



Decision and Reasons for Decision

Application Number:	311428
Applicant:	Serratore
Respondent:	Department of Transport and Main Roads
Third Parties:	Queensland Rail Crown Law
Decision Date:	10 September 2013
Catchwords:	ADMINISTRATIVE LAW – INFORMATION PRIVACY ACT – REFUSAL OF ACCESS – EXEMPT INFORMATION – applicant seeks access to correspondence created or received by certain employees of an agency and correspondence between the agency’s Legal Services and third parties – whether the information would be privileged from production in a legal proceeding on the ground of legal professional privilege – section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and section 47(3)(a) and schedule 3, section 7 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Transport and Main Roads (**Department**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to documents created or received by certain officers of the Department and communications between the Department’s Legal Services, Queensland Rail (**QR**) and Crown Law¹ between 1 April 2009 and 11 December 2012.
2. The Department located 246 pages and, after consulting² with QR and Crown Law, decided to refuse access to 48 full pages and 35 part pages on the basis that the information was exempt from disclosure on the grounds of legal professional privilege.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department’s decision to refuse access to information.
4. As a result of further searches, the Department located an additional 13 pages and agreed to release those pages to the applicant, subject to the deletion of irrelevant information. The Department also agreed to release some further information to the

¹ Crown Law is a business unit of the Department of Justice and Attorney-General and is a principal provider of legal services to the Queensland Government.

² Under section 56 of the IP Act.

applicant which the Department had previously found to be exempt.³ OIC consulted QR and Crown Law; they did not object to the release of this further information.

5. The Department's decision is varied by finding that access to the remaining information in issue can be refused as it would be privileged from production in a legal proceeding on the ground of legal professional privilege.

Background

6. Significant procedural steps relating to the application and the external review are set out in the appendix to this decision.

Reviewable decision

7. The decision under review is the Department's decision dated 21 February 2013.

Evidence considered

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

Information in issue

9. The information remaining under consideration in this external review consists of 3 full pages and 57 part pages (**Information in Issue**).

Relevant law

10. Under the IP Act, a person has a right to access documents of an agency⁴ subject to other provisions of the IP Act and the *Right to Information Act 2009 (Qld)* (**RTI Act**) including grounds on which an agency may refuse access to documents. Section 67(1) of the IP Act provides that access to a document may be refused on the same basis upon which access to a document could be refused under section 47 of the RTI Act.
11. Relevantly, the RTI Act provides that access may be refused to documents to the extent that they comprise exempt information.⁵ Schedule 3, section 7 of the RTI Act provides that information will be exempt from disclosure if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.
12. It is well settled law 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; or, for use, or obtaining material for use, in legal proceedings that have commenced, or were reasonably anticipated, at the time of the relevant communication.⁶
13. The privilege also extends to any document which directly reveals, or which allows a reader to infer, the content or substance of a privileged communication.⁷ However, it will not attach to administrative advice.⁸

³ By letter dated 3 July 2013.

⁴ Section 40 of the IP Act.

⁵ Section 47(3)(a) of the RTI Act.

⁶ *Eso Australia Resources Ltd v Commission of Taxation* (1999) 74 ALJR 339.

⁷ *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 569 (**Propend**); *AWB v Cole* (No. 1) (2006) 152 FCR 382, 417 [132].

⁸ *Waterford v Commonwealth* (1986) 163 CLR 54, 77, 85.

Findings

Does the Information in Issue attract legal professional privilege?

14. Yes, for the reasons that follow.
15. The Information in Issue is communications between the Legal Services Unit of the Department, QR and/or Crown Law which are about infrastructure projects being conducted jointly by the Department and QR.⁹
16. The applicant submits:¹⁰

... I genuinely believe the subject documents were not created for the dominant purpose of seeking advice on behalf of the Department. These documents were created by the Department's in-house lawyers for administrative purposes only and the information sought directly relates to me (the applicant). No particular or specific legal advice was being sought on behalf of the Department and accordingly, I submit that these documents should be produced in its original and clean format.

17. I have considered the Information in Issue.¹¹ I am satisfied that the communications were confidential communications made for the dominant purpose of seeking or giving legal advice in relation to major infrastructure or are of such a nature as would allow the reader to infer the content of substance of other privileged communications. Information of an administrative nature has been released to the applicant by the Department and does not form part of the Information in Issue. I am also satisfied that the legal officers involved in the communications have the necessary degree of independence required to attract legal professional privilege.
18. The applicant was the author or recipient of some of the Information in Issue in her then capacity as a dedicated legal officer from Crown Law placed with the Department or upon her return to Crown Law following the cessation of the placement. I am satisfied that the applicant was in a position of providing legal services to the Department in those capacities.
19. Accordingly, the Information in Issue attracts legal professional privilege.

Does an exception to legal professional privilege apply?

20. No, for the reasons that follow.
21. There are two exceptions to legal professional privilege.
22. The first exception is where a client waives privilege in relation to a privileged communication. In that circumstance the communication is no longer subject to legal professional privilege, and consequently, is no longer exempt from disclosure.¹² Privilege will be waived where there is conduct on the part of the client (in this case, the Department) which is inconsistent with the maintenance of privilege over a communication.¹³

⁹ In the circumstances of this matter, common interest privilege arises as the Department and QR have a shared or similar interest in the subject of the communications between one or more of them and Crown Law. For a decision on common interest privilege, see *Rich V Harrington* [2007] FCA 1987.

¹⁰ Submission dated 30 May 2013.

¹¹ I am unable to discuss the content of the information in detail without revealing information that is claimed to be exempt information – see section 121(3) of the IP Act.

¹² *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, 287 (**Osland**).

¹³ *Mann v Carnell* (1999) 201 CLR 1, *Osland*.

23. The applicant submits¹⁴ that as she was the author of the documents and/or she was aware of the content of the documents, legal professional privilege would not apply presumably because she believes that the documents are not confidential to her. The duty of confidentiality is owed by the lawyer to the client. Privilege belongs to the client (in this case, the Department) and only the client can waive legal professional privilege.
24. As the applicant is no longer a dedicated legal officer placed with the Department, her involvement with these matters has ceased. However, the applicant continues to owe a duty as a lawyer, and as a former employee of the Department, to maintain confidentiality in relation to matters she gained knowledge of as a part of her duties as an employee of or engaged by the Department.
25. The applicant has not sought access to the Information in Issue in the capacity of a legal advisor acting for the Department. Rather, she is seeking access to the Information in Issue in her private capacity. If the Department had given the Information in Issue to the applicant in these circumstances, I am satisfied that such action would be considered to be a waiver of legal professional privilege. In this case, there is no evidence of such conduct on the part of the Department and I am satisfied the communications contained within the Information in Issue remain confidential.
26. The second exception is where a communication is made in furtherance of an improper purpose, a crime, or fraud, privilege cannot be maintained in respect of the communication.¹⁵ There is no material before me which would suggest the Information in Issue was created in furtherance of an improper purpose, a crime, or fraud.
27. Accordingly, I consider that none of the exceptions apply to the Information in Issue.

Conclusion

28. I am satisfied that the Information in Issue attracts legal professional privilege and none of the exceptions to legal professional privilege apply to the Information in Issue.
29. Accordingly, I find that the Information in Issue is exempt from disclosure on the basis that it would be privileged from production in a legal proceeding on the ground of legal professional privilege.

DECISION

30. I vary the Department's decision dated 21 February 2013 by finding that the Department is entitled to refuse access to the Information in Issue pursuant to section 67(1) of the IP Act and section 47(3)(a) and schedule 3, section 7 of the RTI Act.
31. I have made this decision as a delegate of the Acting Information Commissioner, under section 139 of the IP Act.

Assistant Information Commissioner Corby

Date: 10 September 2013

¹⁴ In a telephone discussion with an officer of the Department on 25 January 2013.

¹⁵ *Propend*.

APPENDIX**Significant procedural steps**

Date	Event
11 December 2012	The Department receives the access application.
10 January 2013	The application becomes valid.
21 February 2013	The Department issues its decision.
18 March 2013	OIC receives the applicant's request for external review.
3 April 2013	OIC informs the applicant and the Department that the external review application has been accepted.
18 April 2013	OIC conveys a view to the applicant that the Department is entitled to refuse access on the basis that the information is subject to legal professional privilege. The applicant is invited to provide a submission if she does not accept the view.
2 May 2013	The applicant provides a submission and questions the sufficiency of searches conducted by the Department. OIC requires the Department to conduct further searches for documents responding to the access application.
9 May 2013	The Department advises that a further 13 pages had been located. The Department agrees to release this information to the applicant subject to the deletion of information which is irrelevant to the access application.
16 May 2013	OIC conveys a view to the applicant that the Department has taken all reasonable steps to locate documents which respond to her sufficiency of search issues and access to further documents can be refused on the basis that they are nonexistent or unlocatable. The applicant is invited to provide a submission if she does not accept the view.
30 May 2013	The applicant provides a further submission.
14 June 2013	OIC conveys a view to the Department that some of the information can be released to the applicant as it does not comprise confidential communications made for the dominant purpose of seeking or obtaining legal advice, rather it is information which is administrative in nature. The Department is invited to make a submission if it does not accept the view.
3 July 2013	The Department provides a submission accepting the majority of OIC's view and submits that some further information is subject to legal professional privilege. The Department also requests that OIC consult with QR and Crown Law.
12 July 2013	OIC consults with QR and Crown Law and invites them to provide a submission if they do not accept OIC's view.
22 July 2013	QR advises OIC that it does not object to release of the further information proposed for release.
30 July 2013	Crown Law advises OIC that it does not object to release of the further information proposed for release.