



Decision and Reasons for Decision

Citation: *Cronin and Crime and Corruption Commission* [2017] QICmr 13 (6 April 2017)

Application Number: 312836

Applicant: Cronin

Respondent: Crime and Corruption Commission

Decision Date: 6 April 2017

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – INVESTIGATION BY PRESCRIBED CRIME BODY – complaint information – information obtained, used or prepared for an investigation by a prescribed crime body or another agency in performing the prescribed functions of the prescribed crime body – sections 47(3)(a) and 48 and schedule 3, section 10(4) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – CONTEMPT OF PARLIAMENT – communications with the Parliamentary Crime and Corruption Committee – whether disclosure would infringe privileges of Parliament – whether exempt information – sections 47(3)(a) and 49 and schedule 3 section 6(1)(c) of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant both made and was the subject of several complaints to the Crime and Misconduct Commission, now known as the Crime and Corruption Commission (**CCC**).¹ By application dated 10 February 2016, the applicant applied under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to investigation files maintained by CCC in dealing with those complaints.
2. CCC² granted the applicant access to various documents, and refuse access to others (in full or part), on various grounds. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of CCC's decision.
3. Access may be refused to the information remaining in issue in this review, on the grounds the information comprises exempt information, as either:
 - information obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in the performance of the prescribed functions of the prescribed crime body;³ or

¹ Section 5(1) of the *Crime and Corruption Act 2001* (Qld) (**CC Act**), a change effected by section 7(1) of the *Crime and Misconduct and Other Legislation Amendment Act 2014* (Qld) (**CMOLA Act**). For ease of reference, I will refer only to CCC in these reasons.

² By decision dated 22 April 2016.

³ Sections 47(3)(a) and 48, and schedule 3, section 10(4) of the *Right to Information Act 2009* (Qld) (**RTI Act**).

- information the public disclosure of which would infringe the privileges of Parliament.⁴

Reviewable decision

4. The decision under review is CCC's decision dated 22 April 2016.

Evidence considered

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

Information in issue

6. The information in issue comprises:
- a) pages⁵ 1, 4, 6, 9-10, 12, 17-20, 22, 24-25, 28-30, 33-37, 56, 63, 78, 82-83, 90, 92 and 103, derived from various documents to which CCC granted the applicant partial access
 - b) 133 pages comprising documents to which CCC refused access in full under, relevantly, schedule 3, section 10(4) of the RTI Act (**Prescribed Crime Body Exemption**); and
 - c) two further documents to which access was refused under schedule 3, section 6(c)(i) of the RTI Act (the **Parliamentary Privilege Exemption**).

Relevant law

7. Section 23 of the RTI Act confers a general right to access documents of an agency. This right is, however, subject to a number of exclusions and limitations, including grounds on which an agency may refuse access to documents as prescribed in section 47 of the Act.
8. Relevantly, an agency may refuse access to information to the extent it comprises exempt information.⁶ Schedule 3 of the RTI Act specifies categories of exempt information.

Prescribed Crime Body Exemption

9. One category of exempt information is that provided for in the Prescribed Crime Body Exemption, being information obtained, used or prepared for an investigation by a prescribed crime body or another agency,⁷ during its performance of a prescribed function of the prescribed crime body.⁸ An exception to the Prescribed Crime Body Exemption applies where:
- the information consists of information about the applicant; and
 - the investigation has been finalised.⁹

⁴ Schedule 3, section 6(c)(i) of the RTI Act.

⁵ As numbered by OIC during the course of this review, and with the exception of telephone numbers, email addresses appearing in email 'address blocks', email address 'tails', and the names of CCC officers who printed certain pages (where relevant), this being information to which the applicant does not seek access, and which is therefore not in issue. Copies of these pages – appropriately numbered, with information to which the applicant does not seek access and is therefore not in issue boxed in blue and information I have found to be exempt in red – will be forwarded to CCC together with these reasons. I should also note that during the course of the review, the applicant sought copies of correspondence sent by CCC to him. By letter dated 20 October 2016, OIC advised the applicant to contact CCC's Integrity Services division directly to arrange access to this material (relaying advice conveyed to OIC by CCC, in correspondence dated 14 October 2016). I have heard nothing further from the applicant on this issue, and have therefore not treated it as matter to be addressed in this decision.

⁶ Sections 47(3)(a) and 48 of the RTI Act.

⁷ Although CCC has primary responsibility for dealing with corrupt conduct complaints, CCC may refer such a complaint to a public official (which includes the chief executive officer of a unit of public administration) to be dealt with by the public official or in cooperation with the CCC, subject to the CCC's monitoring role: sections 45 and 46(2) of the CC Act. Equivalent provisions with the same numbering were contained in the *Crime and Misconduct Act 2001* (Qld) (**CM Act**), in operation at the time of relevant investigations.

⁸ Schedule 3, section 10(4) of the RTI Act.

⁹ Schedule 3, section 10(6) of the RTI Act.

10. In this case, I am satisfied that:

- all information remaining in issue on the pages listed at paragraph 6(a);¹⁰ and
- all pages listed at paragraph 6(b)

qualify for exemption from disclosure under the Prescribed Crime Body Exemption, for the reasons that follow. I will refer to this information as the '**Investigation Information**'.

Findings

Did CCC 'obtain, use or prepare' the Investigation Information for an investigation?

11. Yes.

12. The terms '*obtained, used or prepared*' are not defined in the RTI Act or the *Acts Interpretation Act 1954* (Qld), and so are to be given their ordinary meaning. The term '*investigation*' as used in the Prescribed Crime Body Exemption has been defined expansively, and includes the mere examination or consideration of information (paraphrasing the definition of 'investigate' contained in schedule 2 to the CC Act).¹¹

13. Having considered relevant documents, parts of documents,¹² and the participants' submissions, I have formed the view that the Investigation Information was obtained, used or prepared by CCC in the course of investigating – ie, examining, considering, dealing with – and/or overseeing departmental-level investigation¹³ of relevant matters.

Were relevant investigations conducted by a prescribed crime body, or another agency, in performing the prescribed functions of the prescribed crime body?

14. Again, yes.

15. CCC is a 'prescribed crime body' for the purposes of the RTI Act.¹⁴

16. Matters the subject of CCC's investigation (or oversight) were, as I understand, assessed as potentially constituting official misconduct, now known as 'corrupt conduct'.¹⁵ Dealing with corrupt conduct¹⁶ is an aspect of the CCC's 'corruption function',¹⁷ and the 'corruption function' is one of the CCC's 'prescribed functions'.¹⁸

17. CCC was, in obtaining, using or preparing the Investigation Information, therefore a prescribed crime body performing its prescribed functions.

¹⁰ That is, all information to which access has been refused, other than information to which the applicant is not seeking access as discussed at footnote 5, and two small portions of information on pages 22 and 25, which I am satisfied may be deleted as irrelevant. Detailing the time and date the particular page was printed for the purposes of collating information relevant to the applicant's RTI access application, each of these portions post-dates that access application and may be deleted under section 73 of the RTI Act.

¹¹ *Springborg and Crime and Misconduct Commission; RZ (Third Party), BX (Fourth Party), Director-General of the Department of Justice and Attorney-General (Fifth Party) (2006) 7 QAR 77* contains a detailed analysis of the concept of an 'investigation' as used in the provision of the repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**) that was the material equivalent of schedule 3, section 10(4) of the RTI Act. The Information Commissioner in that decision determined that it can encompass the process of examining, considering, "dealing with" and "assessing" a complaint: [55]-[59]. The provisions of the CM Act analysed in *Springborg* are the material equivalents of those contained in the CC Act.

¹² A line of text on page 25 as listed in paragraph 6(a) has been obscured by CCC, on the basis disclosure - even to OIC - would infringe the privileges of Parliament. While section 106(1) of the RTI Act would appear to allow disclosure to OIC of information of this kind, it is not a matter I need to resolve. This is because the relevant segment is subsumed within a larger segment of information that was plainly obtained, used or prepared by CCC for an investigation, and I am satisfied that, from the context in which it appears, this smaller obscured segment similarly attracts exemption on this basis.

¹³ See footnote 7.

¹⁴ Schedule 3, section 10(9) of the RTI Act.

¹⁵ As a consequence of the CMOLA Act, the concept of '*corrupt conduct*' replaced what was previously referred to as '*official misconduct*'—see section 400(c) of the CC Act.

¹⁶ The term '*corrupt conduct*' is extensively defined in section 15 of the CC Act.

¹⁷ Section 33 of the CC Act, and the definition of that term and the term '*corruption*' in schedule 2 of the CC Act.

¹⁸ Schedule 3, section 10(9) of the RTI Act.

Does the exception to the Prescribed Crime Body Exemption apply?

18. In this case, no.
19. The exception to the Prescribed Crime Body Exemption only applies where the investigation is finalised and the information is about the applicant.
20. CCC's investigations have been finalised. The Investigation Information in this case is, however, not 'about' the applicant.
21. Whether information is 'about' a given applicant is a question of fact, to be resolved by reference to the information itself. In this case, many if not most of the segments appearing on pages to which the applicant has been given partial access comprise the names of persons other than him (and are therefore not 'about' him), or otherwise relate not to the applicant, but the administration of CCC's investigatory processes.¹⁹
22. As for the balance of the Investigation Information, relevant pages²⁰ relate to investigations into various individuals other than the applicant, these investigations apparently having resulted from complaints made by the applicant. OIC has dealt with several cases of this kind, in which a complainant applicant has sought access to investigatory documents otherwise exempt under the Prescribed Crime Body Exemption, on the basis that as the documents relate to a finalised investigation initiated by the applicant's complaint, they are therefore about that applicant and thus come within the exception to the exemption.
23. As a consequence of those cases – in which the argument summarised in the preceding paragraph has been consistently rejected – the meaning of 'about' in schedule 3, section 10(6) of the RTI Act is now well-settled.²¹ The word 'about' is to be construed so as to give effect to the intention of the exception: to enable persons the subject of an investigation to obtain access to information about the investigation once it is finalised.²² The effect of this construction is that while an investigation may be the direct result of an applicant's complaint, this does not mean that resulting investigation documents will be 'about' that applicant for the purpose of the exception to the Prescribed Crime Body Exemption (even allowing for, as here, incidental references to a complainant applicant).²³
24. For example, in *G8KPL2* the Right to Information Commissioner found that an investigation report, while created as a result of the applicant's complaint, was not about the applicant but was instead about the persons who were the subject of the allegations and related Crime and Misconduct Commission investigation. Similarly, in *Cameron and Queensland Police Service*,²⁴ OIC found that while the investigation reports and investigatory materials 'came into existence as the result of the applicant's actions in...making...complaints' about public officials, the information was not about the applicant.²⁵ In each case, the thrust or substance of the relevant information was found to concern – be 'about' – those officials who were the subjects of the particular applicants' complaints and resulting investigations.
25. Applying the above principles, the Investigation Information relating to CCC investigations into persons other than the applicant is to be properly characterised as information about the subjects of relevant complaints, not the applicant. While much of this information may

¹⁹ My findings in this paragraph extend to the obscured segment on page 25 noted at footnote 12; by email dated 7 March 2017, CCC confirmed this portion was not about the applicant. Given the offence provision contained in section 177 of the RTI Act, this is advice I am prepared to accept.

²⁰ Or part pages.

²¹ *G8KPL2 and the Department of Health* (Unreported, Queensland Information Commissioner, 31 January 2011) at [32] (*G8KPL2*). This decision was affirmed on appeal: *Minogue v Office of the Information Commissioner Queensland and Anor* [2012] QCATA 191. See also *Darlington and Queensland Police Service* [2014] QICmr 14 (11 April 2014). An appeal against this decision was also dismissed: *Darlington v Office of the Information Commissioner & Queensland Police Service* [2015] QCATA 167.

²² See OIC's discussion of the Second Reading Speech and Explanatory Memorandum relating to the legislation which inserted the equivalent provision into the repealed *Freedom of Information Act 1992* (Qld) in *G8KPL2*, at [29]-[30].

²³ *G8KPL2* at [27] to [32].

²⁴ (Unreported, Queensland Information Commissioner, 7 August 2012).

²⁵ *Cameron* at [31], repeating the Right to Information Commissioner's similar observation in *G8KPL2* (at [32]).

have been obtained or created as a consequence of complaints made by the applicant, the substance of the information they contain concerns – is ‘about’ – those the subject of relevant complaints and investigations that followed.

Prescribed Crime Body Exemption - conclusion

26. The exception to the Prescribed Crime Body Exemption is not enlivened as regards any of the Investigation Information. The requirements of schedule 3, section 10(4) of the RTI Act are met and, as the exception to this provision does not apply, access to the Investigation Information may be refused.²⁶ (For the sake of completeness, I would also note that one document – a four-page set of notes prepared by an in-house legal officer for the purposes of promulgating legal advice – is not only exempt under the Prescribed Crime Body Exemption, but also appears to attract legal professional privilege,²⁷ a separate category of exempt information under schedule 3, section 7 of the RTI Act.)

Applicant's submissions

27. Through his solicitors, the applicant argues²⁸ that the Prescribed Crime Body Exemption cannot apply, on three bases. The first of these is that the Investigation Information is ‘about’ the applicant, and thus subject to the exception to the exemption. The applicant’s submissions in this regard are premised in large part on the notion that as a complainant, any information obtained, used or prepared by CCC in investigating his complaints is therefore ‘about’ him. I have explained above why such a contention is unsustainable. It is thus unnecessary to address this submission any further, other than to reiterate my conclusion that relevant pages are not about the applicant.
28. The same conclusion holds for various segments of information in issue deleted from pages partly released to the applicant. Information on these pages that *is* about the applicant has been released to him; residual information to which access has been refused comprises, as I have noted above, either the names of other individuals or information concerning the administration of CCC’s investigatory activities. I am satisfied neither type is about the applicant.
29. The applicant’s second line of argument is based upon the fact that at least some of the information in issue was released to him by CCC pursuant to notices to produce served by him on CCC in the course of proceedings between him and his former employer, a government department, in the Queensland Industrial Relations Commission (**QIRC**). Relying generally on the doctrines set down in *Commonwealth v Verwayen*,²⁹ the applicant argues that as a consequence of this earlier disclosure, CCC is now precluded from refusing access to the same information under the RTI Act, as it:
- has ‘waived’ its right to rely upon the Prescribed Crime Body Exemption or; alternatively
 - ought to be estopped from doing so.
30. It is not clear on the material before me exactly how much of the Investigation Information was disclosed to the applicant during the relevant QIRC proceedings. Ultimately, this is not a matter I need to resolve, as I am satisfied that neither of the above submissions can be sustained as regards any of this information.
31. Prior to explaining my conclusion in this regard, however, I should also make clear that prior disclosure of information – even general publication – does not preclude the

²⁶ Sections 47(3)(a) and 48 of the RTI Act.

²⁷ In accordance with the principles set out in *Esso Australia Resources Limited v Commissioner of Taxation* [1999] HCA 67; (1999) 201 CLR 49 at [35] and [61] per Gleeson CJ, Gaudron and Gummow JJ and *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 CLR 543 at [9] per Gleeson CJ, Gaudron, Gummow and Hayne JJ and McHugh J at [44]. Documents of this kind – notes and documents recording legal work – may attract legal professional privilege: *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at pages 245–246; *AWB Limited v Cole (No 5)* [2006] FCA 1234 at [44].

²⁸ See particularly submissions dated 8 December 2016.

²⁹ (1990) 170 CLR 394.

application of the Prescribed Crime Body Exemption to such information. A successful claim for exemption under this provision turns only on satisfaction of the requirements discussed at paragraphs 9-16 above, and not demonstration that relevant information is secret or confidential. In other words, information can qualify for disclosure under the Prescribed Crime Body Exemption, even if in the public domain.³⁰

32. I turn now to address the applicant's waiver and estoppel arguments.

Waiver

33. The concept of waiver as elucidated in *Verwayen* requires, on my understanding, 'deliberate action or inaction which has resulted in a changed relationship to which the parties will be held whether or not detriment is actually established'.³¹ The concept is apt to apply to situations in which, as the facts of *Verwayen* and the very reference to 'parties' in the statement of principle set out in the preceding sentence indicate, persons are in a 'relationship' of being parties to the same proceedings or litigation, during which such proceedings some intentional conduct or lack thereof by one effects an alteration in that relationship.
34. In this case, however, any relationships of the *Verwayen* kind existing as between CCC and the applicant were two-fold:
- firstly, the relationship created by the service on CCC by the applicant of QIRC non-party disclosure notices;
 - secondly, the relationship of access applicant and respondent agency under the RTI Act, created by lodgement with CCC by the applicant of a valid access application under the RTI Act.
35. The manner in which CCC elected to respond to the QIRC disclosure notices arguably comprised a deliberate act altering that particular relationship between it and the applicant. The second relationship, however – and the one I am called to consider – was not even on foot at that point, and cannot in my view be said to be altered or affected in any way by CCC's actions in the first (noting that the only deliberate action relevantly taken by CCC in the course of this latter 'RTI relationship' was the action of invoking the refusal of access grounds prescribed in the RTI Act and thus refusing the applicant access to the Investigation Information.)
36. My view in this regard is reinforced by the qualitatively different nature of each of these 'relationships', and the use to which information accessed under each may be put.
37. Firstly, there is only a limited range of grounds open to a respondent to a non-party production notice served under the QIRC rules to object to the production of targeted information³² – considerably fewer than the grounds on which information requested under the RTI Act may be refused. The non-party respondent may, however, take comfort in the fact that information supplied by way of the QIRC disclosure process is subject to the usual implied undertakings restricting the use of information produced under compulsion.³³
38. An almost entirely obverse position obtains as regards requests for information under the RTI Act. Information obtained under the RTI Act is subject to no such conditions or

³⁰ *Together Queensland, Industrial Union of Employees and Department of Transport and Main Roads* (Unreported, Queensland Information Commissioner, 1 February 2013), at [34]-[36].

³¹ Gaudron J at page 485. The applicant's 8 December 2016 submissions also cite various authorities pertaining to the concept of waiver as it applies under the law of legal professional privilege; these are irrelevant to the issues to be addressed when considering the question of potential *Verwayen* waiver.

³² *Industrial Relations (Tribunals) Rules 2011* (Qld), section 64E.

³³ Which have been recognised as applying to QIRC proceedings: *QNU v Sundale Garden Village, Nambour* [2004] QIRComm 212. Where information is subsequently put into evidence, the limitations imposed by such an implied undertaking are generally lifted; from an RTI perspective, however, a person in the applicant's position would enjoy access by alternative means, and access under the RTI Act may therefore be refused in any event: section 47(3)(f) of the RTI Act. In this context, it bears repeating that the operation of the Prescribed Crime Body Exemption is not contingent on information being confidential or secret, whether as against a specific applicant or the world at large.

limitations as applies to disclosure in curial and quasi-curial settings, and a person obtaining access to information under the RTI Act is generally free to use or further disseminate that information in any way not otherwise contrary to law. The right of access afforded by the RTI Act is, however, subject to limitations and exclusions imposed by the Act itself, which entitle agencies such as CCC to legitimately refuse access to information on grounds far broader than those available to a person faced with a notice to produce in QIRC proceedings. These broader grounds include permitting refusal of access to information previously made known to an applicant or otherwise in the public domain, by way of the exemption enshrined in schedule 3, section 10(4) of the RTI Act.

39. With these considerations in mind, I do not think that CCC's election to release information in the first relationship – one subject to various constraints and safeguards, the existence and effect of which presumably influenced CCC's disclosure decisions in responding to the notice served by the applicant – can be fairly extended into the second, discrete relationship created under the RTI Act at a later point in time, where any release of information would be generally unconditional, but where, equally, there is open to the CCC a ground for refusing access to information previously disclosed to the applicant.
40. In short, actions taken by CCC in disclosing information in response to compulsory notices to produce cannot be seen to comprise a deliberate action on its part to waive future exemption claims that might otherwise be open to it under the entirely separate and qualitatively distinct information access regime embodied in the RTI Act.

Estoppel

41. The requirements for establishing an estoppel of the kind argued by the applicant were succinctly stated by the Western Australian Information Commissioner (**WAIC**) in *Re White and Water Corporation*,³⁴ at paragraph 51:
 - *there must have been a representation made as to present or future fact, or present or future intentions;*
 - *the representor must have intended the representation to be relied upon;*
 - *the person seeking to enforce the estoppel must have relied on the representation to his or her detriment; and*
 - *it must have been reasonable to rely on the representation in the way in which it was relied upon.*
42. My view is that the first of these requirements cannot be met. CCC did no more than comply with mandatory non-party disclosure notices, in a context in which the information disclosed was, as I have outlined above, subject to implied undertakings significantly limiting its future use and dissemination. In no way can CCC's conduct³⁵ in that regard be taken as a representation that, were the applicant to subsequently lodge an access application under the RTI Act, CCC would similarly release such information or resile from availing itself of an exemption claim otherwise open to it, in circumstances where such release would be without condition.³⁶
43. Accordingly, there is in my view no representation against which an estoppel of the kind argued by the applicant might fix, let alone any evidence to suggest CCC intended such a representation to be relied upon by him, or that any such reliance was reasonable.
44. The thrust of my reasoning at paragraphs 33-43 was conveyed to the applicant³⁷ by correspondence dated 9 February 2017. His brief submissions in reply³⁸ did not engage

³⁴ [2000] WAICmr 40 (21 July 2000). I should note that this case casts doubt on whether a statutory adjudicator such as OIC even has the competence to determine questions of estoppel; I have in this review proceeded on the basis that I may.

³⁵ There being no evidence before me of any officer of CCC making any express representations as to how any future RTI application might be treated.

³⁶ Indeed, there is nothing before me to suggest that the applicant had, at the time the QIRC disclosure occurred, notified CCC that he intended to also lodge an RTI access application for the same information, nor that he had even formed any such intention to do so.

³⁷ By way of his solicitors.

³⁸ Dated 2 March 2017.

with my preliminary rejection of his estoppel claim. As regards waiver, these submissions did little more than reiterate the applicant's original submissions on the point; ie, that given CCC's preparedness to disclose information pursuant to the QIRC non-party disclosure process, it should not be allowed to 'backtrack' on that position in determining his RTI access application. I have explained above why I reject this argument; there is nothing in these later submissions to cause me to reconsider that rejection.

Public interest considerations

45. As a third line of argument in support of his case for access, the applicant seeks to invoke public interest arguments in favour of release to him of the Investigation Information. In his submissions dated 8 December 2016, the applicant argued that access may be granted to otherwise exempt information, where a sufficient '*public interest argument*' exists, or the '*circumstances of the case*' require disclosure.
46. As I advised the applicant's solicitors in my 9 February 2017 letter, this argument is misconceived. The exemptions set out in schedule 3 to the RTI Act – including the Prescribed Crime Body Exemption – do not require or allow consideration of public interest issues. Parliament has determined that disclosure of these categories of information would be contrary to the public interest. Accordingly, if information falls within one of the categories of exempt information prescribed in schedule 3, a conclusive presumption exists that its disclosure would be contrary to the public interest, and no further consideration is permitted.
47. In reply, the applicant's solicitors sought to clarify his public interest argument, arguing that as the Investigation Information was subject to the exception to the Prescribed Crime Body Exemption, it was not, therefore, exempt information, and that accordingly, the '*...public interest must be considered where an exemption under schedule 3 of the Act is not made out*'.
48. As a statement of principle, the above, too, is strictly incorrect – if information requested under the RTI Act is not exempt information, and there are no other grounds on which access to that information may be refused, then access must be granted; contemplation of the public interest is simply unnecessary. That, however, is not the case here. As I have explained above, I am satisfied both that the Investigation Information is exempt information under the Prescribed Crime Body Exemption, and that it does not fall within the exception to that exemption set out in schedule 3, section 10(6) of the RTI Act. As exempt information, its disclosure must, for the reasons explained in the preceding paragraph, be taken to be contrary to the public interest. Access to it may therefore be refused under the RTI Act.

Parliamentary Privilege Exemption

49. As noted, CCC refused access to two documents – the '**Parliamentary Documents**' – under the Parliamentary Privilege Exemption,³⁹ which provides that information will be exempt information⁴⁰ if its public disclosure would infringe the privileges of Parliament.
50. In identifying the privileges of Parliament, it is convenient to turn first to section 9 of the *Constitution of Queensland 2001* (the **Constitution of Queensland**), which relevantly provides:

9 Powers, rights and immunities of Legislative Assembly

- (1) *The powers, rights and immunities of the Legislative Assembly and its members and committees are—*

³⁹ That is, schedule 3, section 6(c)(i) of the RTI Act.

⁴⁰ To which access may be refused, under sections 473(a) and 48 of the RTI Act.

- (a) *the powers, rights and immunities defined under an Act; and*
- (b) *until defined under an Act—the powers, rights and immunities, by custom, statute or otherwise, of the Commons House of Parliament of the United Kingdom and its members and committees at the establishment of the Commonwealth.*

...

(2) *In this section—*

rights *includes privileges.*

51. The *Parliament of Queensland Act 2001* (Qld) (**PQ Act**) further defines the ‘powers, rights and immunities’ of Parliament⁴¹ as referred to in section 9(a) of the Constitution of Queensland. Section 8 of the PQ Act provides:

8 Assembly proceedings can not be impeached or questioned

- (1) *The freedom of speech and debates or proceedings in the Assembly can not be impeached or questioned in any court or place out of the Assembly.*
- (2) *To remove doubt, it is declared that subsection (1) is intended to have the same effect as article 9 of the Bill of Rights (1688) had in relation to the Assembly immediately before the commencement of the subsection.*

52. CCC has advised⁴² that the Parliamentary Documents comprise communications with the former Parliamentary Crime and Misconduct Committee (**PCMC**), now the Parliamentary Crime and Corruption Committee (**PCCC**). The PCCC is a committee of Parliament⁴³ for the purposes of section 9(1) of the Constitution of Queensland. The PCCC is therefore entitled to all of the privileges enjoyed by Parliament.⁴⁴

53. The phrase ‘proceedings in the Assembly’⁴⁵ is relevantly defined in section 9 of the PQ Act:

9 Meaning of proceedings in the Assembly

- (1) **Proceedings in the Assembly** *include all words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the Assembly or a committee.*
- (2) *Without limiting subsection (1), proceedings in the Assembly include—*
 - (a) *giving evidence before the Assembly, a committee or an inquiry; and*
 - (b) *evidence given before the Assembly, a committee or an inquiry; and*
 - (c) *presenting or submitting a document to the Assembly, a committee or an inquiry; and*
 - (d) *a document tabled in, or presented or submitted to, the Assembly, a committee or an inquiry*
 - (e) *preparing a document for the purposes of, or incidental to, transacting business mentioned in paragraph (a) or (c); and*

⁴¹ Section 36 and schedule 1 of the *Acts Interpretation Act 1954* (Qld) provide that ‘Parliament’ means ‘Legislative Assembly’.

⁴² Letter to OIC dated 24 June 2016.

⁴³ Section 291 of the CC Act and the definition of ‘committee’ in the Schedule to the PQ Act. Similarly, the PCMC was a committee of Parliament: section 291 of the CM Act.

⁴⁴ As was the PCMC.

⁴⁵ ‘Assembly’ as used in the PQ Act means ‘Legislative Assembly’: section 3 and definition in the Schedule to the PQ Act.

- (f) *preparing, making or publishing a document (including a report) under the authority of the Assembly or a committee; and*
- (g) *a document (including a report) prepared, made or published under the authority of the Assembly or a committee.*

...

- (4) *If the way in which a document is dealt with has the effect that—*

...

(b) under the rules, orders, directions or practices of the Assembly;

the document is treated, or accepted, as having been tabled in the Assembly for any purpose, then, for the purposes of this Act, the document is taken to be tabled in the Assembly.

- (5) *For this section, it does not matter what the nature of the business transacted by a committee is or whether the business is transacted under this Act or otherwise.*

54. The Chairperson of the CCC has sworn to the fact that the Parliamentary Documents comprise documents presented or submitted to a committee or made under the authority of a committee.⁴⁶ Accepting this evidence, it follows that these documents are, in accordance with the above definitions, 'proceedings in the Assembly'.

55. In this case, considering whether disclosure of the Parliamentary Documents would infringe a privilege of Parliament may, in my view, be had by reference to Standing Order 211A of the Legislative Assembly.⁴⁷ Standing Order 211A provides:

211A. Confidentiality of proceedings for Parliamentary Crime and Corruption Committee and Ethics Committee

- (1) *The proceedings of the Parliamentary Crime and Corruption Committee and the Ethics Committee or a subcommittee of those committees that is not open to the public or authorised to be published remains strictly confidential to the committee until the committee has reported those proceedings to the House or otherwise published the proceedings.*

56. There is nothing before me to suggest that the PCCC⁴⁸ has reported the contents of the Parliamentary Documents to the House, or otherwise published or authorised their publication.⁴⁹ Their public disclosure would therefore breach a Standing Order, and hence infringe a privilege of the Parliament.⁵⁰

57. Public disclosure of the Parliamentary Documents would infringe the privileges of Parliament. Accordingly, these documents comprise exempt information, to which access may be refused.

58. As with the Investigation Information, the applicant argues that if the Parliamentary Documents were disclosed to him during the QIRC proceedings, equivalent arguments to those discussed above at paragraph 29 should apply in favour of release under the RTI Act; essentially, any prior disclosure of these documents to him preclude application of schedule 3, section 6(c)(i) of the RTI Act.

⁴⁶ Statutory declaration dated 26 October 2016.

⁴⁷ Made pursuant to section 11 of the PQ Act.

⁴⁸ Or its predecessor, the PCMC.

⁴⁹ Or that the Parliament itself has authorised their publication.

⁵⁰ Being the power of the Parliament to control its own proceedings. For the sake of completeness, I am also satisfied that quite apart from breaching Standing Order 211A, public disclosure of these documents would also hinder, impede or impair the making of similar communications in the future for the purpose of transacting the business of the PCCC, affecting the quality of information available to the PCCC, and therefore breaching the 'freedom from impeachment' privilege enshrined in section 8(1) of the PQ Act, in accordance with the principles and analysis in *Waratah Coal Pty Ltd and Department of State Development, Infrastructure and Planning* (Unreported, Queensland Information Commissioner, 10 December 2012) at [26]-[39].

59. CCC advised⁵¹ that no privileged information was disclosed in response to the applicant's QIRC notices to produce. The applicant disputes this.⁵² Yet even if CCC had so disclosed these documents, my view is that the applicant's submissions cannot succeed.⁵³
60. The privileges of Parliament are Parliament's to 'waive'; only Parliament can authorise publication of documents subject to those privileges (and I am aware of no authority suggesting it may be 'estopped' from asserting its rights and privileges, on the basis of prior disclosure or representation by a person or entity outside of Parliament). As the Assistant Information Commissioner, in considering similar submissions concerning substantially similar provisions of the repealed FOI Act, determined in a previous decision:⁵⁴

The test for exemption under s.50 [the former equivalent of schedule 3, section 6(c)(i) of the RTI Act] is worded in different terms to other exemption provisions. Most exemption provisions use the words "Matter is exempt if its disclosure ...". However, s.50 uses the words "if its public disclosure ...". This imports a different test. In particular, the test imposed by the words "public disclosure" in s.50 ... negate the possibility of taking into account the effect of a limited waiver of privilege for the benefit of a particular individual, where that individual is the applicant for access to a document under the FOI Act ... It appears that only an intentional general waiver of parliamentary privilege (most commonly, through tabling, or other authorised publication, of a document) may be taken into account in the application of s.50 of the FOI Act, rather than a limited waiver of parliamentary privilege for the benefit of a particular individual.

DECISION

61. For the above reasons, I affirm CCC's decision refusing access to the information in issue.

JS Mead
Acting Information Commissioner

Date: 6 April 2017

⁵¹ Email dated 20 December 2016.

⁵² Submissions dated 2 March 2017.

⁵³ It is not clear from the applicant's submissions whether he also seeks to argue that public interest considerations favour disclosure to him of the Parliamentary Documents. For the sake of completeness, I note again that such considerations can have no bearing on the application of an exemption provision such as the Parliamentary Privilege Exemption.

⁵⁴ *Sharples and Queensland Police Service* (Unreported, Queensland Information Commissioner, 7 December 2001) at [20].

APPENDIX

Significant procedural steps

Date	Event
20 May 2016	OIC received the external review application.
23 May 2016	OIC asked CCC to provide relevant procedural documents.
6 June 2016	CCC supplied OIC with requested procedural documents.
8 June 2016	OIC notified the applicant and CCC that the external review application had been accepted and asked CCC to provide additional information.
24 June 2016	OIC received the requested information from CCC.
4 August 2016	OIC wrote to CCC seeking further information concerning the information in issue.
12 August 2016	OIC received the additional information from CCC, as requested.
16 August 2016	OIC discussed the information in issue with the applicant.
18 August 2016	OIC requested CCC further clarify the information in issue.
24 August 2016	OIC received further information from CCC.
1 September 2016	OIC wrote to the applicant and CCC in an effort to further clarify the information in issue. OIC requested CCC forward further information to the applicant, and asked the applicant to confirm certain issues by 22 September 2016.
20 September 2016	The applicant wrote to OIC raising queries concerning the information in issue, and requesting further time in which to reply to OIC's 1 September 2016 letter. OIC arranged for CCC to forward further information to the applicant.
21 September 2016	OIC granted the applicant additional time in which to reply to OIC's 1 September 2016 letter.
4 October 2016	The applicant provided its reply to OIC's 1 September 2016 letter.
6 October 2016	OIC wrote to the applicant, confirming reductions to the volume of information in issue and addressing issues raised in the applicant's 4 October 2016 letter.
11 October 2016	OIC wrote to CCC, advising of reductions to the volume of information in issue and seeking advice on and further clarification of issues concerning the information then remaining in issue.
14 October 2016	OIC received CCC's reply to OIC's 11 October 2016 letter, and the applicant's reply to OIC's 6 October 2016 letter.
20 October 2016	OIC wrote to the applicant and CCC, further clarifying the extent of the information in issue. OIC requested the CCC provide a sworn statement concerning the Parliamentary Documents.
31 October 2016	CCC supplied the requested statement.
28 October 2016	OIC requested CCC advise as to whether it was prepared to release further information. CCC declined to release further information.
10 November 2016	OIC conveyed a preliminary view to the applicant that access to the information may be refused, and invited submissions in reply.
8 December 2016	OIC received submissions from the applicant in reply to OIC's 10 November 2016 preliminary view.

Date	Event
20 December 2016	OIC sought and received advice from CCC as to information disclosed during QIRC proceedings. OIC provided the applicant with an update on the status of the review.
9 February 2017	OIC conveyed a second preliminary view to the applicant and invited submissions in response.
2 March 2017	OIC received further submissions from the applicant in reply to OIC's 9 February 2017 preliminary view.
7 March 2017	OIC sought and received advice from CCC as to the nature of a specific segment of information in issue.