



Decision and Reasons for Decision

Application Number: 210360

Applicant: VSC

Respondent: The Public Trustee of Queensland

Decision Date: 30 June 2008

Catchwords: **FREEDOM OF INFORMATION – Section 43(1) of the *Freedom of Information Act 1992 (Qld)* – matter affecting legal proceedings – whether documents subject to legal professional privilege**

Section 45(1)(c) of the *Freedom of Information Act 1992 (Qld)* – matter relating to trade secrets, business affairs and research – whether disclosure of documents could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of an agency

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REASONS FOR DECISION

Summary

1. The documents in issue which comprise confidential communications and research materials (category 1 and 2 documents) are exempt from disclosure under section 43(1) of the *Freedom of Information Act 1992* (Qld)(**FOI Act**).
2. With respect to the remaining documents in issue (category 3 documents) I find:
 - the documents comprising sub-categories 1, 2 and 3 (correspondence received or sent by the applicant, printouts of searches of the Queensland Courts' website and records of administrative functions of the Official Solicitor or the PTQ) do not qualify for exemption from disclosure under either section 43(1) or section 45(1)(c) of the FOI Act
 - the documents comprising sub-category 4 (billing documents) qualify for partial exemption from disclosure under section 45(1)(c) of the FOI Act.

Background

3. By letter dated 30 May 2007, the applicant applied for access under the FOI Act to (**FOI Application**) "...a copy of my file."
4. On 24 July 2007, the Public Trustee of Queensland (**PTQ**) decided (**Initial Decision**) to grant the applicant:
 - full access to documents within Legal File No. 610628
 - partial access to documents comprising:
 - Public Trustee file No. 20382915
 - Legal file No. 380560.
5. By letter dated 5 August 2007, the applicant sought internal review of the Initial Decision and requested that the following documents be provided to her:
 - Mr Robert Moran's notes of the GAAT hearing on 5 April 2005
 - Mr Robert Yorke's notes of the meeting the applicant attended on 13 November 2006.
6. On 3 September 2007, Mr I Kelly, Director Client Services at the PTQ affirmed the Initial Decision (**Internal Review Decision**) and provided the applicant with Mr Yorke's notes and advised the applicant that he was unable to locate Mr Moran's notes.
7. By letter dated 19 October 2007, the applicant requested an external review of the Internal Review Decision.

Decision under review

8. The decision under review is Mr I Kelly's Internal Review Decision dated 3 September 2007 refusing the applicant access to parts of the documents contained within:
 - Public Trustee file No. 20382915
 - Legal file No. 380560.

Steps taken in the external review process

9. By letters dated 21 November 2007, I advised both the applicant and the PTQ of my decision to:
 - exercise the discretion conferred by section 73(1)(d) of the FOI Act in favour of extending the time for the applicant to lodge an application for review of the Internal Review Decision under Part 5 of the FOI Act¹
 - accept the application for external review.
10. By letter dated 24 December 2007, I asked the PTQ to provide me with further submissions in relation to its exemption claim under section 43(1) of the FOI Act, particularly in the context of its role as the applicant's administrator.
11. By letter dated 16 January 2008, the PTQ provided me with the requested submissions.
12. By letter dated 28 April 2008, I provided the applicant with my preliminary view that:
 - the documents which comprise categories 1 and 2 qualify for exemption from disclosure under section 43(1) of the FOI Act
 - the category 3 documents are not exempt from disclosure under section 43(1) of the FOI Act.
13. By letter dated 28 April 2008, I provided the PTQ with my preliminary view that (in relation to the category 3 documents):
 - the documents fall into sub-categories 1, 2, 3 and 4
 - none of the documents within these sub-categories qualify for exemption from disclosure under section 43(1) of the FOI Act
 - some of the documents within sub-category 4 qualify for partial exemption from disclosure under section 45(1)(c) of the FOI Act.
14. In a telephone conversation with a member of this Office on 6 May 2008, the applicant requested:
 - an extension of time in which to respond to my letter dated 28 April 2008
 - that she be provided with all of the PTQ's submissions, as received by this Office.
15. In a telephone conversation with a member of this Office on 12 May 2008, the applicant was advised that I agreed to provide her with a further 7 days in which to provide her submissions.
16. By letter dated 8 May 2008, I asked the PTQ to advise whether it objected to this Office providing the applicant with a copy of its submissions, namely its letter of 16 January 2008.
17. By letter dated 12 May 2008, the PTQ advised that it confirms its original position. I have assumed this to mean that the PTQ does not accept my preliminary view and

¹ Although the application for external review was made outside of the time limit stipulated in section 73 of the FOI Act, the applicant had attempted to make an earlier application for external review on 15 September 2007 which was sent to this Office's previous address on the advice of the PTQ.

maintains its claim for exemption under section 43(1) of the FOI Act with respect to all of the category 3 documents.

18. By letter dated 13 May 2008, the PTQ agreed to the applicant being provided with a copy of its letter dated 16 January 2008.
19. By letter dated 15 May 2008, I provided the applicant with a copy of the PTQ's submission, as received by this Office on 16 January 2008.
20. In a telephone conversation with a member of this Office on 21 May 2008, the applicant requested a further extension of time in which to respond to my letter dated 28 April 2008.
21. In a telephone conversation with a member of this Office on 22 May 2008, the applicant was advised that I agreed to a final extension of two weeks in which to provide her submissions.
22. By letter dated 26 May 2008 to the applicant, I confirmed the extension of time granted and responded to the concerns raised by the applicant in her telephone conversations with members of this Office on 21 and 22 May 2008.
23. By letter dated 26 May 2008, I provided the applicant with my preliminary view (in relation to the category 3 documents) that 25 of the category 3 documents qualify for partial exemption from disclosure under section 45(1)(c) of the FOI Act.
24. In a telephone conversation with a member of this Office on 3 June 2008, the applicant advised that she:
 - accepted my preliminary view of 26 May 2008 in respect of the category 3 documents
 - intended to provide me with submissions in relation to my earlier preliminary view (dated 28 April 2008) concerning the category 1 and 2 documents.
25. In telephone discussions with members of this Office on 6 and 10 June 2008, the applicant:
 - advised that she realised she had missed the deadline to provide submissions
 - thanked us for granting her extensions of time throughout the process
 - advised that she had decided to wait for a decision in this external review.²
26. In making my decision in this matter I have taken the following into account:
 - the Matter in Issue
 - the applicant's FOI Application dated 30 May 2007, request for internal review dated 5 August 2007 and request for external review dated 19 October 2007
 - the PTQ's Initial Decision and Internal Review Decision
 - the PTQ's letters dated 16 January 2008 and 13 May 2008
 - telephone conversations with the PTQ and a member of this Office
 - telephone conversations with the applicant and a member of this Office
 - relevant legislation, case law and decisions of this Office.

² Which I took to mean that the applicant no longer wished to make submissions in respect of the category 1 and 2 documents.

Matter in Issue

27. For the purposes of this review, I have grouped the matter in issue into the following categories:
- Category 1 – Confidential communications
 - Category 2 – Research material
 - Category 3 – Other documents.

Summary – positions of the parties

28. I note that the applicant does not accept that the documents comprising categories 1 and 2 are exempt from disclosure under section 43(1) of the FOI Act.
29. I note that the PTQ does not accept that some of the category 3 documents are partially exempt from disclosure under section 45(1)(c) of the FOI Act and maintains its claim that all of the documents in issue are fully exempt from disclosure under section 43(1) of the FOI Act.

Findings

Section 43(1) of the FOI Act

30. Section 43(1) of the FOI Act provides that:

43 Matter affecting legal proceedings

(1) Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.

31. The effect of section 43(1) of the FOI Act is that information which attracts 'legal professional privilege' (**LPP**) will be exempt from disclosure.

What is LPP?

32. LPP protects confidential communications in the following circumstances:³
1. between a client and their solicitor, when the communication is made for the dominant purpose of obtaining or providing legal advice
 2. between a third party and a client, when the communication is made for the dominant purpose of obtaining or providing legal advice
 3. between a third party and the client's solicitor, when the communication is made for the dominant purpose of obtaining or providing legal advice
 4. between a client and the client's solicitor, when the communication is made for the dominant purpose of using, or obtaining material for use, in litigation

³ See *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 (*Esso*) and *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217.

that has commenced or is reasonably anticipated at the time of the communication

5. between a third party and the client's solicitor, when the communication is made for the dominant purpose of using, or obtaining material for use, in litigation that has commenced or is reasonably anticipated at the time of the communication.

Solicitor-client relationship

33. Underlying each of the above circumstances is the requirement that a solicitor-client relationship be established. As stated by the High Court:

*Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and [he/she] may relinquish that entitlement.*⁴

34. The PTQ submits that as the applicant's administrator:⁵

- it instructed the Official Solicitor to act as its solicitor in relevant matters
- it was the client and the Official Solicitor was the solicitor in the solicitor-client relationship.

35. In her application for external review, the applicant submits that:

The Public Trustee does not have administration of my assets and was never appointed as litigation Guardian. I am concerned that the lack of transparency by the Public Trustee regarding the carriage of a temporary administration may prejudice future action by me regarding the administration.

36. During a telephone conversation with a member of this Office on 3 June 2008, the applicant made submissions including that:

- the PTQ is accountable to her and owes her a duty of care
- there should be some client relationship between her and the PTQ.

37. With respect to these submissions made by the applicant, I have carefully examined the circumstances of the PTQ's appointment as her administrator and note that:

- as the applicant's administrator (for a defined purpose and period) the PTQ had broad powers⁶ which extended to the engagement of solicitors it considered necessary⁷ to finalise the applicant's claims for compensation
- the PTQ retained the Official Solicitor as its solicitor in the applicant's legal matters
- the Official Solicitor is a barrister or solicitor of the Supreme Court.⁸

⁴ *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1 at paragraph 28.

⁵ I note by way of background that on 5 September 2005 the Guardianship and Administration Tribunal (GAAT) appointed the PTQ as the applicant's administrator for her claim for compensation arising out of a motor vehicle accident on 3 May 2000 and her claim for compensation arising out of a medical negligence action on or about 23 January 2002.

⁶ See section 33(2) of the *Guardianship and Administration Act 2000* (Qld)

⁷ See section 16(1) of the *Public Trustee Act 1978* (Qld) (**PT Act**).

⁸ See section 16(3) of the PT Act.

38. Accordingly, on the information available to me, I am satisfied that:

- the Official Solicitor acted as the PTQ's solicitor in settling the applicant's claims for compensation
- a valid solicitor-client relationship existed between the PTQ and the Official Solicitor for the purposes of establishing LPP.

Do the category 1, 2 and 3 documents attract LPP

39. I will now consider whether the documents which comprise categories 1, 2 and 3 attract LPP and therefore qualify for exemption from disclosure under section 43(1) of the FOI Act.

Category 1 – Confidential communications

40. I note that the documents in category 1 include:

- communications between the Official Solicitor and the PTQ
- communications between the Official Solicitor and third parties
- internal communications of the Official Solicitor and the PTQ.⁹

41. In determining whether the category 1 documents qualify for exemption under section 43(1) of the FOI Act, it is important to note that although LPP applies to a variety of documents:

*...it is the purpose of the communication that is decisive, not the purpose in making the document....*¹⁰

42. The dominant purpose of a communication must be determined objectively, having regard to the evidence, the nature of the document and the parties' submissions.¹¹

43. I have carefully reviewed the category 1 documents. On the information available to me, I am satisfied that each document within this category discloses a confidential communication made for the dominant purpose of:

- requesting information from or providing information to the Official Solicitor, for use in litigation which had commenced or was reasonably anticipated at that time; or
- requesting information from or providing information to the Official Solicitor, so that it could provide legal advice to the PTQ.

44. I also note that there is no evidence before me which demonstrates that the LPP attaching to these documents has been waived or that the relevant information has been inadvertently disclosed.

⁹ As stated by Lockhart J at page 246 of *Trade Practices Commission v Sterling* (1979) 36 FLR 244, LPP may attach to "Notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications which are themselves privileged, or containing a record of those communications, or related to information sought by the client's legal adviser to enable him to advise the client or to conduct litigation on his behalf."

¹⁰ per Greenwood J at paragraph 35 of *Comcare v Foster* (2006) 150 FCR 301.

¹¹ *Grant v Downs* [1976] HCA 63 ; (1976) 135 CLR 674 at page 692; *Waterford*.

45. On the basis of the matters set out above, I am satisfied that the category 1 documents attract LPP and qualify for exemption from disclosure under section 43(1) of the FOI Act.

Category 2 – Research material

46. I note that the documents in category 2 comprise legal research material.
47. The question of whether LPP attaches to legal research material was examined in *Propend Finance P/L & Ors v Australian Federal Police Commissioner & Ors*¹² where the Court found that:

*... it is incorrect to state, as a general proposition, that a copy of an unprivileged document becomes privileged so long as it is obtained by a party, or its solicitor, for the sole purpose of advice or use in litigation. I think that the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a **selective copying or results from research**, or the exercise of skill and knowledge on the part of a solicitor, then I consider privilege should apply ...*

[emphasis added]

48. I have carefully examined these documents and am satisfied that the category 2 documents qualify for exemption from disclosure under section 43(1) of the FOI Act as each document:
- comprises information gathered by staff of the Official Solicitor (using their skill and knowledge) in the course of legal research conducted for the purpose of providing legal advice
 - reveals the results of legal research conducted by the Official Solicitor.

Category 3 – Other documents

49. I note that the documents comprising category 3 can be sub-categorised in the following manner:
1. correspondence received or sent by the applicant
 2. printouts of searches of the Queensland Courts' website in respect of the applicant's relevant legal matters
 3. records of administrative functions of the Official Solicitor or the PTQ
 4. billing documents of the Official Solicitor.
50. I have carefully examined these documents and am satisfied that none of these documents:
- are confidential communications between relevant parties (nor do they refer to such communications)
 - qualify for exemption from disclosure under section 43(1) of the FOI Act.
51. In respect of the sub-category 4 documents (that is, the billing documents) I note that the Information Commissioner has previously stated that:¹³

In my view, the rationale for legal professional privilege requires that protection from compulsory disclosure be extended only to any record, contained in a solicitor's bill of costs, of a communication which itself satisfies the requirements to attract legal

¹² (1995) 128 ALR 657.

¹³ *Murphy and Queensland Treasury* (1998) 4 QAR 446 at paragraph 20.

professional privilege. The balance of a solicitor's bill of costs would not ordinarily, in my opinion, attract legal professional privilege under the prevailing High Court authorities.

Do the sub-category 4 documents qualify for exemption?

52. I will now consider whether the sub-category 4 (of category 3) documents qualify for partial exemption from disclosure under section 45(1)(c) of the FOI Act.

Section 45(1)(c) of the FOI Act

53. Section 45(1)(c) provides:

45 Matter relating to trade secrets, business affairs and research

(1) Matter is exempt matter if—

...

(c) its disclosure—

(i) would disclose information (other than trade secrets or information mentioned in paragraph (b)) concerning the business, professional, commercial or financial affairs of an agency or another person; and

(ii) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government;

unless its disclosure would, on balance, be in the public interest.

54. The Information Commissioner set out the following approach to interpreting and applying section 45(1)(c) of the FOI Act in *Cannon and Australian Quality Egg Farms Limited*¹⁴:

1. the matter in issue is properly to be characterised as information concerning the business, professional, commercial or financial affairs of an agency or another person, if
2. disclosure of the matter in issue could reasonably be expected to have either of the prejudicial effects contemplated by section 45(1)(c)(ii), namely:
 - (i) an adverse effect on the business, professional, commercial or financial affairs of the agency or other person, which the information in issue concerns; or
 - (ii) prejudice to the future supply of such information to government.

unless disclosure of the matter in issue would, on balance, be in the public interest.

55. I will consider each of these elements below.

(a) Information concerning business, professional, commercial or financial affairs

56. In *Johnson and Queensland Transport; Department of Public Works (Third Party)*,¹⁵ the Information Commissioner stated that:

¹⁴ (1994) 1 QAR 491 (*Cannon*) at paragraphs 66-88.

I consider that Parliament's intention in enacting the s.45(1)(c) exemption was to provide a means by which the general right of access to documents in the possession or control of government agencies could be prevented from causing unwarranted commercial disadvantage to:

- *individuals who offer professional services to the public on a fee for service basis (see *Re Pope and Queensland Health* [1994] QICmr 16 (18 July 1994) at paragraph 29);*
- *private sector business operators (whether they be individuals, partnerships, or corporations); and*
- *government agencies which function on a business model to generate income from the provision of goods or services.*

57. In respect of protecting government agencies from unwarranted commercial disadvantage, the Information Commissioner has previously found (in relation to documents created by Crown Law) that:

- government departments such as Crown Law operate in a commercially competitive environment with private sector legal firms
- disclosure of their hourly charge-out rates for its professional staff could reasonably be expected to assist its competitors to compete with it more effectively in the legal services market generally.¹⁶

58. On the information available to me, I find that in the current circumstances, the operations of the Official Solicitor are comparable with those of Crown Law as each:

- provides legal advice or conducts litigation on behalf of government departments/agencies
- bills the relevant government department/agency for work undertaken on their behalf (which is calculated in accordance with time spent and professional charge-out rates).

59. On this basis, I am satisfied that some of the information in the billing documents (namely, hourly charge-out rates of professional staff of the Official Solicitor & fee structuring information) concern the business, professional, commercial or financial affairs of the Official Solicitor.

(b) Adverse effect or prejudice to future supply reasonably expected from disclosure

60. I note that the Information Commissioner has stated that the phrase 'could reasonably be expected to' requires the decision-maker:

*... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.*¹⁷

¹⁵ (2004) 6 QAR 307 at paragraph 50.

¹⁶ See *Kelly and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 13 March 2002) at paragraph 44 and *Macrossan and Amiet and Queensland Health and Ors* (Unreported, Queensland Information Commissioner, 27 February 2002).

¹⁷ *Cannon* at paragraphs 62 as stated in *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at paragraphs 154-161.

61. Further, the Information Commissioner relevantly stated the following in relation to section 45(1)(c) of the FOI Act:¹⁸
- an adverse effect under section 45(1)(c) will almost invariably be financial in nature, whether directly or indirectly (eg an adverse effect on an entity's 'business reputation or goodwill ... is feared ultimately for its potential to result in loss of income or profits, through loss of customers')
 - in most instances the question of whether disclosure of information could reasonably be expected to have an adverse effect will turn on whether the information is capable of causing competitive harm to the relevant entity. A relevant factor is whether it enjoys a monopoly position or whether it operates in a commercially competitive environment.
62. On the information available to me, I am satisfied that:
- disclosure of certain parts of the billing documents (including hourly charge-out rates of professional staff of the Official Solicitor & fee structuring information) could reasonably be expected to cause an adverse financial effect on the business, commercial or financial affairs of the Official Solicitor given that it operates in a commercially competitive environment
 - it is therefore unnecessary to consider whether disclosure would prejudice the future supply of information to government.

Public Interest Balancing Test

63. The final issue for determination is whether public interest considerations favouring disclosure outweigh those favouring non-disclosure.
64. Facilitating the accountability of government through disclosure of government-held information is a public interest consideration recognised by section 4 of the FOI Act. The question in this case is whether disclosure of the billing documents would allow members of the public a better understanding of action taken by the Official Solicitor and the PTQ in this instance.
65. Against the public interest consideration, I must balance any public interest considerations against disclosure of the billing documents, which in the circumstances include exposing aspects of the Official Solicitor's business, commercial or financial affairs to its competitors.
66. After weighing the public interest consideration favouring disclosure (government accountability and transparency) against the privacy interests favouring non-disclosure (the public interest in not subjecting an entity to unwarranted commercial disadvantage), I am satisfied that:
- public interest considerations favouring disclosure do not outweigh those favouring non-disclosure
 - parts of the billing documents (comprised within sub-category 4 of the category 3 documents) qualify for exemption from disclosure under section 45(1)(c) of the FOI Act (see **Appendix A**).

¹⁸ Cannon at paragraphs 62-63, 83 and 84.

DECISION

67. I set aside the decision under review, by deciding that:

- the documents in issue comprising the category 1 and 2 documents (confidential communications and research materials) are exempt from disclosure under section 43(1) of the FOI Act
- the documents comprising sub-categories 1, 2 and 3 of the category 3 documents (correspondence received or sent by the applicant, printouts of searches of the Queensland Courts' website and records of administrative functions of the Official Solicitor or the PTQ) do not qualify for exemption from disclosure under either section 43(1) or section 45(1)(c) of the FOI Act (see **Appendix A**)
- the documents comprising sub-category 4 of the category 3 documents (billing documents) qualify for partial exemption from disclosure under section 45(1)(c) of the FOI Act (see **Appendix A**).

68. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

Assistant Commissioner Henry

Date: 30 June 2008

Appendix A – Category 3 documents

Documents not exempt under the FOI Act:

Public Trustee file No. 20382915	
10	38-39

Legal file No. 380560									
12	13	16	29	57-58	62	79	80	85	110
127	143	181-182	190	204-205	223-226	231-234	246	262-263	285-298
307	336-337	406-407	442-443	532-533	595	620	676	681-682	722
729	751	852	864	898	956	1024-1025	1122-1123	1130	1038
1042-1043			1121			1137-1144			

Documents partially exempt under the FOI Act:

Public Trustee file No. 20382915		
21	80-81	84-85

Legal file No. 380560							
133-134	928	1026	1028	1070-1075	1087-1088	1107-1112	1115