



## Decision and Reasons for Decision

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| <b>Citation:</b>           | <b><i>Diatreme Resources Limited and Far North Queensland Ports Corporation Limited [2026] QICmr 9 (22 January 2026)</i></b>  |
| <b>Application Number:</b> | <b>318471</b>   |
| <b>Applicant:</b>          | <b>Diatreme Resources Limited (ACN: 061 267 061)</b>  |
| <b>Respondent:</b>         | <b>Far North Queensland Ports Corporation Limited (ACN: 131 836 014)</b>  |
| <b>Decision Date:</b>      | <b>22 January 2026</b>  |
| <b>Catchwords:</b>         | <b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - communications between lawyer and client - whether communications attract privilege - sections 47(3)(a) and 48 and schedule 3, section 7 of the <i>Right to Information Act 2009 (Qld)</i></b> |

## REASONS FOR DECISION

### Summary

1. The applicant applied to Far North Queensland Ports Corporation Limited, trading as Ports North (**Ports North**), under the *Right to Information Act 2009 (Qld)* (**RTI Act**)<sup>1</sup> for access to certain documents concerning lease negotiations between Ports North and Cape Flattery Silica Mines Pty Ltd (**CFSM**).<sup>2</sup>
2. Ports North located 17 documents<sup>3</sup> and decided to refuse access in full to 3 documents on the basis they comprised exempt information and 14 documents on the basis they comprised information the disclosure of which would, on balance, be contrary to the public interest.<sup>4</sup>
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Ports North's decision.<sup>5</sup> During the review, Ports North agreed to disclose 4 documents<sup>6</sup> in full to the applicant and provided submissions in support of its position

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<sup>1</sup> On 1 July 2025 key parts of the *Information Privacy and Other Legislation Amendment Act 2023 (Qld)* (**IPOLA Act**) came into force, effecting changes to the RTI Act. As the applicant's application was made before this change, the RTI Act **as in force prior to 1 July 2025** remains applicable to it. This is in accordance with transitional provisions in Chapter 7, Part 9 of the RTI Act, which require that applications on foot before 1 July 2025 are to be dealt with as if the IPOLA Act had not been enacted. Accordingly, references to the RTI Act in this decision is to that Act **as in force prior to 1 July 2025**.

<sup>2</sup> Access application dated 28 November 2024.

<sup>3</sup> Comprising a total of 342 pages.

<sup>4</sup> Decision dated 29 January 2025. This is the 'reviewable decision' for the purpose of this review. During the processing of the access application, Ports North consulted with CFSM under section 37 of the RTI Act.

<sup>5</sup> External review application dated 19 February 2025.

<sup>6</sup> Documents 10 and 12 to 14, comprising a total of 18 pages.

that the remaining 13 documents<sup>7</sup> comprised exempt information.<sup>8</sup> The applicant contested the application of the exemption.<sup>9</sup>

4. The information remaining the subject of Ports North's disclosure objections can generally be described as emails, including attachments (**Emails**), annotated draft lease documents and associated documents regarding terms of draft lease documents (**Draft Documents**).<sup>10</sup> The issue I must determine is whether access to the Emails and Draft Documents may be refused on the basis they comprise exempt information<sup>11</sup> due to being subject to legal professional privilege.
5. For the below reasons, I vary Ports North's decision and find that access to the Emails and Draft Documents may be refused under sections 47(3)(a) and 48 of the RTI Act on the basis that they comprise exempt information because they are subject to legal professional privilege.<sup>12</sup>

## Legal professional privilege

### *Relevant law*

6. A person has a right, under the RTI Act, to be given access to documents of an agency<sup>13</sup> subject to certain limitations, including grounds for refusing access.<sup>14</sup> It is Parliament's intention that the RTI Act is to be administered with a pro-disclosure bias<sup>15</sup> and that the grounds for refusing access are to be interpreted narrowly.<sup>16</sup>
7. Access may be refused to exempt information.<sup>17</sup> Schedule 3 of the RTI Act sets out the categories of exempt information, the disclosure of which Parliament has deemed is always contrary to the public interest.<sup>18</sup> Information will be exempt if it would be privileged from production in a legal proceeding on the ground of legal professional privilege (**LPP**).<sup>19</sup> This exemption reflects the requirements for establishing LPP at common law.<sup>20</sup> LPP is integral to the administration of justice and exists to uphold the right of a client to obtain confidential and independent advice about their legal circumstances.
8. Establishing whether LPP applies to information at common law requires that the information must comprise a communication made in the course of a lawyer-client relationship, that was and remains confidential; and that was made for the dominant purpose of seeking or providing legal advice or for use in existing or reasonably anticipated legal proceedings.<sup>21</sup>

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<sup>7</sup> Documents 1 to 9, 11 and 15 to 17, totaling 324 pages.

<sup>8</sup> Submission dated 19 September 2025. The 18 pages were disclosed to the applicant by Ports North on 7 October 2025.

<sup>9</sup> Submissions dated 17 November 2025.

<sup>10</sup> As described by Ports North in a PDF titled *Schedule of Relevant Documents* which was provided to the applicant by email dated 29 January 2025. I am unable to describe these documents in any further detail, due to the operation of section 108 of the RTI Act.

<sup>11</sup> Under sections 47(3)(a) and 48 of the RTI Act.

<sup>12</sup> Under schedule 3, section 7 of the RTI Act.

<sup>13</sup> Section 23 of the RTI Act.

<sup>14</sup> Section 47(3) of the RTI Act.

<sup>15</sup> Section 44 of the RTI Act.

<sup>16</sup> Section 47(2)(a) of the RTI Act.

<sup>17</sup> Section 47(3)(a) of the RTI Act.

<sup>18</sup> Section 48(2) of the RTI Act.

<sup>19</sup> Schedule 3, section 7 of the RTI Act.

<sup>20</sup> *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commissioner* (2002) 213 CLR 543 (**Daniels**) at page 552 and see also *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 (**Esso**).

<sup>21</sup> *Esso and Daniels*.

9. LPP will extend to any document which directly reveals, or which allows a reader to infer, the content or substance of a privileged communication.<sup>22</sup> Relevantly, advice privilege may extend, subject to satisfying the dominant purpose test, to notes and drafts provided by the client in the course of communicating information to the lawyer.<sup>23</sup>
10. Qualifications and exceptions to privilege (such as waiver and improper purpose) may, in particular circumstances, affect the question of whether information attracts or remains subject to privilege.

### **Submissions**

11. Ports North submitted that disclosure of the Emails and Draft Documents *'would directly reveal, or would allow a reader to infer, the content or substance of legal advice given to [Ports North], and, therefore, [the Emails and Draft Documents] constitutes exempt information under the LPP exemption.'*<sup>24</sup>
12. In summary, the applicant submitted:<sup>25</sup>
  - Ports North's decision refusing access to the Emails and Draft Documents is inconsistent with the primary object of the RTI Act and Parliament's intention that the RTI Act should be administered with a pro-disclosure bias
  - the documents which have been disclosed *'give rise to serious questions as to how Ports North made the decision to enter the current sublease'*
  - it is not clear why the Emails and Draft Documents as described by Ports North would be the subject of LPP, as the Emails and Draft Documents are not *'described as legal advice or briefs or instructions seeking legal advice, or would have been prepared in contemplation of litigation'*
  - it is unlikely that draft lease or sublease documents would meet the requirements of LPP *'given they reflect commercial negotiations with a counterparty, and ... there cannot be any legal professional privilege for Ports North in lease terms put forward by the counterparty; and ... disclosure by Ports North of any terms of the counterparty is obviously inconsistent with maintaining legal professional privilege in such terms (and therefore a waiver of any legal professional privilege which would otherwise be said to exist)'*
  - as to annotations on the draft documents, *'commercial (rather than legal) comments ... should not attract legal professional privilege'*
  - as well as being made by a lawyer, the annotations *'would need to have been made for the dominant purpose of providing legal advice';* and
  - *'to the extent Ports North continues to rely on [the public interest balancing test under section 47(3)(b) of the RTI Act] as a justification for non-disclosure, we consider that should be scrutinised by OIC.'*

### **Findings**

13. The Emails are from Ports North's external legal advisor providing legal advice and seeking further instructions from Ports North, and the Draft Documents were prepared by Ports North and provided to the external legal advisor for the dominant purpose of seeking legal advice regarding matters associated with the lease negotiations between Ports North and CFMSM. Having examined the Emails and Draft Documents, I am satisfied that they comprise confidential communications between Ports North and its external

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<sup>22</sup> *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at page 569; *AWB Ltd v Cole* (2006) 152 FCR 382 (*AWB v Cole No 1*) at page 417.

<sup>23</sup> *Saunders v Commissioner Australian Federal Police* (1998) 160 ALR 469 at pages 471–472.

<sup>24</sup> Submissions dated 19 September 2025.

<sup>25</sup> Submissions dated 17 November 2025.

legal advisor. There is nothing before me to suggest that the external legal advisor is not suitably qualified.

14. I have considered the applicant's submissions that it is not clear by the description of the Emails and Draft Documents, as set out in paragraph 4, that they would be subject to LPP, and that commercial negotiations with, or information provided by, a counterparty and commercial comments cannot attract LPP. Having examined the Emails and Draft Documents, I am satisfied that the content does not comprise negotiations with, or information provided by a counterparty nor commercial comments. Rather, the content of the Emails and Draft Documents is concerned with providing and/or seeking legal advice regarding matters associated with the lease negotiations between Ports North and CFMS. Accordingly, I am satisfied that the dominant purpose of the Emails and Draft Documents was providing and/or seeking legal advice.
15. There is nothing in the material before OIC to suggest that privilege in the advice has been waived, or that the improper purpose exception applies to displace the privilege.
16. The applicant submits that to the extent Ports North relies on the public interest balancing test in section 47(3)(b) of the RTI Act, this should be scrutinised by OIC. As set out in paragraph 3, it is Ports North's position that the Emails and Draft Documents comprise exempt information. Further, schedule 3 of the RTI Act prescribes categories of exempt information which Parliament has already decided are contrary to the public interest to release. Accordingly, where information meets the requirements of an exemption, the legislation does not allow a decision maker to take into account any public interest factors. To the extent the applicant's submissions raise public interest factors, they are not relevant to the application of the exemption and accordingly, I am unable to take them into account in making this decision.
17. For the above reasons, I find that the Emails and Draft Documents comprise exempt information under section 48 and schedule 3, section 7 of the RTI Act. Therefore, access may be refused under section 47(3)(a) of the RTI Act.

## **DECISION**

18. For the reasons set out above, I vary the reviewable decision<sup>26</sup> and find that access to the Emails and Draft Documents may be refused under sections 47(3)(a) and 48, and schedule 3, section 7 of the RTI Act.
19. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.



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**K McGuire**  
**Acting Manager, Right to Information**

**Date: 22 January 2026**

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<sup>26</sup> Under section 110(1)(b) of the RTI Act.