



Decision and Reasons for Decision

Application Number: 311594

Applicant: Dacey

Respondent: Department of Education, Training and Employment

Decision Date: 18 October 2013

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION – GROUNDS ON WHICH ACCESS MAY BE REFUSED – EXEMPT INFORMATION – an agency may refuse access to a document to the extent the document comprises exempt information – information subject to legal professional privilege – whether the information would be privileged from production in a legal proceeding on the ground of legal professional privilege – sections 47(3)(a) and 48 of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Education, Training and Employment (**Department**) under the *Information Privacy Act (IP Act)* for access to documents concerning his employment with the Department as held by the Department's South East Regional Office.
2. In its decision of 16 May 2013 the Department advised it had identified 4130 documents and decided to grant full access to 3875 documents, partial access to 74 documents and refuse access to the remaining information. Access was refused to information on the basis that it was subject to legal professional privilege or its disclosure would, on balance, be contrary to the public interest.
3. The applicant applied to the Department for internal review of its decision. The applicant also contended that the Department had not located all relevant documents. On internal review, the Department made the same decision dated 12 June 2013 on refusal of access and decided that access to the further documents could be refused because they are nonexistent.
4. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision on 12 June 2013. During the course of the external review, the applicant did not contest OIC's view that the Department was entitled to refuse access to:

- 74 documents in part as disclosure would, on balance, be contrary to the public interest;¹ and
- the additional documents the applicant contends exist on the ground that they are nonexistent.²

5. For the reasons set out below, I am satisfied that the Department is entitled to refuse access to 181 documents in full because they would be privileged from production in a legal proceeding on the ground of legal professional privilege.

Background

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

Reviewable decision

7. The decision under review is the Department's internal review decision dated 12 June 2013.

Evidence considered

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

Information in issue

9. The information under consideration in this review is 181 documents which the Department submits would be privileged from production in a legal proceeding on the ground of legal professional privilege³ (**Information in Issue**).

Is the Information in Issue subject to legal professional privilege?

10. Yes, for the reasons that follow.

Relevant law

11. Under the IP Act, a person has a right to be given access to documents of an agency.⁴ However, this right is subject to provisions of the *Right to Information Act 2009 (RTI Act)* including the grounds on which an agency may refuse access to documents.⁵ Relevantly, the RTI Act provides that access may be refused to documents to the extent that they comprise exempt information.⁶ 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.⁷

12. 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

¹ Sections 47(3)(b) and 49 of the *Right to Information Act 2009 (RTI Act)*; section 67 of the IP Act.

² Sections 47(3)(e) and 52 of the RTI Act; section 67 of the IP Act.

³ Sections 47(3)(a), 48 and schedule 3 section 7 of the RTI Act.

⁴ Section 40 of the IP Act.

⁵ As set out in section 47 of the RTI Act; section 67 of the IP Act.

⁶ Section 47(3)(a) of the RTI Act.

⁷ Section 48(2) of the RTI Act.

of legal professional privilege. This exemption reflects the requirements for establishing legal professional privilege at common law.⁸

13. 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*⁹ 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...

14. Legal professional privilege is generally divided into two categories, advice privilege and litigation privilege.¹⁰ 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.¹¹ Litigation privilege attaches to confidential communications between a legal adviser and client in relation to current or reasonably anticipated litigation.¹²

Findings

15. The applicant objected to OIC's view but did not make specific submissions on why he thinks that the Information in Issue is not subject to legal professional privilege. I have considered below whether the requirements of legal professional privilege apply to the Information in Issue.

Confidential communications

16. I am prevented by the RTI Act from describing the actual content of the Information in Issue in these reasons.¹³ However, the Information in Issue can be described generally as correspondence to and from officers of the Department's Legal and Administrative Law Branch for the purpose of obtaining and providing legal advice.
17. There is no evidence that these communications have been disclosed to the applicant or any other party outside of the relevant units of the Department. Therefore, I am satisfied the Information in Issue can be characterised as confidential communications.

Dominant purpose

18. The dominant purpose is '*the ruling, prevailing, paramount or most influential purpose*'¹⁴ and is to be determined objectively, having regard to the evidence, the nature of the document and the parties' submissions.¹⁵ Legal advice can involve more 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*'.¹⁶ However, it does not

⁸ *Ozcare and Department of Justice and Attorney-General* (Unreported, Information Commissioner of Queensland, 13 May 2011) at [12].

⁹ (2002) 213 CLR 543 at [9].

¹⁰ *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 322 at [8]-[9].

¹¹ *AWB v Cole (No.5)* (2006) 155 FCR 30 at [41]; *Waterford v Commonwealth* (1987) 163 CLR 54 at [95] (**Waterford**); *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357 (**Pratt Holdings**).

¹² Above n 10.

¹³ Section 108(3) of the RTI Act.

¹⁴ *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at [416].

¹⁵ *Grant v Downs* (1976) 135 CLR 674 at [692].

¹⁶ *Balabel v Air India* [1988] Ch 317 per Lord Justice Taylor at [330] and referred to with approval in *Pratt Holdings* at [382].

include advice that is predominantly for administrative, financial, personal, commercial or public relations purposes.¹⁷

19. I am satisfied that the communications contained in the Information in Issue were made for the dominant purpose of requesting and providing legal advice.

Professional relationship and independence

20. Legal professional privilege may protect communications between salaried employee legal advisers of a government department or statutory authority and his/her employer as the client (including communications through other employees of the same employer) provided there is a professional relationship of legal adviser and client, which secures to the advice an independent character, notwithstanding the employment.
21. The relevant communications are between officers of the Department's Legal and Administrative Law Branch and other officers of the Department who were involved in handling the relevant issues. I am satisfied that:
- in each case, the officers of the Legal and Administrative Law Branch are salaried legal advisers
 - there is a professional relationship of legal adviser and client; and
 - this relationship secures to the advice an independent character.
22. This requirement is therefore satisfied.

Waiver and the improper purpose exception

23. 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. There is no evidence before me to indicate that legal professional privilege has been waived in relation to the Information in Issue or that the improper purpose exception applies.

Conclusion

24. For the reasons set out above, I am satisfied that the Information in Issue is exempt from disclosure as it would be privileged from production in a legal proceeding on the ground of legal professional privilege.

DECISION

25. I affirm the decision under review by finding that the Information in Issue is exempt from disclosure under sections 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act.

¹⁷ *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 at [8]; *Waterford* at [77], [85].

26. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

Lisa Meagher
Acting Assistant Information Commissioner

Date: 18 October 2013

APPENDIX**Significant procedural steps**

Date	Event
21 December 2012	The Department received the applicant's access application for access to documents concerning his employment with the Department.
10 April 2013	The applicant agreed to the Department processing documents concerning the applicant's employment with the Department held by the Department's South East Regional Office as a separate application to the remaining documents held by the Department.
16 May 2013	The Department issued its decision to the applicant. The applicant applied for internal review of the Department's decision.
12 June 2013	The Department issued its internal review decision to the applicant.
12 June 2013	OIC received the external review application.
5 July 2013	The Department provided OIC with a copy of the information in issue.
13 September 2013	OIC conveyed its view to the applicant on the issues in the review.
25 September 2013	The applicant advised OIC that he did not accept OIC's view on legal professional privilege.