



Decision and Reasons for Decision

Application Number: 310525

Applicant: DG30RG

Respondent: State Library of Queensland

Decision Date: 18 May 2012

Catchwords: RIGHT TO INFORMATION – APPLICATION FOR ACCESS TO INFORMATION – REFUSAL OF ACCESS – applicant sought access to documents comprising her complete personnel HR file – whether there are reasonable grounds to be satisfied that documents are unlocatable – sections 47(3)(e) and 52(1)(b) of the *Right to Information Act 2009* (Qld) – whether information would be privileged from production in a legal proceeding on the ground of legal professional privilege –sections 47(3)(a) and 48 of the *Right to Information Act 2009* (Qld)

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REASONS FOR DECISION

Summary

1. The applicant applied to the State Library of Queensland (**SLQ**) for access to her complete personnel Human Resources (**HR**) file held by SLQ or SLQ's shared service provider, the Corporate Administration Agency (**CAA**), for the period June 2008 to October 2010.
2. SLQ decided¹ to give the applicant access to all personnel records held by CAA not previously provided to her² and to refuse access to certain documents on the basis that they are subject to a claim of legal professional privilege.
3. The applicant sought external review of SLQ's decision.
4. As a result of further searches conducted on external review, SLQ located additional documents comprising:
 - 535 email items from SLQ's Enterprise Vault email folders
 - 6 documents from SLQ's corporate file system; and
 - 8 documents from CAA TRIM document management system files and electronic document files.
5. After carefully considering all of the information before me,³ I am satisfied that SLQ is entitled to refuse access to:
 - further documents on the basis that they are unlocatable; and
 - information on the basis that it is exempt as it is subject to legal professional privilege (**Relevant Information**).⁴

Significant procedural steps

6. Significant procedural steps relating to the application are set out in the Appendix.

Reviewable decision

7. The decision under review is SLQ's decision dated 22 December 2010.

Evidence considered

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

¹ By decision dated 22 December 2010.

² By correspondence dated 29 July 2011, SLQ advised OIC that CAA had previously released to the applicant, by correspondence dated 2 July 2009, the applicant's entire personnel records file held by CAA as a result of an application to CAA under the now repealed *Freedom of Information Act 1992* (Qld).

³ Including relevant submissions made by the Applicant and SLQ.

⁴ The Relevant Information comprises all of the information contained within email items 126-128, 190, and 209-211 and some of the information contained within email items 86, 88, 99-102, 114-125, 129-184, 187-189, 191-193, 196-199, 201, 203-205, 208 and 311-312.

Issues remaining for determination

9. As a result of informal negotiations conducted by this Office during the course of the external review,⁵ the issues remaining for determination in this external review are:
- whether the searches conducted by SLQ to locate information responsive to the access application are sufficient to establish that no further documents can be located; and
 - whether SLQ can refuse access to the Relevant Information on the basis that it is subject to legal professional privilege.

Relevant law

10. Under section 23 of the *Right to Information Act 2009 (RTI Act)*, a person has a right to be given access to documents of an agency. However, this right is subject to a number of exclusions and limitations, including grounds for refusal of access.⁶

Sufficiency of search

11. The RTI Act allows an agency to refuse access to documents where the agency is satisfied that those documents are nonexistent or cannot be located following all reasonable steps having been taken to locate them.⁷
12. The Information Commissioner considered the grounds for refusal of access set out in section 52 of the RTI Act in *PDE and the University of Queensland*⁸ (*PDE*).
13. In *PDE*, the Information Commissioner said that:⁹
- ... [T]he FOI Act [equivalent of section 52] address[es] two different scenarios faced by agencies and Ministers from time to time in dealing with FOI applications: circumstances where the document sought does not exist and circumstances where a document sought exists (to the extent it has been or should be in the agency's possession) but cannot be located. In the former circumstance, an agency or Minister is required to satisfy itself that the document does not exist. If so satisfied, the agency or Minister is not required by the FOI Act to carry out all reasonable steps to find the document. In the latter circumstance an agency or Minister is required to satisfy itself that the document sought exists (to the extent that it has been or should be in the agency's possession) **and** carry out all reasonable steps to find the document before refusing access.
14. The Information Commissioner also found¹⁰ that to be satisfied that a document does not exist, it is necessary for the agency to rely upon its particular knowledge and experience with respect to various key factors including:
- the administrative arrangements of government
 - the agency structure

⁵ Including the conveying of preliminary views to the applicant, by correspondence dated 20 December 2011 and 29 February 2012, which were not contested and deemed by this Office to be accepted by the applicant.

⁶ As set out in section 47(3) of the RTI Act.

⁷ Under section 52(1) of the RTI Act.

⁸ Unreported, Queensland Information Commissioner, 9 February 2009. Note—Although *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld), the requirements of that section are replicated in section 52 of the RTI Act.

⁹ At paragraph 34.

¹⁰ See *PDE* at paragraph 37.

- the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
 - the agency's practices and procedures (including but not exclusive of its information management approach); and
 - other factors reasonably inferred from information supplied by the applicant including:
 - the nature and age of the requested document/s
 - the nature of the government activity the request relates to.
15. If an agency relies on searches to justify a decision that the document sought does not exist, the Information Commissioner indicated in *PDE* that all reasonable steps must be taken to locate documents. Enquiries and searches of all relevant locations having regard to the key factors listed above should take place.¹¹
16. As for unlocatable documents, for an agency to be entitled to refuse access it is necessary to consider whether:
- the document/s sought has been or should be in the agency's possession?
and
 - the agency has taken all reasonable steps to find the document/s sought ?

Were searches conducted by SLQ?

17. As noted above, when assessing claims by an agency that documents are unlocatable or that documents are nonexistent, it is always necessary to consider the adequacy of searches undertaken by an agency in an effort to locate relevant documents.
18. When applying for external review, the applicant raised concerns that further information responsive to the scope of her application should exist. Specifically, the applicant indicated that she was seeking correspondence exchanged between specific SLQ staff members about:
- her workplace grievance with another employee
 - the psychiatric assessment reports that were made about her; and
 - communication from the Public Service Commission to SLQ about the psychiatric assessment reports.
19. SLQ subsequently undertook additional searches for information relating to the specific information sought by the applicant. The search efforts were explained in SLQ's submission dated 25 March 2011. The search certification sheets and search record tables show that comprehensive and systematic searches were undertaken. I accept the submission as accurate.
20. The specific additional searches undertaken were of:
- SLQ's Enterprise Vault email folders of SLQ employees specified by the applicant

¹¹ At paragraph 49.

- SLQ's corporate file system; and
- CAA's TRIM document management system files and electronic document files.

21. As a result of the additional searches undertaken, SLQ located the following additional documents:

- 535 email items from SLQ's Enterprise Vault email folders
- 6 documents from SLQ's corporate file system; and
- 8 documents from CAA's TRIM document management system files and electronic document files.

Specific additional information sought by the applicant

22. The applicant submits¹² that she has not received information about:

- a complaint she made about another SLQ employee about the documenting of the applicant's children's whereabouts; and
- a complaint she made about another SLQ employee about importation of private artwork to SLQ's Cairns office.

23. The terms of the access application limit the scope of the external review to information which could reasonably be expected to form a part of the applicant's personnel Human Resources file regarding her employment by SLQ.

24. In relation to complaints made about SLQ employees by other SLQ employees, SLQ have submitted that:¹³

If a SLQ case is being managed by CAA, CAA would hold a separate confidential case management file which would contain all documentation relevant to the case. These documents ARE NOT stored on a staff members personnel HR file. The only time documentation relating to the case would be stored on a staff members personnel HR file would be if disciplinary action was taken which resulted in an outcome (penalty – i.e. financial), this notification would be stored on their personnel HR file and notation that a separate disciplinary file exists.

Filing specifications (i.e. case stored under who's name) would depend on how the complaint was brought to our attention i.e. by who and how. Generally when these types of requests are made, the person seeking information would need to provide full particulars of the case to ensure that the relevant case/information is presented accurately to the persons involved.

Therefore, if a staff member requested their personnel HR file, unless there was a disciplinary outcome, no case documentation would be present. The persons involved are able to request to view documentation from the case in accordance with the Public Service Regulations Act 2008.

25. On this basis, I am satisfied that the complaint information sought by the applicant would not form a part of her personnel HR file and, accordingly, it does not fall within the scope of this external review.

¹² By correspondence dated 1 May 2012.

¹³ By correspondence dated 9 May 2012.

Are there reasonable grounds to be satisfied that further documents are unlocatable?

26. In short, yes.
27. Where documents requested in an application cannot be located, an agency may refuse access provided the requirements (as discussed in this decision) are satisfied.
28. The applicant's mere assertion that more documents must exist is not sufficient evidence upon which I can make a finding that documents which fall within the scope of the access application do exist.
29. Further, there is nothing before me to suggest that the search certification sheets and search record tables completed by SLQ's staff are not credible.¹⁴
30. I am also satisfied that SLQ's searches have been carried out in a systematic way taking into account the factors identified in *PDE*. Having carefully reviewed SLQ's submissions, together with the submissions lodged by the applicant, I am satisfied that SLQ has taken all reasonable steps to locate relevant documents and that there are reasonable grounds for me to be satisfied that no further documents responding to the applicant's access application can be located.
31. Accordingly, I am satisfied that:
 - SLQ has taken all reasonable steps to locate documents within the scope of the access application; and
 - access to further information can be refused on the basis that it is unlocatable.¹⁵

Legal professional privilege

32. An agency may refuse access to information where the information would be privileged from production in a legal proceeding on the ground of legal professional privilege.¹⁶
33. It is well settled that legal professional privilege attaches to confidential communications between a lawyer and client (including communications through their respective servants or agents) made for the dominant purpose of seeking or giving legal advice or professional legal assistance for use, or obtaining material for use, in legal proceedings that have commenced, or were reasonably anticipated, at the time of the relevant communication.¹⁷
34. In addition, privilege extends to any document which directly reveals, or which allows a reader to infer, the content or substance of a privileged communication.¹⁸ Advice privilege may also extend, subject to application of the dominant purpose test, to notes, drafts, charts, diagrams, spreadsheets and other documents by the client in the course of communicating information to the legal adviser.¹⁹
35. I have carefully considered the Relevant Information and I am satisfied that the information:

¹⁴ Attached to SLQ's submissions about search efforts dated 25 March 2011.

¹⁵ In accordance with sections 47(3)(e) and 52(1)(b) of the RTI Act.

¹⁶ Under section 48 and schedule 3, section 7 of the RTI Act.

¹⁷ *Eso Australia Resources Ltd v Commission of Taxation* (1999) 74 ALJR 339.

¹⁸ *Commissioner of Australian Federal Police v Propend Finance* (1997) 188 CLR 501 at 569; *AWB v Cole (No. 1)* (2006) 152 FCR 382, 417 [132].

¹⁹ *Saunders v Commissioner, Australian Federal Police* (1998) 160 ALR 469, 471-472.

- was created for the dominant purpose of seeking or giving legal advice—SLQ sought and received legal advice from Crown Law in relation to a number of issues arising as a result of disciplinary action commenced against the applicant and the applicant's extended absence from the workplace
- was communicated:
 - in confidence—the information reveals that the communications remained confidential between relevant employees of SLQ and CAA (as SLQ's shared service provider for HR matters) and legal officers of Crown Law; and
 - by a professional, independent legal advisor—the advice was provided to SLQ by legal officers employed by Crown Law.²⁰

36. Accordingly, I am satisfied that SLQ is entitled to refuse access to the Relevant Information on the basis that it would be privileged from production in a legal proceeding on the ground of legal professional privilege.

DECISION

37. I vary SLQ's decision by finding that SLQ is entitled to refuse access to:

- further documents under section 47(3)(a) of the RTI Act on the ground that they are unlocatable under section 52(1)(b) of the RTI Act; and
- the Relevant Information on the basis that it would be privileged from production in a legal proceeding on the ground of legal professional privilege under section 47(3)(a) of the RTI Act.

38. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

Louisa Lynch
Acting Assistant Information Commissioner

Date: 18 May 2012

²⁰ In *Smith and Administrative Services Department* (1993) 1 QAR 22 (at paragraphs 88-90), the Information Commissioner found that legal professional privilege could apply to communications between legal officers employed by Crown Law and Crown Law's clients, provided those communications satisfied the tests for legal professional privilege.

APPENDIX

Significant procedural steps

Date	Event
21 October 2010	The State Library of Queensland (SLQ) receives the applicant's access application dated 4 October 2010. The access application was non-compliant.
18 November 2010	The access application becomes compliant.
22 December 2010	SLQ decides to: <ul style="list-style-type: none"> • give the applicant access to all personnel records held by the Corporate Administration Agency (CAA); and • refuse access to certain documents on the basis that they are subject to a claim of legal professional privilege.
10 January 2011	The applicant applies to OIC for external review.
22 February 2011	Crown Law, on behalf of SLQ, provides OIC with a copy of the documents to which the applicant was refused access.
2 March 2011	OIC informs the applicant that the external review application has been accepted and confirms that the issues in this external review are sufficiency of search and refusal of access.
2 March 2011	OIC informs SLQ that the external review application has been accepted and requests SLQ to: <ul style="list-style-type: none"> • conduct any further searches it considered necessary to locate the missing documents identified by the applicant; • provide OIC with search certifications and record of searches tables completed by staff conducting the further searches; and • provide OIC with a submission setting out: <ul style="list-style-type: none"> ○ locations that were searched ○ reasons those locations were chosen ○ search terms used in any electronic databases; and ○ if no further documents can be located, any explanation SLQ can offer as to why no further documents exist.
25 March 2011	SLQ provides OIC with: <ul style="list-style-type: none"> • a submission • signed search certifications and record of searches tables; and • electronic copies of additional documents located as a result of further searches conducted (Additional Documents).
20 June 2011	The applicant provides a submission in support of her case.
29 July 2011	SLQ provides OIC with a copy of the schedules of documents released under SLQ's decision dated 22 December 2010 and details of documents released to the applicant in response to an earlier request to CAA under the now repealed <i>Freedom of Information Act 1992</i> .

7 November 2011	OIC requests SLQ to consider releasing to the applicant documents contained with the Additional Documents that would form part of the applicant's employee record under the <i>Public Service Regulation 2008 (PSR)</i> .
18 November 2011	SLQ advises OIC that it will review the Additional Documents to assess whether they form part of the applicant's employee record under the PSR.
22 November 2011	OIC conveys a written preliminary view to SLQ regarding SLQ's decision to refuse access to documents on the basis that they are subject to a claim of legal professional privilege and invites SLQ to provide submissions in support of its case by 6 December 2011 if the view is contested.
7 December 2011	SLQ requests an extension of time within which to provide submissions.
8 December 2011	OIC advises SLQ that an extension to provide a written submission is granted until 13 December 2011.
13 December 2011	SLQ provides a submission.
16 December 2011	SLQ advises OIC that a view has been formed on whether the Additional Documents form part of the applicant's employee record under the PSR. SLQ's view in relation to each document is detailed in 3 schedules according to where each document was located: <ul style="list-style-type: none"> • Schedule 1—from Enterprise Vault email folders (535 Email Items) • Schedule 2—from SLQ's corporate file system (6 documents); and • Schedule 3—from CAA TRIM document management system files and electronic document files (8 documents).
20 December 2011	OIC conveys a written preliminary view to the applicant regarding SLQ's decision to refuse access to documents on the basis that they are subject to a claim of legal professional privilege and invites the applicant to provide submissions in support of her case by 24 January 2012 if the view is contested.
20 December 2011	Following negotiations with SLQ, OIC conveys a second written preliminary view to SLQ regarding SLQ's decision to refuse access to documents on the basis that they are subject to a claim of legal professional privilege and requests that SLQ arrange for a copy of the relevant documents to be provided to the applicant in accordance with the preliminary view by 16 January 2012.
17 January 2012	SLQ advises OIC that by correspondence dated 16 January 2012, SLQ released relevant documents to the applicant in accordance with the second preliminary view.
25 January 2012	SLQ provides OIC with an amended Schedule 1 for the Additional Documents regarding the 535 Email Items.
2 February 2012	SLQ provides OIC with a further amended Schedule 1 for the Additional Documents regarding the 535 Email Items.
29 February 2012	OIC categorises the Additional Documents as follows: <ol style="list-style-type: none"> 1. Outside date range 2. Irrelevant

	<p>3. Employee record</p> <p>4. Medical Document; and</p> <p>5. Legal professional privilege.</p>
29 February 2012	OIC conveys a written preliminary view to the applicant in relation to Categories 1 to 4 of the Additional Documents and invites the applicant to provide submissions in support of her case by 14 March 2012 if the view is contested.
29 February 2012	OIC conveys a written preliminary view to SLQ in relation to Categories 1 to 4 of the Additional Documents and requests a submission in support of SLQ's claim in relation to Category 5. OIC invites SLQ to provide submissions in support of its case by 21 March 2012 if the view is contested.
29 February 2012	The applicant acknowledges receipt of OIC's written preliminary view, indicates that she already has " <i>all the medical records</i> " and advises that she will correspond further once she has had an opportunity to digest the information contained within the preliminary view.
20 March 2012	<p>SLQ advises that it:</p> <ul style="list-style-type: none"> • accepts OIC's preliminary view in relation to Categories 1 to 4 of the Additional Documents • will assess the employee record documents to identify any personal information of third parties that cannot be released to the applicant; and • requests an extension of time within which to provide a submission in support of its claim in relation to Category 5 of the Additional Documents.
20 March 2012	OIC advises SLQ that an extension to provide a written submission is granted until 28 March 2012.
28 March 2012	SLQ provides OIC with a copy of the Email Items which comprise Category 5 of the Additional Documents highlighted in accordance with its claim for exemption on the basis that the information is subject to legal professional privilege.
26 April 2012	OIC conveys a verbal preliminary view to SLQ in relation to Category 5 of the Additional Documents which SLQ accepts.
27 April 2012	OIC conveys a written preliminary view to the applicant in relation to Category 5 of the Additional Documents and the sufficiency of searches conducted by SLQ to locate all documents responsive to the scope of the access application. OIC invites the applicant to provide submissions in support of her case by 11 May 2012 if the view is contested.
1 May 2012	The applicant advises OIC that she does not accept the preliminary view and provides a submission. The applicant submits that she has not received information relating to certain complaints made by her.
9 May 2012	OIC requests SLQ to provide a submission in relation to procedures following receipt of a complaint about an SLQ employee by another SLQ employee.
9 May 2012	SLQ provides a submission.