



Decision and Reasons for Decision

Application Number: 311035

Applicant: Waratah Coal Pty Ltd

Respondent: Department of State Development, Infrastructure and Planning

Decision Date: 10 December 2012

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION ACT – applicant sought access to documents concerning the applicant and the Office of the Coordinator General – whether disclosure of information would infringe the privileges of Parliament under schedule 3, section 6(c)(i) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION ACT – whether information comprises Cabinet matter brought into existence before commencement of the RTI Act under schedule 3, section 1 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION ACT – whether there are reasonable grounds for the agency to be satisfied documents do not exist or are unlocatable – whether the agency has taken all reasonable steps to locate documents – whether access can be refused under sections 47(3)(e) and 52(1)(a) and (b) of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of State Development, Infrastructure and Planning¹ (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to:

All documents and correspondence relating to Waratah Coal Pty Ltd and the Office of the Coordinator General.

2. The Department located 304 pages relevant to the access application. The Department granted the applicant full access to 221 pages and partial access to 31 pages. The Department refused access to the balance of those latter 31 pages, and a further 52 pages in full, on the basis that:

¹ Formerly the Department of Employment, Economic Development and Innovation.

- segments of information appearing on the 31 pages to which partial access was refused comprised personal information, the disclosure of which would, on balance, be contrary to the public interest;
 - the balance of the documents - the remaining 52 pages - comprised exempt information, as documents either subject to Parliamentary privilege or consisting of Cabinet matter brought into the existence before the commencement of the RTI Act.
3. The applicant applied to the Information Commissioner for external review of the Department's decision. During the course of external review, the applicant withdrew its application in so far as it concerned the segments of personal information on the 31 pages to which the Department refused partial access. Accordingly that information is no longer in issue in this review.
 4. The applicant did, however, raise a concern during the review that the Department may not have identified all relevant documents, giving rise to a 'sufficiency of search' issue.
 5. For the reasons set out below, the Department is entitled to refuse access to the 52 pages comprising the information in issue, on the basis the information is exempt information.
 6. Further, the Department has, in the circumstances of this review, taken all reasonable steps to locate documents relevant to the access application and may refuse access to any additional documents on the basis the documents do not exist.

Background

7. Significant procedural steps relating to the access application and external review are set out in the Appendix to these reasons.

Reviewable decision

8. The decision under review is the Department's decision dated 30 March 2012.

Evidence considered

9. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).

Information in issue

10. The information in issue consists of the 52 pages to which the Department refused access, on the basis the information comprises exempt information.

Relevant law

11. Under the RTI Act, a person has a right to be given access to documents of an agency.² However, this right is subject to other provisions of the RTI Act including grounds on which access may be refused.³ Relevantly, an agency may refuse access to information under the RTI Act if the information is exempt information⁴ or if a document is non-existent or unlocatable.⁵

² Section 23 of the RTI Act.

³ As set out in section 47 of the RTI Act.

⁴ Section 47(3)(a) and 48 of the RTI Act.

⁵ Section 47(3)(e) and 52 of the RTI Act.

Sufficiency of search

12. As noted in paragraph 4, during the course of this review the applicant questioned whether the Department had located all documents relevant to its access application. Specifically, the applicant contended that the Department may have failed to locate documents concerning a meeting between a former Coordinator-General and representatives of the applicant, said to have taken place on 10 October 2008.⁶ In support of this contention, the applicant relied on a letter⁷ from its 'President and CEO' to the Coordinator-General, dated 14 October 2008, which relevantly refers to 'the time spent with our team on Friday 10 October 2008'.
13. The Office of the Information Commissioner (**OIC**) forwarded a copy of this letter to the Department, and requested it undertake additional searches for relevant documents. Departmental officers consequently reviewed the former Coordinator-General's electronic and hard copy diaries for 10 October 2008 and surrounding dates, and conducted archival and record searches for relevant agenda and minutes.
14. Despite these searches, no additional documents were found. Indeed, the review of the Coordinator-General's diaries disclosed no reference to any meeting involving the applicant whatsoever. The Department suggested that this may have been because any meeting (if one occurred) may have been conducted informally, and thus have required no follow up action on the part of the Coordinator-General (which might presumably have resulted in the generation of documents), nor the production of any agenda or minutes.
15. OIC forwarded the Departmental search certifications containing the above information to the applicant. OIC proposed that, at face value, the Department appeared to have undertaken reasonable search efforts appropriate in the circumstances of this case, and that it appeared no relevant documents existed. OIC invited the applicant to lodge further submissions or provide further information concerning the meeting in the event it did not accept this proposition.
16. The applicant has offered no further submissions or information concerning this issue.
17. An agency has an obligation under the RTI Act to locate and deal with all documents responding to the terms a particular access application. An agency is, however, entitled to refuse access to documents which do not exist or cannot be located.⁸
18. A document is nonexistent if there are reasonable grounds for the agency or Minister dealing with the access application to be satisfied that the document does not exist.⁹ Where, as in this case, an agency has relied upon searches to demonstrate that relevant documents do not exist, the agency must show that its search efforts have been reasonable in the circumstances, ie, that the agency has taken all reasonable steps to find the documents.¹⁰
19. There is no reason to question the veracity of the letter tendered by the applicant and its reference to a meeting between representatives of the applicant and the former Coordinator-General having occurred. Nevertheless, in the absence of any additional information or submissions from the applicant (whose representatives were, after all, apparently in attendance at any meeting), I consider that by searching the Coordinator-

⁶ The applicant's initial query was whether relevant 'missing' documents appeared among the 52 documents in issue (which, as OIC confirmed with the applicant, they do not). In the alternative, the applicant contended the Department had failed to locate the documents.

⁷ Supplied to OIC by the applicant under cover of correspondence dated 7 September 2012.

⁸ Sections 47(3)(e) and section 52 of the RTI Act.

⁹ Section 52(1)(a) of the RTI Act.

¹⁰ A full exposition of the principles to be applied in sufficiency of search cases can be found in *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) at [34]-[38].

General's electronic and physical diaries on and around 10 October 2008, and by further attempting to locate relevant meeting materials such as agenda and minutes, the Department has taken all reasonable steps to locate relevant documents.

20. Accordingly, I am satisfied the Department has taken all reasonable steps to locate these 'meeting' documents, and is entitled to conclude they do not exist.

Exempt information

Is the information in issue privileged information?

21. The Department refused access to 27 pages¹¹ of the 52 remaining in issue, on the basis their public disclosure would infringe the privileges of Parliament,¹² and that they thus comprise exempt information¹³ to which access may be refused.¹⁴ I will refer to these documents as the '**Privileged Information**'.

What are the privileges of Parliament?

22. In assessing the application of schedule 3, section 6(c)(i) of the RTI Act, it is firstly necessary to identify Parliamentary privileges that may be susceptible to infringement by public disclosure of information.
23. Section 9 of the *Constitution of Queensland 2001* (the **Constitution of Queensland**) 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—

(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.*

24. The *Parliament of Queensland Act 2001* (Qld) (**PQ Act**) further defines the 'powers rights and immunities' of Parliament¹⁵ 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.

25. 'Proceedings in the Assembly'¹⁶ is defined in section 9 of the PQ Act:

¹¹ Relevantly, pages 54-80, as numbered by the Department.

¹² Under schedule 3, section 6(c)(i) of the RTI Act.

¹³ Within the meaning of section 48 of the RTI Act.

¹⁴ Under section 47(3)(a) of the RTI Act.

¹⁵ Section 36 of the *Acts Interpretation Act 1954* (Qld) provides that 'Parliament' means 'Legislative Assembly'.

¹⁶ 'Assembly' as used in the PQ Act means 'Legislative Assembly': section 3 and definition in the schedule to the PQ Act.

9 Meaning of ‘proceedings in the Assembly’

- i. ‘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.
- ii. Without limiting subsection (1), **proceedings in the Assembly** include –
 - 1. giving evidence before the Assembly, a committee or an inquiry; and
 - ...
 - (c) presenting or submitting a document to the Assembly, a committee or an inquiry; and
 - ...
 - (e) preparing a document for the purposes of, or incidental to, transacting business mentioned in paragraph (a) or (c) ...

26. MacPherson JA analysed Commonwealth privilege provisions materially equivalent to sections 8 and 9 of the PQ Act in *Rowley v O’Chee*.¹⁷ His Honour noted that the ‘freedom from impeachment’ privilege as contained in the equivalent of section 8(1) of the POQ Act¹⁸ gives rise – when read together with those parts of the definition of ‘proceedings in the Assembly’¹⁹ concerning documents – to a ‘prohibition’

*...that should be read as meaning that “the preparation of a document for purposes of or incidental to the transacting of” the business of the...[Assembly] “ought not to be impeached or questioned in any court” [or place out of the Assembly].*²⁰

27. His Honour then went on to consider the meaning of the term ‘impeach’ in this context,²¹ noting that its use:²²

*...means that preparation of a document for purposes of or incidental to the transacting of the business of the Parliament is not to be **impeded, hindered or prevented**...or is not to be **detrimentially or prejudicially affected, or impaired**.*²³

(My emphasis.)

28. Applying these principles to the present review, for the Privileged Information to comprise exempt information, I must be satisfied that:
- 1. the Privileged Information was prepared for the purposes of, or incidental to, the transacting of business of the Parliament, and
 - 2. its public disclosure would, as the Information Commissioner has previously paraphrased the test formulated by MacPherson JA in *Rowley v O’Chee*:²⁴

¹⁷ [2000] 1 Qd R 207.

¹⁸ Being article 9 of the *Bill of Rights (1688)* itself, directly imported via section 16(1) of the *Parliamentary Privileges Act 1987* (Cth).

¹⁹ His Honour was considering section 16 of the *Parliamentary Privileges Act 1987* (Cth), which refers to ‘proceedings in Parliament’, a difference in terminology on which I am satisfied nothing turns.

²⁰ At 222.

²¹ His Honour essentially set aside the relevance of the ‘questioning’ element of the ‘freedom from impeachment’ privilege in this context, finding that it was not ‘easy to see that requiring [production] of documents for the inspection of another party to litigation can be said to involve “questioning”...preparation of them in any way’.

²² In article 9 of the *Bill of Rights* (in Queensland, now, as noted, enacted in section 8(1) of PQ Act), when read together with the Commonwealth equivalents of sections 9(1) and 9(2)(a),(c) and (e) of the PQ Act. The relevant Commonwealth provision defining ‘proceedings’ (section 16 of the *Parliamentary Privilege Act 1987* (Cth) is worded slightly differently to its Queensland equivalent, section 9(2) of the PQ Act. As with the difference in terminology noted in note 6, I am satisfied this difference is, for present purposes, of no consequence.

²³ *Rowley v O’Chee*, at 222-223.

²⁴ The retrospective and prospective aspects of which immunity were discussed by His Honour at 223-224.

*hinder, impede or impair the making of similar communications in the future for the purpose of transacting the business of the [Parliament],*²⁵

and therefore breach or infringe the 'freedom from impeachment' privilege enshrined in section 8(1) of the PQ Act.

1. Was the Privileged Information prepared for the purposes of or incidental to the transacting of business of the Parliament?

29. Yes.

30. The documents consist of possible parliamentary questions, proposed responses to same, and associated briefs prepared for specific Parliamentary sitting dates and formatted for use by a Member of the Parliament – the former Deputy Premier – on said dates. I am satisfied the documents therefore comprise documents prepared for the purposes of or incidental to the transacting of Parliamentary business.

2. Would public disclosure of the Privileged Information hinder, impede or impair the making of similar communications in the future for the purpose of transacting the business of the Parliament?

31. Again, yes.

32. I am satisfied public disclosure of these documents under the RTI Act would hinder or impair the production of similar documents in the future, and thus 'impeach' proceedings in Parliament.

33. In reaching this view, I have had regard to the decision of Austin J in *In the matter of OPEL Networks Pty Ltd (in liq)*.²⁶ In that case, His Honour was required to determine whether production of Commonwealth Parliamentary briefing materials (analogous to those in issue in this review) pursuant to court disclosure processes would impeach Parliamentary proceedings.

34. Having adopted the analysis of McPherson JA in *Rowley v O'Chee*, His Honour went on to find²⁷ that:

compulsory production of these documents would "impeach" (as explained in Rowley v O'Chee) "proceedings in Parliament" (as extensively defined in s 16(2)(c) of the Parliamentary Privileges Act). It seems to me necessarily true, and not dependent upon the evidence of the particular case, that if briefings and draft briefings to Parliamentarians for Question Time and other Parliamentary debate are amenable to subpoenas and other orders for production, the Commonwealth officers whose task it is to prepare those documents will be impeded in their preparation, by the knowledge that the documents may be used in legal proceedings and for investigatory purposes that might well affect the quality of information available to Parliament. To take a step that would have that consequence would, I think, derogate from the force of the Bill of Rights and run contrary to the historical justification for that legislation, so ably sketched by McPherson JA (and see Mees v Road Corporation (2003) 128 FCR 418; [2003] FCA 306, at [75] -[79] per Gray J).

35. I agree with His Honour's statement of the relevant principles, which I consider equally applicable to a consideration of the scope and application of the Parliamentary privilege exemption under the RTI Act.

²⁵ *Harris and Criminal Justice Commission*, (Unreported, Queensland Information Commissioner, 27 July 2001). Although *Harris* was decided under the repealed *Parliamentary Papers Act 1992* (Qld) the definition of 'parliamentary record' under that Act and 'proceedings in the Assembly' under the *Parliament of Queensland Act 2001* are identical.

²⁶ [2010] NSWSC 142.

²⁷ At [118].

36. It is therefore my view that public disclosure of the Privileged Information would – to paraphrase MacPherson JA – have the potential to hinder, impede or impair the preparation or assembly of *documentary information for future debates and questions in the [Parliament]*.²⁸
37. My view in this regard is reinforced by the fact that, unlike the conditional court processes under consideration in *OPEL Networks*, disclosure under the RTI Act is essentially unconditional. This unconditional disclosure thus only amplifies the potential for the detrimental consequences against which the Parliamentary privilege exemption is intended to safeguard. As was noted in a similar case arising under the *Government Information (Public Access) Act 2009* (NSW):²⁹

Another relevant consideration is that, while the use of Parliamentary information provided to a court pursuant to court procedures such as discovery and subpoena may be controlled, whereas disclosure of information pursuant to the GIPA Act is necessarily unconditional and therefore cannot be controlled.

38. Accordingly, I consider public disclosure of the Privileged Information under the RTI Act would impeach proceedings in Parliament in the sense as discussed above. Such disclosure would therefore infringe the privileges of Parliament, contrary to schedule 3, section 6(c)(i) of the RTI Act.
39. The Privileged Information therefore comprises exempt information, to which access may be refused under section 47(3)(a) of the RTI Act.³⁰

Does the balance of the information in issue comprise Cabinet matter brought into existence before the commencement of the RTI Act?

40. Schedule 3, section 1 of the RTI Act provides that information is exempt from disclosure if:
- it was brought into existence before the commencement of schedule 3, section 1 of the RTI Act;
 - it is mentioned in section 36(1) of the repealed *Freedom of Information Act 1992* (Qld) (the **FOI Act**); and
 - it has not been officially published by decision of Cabinet.
41. This exemption provision therefore effectively imports the requirements of section 36(1) of the FOI Act – the FOI Act's Cabinet exemption provision – to documents pre-dating 1 July 2009. All of the relevant documents³¹ were created prior to this date, and there is nothing before me to suggest they have been officially published by decision of Cabinet.

²⁸ *Rowley v O'Chee*, per McPherson J (at 224).

²⁹ *Tziolas v NSW Department of Education and Communities* [2012] NSWADT 69, at [38].

³⁰ The substance of my reasoning as set out in these paragraphs was conveyed to the applicant in my letter dated 19 November 2012, in which I expressed the preliminary view the Privileged Information comprised exempt information. This letter supplanted an earlier letter dated 3 September 2012, in which I also conveyed the preliminary view the Privileged Information comprised exempt information as information the public disclosure of which would infringe the privileges of Parliament, but on a different basis; relevantly, that public disclosure would infringe Parliament's authority to publish parliamentary records (as contained in section 50 of the PQ Act). After issuing that latter letter, however, I formed the view the 'freedom from impeachment' privilege prescribed in section 8 of the PQ Act was the preferable head of privilege on which to ground the Parliamentary privilege exemption contained in schedule 3, section 6(c)(i) of the RTI Act. In any event, the applicant offered no submissions in response to either preliminary view.

³¹ Numbered 14-17, 171-187 and 198-201.

42. Section 36(1) was a relatively broad provision, relevantly exempting from disclosure information (including drafts) prepared for briefing, or the use of, a Minister or chief executive in relation to a matter:
- submitted to Cabinet; or
 - that was proposed, or had at any time been proposed to be submitted to Cabinet by a Minister.³²
43. The relevant documents – i.e, the balance of the information in issue, comprising those 25 pages other than the Privileged Information – consist of Ministerial briefing notes. The Department has stated that the subject matter addressed in these documents was submitted to Cabinet by the former Minister, a statement which I accept.³³ In any event, it is clear from the face of one of the documents that the matter these documents concern was at the least proposed to be submitted to Cabinet.³⁴
44. On this basis, I am satisfied the documents in question were created to brief the former Minister about a matter that was submitted, or was proposed to be submitted, to Cabinet.
45. Accordingly, the relevant information comprises information mentioned in section 36(1) of the FOI Act, and is therefore exempt information under schedule 3, section 1 of the RTI Act, to which access may be refused.³⁵

DECISION

46. I affirm the Department's decision to refuse access to the information in issue under section 47(3)(a) of the RTI Act, on the basis the information is exempt information under section 48 of the RTI Act, as either:
- information the public disclosure of which would infringe the privileges of Parliament, within the meaning of schedule 3, section 6(c)(i) of the RTI Act, or
 - information comprising Cabinet matter brought into existence before the commencement of the RTI Act, within the meaning of schedule 3, section 1 of the RTI Act.
47. Further, I find the Department has taken all reasonable steps to locate documents relevant to the access application and may refuse access to relevant documents under section 47(3)(e) and section 52(1)(a) of the RTI Act, on the basis the documents do not exist.

Jenny Mead
Acting Information Commissioner

Date: 10 December 2012

³² Section 36(1)(c)(i) and (ii) of the FOI Act.

³³ Thus satisfying section 36(1)(c)(i) of the FOI Act.

³⁴ Satisfying the relevant requirements of section 36(1)(c)(ii) of the FOI Act.

³⁵ Section 36(1)(c)(ii) of the FOI Act.

APPENDIX

Significant procedural steps

Date	Event
18 October 2011	The applicant applied to the Department of State Development, Infrastructure and Planning ³⁶ (Department) for access to all documents relating to Waratah Coal Pty Ltd and the Office of the Coordinator General from September 2008 until March 2009.
30 March 2012	The Department issued a notice of decision to the applicant.
2 May 2012	The Office of the Information Commissioner (OIC) received the applicant's application for external review of the Department's decision.
4 May 2012	OIC informed the applicant and the Department that the applicant's external review application had been accepted.
18 May 2012	The Department provided OIC with documents relevant to the external review.
20 July 2012	OIC requested further information from the Department concerning the Department's Cabinet exemption claim.
23 July 2012	Department provided additional information concerning Cabinet exemption claim.
3 September 2012	OIC confirmed in writing that the applicant no longer sought access to some information in issue and conveyed a preliminary view on the remaining information in issue, inviting the applicant to provide submissions supporting its case by 19 September 2012 if the applicant did not accept the preliminary view.
10 September 2012	OIC requested the Department conduct additional searches.
13 September 2012	The applicant sought an extension of time to provide submissions in response to OIC's preliminary view.
3 October 2012	The Department provided OIC with search certifications in response to OIC's request for the Department to conduct additional searches.
3 October 2012	OIC wrote to the applicant forwarding Departmental search certifications and proposing that, on the basis of those searches, no further relevant documents existed. OIC invited the applicant to provide submissions and/or information as to missing documents by 10 October 2012.
11 October 2012	The applicant requested an extension of time to respond to OIC's 3 September 2012 and 3 October 2012 correspondence.
15 October 2012	OIC provided an extension of time for the applicant to respond to OIC correspondence.
18 September 2012	The applicant informed OIC that it did not accept OIC's positions on the issues in this review as conveyed in 3 September 2012 and 3 October 2012 correspondence.
19 November 2012	OIC issued a further preliminary view to the applicant clarifying the basis on which relevant information was said to comprise exempt information as information the public disclosure of which would infringe the privileges of Parliament. OIC invited the applicant to lodge any further, final submissions by 3 December 2012. No further submissions were received.

³⁶ Formerly the Department of Employment, Economic Development and Innovation.