



Decision and Reasons for Decision

Application Number:	311333 and 311553
Applicant:	DF36ZV
Respondent:	Department of Justice and Attorney General
Decision Date:	17 December 2013
Catchwords:	<p>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – LEGAL PROFESSIONAL PRIVILEGE – whether information about prosecution is exempt on the basis of legal professional privilege – improper purpose exception – waiver – section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(a) and 48 and schedule 3, section 7 of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – CONTRARY TO PUBLIC INTEREST INFORMATION – information about prosecution – whether disclosure would, on balance, be contrary to the public interest – section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)</p>

REASONS FOR DECISION

Summary

1. In two access applications, the applicant applied to the Department of Justice and Attorney General (**Department**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to information about the discontinuance of a prosecution against him.
2. The Department identified 44 pages in response to the first application and 66 pages in response to the second application. In each decision, the Department refused access to some pages and parts of pages on the basis the information was subject to legal professional privilege or its disclosure would, on balance, be contrary to the public interest.¹
3. The applicant sought external review in respect of both decisions.
4. For the reasons set out below, I find that access can be refused to:
 - some information on the ground that it is subject to legal professional privilege and is therefore exempt information;² and

¹ The applicant has in total obtained access to 18 pages and 21 part pages.

² Under section 47(3)(a) and section 48 and schedule 3, section 7 of the *Right to Information Act 2009* (Qld) (**RTI Act**), in conjunction with section 67(1) of the IP Act.

- the remaining information on the ground that disclosure would, on balance, be contrary to the public interest.³

Background

5. The applicant was charged with two stalking offences by the Queensland Police Service (**QPS**) and committed for trial on one of the charges. The Office of the Director of Public Prosecutions (**ODPP**) subsequently initiated a prosecution on both charges however the matter did not proceed to trial as ODPP withdrew the prosecution.
6. Significant procedural steps relating to the applications and the external reviews are set out in the appendix to this decision.

Reviewable decisions

7. The decisions under review are the Department's:
 - initial decision⁴ in external review 311333; and
 - internal review decision⁵ in external review 311553.⁶

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 in issue in the reviews comprises 42 pages of Category A Information⁷ and 5 pages of Category B Information.⁸

Issues for determination

10. The issues for determination are whether:
 - the Category A Information comprises exempt information on the basis that it is subject to legal professional privilege; and
 - disclosure of the Category B Information would, on balance, be contrary to the public interest.

Is the Category A Information subject to legal professional privilege?

11. Yes, for the reasons that follow.

Relevant law

12. Under the IP Act a person has a right to be given access to documents of an agency to the extent they contain the individual's personal information, however, this right is subject to other provisions of the IP Act and the RTI Act,⁹ including the grounds on which an agency may refuse access to documents. Relevantly, the RTI Act provides that access may be

³ Under section 47(3)(b) and section 49 of the RTI Act.

⁴ Dated 24 December 2012.

⁵ Dated 14 May 2013.

⁶ While some information is outside the scope of the first access application (pages 1564-1565, 1566 and 1571-1574), it falls within the scope of the later access application and is therefore able to be considered in this decision.

⁷ The Category A Information comprises pages: 66, 67, 791, 935, 953, 961, 1042, 1044, 1045, 1046-1047, 1143, 1466-1467, 1468-1472, 1557-1558, 1559, 1560, 1563, 1564-1565, 1566 and 1571-1574; and parts of pages: 995, 996, 1003, 1120, 1129-1130, 1133-1134, 1136, 1447, 1448, 1561 and 1567.

⁸ The Category B Information comprises parts of pages 959-960, 1000, 1135 and 1140.

⁹ Section 67 of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent the agency could refuse access to the document under section 47 of the RTI Act.

refused to documents to the extent that they comprise exempt information.¹⁰ Schedule 3 of the RTI Act sets out categories of information the disclosure of which Parliament has deemed to be contrary to the public interest, and therefore exempt from disclosure.¹¹

13. Schedule 3, section 7 of the RTI Act provides that information will be exempt from disclosure if it would be privileged from production in a legal proceeding on the ground of legal professional privilege. This exemption reflects the requirements for establishing legal professional privilege at common law.¹² Legal professional privilege attaches to a confidential communication 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.¹³
14. Legal professional privilege is generally divided into two categories, advice privilege and litigation privilege.¹⁴ 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.¹⁵ Litigation privilege attaches to confidential communications between a legal adviser and client in relation to current or reasonably anticipated litigation.¹⁶ Communications between the lawyers and third party witnesses are protected when made in relation to existing litigation.¹⁷
15. Communications between a salaried employee legal adviser of a government department or statutory authority and his/her employer as the client, including communications through other employees of the same employer, will attract legal professional privilege provided there is a professional relationship of legal adviser and client, which secures to the legal advice an independent character, notwithstanding the employment.¹⁸

Findings

16. While I am prohibited from disclosing information in issue in the review,¹⁹ generally, the relevant information concerns legal issues arising in relation to the prosecution, arrangements for witnesses to attend court hearings, and legal issues associated with a consensual restraining order.
17. I am satisfied the relevant officers within the ODPP were in a position to provide professional legal advice of an independent character and had the necessary degree of independence required to attract legal professional privilege.
18. Also, I am satisfied that the Category A Information comprises confidential communications:
 - between ODPP and QPS in relation to gathering evidence at ODPP's request, or between ODPP and relevant witnesses in relation to proceedings
 - made during the course of a lawyer-client relationship between ODPP and QPS; and
 - made for the dominant purpose of use in, or in relation to, litigation proceedings

¹⁰ Section 47(3)(a) of the RTI Act.

¹¹ Section 48(2) of the RTI Act.

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

¹³ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [9].

¹⁴ *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 322 at [8]-[9] (*Mitsubishi*).

¹⁵ *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.

¹⁶ *Mitsubishi* at [8].

¹⁷ *Sterling Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 246; *Mitsubishi* at [8].

¹⁸ *Waterford* at 62 (Mason and Wilson JJ).

¹⁹ Section 121(3) of the IP Act prohibits the disclosure of documents in issue in an external review to persons other than the author or the person providing the information to the agency.

that were on foot, or reasonably anticipated, at the time they occurred.

19. For the above reasons, I find the Category A Information satisfies the common law requirements for establishing legal professional privilege.
20. The applicant submits²⁰ that communications to continue the prosecution against him comprise an attempt to conceal fraud and perjury by third party witnesses. He contends the prosecution was improperly instituted and maintained, as QPS and ODPP knew the complainants' evidence was unreliable. I must therefore consider whether the improper purpose exception to legal professional privilege applies to the Category A Information.
21. Legal professional privilege is not available where a communication is made in furtherance of an illegal or improper purpose.²¹ In summarising an established line of relevant case law²² the Assistant Information Commissioner in *Secher and James Cook University*²³ explained that:

This exception operates to displace legal professional privilege where evidence exists that the relevant client has embarked on a deliberate course of action knowing that the proposed actions were contrary to law, and has made the relevant communications in furtherance of that illegal or improper purpose.

.... In establishing improper purpose, the standard of proof is high. The High Court has observed that it "is a serious thing to override legal professional privilege where it would otherwise be applicable" and as a result "vague or generalised contentions of crimes or improper purposes will not suffice."

22. I have considered the applicant's extensive submissions and am satisfied that the contents of the Category A Information do not evidence the applicant's view that police and prosecutors' motives in bringing and maintaining the prosecution against him were improper. Further, none of the information before me records or otherwise evidences an illegal or improper purpose.
23. As there is no evidence in the relevant information before me that the particular communications were made in furtherance of any illegal or improper purpose, I am satisfied that the improper purpose exception does not preclude the application of legal professional privilege to the Category A Information.
24. The applicant also contends information in QPS/ODPP communications has been disclosed by third parties revealing their personal information in open court, thereby effecting a waiver of legal professional privilege.
25. Legal professional privilege may be waived either:
 - intentionally, by the client or the client's agent disclosing a privileged communication to persons outside of the privileged relationship;²⁴ or
 - by implication of law, in circumstances where there is conduct by, or on behalf of, the client which is inconsistent with the maintenance of the privilege, whether the client intended that result or not.²⁵

26. The Category A Information concerns events about which evidence was given in

²⁰ The applicant's submissions are contained in emails dated 30 May 2013, 5 June 2013 (two emails, sent at 10.27am and 11.34am), 8 June 2013 (three emails, sent at 9.50am, 9.51am and 9.52am), 9 June 2013 (four emails, sent at 11.46am, 11.49am, 11.52am and 12.14pm), 10 June 2013, 13 June 2013, 3 September 2013, 5 September 2013, 11 October 2013, 23 October 2013, 1 November 2013 (two emails, sent at 9.47am and 9.53am), 4 November 2013, 18 November 2013 and 25 November 2013; a telephone conversation on 10 October 2013; and a letter dated 17 June 2013.

²¹ *R v Bell; Ex Parte Lees* (1980) 146 CLR 141.

²² *Commissioner of Australian Federal Police and Another v Propend Finance Limited and Others* (1997) 188 CLR 501 at 514 and *O'Rourke v Darbyshire* [1920] All ER Rep 1 at 6.

²³ (Unreported, Queensland Information Commissioner, 6 June 2012) at [20] and [21].

²⁴ *Goldberg v Ng* (1994) 33 NSWLR 639 at [670].

²⁵ *Osland v Secretary to the Department of Justice* (2008) 234 CLR 275 at 296-297.

various court proceedings. The applicant submits that legal professional privilege in the Category A Information has been lost as the substance could have been adduced at trial. However, as noted in paragraph 5, no trial took place, and accordingly no waiver was effected.

27. I accept that third parties have given evidence in pre-trial court proceedings about themselves and actions undertaken by them, however after careful review of the applicant's submissions, I am satisfied the communications comprising the Category A information have not been disclosed. Accordingly, I am satisfied that there has been no waiver, either intentional or inadvertent, of the legal professional privilege attaching to the Category A Information.
28. Further, I am satisfied that the internal ODPP and QPS communications and communications within QPS in relation to gathering evidence at ODPP's request do not comprise a waiver of privilege. Confidential disclosure within a government department of information that is subject to legal professional privilege does not amount to waiver of privilege.²⁶ Circulation of communications which record or convey privileged communications among relevant officers within an entity such as QPS does not constitute waiver of privilege.²⁷
29. For the above reasons, I am satisfied that the Category A Information is subject to legal professional privilege²⁸ and that privilege is not lost through application of the improper purpose exception or through waiver. I therefore find that the Category A Information comprises exempt information to which the Department is entitled to refuse access.²⁹

Would disclosure of the Category B Information be contrary to the public interest?

30. Yes, for the reasons that follow.
31. The Category B Information consists of information about individuals other than the applicant. It includes names, birth details, a mobile telephone number and leave arrangements.

Relevant law

32. Access may be refused to information where its disclosure would, on balance, be contrary to the public interest.³⁰ The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest³¹ and explains the steps that a decision-maker must take³² in deciding the public interest.

²⁶ *N55WLN and Department of Health* (Unreported, Queensland Information Commissioner, 30 April 2012) at [29].

²⁷ The following cases regarding circulation of privileged information within a corporation are analogous: *Komacha v Orange City Council* (unreported, Supreme Court of New South Wales, 30 August 1979); *Brambles Holdings Ltd v Trade Practices Commission (No. 3)* (1981) 58 FLR 452 at 458-459; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2000] FCA 593 at [9]-[10]; *Arrow Pharmaceuticals Ltd v Merck & Co Ltd* [2004] FCA 1131; *Seven Network Ltd v News Ltd* [2005] FCA 864 at [56]; and *Seven Network Ltd v News Ltd* [2005] FCA 1342 at [26].

²⁸ In common law and therefore for the purpose of schedule 3, section 7 of the RTI Act.

²⁹ Sections 47(3)(a) and 48 of the RTI Act.

³⁰ Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act. The term *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. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

³¹ Schedule 4 of the RTI Act sets out a non-exhaustive list of factors for deciding whether disclosing information would, on balance, be contrary to the public interest.

³² Section 49(3) of the RTI Act provides that a decision maker must:

- 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 disclosure of the information in issue would, on balance, be contrary to the public interest.

Findings

Irrelevant factors

33. No irrelevant factors arise in the circumstances of this case.

Factors Favouring Disclosure

34. The Category B Information relates to a decision by ODDP to prosecute the applicant for a criminal offence. While the Category B Information mostly consists of information identifying third parties, its disclosure would allow a degree of scrutiny of ODPP's evidence gathering process. On this basis, I am satisfied that disclosure would:

- enhance the Government's accountability;³³ and
- inform the community of the Government's operations.³⁴

35. Given the applicant's submissions³⁵ that officers acted to suborn justice by concealing evidence, I have also considered whether disclosure of the information in issue could reasonably be expected to reveal/substantiate agency/official misconduct etc., or assist inquiry into possible deficiencies in public conduct.³⁶

Accountability and government operations

36. I am satisfied that information about potential prosecution witnesses goes towards government accountability, its operations and the administration of justice insofar as it relates to the applicant.
37. The applicant submits, as noted in paragraph 20, that QPS and ODPP officers acted improperly in continuing the prosecution after the committal hearing, by keeping from the court information that cast doubt on evidence against him. He contends that disclosure of the Information in Issue would disclose the reasons why charges were brought against him only to be withdrawn at a later date and reveal that officers proceeded with the prosecution improperly.
38. However, none of the Category B Information evidences any intent of any QPS officer to prosecute the applicant for the reason he suspects (namely revenge for complaints made by the applicant against certain QPS officers), or that possibly exculpatory information was withheld by prosecution officers.
39. I have also considered whether disclosure of the Category B Information would contribute to the administration of justice for a person, namely the applicant,³⁷ by enabling him to mount a defence or clear his name. However, as the prosecution is finalised and the applicant is not subject to adverse findings or conviction, I therefore consider disclosure could not reasonably be expected to contribute significantly to the administration of justice for a person. I therefore afford limited weight to these factors favouring disclosure.

Agency and official conduct

40. As stated above,³⁸ the Category B Information does not demonstrate any improper conduct of the sort contended by the applicant. Accordingly, in the event the factors of reveal/substantiate agency/official misconduct etc., or assist inquiry into possible

³³ Schedule 4, part 2, item 1 of the RTI Act.

³⁴ Schedule 4, part 2, item 3 of the RTI Act.

³⁵ For example, emails dated 11 October, 23 October and 1 November (two emails sent at 9.47 and 9.53am).

³⁶ The public interest factors prescribed in schedule 4, part 2, items 5 and 6 of the RTI Act.

³⁷ Schedule 4, part 2, item 17 of the RTI Act.

³⁸ Paragraph [38].

deficiencies in public conduct arise for consideration, I afford them no weight.

Factors favouring non-disclosure

41. The Category B Information contains the personal information of persons other than the applicant. I am satisfied that disclosure of the information could reasonably be expected to:
- cause a public interest harm by disclosing the personal information of a person, whether living or dead;³⁹ and
 - prejudice the protection of an individual's right to privacy.⁴⁰

Personal information and privacy

42. The Category B Information contains the personal information of individuals other than the applicant - relevantly, prosecution witnesses and some personal information of officers such as a mobile telephone number and leave arrangements – disclosure of which the RTI Act provides would give rise to public interest harm.⁴¹
43. Additionally, disclosing private personal information about witnesses and officers could in my view reasonably be expected to prejudice the protection of those individuals' right to privacy. Accordingly, a factor favouring nondisclosure of the information in issue also arises for consideration.⁴²
44. There is a clear public interest in ensuring that government protects privacy and treats with respect the personal information it collects from members of the community and information about officers to the extent that information is related to private aspects of their lives. This is particularly so in relation to information collected from prospective witnesses for use in court proceedings. I acknowledge that, through the committal and pre-trial processes, the applicant is aware of some personal information about witnesses.⁴³ This arguably diminishes relevant privacy interests, at least as they pertain to the witnesses. However, the Category B Information concerns personal information imparted in the absence of the applicant and is not known to the applicant. I therefore consider these interests remain substantial and attract significant weight.

Balancing the relevant public interest factors

45. To summarise, I afford:
- minimal weight to the public interest considerations relating to enhancing government accountability and operations and administration of justice
 - no weight to the public interest considerations relating to reveal/substantiate agency/official misconduct etc., or assist inquiry into possible deficiencies in public conduct; and
 - significant weight to the public interest factors relating to the protection of personal information and the privacy of other individuals.
46. Balancing these factors against one another, I consider the substantial public interest in safeguarding individual privacy and avoiding public interest harm by protecting personal information should be preferred to considerations favouring disclosure of the

³⁹ Schedule 4, part 4, section 6 of the RTI Act.

⁴⁰ Schedule 4, part 3, item 3 of the RTI Act.

⁴¹ Schedule 4, part 4, section 6 of the RTI Act.

⁴² The nondisclosure factor in schedule 4, part 3, item 3 of the RTI Act. The concept of 'privacy' is not defined in the IP Act or RTI Act. It can, however, be viewed as the right of an individual to preserve their personal sphere free from interference from others – see the Australian Law Reform Commission's definition of the concept in "For your information: Australian Privacy Law and Practice" *Australian Law Reform Commission Report No. 108* released 11 August 2008, at paragraph 1.56.

⁴³ The applicant contends that disclosure of the Information in Issue would not be contrary to the public interest as third parties had previously disclosed their personal information in pre-trial proceedings.

Category B Information. Disclosure of the small portions of personal information of others connected to, or being provided for use in, a criminal action will not provide information about the reasons for the prosecution and its withdrawal nor evidence of misconduct.

47. I therefore find that disclosure of the Category B Information would, on balance, be contrary to the public interest.

DECISION

48. For the reasons set out above, I vary the decisions under review and find that access to the information in issue can be refused on the basis that:

- the Category A Information is exempt as it is subject to legal professional privilege under section 67(1) of the IP Act and sections 47(3)(a) and 48 and schedule 3 section 7 of the RTI Act; and
- disclosure of the Category B Information would, on balance, be contrary to the public interest under section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

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

Louisa Lynch
Assistant Information Commissioner

Date: 17 December 2013

APPENDIX - Significant procedural steps**Review 311333**

Date	Event
24 September 2012	The Department received the access application under the IP Act.
24 December 2012	The Department issued its initial decision to the applicant.
8 January 2013	OIC received the external review application and asked the Department to provide a number of procedural documents by 11 January 2013.
11 January 2013	OIC received the requested documents from the Department.
16 January 2013	OIC notified the applicant and the Department that it had accepted the external review application and asked the Department to provide a copy of the documents in issue.
22 January 2013	OIC received the requested documents from the Department.
13 March 2013	OIC requested that the Department provide additional information in relation to the external review.
7 May 2013	The Department provided the requested additional information in relation to the external review.
22 May 2013	OIC conveyed a preliminary view to the applicant regarding the information in issue in the review.
23 May 2013	The applicant notified OIC that he did not accept the preliminary view and requested an extension of time in which to provide his submissions. OIC granted the applicant an extension of time until 26 June 2013.
30 May 2013 – 17 June 2013	The applicant provided several submissions, by email and by post, supporting his case.
24 June 2013	On the applicant's request, OIC returned to him a CD he had lodged in support of his case.

Review 311553

Date	Event
11 February 2013	The Department received the access application under the IP Act.
10 April 2013	The Department issued its initial decision to the applicant.
16 April 2013	The Department received the internal review application.
14 May 2013	The Department issued its internal review decision to the applicant.
3 June 2013	OIC received the external review application.
4 June 2013	OIC asked for and received a number of procedural documents from the Department in relation to the external review.
11 June 2013	OIC notified the applicant and the Department that it had accepted the external review application and asked the Department to provide a copy of the documents in issue.

Date	Event
14 June 2013	OIC received the requested documents from the Department.

Reviews 311333 and 311553

Date	Event
2 September 2013	OIC conveyed a preliminary view to the applicant regarding the remaining information in issue in both reviews.
3 September 2013	The applicant notified OIC that he did not accept the preliminary view and made a further submission by email.
5 September 2013 - 6 September 2013	The applicant made another two submissions by email.
16 September 2013	OIC notified the Department that the applicant had rejected the preliminary view.
11 October 2013 – 25 November 2013	The applicant provided further submissions by telephone and email.