access.