



## Decision and Reasons for Decision

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**Citation:** *NewsCorp Australia Pty Ltd and Legal Aid Queensland* [2017] QICmr 53 (9 November 2017)

**Application Number:** 313166

**Applicant:** NewsCorp Australia Pty Ltd

**Respondent:** Legal Aid Queensland

**Decision Date:** 9 November 2017

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - internal legal advice - whether exempt - section 47(3)(a) and 48 and schedule 3, section 7 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - documents concerning Legal Aid Queensland preferred supplier arrangements and monies paid - whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL TO DEAL WITH APPLICATION - EFFECT ON AGENCY'S FUNCTIONS - whether the work involved in dealing with application would, if carried out, substantially and unreasonably divert resources of agency from their use by agency in performing its functions – section 41 *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL TO DEAL WITH APPLICATION - EXEMPT CLASS OF DOCUMENTS - documents concerning grants of legal aid - whether application expressed to relate to a stated subject matter - whether all documents to which the application relates appear to comprise exempt information - whether agency may refuse to deal with the application - section 40 *Right to Information Act 2009* (Qld)

## REASONS FOR DECISION

### Summary

1. The applicant applied to Legal Aid Queensland (**LAQ**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to:
  - *all documents relating to Legal Aid funding granted to [a named firm]<sup>1</sup>...for years 2013-14, 2014-15, 2015-16 (**Firm Payments Information**),*
  - *all documents related to Legal Aid funding granted to...[the Firm]...relating to...[a named individual's] cases... (**Funding Documents**); and*
  - *documents related to discussion about the suitability of Legal Aid funding being granted to...[the Firm]... (**Firm Documents**).*
2. LAQ:<sup>2</sup>
  - neither confirmed nor denied the existence of any Funding Documents;<sup>3</sup> and
  - refused access to various pages comprising some of the Firm Payments Information and all of the Firm Documents, on the grounds that:
    - three pages attracted legal professional privilege; and
    - disclosure of the remainder would, on balance, be contrary to the public interest.
3. Having considered all relevant information and circumstances, I vary LAQ's decision and have decided that:
  - the applicant may access a number of the Firm Documents, although grounds exist for refusing access to other parts of this information,
  - the applicant may also access pages containing the Firm Payments Information for the 2015-16 year,<sup>4</sup> however LAQ may refuse to deal with the applicant's application under section 41 of the RTI Act insofar as it seeks the Firm Payments Information for the 2013-14 and 2014-15 years, as collating this information would substantially and unreasonably divert LAQ's resources; and
  - LAQ may refuse to deal with the applicant's access application under section 40 of the RTI Act insofar as it seeks to access to the Funding Documents (should any exist), without having identified any such documents.

### Reviewable decision

4. The decision under review is LAQ's decision dated 19 December 2016.

### Evidence considered

5. Evidence, submissions, legislation and other material considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).

### Information in issue

6. The information in issue comprises:
  - all pages dealt with in LAQ's decision dated 19 December 2016; and
  - a further three pages identified by LAQ during the course of the Office of the Information Commissioner's (**OIC**) external review ('**Additional Pages 1-3**').

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<sup>1</sup> 'the Firm'.

<sup>2</sup> By decision dated 19 December 2016.

<sup>3</sup> Under section 55 of the RTI Act.

<sup>4</sup> Which is contained in pages 7, 11 and 12 of the pages in issue, described further below.

7. A copy of the information in issue, marked up in accordance with these reasons, will be forwarded to LAQ along with this decision.

## Findings

### **Firm Documents**

8. The Firm Documents comprise the bulk of the information in issue, ie all pages noted in paragraph 6, other than pages 7, 11 and 12 (the latter which comprise Firm Payments Information for the 2015-16 year).
9. I am satisfied that access may be refused to some of the information comprising the Firm Documents. As explained below, I consider that pages 1-3, and Additional Page 1, comprise exempt information, as information subject to legal professional privilege.
10. I am also of the view that disclosure of some of the information contained in the Firm Documents would, on balance, be contrary to the public interest. Relevant information is particularised in paragraph 15.
11. Otherwise, no grounds exist for refusing access to the balance of the Firm Documents. The applicant may therefore access this information, which I will refer to as the **'Release Information'**. Reasons follow.

### **Pages 1-3 and Additional Page 1 – exempt information**

12. Agencies such as LAQ may refuse access to information requested under the RTI Act to the extent the information comprises 'exempt information'.<sup>5</sup> The concept of exempt information includes information that would be privileged from production in a legal proceeding on the ground of legal professional privilege (**LPP**).<sup>6</sup>
13. LPP attaches to confidential communications between a lawyer and client (including communications through their respective servants or agents) made for the dominant purpose of; seeking or giving legal advice or professional legal assistance; or, for use, or obtaining material for use, in legal proceedings that have commenced, or were reasonably anticipated, at the time of the relevant communication.<sup>7</sup> The privilege extends to copies of unprivileged documents made for the dominant purpose of obtaining legal advice,<sup>8</sup> and to internal communications repeating legal advice, whether verbatim or in substance.<sup>9</sup>
14. Pages 1-3 and Additional Page 1 comprise confidential communications between LAQ officers and an in-house LAQ legal officer, made for the purpose of seeking and conveying legal advice. I consider that these pages meet the requirements for LPP set out above, and, noting that the applicant has not sought to argue otherwise,<sup>10</sup> I am satisfied that these pages comprise exempt information, to which access may be refused.

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<sup>5</sup> Section 47(3)(a) of the RTI Act.

<sup>6</sup> Section 48 and schedule 3, section 7 of the RTI Act.

<sup>7</sup> *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 552. Qualifications and exceptions to the privilege – such as waiver and improper purpose – may, in particular circumstances, affect the question of whether information attracts or remains subject to it. There is nothing before me in this case to suggest the application of any exception to LPP.

<sup>8</sup> *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

<sup>9</sup> *Brambles Holdings v Trade Practices Commission (No. 3)* (1981) 58 FLR 452 at pp.458-459; *Komacha v Orange City Council* (Supreme Court of New South Wales, Rath J, 30 August 1979, unreported).

<sup>10</sup> The substance of the reasoning in this and paragraphs 12-13 was conveyed to the applicant's solicitor by way of OIC letter dated 8 August 2017; the applicant, while expressing the desire that OIC formally decide this and all other reviewable issues, did not seek to contest any of this reasoning.

## Contrary to public interest information

15. Another ground on which agencies may refuse access to information is where disclosure of that information would, on balance, be contrary to the public interest.<sup>11</sup> I am satisfied that access to the following information may be refused on this basis:
- signatures,
  - bank account particulars appearing on pages 33 and 98; and
  - pages 65-79 and 101-116 in entirety.
16. Section 44 of the RTI Act provides that the RTI Act is to be administered with a pro-disclosure bias, with access to information to be granted unless giving access would, on balance, be contrary to the public interest.<sup>12</sup> Section 49 of the RTI Act sets out the steps to be followed in deciding whether disclosure of information would, on balance, be contrary to the public interest, as follows:<sup>13</sup>
- identify any irrelevant factors and disregard them,
  - identify relevant public interest factors favouring disclosure and nondisclosure,
  - balance the relevant factors favouring disclosure and nondisclosure; and
  - decide whether, on balance, disclosure of the information would be contrary to the public interest.
17. I consider the signatures in issue comprise personal information,<sup>14</sup> disclosure of which the RTI Act presumes would give rise to a public interest harm.<sup>15</sup> Generally speaking, it is also reasonable to expect that disclosure of signatures, the means by which individuals represent personal identity and intent, could prejudice protection of a person's right to privacy.<sup>16</sup> There is a clear public interest in ensuring that government protects personal information and the individual privacy of citizens, both private and employees. Accordingly, I am satisfied that each of these considerations warrants substantial weighting.
18. I acknowledge the general public interest in furthering access to government-held information. I can,<sup>17</sup> however, identify no other factors favouring disclosure of relevant signatures, and the applicant has not argued that any apply to this information.
19. Given there are no broader public interest considerations to be advanced by release of this information, the sole pro-disclosure factor I have identified warrants marginal weight. This is insufficient to displace the significant weight attaching to public interest considerations telling against disclosure of relevant signatures as identified in paragraph 17. I am therefore satisfied that disclosure of the signatures in issue would, on balance, be contrary to the public interest.
20. Pages 65-79 and 101-116 comprise internal Firm guidelines, work standards and procedures supplied by the Firm to LAQ. They plainly concern the Firm's business, professional, commercial or financial affairs, and I consider that their disclosure could reasonably be expected to<sup>18</sup> have both

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<sup>11</sup> Section 47(3)(b) of the RTI Act. The phrase *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests.

<sup>12</sup> Section 44 of the RTI Act. I have borne this bias in mind in making my decision.

<sup>13</sup> Section 49(3)(a)-(f) of the RTI Act.

<sup>14</sup> Given the identifying contexts in which they appear. 'Personal information' is 'information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion': *Information Privacy Act 2009* (Qld), section 12, and schedule 6 of the RTI Act.

<sup>15</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>16</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>17</sup> Having carefully scrutinised the list of pro-disclosure factors set out in schedule 4, part 2 of the RTI Act.

<sup>18</sup> The phrase 'could reasonably be expected to' requires discrimination between '*...unreasonable expectations and reasonable expectations, between what is merely possible (eg, merely speculative/conjectural "expectations") and expectations which are reasonably based, ie expectations for the occurrence of which real and substantial grounds exist*': *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at [154]-[160] (**B and BNRHA**). Other authorities note that the words 'require a judgement to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous' to expect a disclosure of the information in issue could have the prescribed consequences relied on': *Smolenski v Commissioner of Police, NSW Police* [2015] NSWCATAD 21 at [34], citing *Commissioner of Police, NSW Police Force v Camilleri (GD)* [2012] NSWADTAP 19 at [28], *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 445, and *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, at 190.

an adverse effect on and prejudice those affairs, so as to give rise to factors favouring nondisclosure,<sup>19</sup> and to cause a public interest harm.<sup>20</sup> Disclosure of this material, concerning as it does the Firm's service standards, performance measures and other information by which it seeks to obtain an edge in the competitive field of legal services, could reasonably be expected to confer a competitive advantage on competitors of the Firm (with a corresponding disadvantage on the Firm, one sufficient to amount to adverse effect/prejudice within the meaning of relevant public interest harm/nondisclosure factors).<sup>21</sup>

21. In short, my view is that release of this information – together with the Firm's banking particulars appearing on pages 33 and 98 – could reasonably be expected to expose the Firm to business, commercial or financial impairment or detriment, enlivening the nondisclosure considerations noted in the preceding paragraph.
22. Again, I acknowledge the general public interest in furthering access to government-held information. It is also arguable that disclosure of at least some of it may enhance LAQ's accountability and disclose background information relied on by LAQ in making funding decisions,<sup>22</sup> given such information was tendered by the Firm in support of an application for preferred supplier status with LAQ.
23. Having said that, I consider that any applicable pro-disclosure public interest considerations of the above type will be adequately served by release of that information to which I have decided the applicant may have access. My view is that any public interest considerations favouring disclosure of the commercially sensitive information the subject of this and the preceding three paragraphs are insufficient to displace or counter the public interest harm that could reasonably be expected to flow from its release. Disclosure of relevant pages (or parts) would, on balance, be contrary to the public interest. Access to this information may therefore be refused.

#### **Release Information – information to which the applicant may have access**

24. As regards the Release Information, LAQ submits that:
  - pages 35-55 fall outside the scope of the applicant's access application; and, in any event,
  - access to both the above pages and the remainder of the Release Information should be refused, on the basis their disclosure would, on balance, be contrary to the public interest, as disclosure could reasonably be expected to give rise to several factors favouring nondisclosure in the public interest, detailed further below.
25. The Firm was invited both to apply to participate and provide submissions about possible disclosure of this information during the course of the external review. While it did not apply to participate, the Firm did object to release of relevant documents. These objections were not, however, premised on any apprehended prejudice to or adverse impact on the Firm's business or commercial affairs, but on the basis relevant documents comprise deliberative process information, disclosure of which may, in certain circumstances, give rise to a public interest harm.<sup>23</sup>
26. By letter dated 24 August 2017, I wrote to the Firm explaining my preliminary view that the deliberative process harm factor did not apply to much of the Release Information, and that, to the extent it might arguably apply, it was outweighed by a range of considerations favouring release of

<sup>19</sup> Schedule 4, part 3, items 2 and 15 of the RTI Act.

<sup>20</sup> Schedule 4, part 4, section 7(1)(c) of the RTI Act.

<sup>21</sup> *Wanless Wastecorp Pty Ltd and Caboolture Shire Council; JJ Richards & Sons Pty Ltd (Third Party)* (2003) 6 QAR 242 (**Wanless**). See also *Kalinga Woolloowin Residents Association Inc and Brisbane City Council; and Ors* (Unreported, Queensland Information Commissioner, 9 May 2012), at [89], noting that schedule 4, part 3, items 2 and 15 – although referring to 'prejudice' rather than 'adverse effect' – operate to safeguard against similar harm.

<sup>22</sup> Schedule 4, part 2, item 11 of the RTI Act. The applicant raised a number of factors favouring disclosure in an attachment to its application for external review; insofar as any of these are relevant, they properly relate to the Release Information discussed below, and not to the internal Firm information discussed in this and preceding paragraphs. I cannot see how, for example, disclosure of a private law firm's service standards could reasonably be expected to contribute to informed debate on important issues, reveal that a government agency has engaged in misconduct, or contribute to either procedural fairness or enforcement of the criminal law.

<sup>23</sup> Schedule 4, part 4, section 4 of the RTI Act.

that information. The Firm did not respond to my preliminary view, which cautioned that, in the absence of any reply, I would proceed on the basis it did not object to disclosure of the Release Information. Nevertheless, for the sake of completeness, I have taken the Firm's initial submissions into account in making my decision.

27. In summary, I am not persuaded that the bulk of the nondisclosure factors or considerations cited by either LAQ or the Firm apply to the Release Information, and do not, therefore, consider that they fall to be considered in balancing the public interest. To the extent any may, my view is that there exist significant public interest considerations telling in favour of disclosure of relevant information; considerations sufficient to displace those that might weigh against release.
28. I will now deal in detail with considerations against disclosure raised by the Firm and LAQ, beginning with LAQ's submissions about scope.

***Are pages 35-55 within the scope of the access application?***

29. Yes, for the following reasons.
30. The applicant relevantly applied for access to documents 'relating' to LAQ payments to the Firm, and the latter's 'suitability' for receiving those payments.
31. Pages 35-55 comprise a copy of a service or supplier agreement between LAQ and the Firm. An agreement of this kind 'relates' to the matters specified in the applicant's access application, lying as it does at the centre of the financial relationship between LAQ and supplier firms. Bearing in mind that RTI access applications are not to be interpreted in a narrow or legalistic fashion as one might a statute or legal pleading,<sup>24</sup> I am satisfied that pages 35-55 relate to topics canvassed in the applicant's access application, and therefore fall within the scope of that application.

***Would disclosure of any of the Release Information be contrary to the public interest?***

32. No, for the following reasons.
33. LAQ contends that disclosure of the Release Information could reasonably be expected to:
  - prejudice the private, business, professional, commercial or financial affairs of the Firm;<sup>25</sup> and
  - give rise to the business affairs public interest harm prescribed in schedule 4, part 4, section 7(1)(c) of the RTI Act.
34. LAQ also submits that disclosure of the Release Information is prohibited by section 82(2) of the *Legal Aid Queensland Act 1997* (Qld) (**LAQ Act**), giving rise to the nondisclosure factor prescribed in schedule 4, part 3, item 22 of the RTI Act.
35. As noted in paragraph 25, the Firm submits that disclosure of these documents could reasonably be expected to give rise to a public interest harm, by disclosing deliberative processes.<sup>26</sup>

**Adverse effect on/prejudice to business etc affairs**

36. For the business affairs public interest harm factor in schedule 4, part 4 section 7(1)(c) of the RTI Act to arise, I must be satisfied that relevant information:
  - concerns the business, professional, commercial or financial affairs of an agency or another person; and

<sup>24</sup> For the principles applicable to the interpretation of access applications see *Cannon and Australia Quality Egg Farms Ltd* (1994) 1 QAR 491 at [10] (**Cannon**).

<sup>25</sup> Schedule 4, part 3, items 2 and 15 of the RTI Act.

<sup>26</sup> Schedule 4, part 4, section 4 of the RTI Act.

- its disclosure could reasonably be expected to have an adverse effect on those affairs, or to prejudice the future supply of information of the type in question to government.
37. I must then be satisfied that the resultant public interest harm would be of such gravity so as to outweigh any public interest factors favouring disclosure of the information.<sup>27</sup>
38. The Information Commissioner has previously noted that the adverse effect required by schedule 4, part 4, section 7(1)(c) will almost invariably be economic in nature, and that in most instances the question of whether disclosure of information could reasonably be expected to have an adverse effect will turn on whether the information is capable of causing competitive harm to the relevant entity.<sup>28</sup> The related nondisclosure factors set out in schedule 4, part 3, items 2 and 15 require, as noted, a reasonable expectation of similar harm.<sup>29</sup>
39. I accept that the Release Information concerns the business etc. affairs of the Firm.<sup>30</sup> I am not, however, satisfied that the other requirements of the business affairs public interest harm factor are met, nor that disclosure of this information could reasonably be expected to cause prejudice to the affairs of the Firm, LAQ or any other entity.
40. The Release Information includes press clippings and the apparently standard-form supplier agreement discussed in paragraphs 29-31, the pro-forma for which is publicly available on LAQ's website. I cannot see how it could be reasonable to expect that disclosure of information already in the public domain would cause either an adverse effect upon or prejudice to any entity's business etc affairs.
41. Similarly, I am unable to see how disclosure of various emails and letters discussing certain allegations against the Firm<sup>31</sup> could reasonably be expected to cause any prejudice to or have an adverse effect upon that firm or any other entity or agency's business etc affairs, given they do little more than repeat matters of public record (as evidenced by the very press clippings accompanying certain of these records, the former which appear to contain more detail than these relatively routine communications). This is particularly so, in view of the fact the Firm itself has not sought to press such an argument.
42. Other pages – such as a guide for clients,<sup>32</sup> blank file note template and certain communications at 83-86 – appear to comprise routine administrative information possessed of little-to-no commercial sensitivity. Again, I am unable to discern how disclosure of such information would cause the Firm or LAQ any competitive or commercial detriment or prejudice (particularly, as regards the Firm, in view of the lack of any such claim on its part).
43. I acknowledge that pages 7, 11 and 12 reveal details of monies the Firm has derived from legally-aided work in a given period. There is insufficient material before me, however, to substantiate LAQ's assertions that disclosure of this information could reasonably be expected to, as LAQ asserted in its decision, '*confer a competitive advantage on [the Firm's] competitors...*'. Relevant information does not strike me as being commercially sensitive of itself; it does not, for example, disclose what proportion of the Firm's income this LAQ stream represents for the given period. Even if it did, it is not evident to me how such information would arm competitors with information sufficient to allow them to 'outcompete' the Firm for legally-aided work, bearing in mind that access to LAQ-funded work is, as I understand, strictly controlled, and subject to application and approval by LAQ.
44. I also recognise that information contained on pages 28 and 30 reveals LAQ's concerns with aspects of the Firm's administration at a given point in time. In its submissions dated 22 June 2017, LAQ argued that release of information disclosing complaints about or concerns with a given

<sup>27</sup> In accordance with the public interest balancing exercise prescribed in section 49 of the RTI Act.

<sup>28</sup> *Cannon* at [82]–[84], analysing section 45(1)(c) of the former *Freedom of Information Act 1992* (Qld) (**FOI Act**), materially reproduced in schedule 4, part 4, section 7(1) of the RTI Act.

<sup>29</sup> See note 21.

<sup>30</sup> And arguably LAQ, to an extent.

<sup>31</sup> Eg, emails and correspondence at pages 4-13 and 18-22.

<sup>32</sup> Page 80 – a document presumably intended for general circulation.

law firm 'could be likely to have a[n]...impact on their ability to attract private paying clients'. While I acknowledge disclosure of this information could arguably impact the Firm's reputation, I am not persuaded that disclosure of relatively mild concerns of the kind expressed in the relevant information could reasonably be expected to have such a consequence, particularly given the Firm has advanced no such claim. (I also note that even if such an outcome were likely, it would be equally arguable that disclosure of such information would advance the public interest, by ensuring potential consumers of legal services are fully informed as to the strengths and weaknesses of particular firms.)

45. Ultimately, neither LAQ nor the Firm has provided information to allow me to be satisfied that any apprehended reputational impact upon the latter could reasonably be expected to amount to competitive or pecuniary harm of the kind required by the business affairs harm and nondisclosure factors relied on by LAQ. In view of this – and the modest tone of relevant information – I am not able to conclude that disclosure of this specific information could reasonably be expected to result in any adverse outcomes of the kind cited by LAQ.
46. I further note LAQ's argument<sup>33</sup> that disclosure of the Release Documents may dissuade private firms from offering their services to LAQ, arguably impeding LAQ service delivery and/or prejudicing future supply of similar information to government.<sup>34</sup> In the absence of probative evidence to the contrary, I find this claim difficult to accept. Legal services is a competitive industry, and I do not consider that disclosure of information of the type in issue in this case is reasonably likely to dissuade a significant number of practices from tendering for legally-aided work, in the process denying themselves the benefit of a relatively stable revenue stream.
47. In this regard, I note that some of the documents supplied by the Firm to LAQ appear to have been tendered in support of applications by the Firm for preferred supplier status with LAQ, or pursuant to the supplier agreement between LAQ and the Firm resulting from that application. In each case, as supply by the Firm was either necessary for it to secure the benefit of preferred supplier status, or required under the terms of its agreement with LAQ, it is not reasonable to expect that disclosure of these documents would prejudice the future supply of similar information.<sup>35</sup>
48. For the above reasons, disclosure of relevant information could not reasonably be expected to prejudice or adversely affect the Firm's, LAQ's, or any other entity's business etc affairs, nor, insofar as any information was supplied by the Firm to LAQ, cause a substantial number of firms to refrain from providing like information in the future. Accordingly, relevant factors do not arise to be considered in balancing the public interest in this case.
49. As noted above, LAQ also argues that disclosure of the Release Information would be in breach of the prohibition contained in section 82(2) of the LAQ Act, enlivening the nondisclosure factor prescribed in schedule 4, part 3, item 22 of the RTI Act. Section 82(2) of the LAQ Act applies, relevantly, to LAQ employees, commissioners and board members,<sup>36</sup> providing as follows:
  - (2) *A person to whom this section applies (the **first person**) must not, directly or indirectly, other than for this Act or in a proceeding under this Act—*
    - (a) *give a person, make a record of, or use information acquired about a person's affairs by the first person under this Act or the former Act; or*
    - (b) *give a person a document acquired about someone else's affairs under this Act or the former Act.*
50. Crucial to the injunction contained in section 82(2) is the word 'acquired'. A considerable amount

<sup>33</sup> Submissions dated 22 June 2017.

<sup>34</sup> Insofar as relevant documents in issue were supplied by the Firm to LAQ. The test of prejudice to future supply is evaluated not by reference to whether the particular supplier whose information is under consideration could reasonably be expected to refrain from future supply, but whether disclosure could reasonably be expected to prejudice future supply of similar information from a substantial number of the sources of that information available or likely to be available to an agency (in this case, other firms): *B and BNRHA*, at [161].

<sup>35</sup> *B*, [161]; *Cannon*, [85].

<sup>36</sup> Section 82(1) of the LAQ Act.



of the Release Information, however, cannot be said to have been 'acquired' by LAQ from the Firm or any other person, but comprises information created or generated by LAQ itself. The relevant nondisclosure factor can have no application to this type of information.

51. Further, even accepting that the literal wording of section 82(2) may be broad enough to encompass information genuinely acquired from the Firm, the provision appears to me to have been clearly intended to protect information acquired by LAQ from persons seeking LAQ's assistance, or others connected to such persons, and not the affairs of firms providing legal services on LAQ's behalf.
52. To the extent this nondisclosure factor might arguably apply, I would accord it negligible weight. It and any other considerations (in the event I am incorrect about the applicability or weight of other nondisclosure factors) would be more than offset by the factors favouring disclosure discussed further below.
53. Before addressing the Firm's objections to disclosure of the Release Information, I should for the sake of completeness deal with a final matter raised by LAQ in correspondence dated 22 June 2017. The scope of this submission is somewhat unclear, however it could be construed as a contention that information concerning monies disbursed to private legal firms (such as that contained in pages 7, 11 and 12) comprises personal information of an LAQ client and/or '*subject to legal professional privilege under section 75 of the LAQ Act*'.
54. Section 75 is discussed further below in the context of the Funding Documents. For present purposes, it is sufficient to note that it extends the reach of legal professional privilege to certain communications made to or by LAQ in deciding applications for legal assistance, acting as a lawyer for a legally assisted person and functions incidental to each of the preceding.
55. OIC rejected this submission on a preliminary basis in our letter to LAQ dated 18 July 2017.<sup>37</sup> Given LAQ has not sought to press the submission,<sup>38</sup> I think it sufficient to record that I am satisfied that nothing in the Release Documents comprises the personal information of any LAQ client, nor attracts legal professional privilege, whether under the general law or section 75 of the LAQ Act.<sup>39</sup>

### Deliberative processes

56. As noted above, the Firm initially objected to disclosure of the Release Information, submitting that release would give rise to the deliberative process public interest harm factor prescribed in schedule 4, part 4, section 4 of the RTI Act.
57. For the deliberative process harm factor to apply, relevant information must comprise an opinion, advice, recommendation or consultation or deliberation obtained, prepared or recorded in the course of, or for, the deliberative processes involved in the functions of government. Deliberative processes involved in the functions of government have been defined as '*...thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action*'.<sup>40</sup>
58. The harm factor cannot apply to purely factual material, nor expert opinion or analysis.<sup>41</sup> Nor, more generally, can it apply to information that was not obtained, prepared or recorded for a deliberative process, or which cannot properly be characterised as an 'opinion, advice or recommendation', including information that is:
  - merely descriptive or procedural information,<sup>42</sup> or

<sup>37</sup> Insofar as it may have been construed as an argument for refusing access to the Release Information.

<sup>38</sup> Noting the onus it bears under section 87 of the RTI Act.

<sup>39</sup> Comprising as it does information made for purposes other than the functions prescribed in section 75(1) of the LAQ Act.

<sup>40</sup> *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at [28]-[30] (**Eccleston**), citing with approval the definition given in *Waterford and Department of Treasury* (No.2) (1984) 5 ALD 588 at 606 (**Waterford**).

<sup>41</sup> Schedule 4, part 4 section 4(3)(b) and (c) of the RTI Act.

<sup>42</sup> *Subramanian and Refugee Review Tribunal* [1997] AATA 31.

- relates to purely procedural or routine administrative functions.<sup>43</sup>
59. In this case, much of the Release Information comprises factual information,<sup>44</sup> routine administrative information, or information created for something other than a deliberative process. The harm factor cannot apply to information of this kind.
60. As for information to which the harm factor might be argued to apply, simply meeting the requirements of the harm factor does not of itself justify a decision to refuse access. This is because satisfaction of the requirements of schedule 4, part 4, section 4 of the RTI Act only implies the existence of a public interest harm. A participant seeking to argue that access to information should be refused must, however, also demonstrate that the relevant public interest harm would be of an extent sufficient to displace public interest factors favouring disclosure, so as to justify a decision to refuse access.
61. As mentioned earlier, I consider that there are significant public interest considerations telling in favour of disclosure of the Release Information. Such considerations are, in my view, sufficient to displace any that might weigh against release, including any deliberative process public interest harm that might be presumed to flow from disclosure of the Release Information.<sup>45</sup> I will now address these pro-disclosure considerations.
62. There exist several significant public interest considerations counting in favour of the disclosure of the Release Information.<sup>46</sup> The Release Information variously reveals the criteria by which LAQ assesses preferred supplier applications and the processes involved in approving such applications, the monies disbursed to one such supplier for a given period, and the steps taken by LAQ to monitor the compliance of preferred suppliers with the agreements by which the latter receive public funds. Disclosure of the Release Information could reasonably be expected to:
- enhance the accountability of LAQ for its decisions to approve preferred supplier applications;<sup>47</sup>
  - inform the community of the criteria and guidelines relied on by LAQ in making those decisions;<sup>48</sup>
  - ensure the effective oversight of expenditure by LAQ of public funds;<sup>49</sup> and
  - increase generally the transparency of LAQ's operations and decision-making processes.
63. These are important public interest considerations, deserving of substantial weight and sufficient, in my view, to outweigh those that might operate in favour of nondisclosure. As the Information Commissioner has observed in the analogous context of tender information:<sup>50</sup>
- ...government agencies...are accountable to the public regarding the decisions they make to award contracts for the performance of services to be undertaken for the benefit of the public (or a particular segment of the public) and which are to be paid for from funds raised by imposts on the public. Private sector businesses who wish to contract with government to perform services for the public have to accept an appropriate level of scrutiny of their dealings with government, and of their performance in terms of service delivery to the public, as something which goes with the territory.*
64. OIC explained the thrust of the reasoning at paragraphs 62-63 to both LAQ and the Firm during the course of the review. The Firm, as noted, did not seek to contest this analysis, nor press its initial objection to disclosure. LAQ, while not disputing the factors favouring disclosure identified by OIC, did contend<sup>51</sup> that the weight attributed to those considerations ought to be lessened, in view of the fact that LAQ is subject to accountability mechanisms other than the RTI Act.

<sup>43</sup> See *Waterford* at 606, and *Eccleston* at [27]-[30].

<sup>44</sup> For example, the supplier agreement in issue (pages 35-55).

<sup>45</sup> A harm which, in view of the relatively innocuous nature of relevant information, and the fact it does not concern any ongoing deliberative process, I would accord only minimal weight.

<sup>46</sup> LAQ identified no factors favouring disclosure in its decision; the applicant cited a relatively large number in its application for external review. Having carefully considered both participants' submissions, the information in issue, and the non-exhaustive list of factors set out in schedule 4, part 2 of the RTI Act, I have concluded that the factors favouring disclosure are as set out in this paragraph.

<sup>47</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>48</sup> Schedule 4, part 2, items 3 and 11 of the RTI Act.

<sup>49</sup> Schedule 4, part 2, item 4 of the RTI Act.

<sup>50</sup> *Wanless*, [145].

<sup>51</sup> Letter dated 22 June 2017.

65. I do not accept this submission. The existence of other accountability mechanisms does not diminish the public interest in disclosure of information – the RTI Act is not an accountability measure of last resort, but confers a right that is in addition to, and not an alternative for, existing rights and measures.<sup>52</sup> Each and every consideration favouring disclosure identified in paragraph 62 warrants substantial weight – enough, in this case, to tip the balance of the public interest in favour of disclosure.
66. For the reasons set out above, I find that disclosure of the Release Information would not, on balance be contrary to the public interest. I can identify no other grounds<sup>53</sup> on which access may be refused, and neither LAQ – the participant bearing the onus in this review<sup>54</sup> – nor the Firm have sought to persuade me that any exist beyond those analysed in these reasons. In the circumstances, the applicant is entitled to access this information, in accordance with the right conferred by section 23 of the RTI Act.

### Firm Payments Information

67. Firm payment information for the 2015-16 year appears in pages 7, 11 and 12 of the Release Information, which I have dealt with above.
68. OIC enquired<sup>55</sup> of LAQ as to the whereabouts of payment information for the 2013-14 and 2014-15 years. LAQ advised that it does not hold consolidated information of this kind, and that extracting it from its systems would involve creating a new document, entailing the writing of a 'script' for the purposes of interrogating relevant databases and collating relevant information. LAQ noted correctly that the RTI Act does not require it to create a new document for the purposes of responding to an RTI access application.<sup>56</sup>
69. LAQ advised OIC that the only other way the yearly payments information requested by the applicant could be retrieved would be by sorting through 10,140 pages of spreadsheets for relevant years, containing records of individual payments to particular firms. LAQ estimated that undertaking this task would consume 52-78 hours, which, given its size, it submitted would substantially and unreasonably divert LAQ's resources from their use by LAQ in performance of its functions.<sup>57</sup>
70. In our letter dated 8 August 2017, OIC advised the applicant that LAQ's case in this regard appeared arguable; ie, that the work estimated by LAQ would comprise a substantial – a considerable and telling<sup>58</sup> – diversion of its resources, which are relatively limited in comparison to larger State government agencies. We also noted that this amount of work would arguably

<sup>52</sup> *Director-General, Department of Families, Youth and Community Care and Department of Education and Ors* (1997) 3 QAR 459 at [19(a)]. See also *Pearce and Queensland Rural Adjustment Authority; Third Parties* (1999) 5 QAR 242 at [70] and *Glass Media Pty Ltd and Department of the Premier and Cabinet; Screen Queensland Pty Ltd (Third Party); The Walt Disney Company (Australia) Pty Ltd (Fourth Party)* [2016] QICmr 30 (18 August 2016), [174]-[175].

<sup>53</sup> Being those prescribed in section 47 of the RTI Act.

<sup>54</sup> Section 87 of the RTI Act.

<sup>55</sup> By letter dated 11 April 2017.

<sup>56</sup> *Dimitrijević and Department of Education* (Unreported, Queensland Information Commissioner, 23 February 1998), [21], concerning the equivalent provision of the former FOI Act. OIC had tentatively advanced the view that section 68(1)(e) of the RTI Act might apply to require creation of a new document containing the outstanding payment information requested by the applicant. This provision obliges an agency to create a document where requested information is not contained in a written document, but a document containing the information could be created by use of equipment usually available to the agency for retrieving or collating stored information. As the Information Commissioner stated in *Dimitrijević* (at [24]), provisions such as section 68(1)(e) imposes, however, no requirement on an agency to write a specific program to this end, which LAQ maintains is necessary to collate relevant information in this case. I accept LAQ's account in this regard, and, in the circumstances, I am satisfied collating Firm Payments Information for the 2013-14 and 2014-15 years would entail creation by LAQ of a new document, a task it is not obliged to undertake.

<sup>57</sup> A ground for refusing to deal with an access application: section 41 of the RTI Act. Section 41(2) sets out a non-exhaustive list of matters to which an authorised decision-maker must have regard in assessing whether the requirements of section 41 are made out. I would also note that as OIC may, on external review, decide anything that could, under the RTI Act, have been decided by an agency, it is competent for OIC to decide that an agency may refuse to deal with an application under section 41: *F60XCX and Department of the Premier and Cabinet* [2016] QICmr 41 (13 October 2016) (**F60XCX**). The intent of the procedural requirements prescribed in section 42 can be met by way of preliminary view – in this case, OIC's letter to the applicant dated 8 August 2017: *F60XCX*, [68]-[69].

<sup>58</sup> The phrase 'substantially and unreasonably' is not defined in the RTI Act. It is therefore appropriate to consider the ordinary meaning of these words. 'Substantial' is relevantly defined as meaning 'considerable amount, quantity, size, etc.: a substantial sum of money' (Macquarie Dictionary, Fifth Edition) and 'of telling effect: a substantial reform' (Collins Dictionary, 3<sup>rd</sup> Australian Edition).

comprise an exorbitant and excessive,<sup>59</sup> and therefore unreasonable, diversion of agency resources, and that it therefore appeared open for LAQ to refuse to deal with this part of the applicant's access application under section 41 of the RTI Act.

71. The applicant was invited to provide OIC with submissions addressing LAQ's claims, in the event it wished to pursue this aspect of its access application.
72. The applicant made no such submissions.
73. In the circumstances, I accept LAQ's estimates about the work that would be involved in dealing with this part of the applicant's access application, and adopt the reasoning set out in paragraph 70 in final disposition of this issue. I find that dealing with the applicant's access application insofar as it requests Firm Payments Information for the 2013-14 and 2014-15 would substantially and unreasonably divert the resources of LAQ from their use by LAQ in the performance of its functions. LAQ may therefore refuse to deal with this part of the access application, under section 41 of the RTI Act.

### Funding Documents

74. LAQ decided to neither confirm nor deny the existence of documents responding to this part of the applicant's access application, under section 55 of the RTI Act. LAQ's position is, as I understand, that confirming or denying the existence of documents would involve disclosing personal information and compromising privacy, by revealing – one way or another – information concerning the manner in which the individual named in the access application financed certain legal proceedings.
75. It is not necessary for me to resolve the applicant's challenge to LAQ's application of section 55 of the RTI Act.<sup>60</sup> This is because I am satisfied that LAQ is entitled to refuse to deal with this part of the applicant's access application without having identified any relevant documents (should any exist), under section 40 of the RTI Act.
76. Section 40 of the RTI Act permits an agency to refuse to deal with an access application – without having identified any or all relevant documents – where:
  - the application requests all documents, or all documents of a particular class, that contain information of a stated kind or relate to a stated subject matter; and
  - it appears to the agency that all of the documents to which the application relates are comprised of exempt information.
77. This part of the applicant's access application sought access to '*all documents relating to Legal Aid funding granted to...[the Firm]...relating to...[a named individual]*'. I am satisfied that this comprises a request for all documents, or all documents of a particular class – those concerning funding granted to the Firm – relating to a stated subject matter, ie the named individual.
78. Additionally, it appears to me that all of these documents (ie, the Funding Documents) would, if they exist, comprise exempt information under schedule 3, section 7 of the RTI Act.
79. As explained above, schedule 3, section 7 of the RTI Act provides that information which would be privileged from production in a legal proceeding on the ground of LPP is exempt information.
80. Section 75 of the LAQ Act provides that confidential communications between a legally assisted person (**LAP**) and LAQ or a LAQ lawyer are subject to LPP. The section applies to communications made in or for the performance of the following LAQ functions:

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<sup>59</sup> '*Unreasonable*' is relevantly defined as meaning '*exceeding the bounds of reason; immoderate; exorbitant*' (Macquarie Dictionary, Fifth Edition) and '*immoderate; excessive: unreasonable demands*' (Collins Dictionary, 3<sup>rd</sup> Australian Edition).

<sup>60</sup> And therefore the procedural obligations potentially imposed by section 109 of the RTI Act are of no relevance one way or another in this case. I should stress that nothing in these reasons should be taken to confirm or deny the existence of any Funding Documents.

- deciding applications for legal assistance,
- acting as a lawyer for a legally assisted person,
- a function incidental to the above.

81. I consider that the Funding Documents would, if they exist, comprise documents attracting LPP, as documents comprising confidential communications between a LAP and LAQ made for the purpose of deciding applications for legal assistance<sup>61</sup> and/or functions incidental to that purpose. Assuming LAQ did hold any information about the relevant individual, there is no evidence before me that that person would consent to release by LAQ of that information.<sup>62</sup>

82. In reaching these conclusions, I have had regard to the applicant's initial submissions<sup>63</sup> that:

- not all documents would (if they exist) comprise 'communications' for the purposes of section 75 of the LAQ Act; and
- section 75 will only cover communications between a LAP and LAQ, but not a LAP's lawyers and LAQ.

83. As for the first point, 'communications' in this context is, in my view, to be read consistently with the meaning accorded the word under the general law as it concerns LPP, and will include both actual communications, and any and all documents disclosure of which would involve disclosure of such a communication<sup>64</sup> (in this context, information related to applications for legal assistance and functions incidental to such requests). It appears to me that requested Funding Documents would, if they exist, disclose either such communications or the substance of same.

84. Similarly, I do not accept that the protection afforded by section 75 of the LAQ Act is limited to only those communications passing directly between a LAP and LAQ. This is an overly restrictive interpretation, and inconsistent with general law LPP principles that allow for privilege to exist over communications between third parties acting on a person's behalf, and that person's lawyers.<sup>65</sup> I note that a LAP for the purposes of section 75 is a person receiving legal assistance whether from LAQ directly or an LAQ service provider, and consider that communications between such a service provider on behalf of a LAP and LAQ made for one or more of the purposes noted above would attract the privilege conferred by section 75(3) of the LAQ Act.

85. For the above reasons, I am satisfied that LAQ may refuse to deal with the applicant's access application under section 40 of the RTI Act insofar as it requests access to the Funding Documents (should any exist), without having identified any or all such documents.

## DECISION

86. I vary the decision under review, and find that:

- pages 1-3 and Additional Page 1 comprise exempt information to which access may be refused;
- signatures, and bank account particulars appearing on pages 33 and 98, and pages 65-79 and 101-116 comprise information disclosure of which would, on balance, be contrary to the public interest;
- there are no grounds established for refusing access to the Release Information;
- LAQ may refuse to deal with the applicant's access application to the extent it requests access to Firm Payments Information for the 2013-14 and 2014-15 years, under section 41 of the RTI Act; and

<sup>61</sup> Being requests for legal services, including advice, free or on payment of an amount less than the cost of giving the service: section 5 of the LAQ Act.

<sup>62</sup> Noting that the views of a person potentially affected by the possible release of information are only required to be obtained under the RTI Act where release is contemplated: section 37 of the RTI Act.

<sup>63</sup> Accompanying its application for external review. Despite being apprised of OIC's preliminary view – a view conveyed by letter dated 8 August 2017, in substantially similar terms as paragraphs 83-84 of these reasons – and being invited to make further submissions, the applicant did not proffer any additional arguments on this issue.

<sup>64</sup> *Mann v Carnell* (1999) 201 CLR 1, [16] and *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2000] FCA 593, [8] (Lehane J).

<sup>65</sup> *Pratt Holdings Pty Ltd v Federal Commissioner of Taxation* (2004) 136 FCR 357.

- LAQ may refuse to deal with the applicant's access application to the extent it requests access to the Funding Documents (should any exist), under section 40 of the RTI Act.

87. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**L Lynch**  
**Acting Right to Information Commissioner**

**Date: 9 November 2017**

## APPENDIX

### Significant Procedural Steps

Date	Event
19 January 2017	<b>OIC received the applicant's application for external review.</b>
20 January 2017	OIC notified the participants that the external review application had been accepted and explained the procedure to be adopted on external review. OIC requested initiating documents from LAQ.
20 January 2017	OIC received further information relevant to the external review application from the applicant's solicitor.
20 January 2017	OIC received the initiating documents from LAQ as requested.
13 February 2017	OIC requested further information from LAQ.
13 February 2017	OIC notified the applicant's solicitor of its acceptance of the external review application.
27 February 2017	OIC received further information from LAQ as requested.
11 April 2017	OIC conveyed a preliminary view to LAQ.
28 April 2017	LAQ requested, and OIC granted, an extension of time to respond to OIC's preliminary view.
12 and 15 May 2017	OIC received LAQ's reply to OIC's 11 April 2017 preliminary view
1 June 2017	OIC requested further submissions from LAQ.
23 June 2017	OIC received further submissions from LAQ as requested.
26 June 2017, 28 June 2017	OIC liaised with participants in an effort to achieve informal resolution. Informal resolution not achieved.
18 July 2017	OIC reiterated OIC's 11 April 2017 preliminary view and invited further submissions from LAQ.
1 August 2017	OIC sought the views of the Firm about possible release of the Release Information.
8 August 2017	OIC conveyed a preliminary view to the applicant's solicitor.
18 August 2017	OIC received submissions from the Firm objecting to the release of the Release Information.
23 August 2017	OIC received submissions from the applicant in reply to OIC's 8 August 2017 preliminary view.
24 August 2017	OIC wrote again to the Firm, reiterating OIC's preliminary view concerning the Release Information and inviting further submissions in reply.
21 September 2017	OIC informed LAQ and the applicant that the external review will proceed to a formal decision.