



## **Decision and Reasons for Decision**

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**Application Number:** 310878

**Applicant:** C01MAA

**Respondent:** The Public Trustee of Queensland

**Decision Date:** 8 May 2012

**Catchwords:** **ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - applicant seeking personal information - access refused to correspondence exchanged between officers of the Public Trustee and its Official Solicitor in relation to legal proceedings involving the applicant - whether communications are exempt under schedule 3, section 7 of the *Right to Information Act 2009* (Qld) due to legal professional privilege - whether access to information may be refused under section 67(1) of the *Information Privacy Act 2009* (Qld)**

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## REASONS FOR DECISION

### Summary

1. The applicant applied to the Public Trustee of Queensland (**Public Trustee**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to documents containing the applicant's personal information, created on or after 1 January 2006.<sup>1</sup> The Public Trustee delegated the power to deal with the application to the principal officer of the Department of Justice and Attorney-General (**Department**).<sup>2</sup>
2. The majority of documents located by the Department were released to the applicant in full.<sup>3</sup> However, the Department refused to grant the applicant access<sup>4</sup> to three pages<sup>5</sup> on the basis that they were exempt from disclosure due to legal professional privilege.<sup>6</sup>
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the decision to refuse access to the three pages.
4. For the reasons set out below, I affirm the Department's decision to refuse access to information on the basis that it is subject to legal professional privilege and is therefore exempt under schedule 3, section 7 of the RTI Act.

### Significant procedural steps

5. These are set out in the Appendix to these reasons.

### Reviewable decision

6. The decision under review is the Department's internal review decision dated 18 November 2011, made under delegation by the Public Trustee.

### Material considered

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

### Information in issue

8. The three pages to which access was refused (**Information in Issue**) comprise correspondence between a Principal Legal Officer of the Official Solicitor's Office<sup>7</sup>, the Acting Official Solicitor and an officer of the Public Trustee in relation to a proceeding in the Guardianship and Administration Tribunal (**GAAT**) involving the applicant.<sup>8</sup> The Information in Issue can be described as follows:
  - page 346 – email sent by Principal Legal Officer, Official Solicitor's Office to the Acting Official Solicitor; and
  - pages 349-350 – memorandum prepared by the Principal Legal Officer, Official Solicitor's Office and sent to the Acting Official Solicitor and a non-legal officer of the Public Trustee.
9. Section 121(3) of the IP Act prohibits the Information Commissioner from including, in reasons for a decision on an external review, information that is claimed to be exempt

<sup>1</sup> The applicant specifically requested "information that post-dates my 2006 FOI application to the Public Trustee".

<sup>2</sup> Under section 50(3) of the IP Act. Under section 50(4) of the IP Act, the principal officer of the other agency may subdelegate a power delegated to him or her under section 50(3) of the IP Act.

<sup>3</sup> In excess of 1500 pages.

<sup>4</sup> Under section 67(1) of the IP Act and sections 47(3)(a) and 48 of the *Right to Information Act 2009* (Qld) (**RTI Act**).

<sup>5</sup> Folio numbers 346, 349 and 350.

<sup>6</sup> Under schedule 3, section 7 of the RTI Act.

<sup>7</sup> The Office of the Official Solicitor forms part of the Public Trustee. It is established by the *Public Trustee Act 1978* (Qld) and delivers legal services to both the Public Trustee of Queensland and the Queensland Government generally. See <http://www.pt.qld.gov.au/official-solicitor/index.html>.

<sup>8</sup> One of the orders made by GAAT in the proceeding was to appoint the Public Trustee as administrator for the applicant in the management of particular litigation proceedings. See *Re SE* [2005] QGAAT 66, 5 September 2005.

information. This prevents me from describing the actual content of the Information in Issue in these reasons.

### Relevant law

10. Under the IP Act, a person has a right to be given access to documents of an agency to the extent they contain the individual's personal information.<sup>9</sup> This right is subject to some limitations, including grounds for refusal of access.<sup>10</sup> One of the grounds for refusal of access is where information is exempt under schedule 3 of the RTI Act.<sup>11</sup>

### Legal professional privilege

11. Schedule 3, section 7 of the RTI Act sets out that information will be exempt if it would be privileged from production in a legal proceeding on the ground of legal professional privilege (**LPP**). This section reflects the common law requirements for establishing LPP.<sup>12</sup>
12. The general principles of LPP were summarised by the High Court of Australia in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*<sup>13</sup> as follows:

*It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.*

13. The dominant purpose is 'the ruling, prevailing, paramount or most influential purpose'<sup>14</sup> and is to be determined objectively, having regard to the evidence, the nature of the document and the parties' submissions.<sup>15</sup>
14. LPP is generally divided into two categories, advice and litigation privilege.<sup>16</sup> Advice privilege attaches to confidential communications between a legal adviser and client or third party which are made for the dominant purpose of obtaining or providing legal advice.<sup>17</sup> Litigation privilege attaches to confidential communications between a legal adviser and client in relation to current or reasonably anticipated litigation.

### Government legal officers

15. The High Court of Australia has established that LPP may protect communications between salaried employee legal advisers of a government department or statutory authority and his/her employer as client (including communications through other employees of the same employer) provided there is a professional relationship of legal adviser and client, which secures to the advice an independent character notwithstanding the employment.<sup>18</sup>

<sup>9</sup> Section 40 of the IP Act.

<sup>10</sup> Section 67 of the IP Act provides that the grounds for refusal of access set out in section 47 of the RTI Act apply in the same way, and to the same extent, under the IP Act.

<sup>11</sup> Section 47(3)(b) and 48 of the RTI Act.

<sup>12</sup> The Electoral and Administrative Review Commission Report on Freedom of Information (1990) stated, in the context of the equivalent exemption in section 43 of the repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**), 'the exemption incorporates the common law concept of legal professional privilege'. This approach was recently confirmed in *Ozcare and Department of Justice and Attorney-General* (Unreported, Information Commissioner of Queensland, 13 May 2011) [12].

<sup>13</sup> (2002) 213 CLR 543 [9].

<sup>14</sup> *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 [416], see also *AWB v Cole* (No. 1) (2005) 152 FCR 382 [411].

<sup>15</sup> *Grant v Downs* (1976) 135 CLR 674 [692].

<sup>16</sup> *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 322 [8]-[9].

<sup>17</sup> *AWB v Cole* (No.5) (2006) 155 FCR 30, 44 [41]; *Waterford v Commonwealth* (1986) 163 CLR 54, 95; *Pratt Holdings Pty Ltd v Federal Commissioner of Taxation* (2004) 136 FCR 357.

<sup>18</sup> *Waterford v Commonwealth* (1986) 163 CLR 54 [95] per Mason and Wilson JJ.

16. In *Osland v Secretary to the Department of Justice (Vic)*<sup>19</sup> the limits of LPP, as it applies to communications by government lawyers, were explained as follows:

*It would be a mistake to assume that all communications with government lawyers, no matter what their origins, purpose and subject matter, fall within the ambit of the State's legal professional privilege. Advice taken from lawyers on issues of law reform and public policy does not necessarily attract the privilege.*<sup>20</sup>

17. The Information Commissioner has previously decided, under the repealed FOI Act, that communications with government legal officers will attract LPP, provided the legal adviser is an appropriately qualified legal practitioner conducting their practice with a requisite degree of independence.<sup>21</sup> Recently, in *Hillier and Redland Shire Council*<sup>22</sup>, the Right to Information Commissioner found that legal advice communicated by a Council legal officer to a Council employee by email, had the necessary character of independence to attract LPP.<sup>23</sup>

## Findings

18. As set out in paragraph 8 of these reasons, there are two pieces of correspondence in issue in this review, both of which were prepared by a Principal Legal Officer of the Official Solicitor's Office in relation to a GAAT proceeding involving the applicant and the Public Trustee.
19. I am satisfied that both pieces of correspondence were prepared by the Principal Legal Officer for the dominant purpose of providing independent legal services to its client, the Public Trustee, in relation to a legal proceeding in GAAT which was current at the time. I am also satisfied that the communications were made confidentially between the relevant officers of the Public Trustee and Official Solicitor's Office. I therefore find that the Information in Issue satisfies the requirements for litigation privilege.
20. As stated in paragraph 8 of these reasons, the Public Trustee was later appointed by GAAT to act as administrator for the applicant in relation to specific litigation matters. I do not consider that this has any effect on the legally privileged nature of the communications. I recognise that the applicant was a party to the GAAT proceeding, however, I am satisfied that the Official Solicitor was acting as legal representative for the Public Trustee, not the applicant, in preparing the communications. I am also satisfied that there is no available information to indicate that LPP has been waived.
21. Based on the above, I am satisfied that the Information in Issue attracts LPP and is therefore exempt under schedule 3, section 7 of the RTI Act.

## DECISION

22. I affirm the Department's decision to refuse access to the Information in Issue under section 67 of the IP Act and section 47(3)(a) of the RTI Act.
23. I have made this decision as a delegate of the Information Commissioner under section 139 of the IP Act.

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**J Mead**  
**Right to Information Commissioner**

**Date: 8 May 2012**

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<sup>19</sup> [2008] HCA 37.

<sup>20</sup> *Osland v Secretary to the Department of Justice (Vic)* [2008] HCA 37 [89].

<sup>21</sup> *Potter and Brisbane City Council* (1994) QAR 37; *Smith and Administrative Services Department* (1993) 1 QAR 22 [88-90]; *Harris and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 21 January 2009).

<sup>22</sup> Unreported, Queensland Information Commissioner, 9 June 2011 (*Hillier*).

<sup>23</sup> See *Hillier* [51-58].

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

<b>Date</b>	<b>Step taken</b>
21 August 2011	The applicant sent an email to the Department requesting his/her personal information held by the Public Trustee <i>'that post dates my 2006 FOI application to the Public Trustee'</i> .
10 October 2011	The Department wrote to the applicant to confirm that the Public Trustee had delegated its power to process the application to the Department under section 50(3) of the IP Act.
28 October 2011	The Department located 1538 pages in response to the application and decided to: <ul style="list-style-type: none"> <li>• release 1521 pages in full</li> <li>• refuse access to 13 pages on the basis that they were outside the scope of the application (<b>Out of Scope Documents</b>)</li> <li>• refuse access to the Information in Issue on the basis that it was subject to LPP; and</li> <li>• refuse access to parts of one page on the basis that disclosure would, on balance, be contrary to the public interest under section 49 of the RTI Act.</li> </ul>
15 November 2011	The applicant requested internal review of the Department's decision in relation to the Information in Issue and certain Out of Scope Documents.
18 November 2011	The Department issued its internal review decision which released the Out of Scope Documents and affirmed the decision refusing access to the Information in Issue.
15 December 2011	The applicant applied to OIC for an external review of the Department's decision.
16 December 2011	The Department provided OIC with a copy of the documents to which the applicant was refused access.
23 December 2011	OIC conveyed a written preliminary view to the applicant that the Information in Issue was subject to LPP and that access may therefore be refused under the IP Act. OIC invited the applicant to provide submissions in response to the preliminary view by 20 January 2012.
20 January 2012	The applicant sent an email to OIC, contesting the preliminary view.