



## Decision and Reasons for Decision

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<b>Citation:</b>	<i>T93 and The University of Southern Queensland</i> [2019] QICmr 53 (2 December 2019)
<b>Application Number:</b>	314542
<b>Applicant:</b>	T93
<b>Respondent:</b>	The University of Southern Queensland
<b>Decision Date:</b>	2 December 2019
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - communications between university staff and legal advisers - whether information would be privileged from production in a legal proceeding on the ground of legal professional privilege - improper purpose exception - whether access to information may be refused on the basis that it is exempt - section 67 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)</b>  <b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - whether agency has taken all reasonable steps to locate documents requested by the applicant - whether access to further documents may be refused on the basis that they do not exist or cannot be located - section 67 of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009</i> (Qld)</b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied<sup>1</sup> to the University of Southern Queensland (**USQ**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to a range of emails and various other documents ‘*about me or my matters*’, including information about complaints involving the applicant.<sup>2</sup>
2. USQ decided to grant the applicant access to 29 pages and to refuse access to 244 pages on the basis that they comprised exempt information.<sup>3</sup> USQ identified a further 1030 pages falling within scope, but excluded them on the basis they had

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<sup>1</sup> The undated application was received by USQ on 14 February 2019.

<sup>2</sup> The application requested documents for the period 1 January 2014 to 14 February 2019.

<sup>3</sup> On 29 March 2019.

previously been disclosed to the applicant (without redaction) in response to an earlier application (**Prior Application Documents**).

3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of USQ's refusal of access decision and raised concerns that USQ had not located all relevant documents.<sup>4</sup> During the review, USQ conducted further searches which revealed additional relevant documents, and these were disclosed (without redaction) to the applicant. USQ also agreed to release some information to the applicant in accordance with OIC's view that it was not subject to the legal professional privilege exemption. The applicant remains dissatisfied with the level of documentation released to them, believes further documents should exist and that there are grounds to set aside the claim of legal professional privilege.
4. For the reasons set out below, I affirm USQ's decision to refuse access to information on the basis that it is exempt due to legal professional privilege. I also find that access to any further documents may be refused on the basis they do not exist.

### Background

5. The decision under review is USQ's decision dated 29 March 2019.
6. The significant procedural steps taken during the external review process are set out in the Appendix.
7. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including the footnotes and Appendix).
8. The applicant provided numerous submissions to OIC, by email, in support of their case.<sup>5</sup> I have carefully reviewed those submissions and taken into account the parts of those submissions which are relevant to the issues for determination. The applicant also seeks to raise concerns beyond the jurisdiction of the Information Commissioner and which fall outside the scope of this review, eg. they relate to concurrent reviews involving the applicant. In reaching this decision, I have only considered the applicant's submissions to the extent they are relevant to the issues for determination.

### Information in issue

9. The information remaining in issue<sup>6</sup> appears within USQ's legal unit files (**Information in Issue**).<sup>7</sup> Broadly, it comprises requests for legal advice on issues pertaining to the applicant's enrolment, documents attached to those requests, and the corresponding legal advice provided by USQ's internal and external lawyers.<sup>8</sup>
10. The Prior Application Documents were, as noted above, previously disclosed to the applicant without redaction. Accordingly, as the applicant already possesses copies of the Prior Application Documents, they do not form part of the Information in Issue.<sup>9</sup>

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<sup>4</sup> External review application dated 29 March 2019.

<sup>5</sup> Submissions dated 28 August 2019, 17 September 2019, 1 October 2019 and 25 October 2019. I also note that the applicant has corresponded with OIC on multiple occasions (sometimes several times a week) in relation to her various external review applications and that all such correspondence is examined by OIC to determine its relevance to particular reviews.

<sup>6</sup> As noted in paragraph 3 above, USQ released to the applicant the additional documents (19 pages) it located on review, and a further nine pages which it accepted were relevant, and did not comprise legally privileged information. As those documents were released in their entirety, they do not form part of the Information in Issue.

<sup>7</sup> 242 pages.

<sup>8</sup> Section 121 of the IP Act prevents me from describing the Information in Issue in any further detail in these reasons for decision.

<sup>9</sup> The Prior Application (USQ reference IPA-17-007) was the subject of an external review application (OIC reference 314557), however, OIC decided not to accept it outside the statutory timeframe due to a significant delay and lack of merit. That matter was finalised in June 2019.

## Issues for determination

11. The issues to be determined are whether:
  - the Information in Issue comprises exempt information on the basis that it is subject to legal professional privilege<sup>10</sup>; and
  - access to further documents may be refused on the basis they do not exist or cannot be located.<sup>11</sup>

## Exempt information

### Relevant law

12. The IP Act provides individuals with a right to be given access to documents of a Queensland government agency, to the extent they contain the individual's personal information.<sup>12</sup> This right is, however, subject to some limitations, including the grounds on which access to information may be refused.<sup>13</sup> One ground for refusing access is where information is exempt, in accordance with schedule 3 of the RTI Act.
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.<sup>14</sup>
14. Legal professional privilege attaches to confidential communications between a lawyer and client made for the dominant purpose of seeking or giving legal advice or professional legal assistance, or preparing for, or for use in, or in relation to, existing or reasonably anticipated legal proceedings.<sup>15</sup>
15. The 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.<sup>16</sup> The dominant purpose has been described as '*the ruling, prevailing or most influential purpose*',<sup>17</sup> and it is to be determined objectively, having regard to the evidence, the nature of the documents and the parties' submissions.<sup>18</sup>

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<sup>10</sup> Section 48 and schedule 3, section 7 of the *Right to Information Act 2009* (Qld) (RTI Act).

<sup>11</sup> Sections 47(3)(e) and 52 of the RTI Act.

<sup>12</sup> Section 40 of the IP Act.

<sup>13</sup> The grounds are set out in section 47 of the RTI Act. Section 67(1) of the IP Act provides that access may be refused to information in the same way and to the same extent as information may be refused under the RTI Act.

<sup>14</sup> In *Ozcare and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 13 May 2011) at [12], the Information Commissioner noted that this exemption reflects the requirements for establishing legal professional privilege at common law.

<sup>15</sup> 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* (2002) 213 CLR 543 at 552 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*'. These principles were recently confirmed by the High Court in *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 at [23]-[25].

<sup>16</sup> *Waterford v Commonwealth* (1987) 163 CLR 54 at 95 per Mason and Wilson JJ.

<sup>17</sup> *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at page 416.

<sup>18</sup> In *AWB Limited v Honourable Terrance Rhoderic Hudson Cole (No 5)* (2006) 155 FCR 30, Justice Young observed that '*Dominant purpose is a question of fact that must be determined objectively*'. I also note that the High Court confirmed in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 (*Propend*) that legal professional privilege will extend to copies of unprivileged documents made for the dominant purpose of obtaining legal advice.

16. Qualifications and exceptions to legal professional privilege<sup>19</sup> may, in particular circumstances, affect the question of whether information attracts or remains subject to it, and therefore whether it comprises exempt information under the RTI Act.

### **Findings**

17. As set out in paragraph 9 above, the Information in Issue comprises communications between USQ and its legal advisors in connection with the applicant and their enrolment at USQ. There is no evidence before me to indicate that the Information in Issue has been disclosed outside of the lawyer-client relationship. I am therefore, satisfied that the Information in Issue is confidential. I am also satisfied that the necessary professional relationship exists between USQ (as the client) and its legal advisers, and that the communications were created for the dominant purpose of seeking or providing legal advice, or for use in existing or reasonably anticipated legal proceedings.
18. The applicant submits<sup>20</sup> that legal professional privilege cannot apply because a particular USQ staff member was acting as an academic and not in a legal capacity. While I cannot reveal the particular content of the Information in Issue, I am satisfied that none of the communications involve that particular staff member, and therefore, legal professional privilege cannot be set aside on that basis.
19. On the basis of the above, I find that the elements of legal professional privilege are established in relation to the Information in Issue.

### **Exceptions**

20. At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege.<sup>21</sup> Waiver may be express or implied,<sup>22</sup> however, merely communicating privileged legal advice internally within an agency will not, of itself, deprive the agency of the benefit of that privilege.<sup>23</sup>
21. There is no evidence available to me which indicates that USQ, as the party entitled to the benefit of legal professional privilege, has waived that privilege, either expressly or impliedly.
22. Legal professional privilege will also not apply to legal communications made in the furtherance of a fraud or crime.<sup>24</sup> 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 '*some illegal or improper purpose*'.<sup>25</sup> However, a person alleging legal professional privilege is lost for illegality must do more than make vague or generalised contentions of crimes or improper purpose.<sup>26</sup>

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<sup>19</sup> Such as waiver or improper purpose.

<sup>20</sup> In her external review application dated 29 March 2019.

<sup>21</sup> *Mann v Carnell* (1999) 201 CLR 1 at [28].

<sup>22</sup> *Stafford v Information Commissioner & Anor* [2019] QCATA 61 at [51].

<sup>23</sup> *Thiess Contractors Pty Ltd v Terokell Pty Ltd* [1993] 2 Qd R 341 and *Jones and Queensland Police Service* [2015] QICmr 15 (26 June 2015) at [38].

<sup>24</sup> *Fletcher & Ors v Fortress Credit Corporation (Australia) II Pty Limited & Ors* [2014] QSC 303 (**Fletcher**) at [51].

<sup>25</sup> *Propend* at 514. See also *Secher and James Cook University* (Unreported, Queensland Information Commissioner, 6 June 2012) at [20] and *Murphy and Treasury Department* (1998) 4 QAR 446 at [31]-[42].

<sup>26</sup> *Propend* at 591. In *Fletcher* at [61], McMurdo J observed that a party alleging legal professional privilege does not apply is required to establish '*a prima facie case*' that the relevant communications were for the purpose of facilitating the alleged misconduct.

23. The applicant raises allegations of fraud and unlawfulness,<sup>27</sup> however, the applicant has not provided any evidence to support those allegations, apart from their assertions.
24. Having considered the Information in Issue and the applicant's submissions, there is nothing before me, other than the applicant's general assertions, which suggests that any communication within the Information in Issue was made in furtherance of any illegal, improper or dishonest purpose. On this basis, I find that legal professional privilege has not been displaced by the improper purpose exception.

### Conclusion

25. For the above reasons, I am satisfied that the Information in Issue meets the requirements of legal professional privilege and that the exceptions do not apply. Accordingly, I find access to the Information in Issue may be refused as it comprises exempt information.<sup>28</sup>
26. To the extent the applicant raises other reasons why the Information in Issue should be disclosed to them, I am unable to take them into account. Once information is found to be exempt, as is the case here, this obviates the need to engage in a public interest balancing exercise.<sup>29</sup> This is because Parliament has already determined that disclosure of exempt information would be contrary to the public interest in all circumstances.<sup>30</sup> Also, the Information Commissioner does not have the power to direct that access is to be given to exempt information.<sup>31</sup>

### Nonexistent or unlocatable documents

27. As noted in paragraph 3 above, USQ conducted further searches on external review, located additional documents and released these to applicant.
28. Despite the additional documents released, the applicant maintains that there are '*clearly gaps in the records*' and the searches conducted by USQ were '*woefully inadequate*'.<sup>32</sup> The applicant also nominated the manner in which they considered searches for responsive information should be undertaken.<sup>33</sup> In particular, the applicant asserts that searches must be conducted '*from the server data*'.<sup>34</sup>

### Relevant law

29. On external review, the functions of the Information Commissioner include investigating and reviewing whether an agency has taken reasonable steps to identify and locate documents applied for by applicants.<sup>35</sup> However, access to a document may be refused if it is nonexistent or unlocatable.<sup>36</sup>

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<sup>27</sup> Submissions dated 1 and 25 October 2019. To avoid identifying the applicant, I have not included details of these submissions in these reasons.

<sup>28</sup> Under section 67 of the IP Act and sections 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act.

<sup>29</sup> Consistent with the findings of the Queensland Civil and Administrative Tribunal in *BL v Office of the Information Commissioner* [2012] QCATA 149 at [15]-[16].

<sup>30</sup> Section 48(2) of the RTI Act.

<sup>31</sup> Section 118(2) of the IP Act. See also *Minogue v Information Commissioner & Queensland Health* [2014] QCATA 98 at [25].

<sup>32</sup> Submissions dated 25 October 2019.

<sup>33</sup> Submissions dated 1 October 2019.

<sup>34</sup> Submissions dated 1 October 2019.

<sup>35</sup> Section 137(2) of the IP Act.

<sup>36</sup> Sections 47(3)(e) and 52 of the RTI Act. A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist—section 52(1)(a) of the RTI Act. A document is unlocatable if it has been or should be in the agency's possession and all reasonable steps have been taken to find the document but it cannot be found—section 52(1)(b) of the RTI Act.

30. To be satisfied that documents are nonexistent, an agency must rely on their particular knowledge and experience and have regard to a number of key factors.<sup>37</sup> If searches are relied on to justify a finding that documents do not exist, all reasonable steps must be taken to locate the documents. What constitutes reasonable steps will vary from case to case, depending on which of the key factors are most relevant in the particular circumstances.
31. To determine whether a document exists, but is unlocatable, the RTI Act requires consideration of whether there are reasonable grounds for the agency to be satisfied that the requested document has been or should be in the agency's possession; and whether the agency has taken all reasonable steps to find the document. In answering these questions, regard should again be had to the circumstances of the case and the relevant key factors.<sup>38</sup>

### **Findings**

32. USQ relies on searches conducted by its officers to justify its position that reasonable steps have been taken to locate documents responsive to the application and provided information about its recordkeeping system and searches, as set out below.
33. USQ's official recordkeeping system for student files is maintained by its Corporate Records unit and documentation relating to any student registration with USQ's Disability Services is held by its Student Services unit. Also, student complaint records are contained in USQ's recordkeeping system managed by its Student Services unit.
34. USQ submitted<sup>39</sup> to OIC that it conducted the following hard copy and electronic searches<sup>40</sup>:
  - electronic and hard copy records held by the Head of School (Law and Justice)<sup>41</sup> and USQ's legal office
  - three databases storing Student Services records
  - hard copy, archived and email records stored in Corporate Records<sup>42</sup>
  - records held in the Office of the Deputy Vice-Chancellor (Students and Communities)
  - electronic and hard copy records stored in four recordkeeping systems managed by Student Success and Wellbeing
  - hard copy records and email systems<sup>43</sup> maintained by Student Success and Wellbeing; and
  - electronic and hard copy files held by Workforce Support and Partnering.
35. Given the scope of the application, the nature of the applicant's involvement with USQ and the subject matter of the requested documents, I consider that USQ has conducted comprehensive searches of locations where it would be reasonable to expect the types of information requested in the access application to be stored. Having reviewed USQ's

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<sup>37</sup> These factors are identified in *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (*Pryor*) at [19] as including the administrative arrangements of government; the agency structure; the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it); the agency's practices and procedures (including but not exclusive to its information management approach); and other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested document/s and the nature of the government activity to which the request relates. These factors were more recently considered in *Van Veendendaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017).

<sup>38</sup> *Pryor* at [21].

<sup>39</sup> Search records and certifications were provided with USQ's submissions dated 28 August 2019.

<sup>40</sup> Using the applicant's name and student number. The applicant's date of birth was used as an additional search term in USQ's searches of record keeping systems managed by Student Success and Wellbeing.

<sup>41</sup> Including Outlook mailboxes.

<sup>42</sup> Including two electronic databases.

<sup>43</sup> Including archived files.

search records, I am also satisfied that staff with working knowledge of the relevant areas undertook appropriately targeted searches for such information.<sup>44</sup>

36. In view of the above, and taking into account the documents that were located by USQ (including the Information in Issue), there is nothing before me, other than the applicant's assertions, to support an expectation that further relevant documents exist. Accordingly, I am satisfied that:

- USQ has taken reasonable steps to locate documents relevant to the access application; and
- access to further documents may be refused on the basis they do not exist, or cannot be located.<sup>45</sup>

37. Although the applicant is dissatisfied with the external review process and considers searches should have been conducted in a different manner, there is no evidence before me to suggest that the search information provided by USQ is not credible or that there are any grounds to believe that further relevant documents exist.

## **DECISION**

38. For the reasons set out above, I affirm USQ's decision to refuse access to the Information in Issue as it comprises exempt information.<sup>46</sup> In addition, I find that access to any further information may be refused on the basis it is nonexistent or unlocatable.<sup>47</sup>

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

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**K Shepherd**  
**Assistant Information Commissioner**

**Date: 2 December 2019**

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<sup>44</sup> Including search records and certifications.

<sup>45</sup> Under 67(1) of the IP Act and section 47(3)(e) of the RTI Act.

<sup>46</sup> Under section 67(1) of the IP Act and sections 47(3)(a) and 48 of the RTI Act.

<sup>47</sup> Under section 67(1) of the IP Act and sections 47(3)(e) and 52 of the RTI Act

**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
29 March 2019	OIC received the external review application.
18 April 2019	OIC notified the applicant and USQ that the external review had been accepted and asked USQ to provide information.
9 May 2019	OIC received the requested information from USQ.
13 August 2019	OIC asked USQ to provide further information.
28 August 2019	OIC received the requested information from USQ. OIC received submissions from the applicant.
11 September 2019	OIC asked USQ to provide further information.
16 September 2019	OIC received requested information from USQ.
17 September 2019	OIC received further submissions from the applicant.
24 September 2019	OIC received further requested information from USQ.
1 October 2019	OIC conveyed a preliminary view to the applicant and invited the applicant to provide submissions if she did not accept the preliminary view. OIC received submissions from the applicant.
3 October 2019	USQ confirmed to OIC that it had released 28 pages to the applicant.
25 October 2019	OIC wrote to the applicant and confirmed the preliminary view. OIC received further submissions from the applicant.