



Decision and Reasons for Decision

Application Number: 310322

Applicant: Henderson

Respondent: Legal Practice Committee

Decision Date: 30 November 2011

Catchwords: RIGHT TO INFORMATION – APPLICATION FOR ACCESS TO INFORMATION – applicant applied for access to documents relating to disciplinary hearing – whether Legal Practice Committee is an entity to which the RTI Act does not apply in respect of quasi-judicial functions under section 17 and schedule 2, part 2 – whether the Information Commissioner has jurisdiction to conduct an external review – whether the Information Commissioner will decline to deal further with the application under section 94(1)(a) of the *Right to Information Act 2009 (Qld)* on the basis that the application is lacking substance

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REASONS FOR DECISION

Summary

1. The applicant applied to the Legal Practice Committee (**LPC**) for five categories of documents about a complaint and subsequent disciplinary hearing which the applicant says occurred in 2009 (**Access Application**).
2. The LPC did not respond to the Access Application.
3. The applicant subsequently applied to the Office of the Information Commissioner (**OIC**) for external review.
4. In submissions to OIC the LPC contended that *'at the time the relevant documents were created or obtained, the LPC was hearing a disciplinary action (exercising a quasi-judicial function) or performing acts reasonably ancillary to doing so'* and was therefore, for the purposes of the Access Application, an entity to which the *Right to Information Act 2009* (Qld) (**RTI Act**) did not apply.
5. The applicant contended that *'confusion has been created by wrongly assuming an amalgamation of the administrative functions of the LPC (the Secretariat) with the functions of the quasi-judicial tribunal (the Committee)'*.
6. For the reasons set out below, I find that the LPC is not required to process the Access Application because the documents sought were received, or brought into existence, by the LPC in performing its quasi-judicial functions, in relation to which, the LPC is an entity to which the RTI Act does not apply.¹ In view of this finding, I have decided not to further deal with this external review application on the basis that it is lacking substance.²
7. Significant procedural steps relating to the external review application are set out in the Appendix.

Information Commissioner's jurisdiction

8. The Information Commissioner will not have jurisdiction to conduct an external review in this matter if the Access Application is outside the scope of the RTI Act.
9. If an entity decides that a purported access application is outside the scope of the RTI Act, it must give the applicant prescribed written notice of the decision within 10 business days after the purported application is received.³ A decision that an access application is outside the scope of the RTI Act under section 32(1)(b) is a reviewable decision.
10. The LPC did not respond to the Access Application and therefore did not provide the applicant with a written notice. This appears to have occurred because although the Legal Services Commission (**LSC**) received the Access Application (in providing administrative support to the LPC), through an oversight, the application was not forwarded to the LPC to be dealt with.
11. The applicant indicates that the LPC's non-response is a deemed refusal of access. This will only be the case if the LPC is an 'agency' for the purpose of the Access Application.

12. If the LPC is not an agency for the purpose of the Access Application, it is not required to make an access decision and the Information Commissioner will not have jurisdiction to conduct an external review. Though I note that, as an appeal tribunal of limited jurisdiction, the Information Commissioner has both the power and a duty to consider the limits of their jurisdiction.⁴

Material considered

13. Evidence, submissions, legislation and other material I have considered in reaching my decision is disclosed in these reasons (including footnotes and appendix).

Relevant law

14. The RTI Act provides that, subject to the Act, a person has a right to be given access to documents of an 'agency'.⁵
15. Section 14(2) of the RTI Act provides that an 'agency' does not include an 'entity to which [the RTI Act] does not apply'.
16. Relevantly:
 - section 17 of the RTI Act provides that an entity to which the RTI Act does not apply is an entity mentioned in schedule 2, part 2 of the RTI Act in relation to the function mentioned in that part; and
 - schedule 2, part 2, item 6 of the RTI Act provides that 'a quasi-judicial entity in relation to its quasi-judicial functions' is an entity to which the RTI Act does not apply in relation to that function.
17. The explanatory notes to the Right to Information Bill 2009 (Qld) confirm that schedule 2, part 2, item 6 of the RTI Act is a:

...function-based exclusion to ensure that entities that are not named as tribunals (for example, the Family Responsibilities Commission), have similar protections for the performance of their quasi-judicial functions.
18. Section 94(1)(a) of the RTI Act provides that the Information Commissioner may decide not to further deal with an application if satisfied that the application is lacking substance.

Issue

19. The issue to be determined in this external review is whether the LPC is required to process the Access Application in accordance with the RTI Act. The LPC will not be required to process the Access Application if it is a quasi-judicial entity and the documents sought were received, or brought into existence, by the LPC in performing its quasi-judicial functions.⁶
20. The LPC has contended, in the alternative, that the LPC, as a committee of the LSC is not separate to the LSC.⁷ Further, that because the LPC assists the Queensland Civil and Administrative Tribunal (**QCAT**) by deciding complaints otherwise within QCAT's jurisdiction and reducing the tribunal's workload, LPC is not a separate agency for the purposes of section 16 of the RTI Act. The LPC submits that in view of this, the Access Application is invalid.

21. The applicant applied to the LPC for access to documents and appears to have accepted throughout the external review that the LPC is a separate agency to the LSC.⁸ In view of my findings below, it is unnecessary for me to determine this issue. In any event, I am satisfied that the LPC is a separate entity to the LSC for the purposes of the RTI Act.

Findings

Is the LPC a 'quasi-judicial entity'?

22. Yes, for the reasons that follow.

The LPC's submissions

23. The LPC submits that it is a quasi-judicial entity, and is therefore not an agency with respect to its quasi-judicial functions. On this point, the LPC refers to the definition of judicial power in *Huddart, Parker & Co Pty Ltd v Moorehead*,⁹ submitting that:

- in conducting a hearing there is a controversy between the LSC and a legal practitioner which concerns existing rights, such as the right of the practitioner to continue practising law as well as certain property rights, such as the imposition of fines or compensation
- members of the LPC, when conducting a hearing, have the same protections and immunities as a Supreme Court judge carrying out functions of a judge
- further evidence that LPC proceedings are '*on an equal footing with Supreme Court proceedings is the position of parties' representatives, witnesses, and (of particular relevance here) "a document produced at, or used for, a hearing of the committee."* Thus section 642 basically clothes the committee (when hearing a discipline application) with the key attributes of a judicial body.'

Consideration

24. The LPC was established under the *Legal Profession Act 2004* (Qld) and continues under the *Legal Profession Act 2007* (Qld) (**LP Act**). The LP Act details two functions which are undertaken by the LPC. First, the LPC has an advisory function through which it monitors the effectiveness of the legal profession rules and makes recommendations to the relevant Minister (**Advisory Function**). Second, the LPC hears and decides specific types of discipline applications lodged with it by the Legal Services Commissioner (**Discipline Function**). The LP Act also provides that the Legal Services Commissioner must provide administrative support to the LPC. Only the Discipline Function is relevant in this review.
25. The RTI Act defines '*quasi-judicial entity*' as an '*entity that exercises quasi-judicial functions*'.¹⁰
26. The Macquarie Dictionary¹¹ defines '*quasi-judicial*' as '*having characteristics of a judicial act but performed by an administrative agency*'.
27. The LPC referred in its submission to a statement of Griffith CJ as to the meaning of judicial power – '*the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property.*' Similarly, in Cannon, the Information Commissioner described the hallmarks of a judicial function as '*attempting to*

*adjudicate, or to give a final or conclusive decision about, a dispute between parties as to existing rights or obligations by reference to established rules or principles.*¹²

28. In *Re Farnaby and Military Rehabilitation and Compensation Commission*¹³ (**Farnaby**) the Administrative Appeals Tribunal (**AAT**)¹⁴ was required to consider whether proceedings in the AAT attracted common law privilege such that the litigation limb of legal professional privilege (**LPP**) could apply in those proceedings. In that matter, Justice Downes and Deputy President Groom considered that proceedings in the AAT are quasi-judicial in respect of which claims for LPP can apply.¹⁵ In reaching that conclusion, their honours stated that the most important feature to consider was that the Tribunal made decisions which affected peoples' rights.¹⁶ Their honours also noted that the following statutory characteristics of review, whilst undertaken in the context of making administrative decisions, parallel litigation in courts:¹⁷

- there are at least two parties to proceedings
- proceedings are determined through a hearing unless Tribunal and the parties agree otherwise
- the hearing is conducted in public, unless special circumstances require some contrary order
- parties before the Tribunal have a right to representation
- although the Tribunal is not bound by the rules of evidence, the manner in which it is required to conduct a hearing requires it to act on evidence which it admits
- the Tribunal has power to take evidence on oath or affirmation and to summons persons to give evidence or produce documents; and
- the Tribunal must give reasons for its decision which a party can require to be in writing.

29. I accept LPC's submissions at paragraph 23 above. Significantly, under its Discipline Function the LPC can make decisions that affect people's rights including, for example, making an order that a practitioner pay a monetary penalty or refrain from doing something in connection with the practitioner engaging in legal practice.¹⁸ Further, the characteristics identified in *Farnaby* are also evident in respect of the LPC, in particular:

- there are at least two parties to proceedings before the LPC¹⁹
- the LPC generally conducts hearings²⁰ which are open to the public unless there are public interest reasons for directing otherwise²¹
- parties before the LPC have a right to legal representation²²
- although the LPC is not bound by the rules of evidence, it must comply with the rules of natural justice and act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of justice²³
- the LPC has power to take evidence on oath or affirmation and to require a person to give evidence or produce documents;²⁴ and
- the LPC must give the parties a copy of any order (which must also be filed in the Supreme Court) and an information notice about its final decision.²⁵

Were the requested documents received, or brought into existence, by the LPC in performing its quasi-judicial functions?

30. Yes, for the reasons that follow.

31. The applicant seeks access to a number of types of documents including:

- a complaint and a response to the complaint
- all practice directions from number 1 of 2006 to the present
- discipline application arising from the complaint
- order made
- transcript of the discipline hearing; and
- the balance of the discipline file.

The Applicant's submissions

32. The applicant's principal contention is that the requested documents relate to the LPC's administrative functions, rather than its quasi-judicial functions:

Confusion has been created by wrongly assuming an amalgamation of the administrative functions of the LPC (the Secretariat) with the functions of the quasi-judicial tribunal (the Committee).²⁶

33. Supporting this view, the applicant draws an analogy with the administrative function of Court registries, *'who maintain files containing pleadings which members of the public can search and obtain copies of by the payment of fees'*.
34. In relation to the specific documents sought, the applicant contends that the discipline application was initially published on the Legal Services Commission's website and has since been withdrawn *'without any lawful authority under the act or a published explanation to the Legal Consumers of Queensland'*. Further, that the original complaint and response are administrative documents held by the secretariat. The applicant also argues that the transcript and discipline file were created by the Secretariat in discharge of its administrative, not its quasi-judicial functions.

The LPC's submissions

35. The LPC submits that the relevant time for considering the statutory exclusion is the time a document was created or acquired and that when the LPC created or received the documents, the subject of the access application, it was performing a quasi-judicial function.

Consideration

36. I acknowledge that the LSC provides administrative support to the LPC, and in so doing, plays a role which is not dissimilar to a court registry in receiving, creating and managing many of the types of documents sought in the Access Application. That the secretariat for the LPC may play an administrative role in relation to the documents sought does not mean that the documents relate to an administrative function. The relevant question is whether the documents sought were received, or brought into existence, by the LPC in performing its quasi-judicial functions, that is, its Discipline Function. In this instance they clearly were. That similar types of documents may be made available through court registries is not relevant to the issue to be decided here as the availability of such documents, often provided for under specific legislation, does not mean that such documents concern the courts' administrative rather than judicial functions.
37. The RTI Act does not apply to *'a quasi-judicial entity in relation to its quasi-judicial functions'*. On the basis of the matters outlined at paragraphs 22 to 29 above, I am satisfied that in hearing and deciding disciplinary matters, the LPC is a quasi-judicial entity carrying out quasi-judicial functions.

38. The documents sought in the Access Application all concern a matter which would come within the LPC's Disciplinary Function. I am therefore satisfied that the documents sought were received, or brought into existence, by the LPC in performing its quasi-judicial functions, in relation to which, the LPC is an entity to which the RTI Act does not apply. The LPC is therefore not required to process the Access Application.
39. The Information Commissioner has previously indicated that in determining whether a matter is lacking substance, in the sense provided for in section 94(1)(a) of the RTI Act, regard must be had to *'the words of the statute in the context of the particular circumstance of the case'*.²⁷ In *deVere*²⁸ the Information Commissioner was satisfied that the application was 'lacking in substance' because there is no basis on which an external review could be progressed. Similarly in a recent decision of the Queensland Civil and Administrative Tribunal (**QCAT**),²⁹ Senior Tribunal Member Endicott discussed section 47 of the QCAT Act³⁰ which is substantially similar to section 94 of the RTI Act.³¹ In deciding not to proceed with the matter before her, Ms Endicott noted relevantly that:³²

Section 47 has a valid role to play in ensuring that cases lacking substance do not place the tribunal in the position of having to devote time and resources to proceeding with a case that has no prospects of success.

40. I am satisfied that this is the case in this matter also. As the LPC is not required to process the Access Application, the Information Commissioner has no jurisdiction to proceed with an external review and the applicant therefore has no prospect of succeeding in the matter.

DECISION

41. For the reasons set out above, I find that the LPC is not required to process the Access Application as the documents sought in that application were received, or brought into existence, by the LPC in performing its quasi-judicial functions, in relation to which, in accordance with section 17 and schedule 2, part 2 of the RTI Act, the RTI Act does not apply.
42. I am satisfied that the external review application is lacking substance and I have decided, in accordance with section 94(1)(a) of the RTI Act, not to further deal with the application.
43. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

Jenny Mead
Right to Information Commissioner

Date: 30 November 2011

APPENDIX

Significant procedural steps

Date³³	Event
28 June 2010	The applicant applied to the LPC for documents relating to disciplinary proceedings against a third party
23 July 2010	The applicant asked the LPC to issue a decision
29 July 2010	The applicant again asked the LPC to issue a decision
6 August 2010	The applicant applied to the Office of the Information Commissioner (OIC) for external review
12 August 2010	OIC informed the applicant that preliminary inquiries were being undertaken
25 August 2010	OIC provided an initial preliminary view to the Legal Service Commission (LSC)
6 September 2010	The applicant provided submissions
9 September 2010	The LSC provided submissions in response to the preliminary view
24 September 2010	The applicant provided further submissions
11 November 2010	OIC informed the applicant that his application has been accepted for external review
11 November 2010	OIC provided a preliminary view to the LPC
24 November 2010	Cooper Grace Ward, on behalf of the LPC, provided submissions responding to the OIC preliminary view
18 January 2011	The applicant provided further submissions
24 February 2011	The applicant provided further submissions
4 March 2011	OIC provided the applicant with a preliminary view and a copy of LPC' submissions
7 March 2011	The applicant provided further submissions, requesting an extension of time as well as copies of submissions made by the LSC and correspondence between OIC and the LPC
9 March 2011	OIC provided the applicant with a copy of a letter OIC sent to the LPC dated 11 November 2011
18 March 2011	OIC responded to and clarified issues raised by the applicant in his submissions
23 March 2011	The applicant provided submissions in response to the preliminary view
24 May 2011	The applicant provided further submissions
19 August 2011	The applicant provided further submissions

¹ Section 17 of the RTI Act and schedule 2, part 2 of the RTI Act.

² In accordance with section 94(1)(a) of the RTI Act.

³ Section 32(2) of the RTI Act.

⁴ *Christie and Queensland Industry Development Corporation* (Unreported, Queensland Information Commissioner, 31 March 1993) (**Christie**).

⁵ Section 23 of the RTI Act.

⁶ Taken literally, the statutory provisions referred to at paragraphs 15 and 16 above describe the exclusion in terms of the entity's function. They do not expressly prescribe or identify the particular documents to which the exclusion pertains. The Information Commissioner discussed a similar lack of clarity in relation to the interpretation of section 11(1)(e) of the now repealed *Freedom of Information Act 1992* (Qld) (prior to its subsequent amendment) in *Cannon and Magistrates Court* (2004) 6 QAR 340 (**Cannon**), referring also to the previous Information Commissioner's comments in *Christie*. In *Cannon* (at paragraph 22), the Information Commissioner concluded that '*the scope of the exclusion is for any documents received or brought into existence by a court, or the holder of a judicial office et cetera, in performing the judicial function of the court, or holder of a judicial office et cetera.*' *Christie* and *Cannon* concern a different provision under the now repealed FOI Act. However, I consider that the salient issues identified by the Information Commissioners in those decisions are substantially similar to those being considered here, and I endorse the approach taken in those decisions, so as to give proper effect to what was clearly Parliament's intention. I note that this substantially accords with the LPC's submissions on this point.

⁷ Section 14(3)(a) of the RTI Act.

⁸ On this point I note the applicant submits that '*it is futile to analyse whether or not the LPC and LSC are separate agencies or comprise within an agency because nothing turns on it.*'

⁹ (1909) 8 CLR 330, per Griffith CJ at 357.

¹⁰ Schedule 6 of the RTI Act.

¹¹ *Macquarie Dictionary Online* (Fourth Edition) www.macquariedictionary.com.au.

¹² At paragraph 56.

¹³ *Re Farnaby and Military Rehabilitation and Compensation Commission* [2007] AATA 1792.

¹⁴ In this matter the AAT was required to consider whether legal professional privilege could be claimed in proceedings in the AAT.

¹⁵ At paragraphs 34-35. See also *Hercules v Phease & Anor* [1994] 2 VR 411 and *Addis v Crocker & Others* [1960] 2 All ER 629; relying in particular upon the decision in *Waterford v the Commonwealth* (1987) 163 CLR 54, though noting that the same conclusion was reached on the basis of principle – see paragraph 31.

¹⁶ At paragraph 20.

¹⁷ At paragraph 21.

¹⁸ Section 458 of the LP Act.

¹⁹ The respondent and the commissioner and, in some circumstances, the complainant is also entitled to appear; section 643 of the LP Act.

²⁰ There are limited exceptions to this: see sections 453 and of the LP Act.

²¹ Section 644 of the LP Act.

²² Section 643 of the LP Act.

²³ Section 645 of the LP Act.

²⁴ Section 653 of the LP Act.

²⁵ Section 459 of the LP Act.

²⁶ Submissions dated 23 March 2011.

²⁷ *deVere Lawyers and Whitsunday Regional Council* (Unreported, Queensland Information Commissioner, 19 March 2009) (**deVere**) at page 4.

²⁸ *deVere Lawyers and Whitsunday Regional Council* (Unreported, Queensland Information Commissioner, 19 March 2009) at page 4.

²⁹ *Saunders and Department of Communities* (QCAT, 25 October 2011).

³⁰ Queensland Civil and Administrative Tribunal Act 2009 (Qld).

³¹ Allowing the Tribunal to discontinue a proceeding if it is frivolous, vexatious, misconceived, lacking substance or otherwise an abuse of process

³² At paragraph [14].

³³ Of correspondence or relevant communication unless otherwise stated.