

'AM' and Chief Minister, Economic Development Directorate [2019]
ACTOFOI 16 (30 September 2019)

Decision and reasons for decision of Senior Assistant Ombudsman, Louise Macleod

Application Number:	AFOI-RR/19/10019
Decision Reference:	[2019] ACTOFOI 16
Applicant:	'AM'
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Decision Date:	30 September 2019
Catchwords:	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – legal professional privilege

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the ACT *Freedom of Information Act 2016* (FOI Act).
2. Under s 82(1)(a) of the FOI Act, I **confirm** the decision of the Chief Minister, Treasury and Economic Development Directorate (CMTEDD), dated 2 August 2019, with respect to the information at issue in this review, being an Executive Minute relating to the applicant's employment.

Background of Ombudsman review

3. On 26 July 2019, the applicant applied to the respondent for access to:

“...an unredacted version of page 2 ONLY of the Executive Minute – Attachment A, which was on pages 34-35 of the documents provided to me on the 28 May 2019...”
4. On 2 August 2019, the respondent advised the applicant it had identified one document as falling within the scope of the access application. The respondent gave the applicant access to the document in part. In making its decision, the respondent relied on Schedule 1, s 1.2 of the FOI Act.
5. On 9 August 2019, the applicant sought Ombudsman review of the respondent’s decision under s 73 of the FOI Act.
6. On 13 May 2019, I provided my preliminary views about the respondent’s decision to the parties in my draft consideration.
7. The respondent did not provide any submissions in relation to my draft consideration.
8. On 11 September 2019, the applicant provided submissions in relation to my draft consideration:

The applicant acknowledges the broad concept and undertaking of Legal Professional Privilege within common law.

The applicant asks the Ombudsman before finalising the Draft Consideration to consider a part waiver of the Legal Professional Privilege, sufficiently enough, to enable the respondent to advise the applicant in appropriate words of the “Advice to this affect” that should have been delivered to [‘AM’] (the applicant, and past employee) back in 2012.

Scope of Ombudsman review

9. The information at issue in this Ombudsman review are two redacted paragraphs contained in the document (Executive Minute) comprising legal advice from the ACT Government Solicitor.
10. The issue to be decided in this Ombudsman review is whether giving the applicant access to the information at issue would be contrary to the public interest.
11. In making my draft consideration, I have had regard to:
 - the applicant’s access application and review application to the Ombudsman
 - the applicant’s submissions to my draft consideration
 - the respondent’s decision
 - the FOI Act, in particular ss 7, 16, 35(1)(c), 50, 72 and Schedule 1
 - the respondent’s FOI processing file relating to the access application
 - an unedited copy of the information at issue

- relevant case law, in particular *Jones and Queensland Police Service*,¹ *94HQWR and Queensland Police Service*² and *Commissioner of Australian Federal Police v Propend Finance Pty Ltd.*³

Relevant law

12. Section 7 of the FOI Act provides every person with an enforceable right of access to government information. This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.
13. Contrary to the public interest information is defined in s 16 of the FOI Act as:
information—
 - (a) that is taken to be contrary to the public interest to disclose under schedule 1; or
 - (b) the disclosure of which would, on balance, be contrary to the public interest under the test set out in section 17.
14. Section 35(1)(c) of the FOI Act provides that an access application may be decided by refusing to give access to the information sought because the information being sought is contrary to the public interest information.
15. Section 50 of the FOI Act applies if an access application is made for government information in a record containing contrary to the public interest information and it is practicable to give access to a copy of the record from which the contrary to the public interest information has been deleted.
16. Section 72 of the FOI Act provides that it is the person seeking to prevent disclosure of government information that has the onus of establishing that the information is contrary to the public interest information.
17. Schedule 1 of the FOI Act sets out categories of information that is taken to be contrary to the public interest to disclose. In particular, s 1.2 of Schedule 1 provides that disclosure of information is taken to be contrary to the public interest if its disclosure would be privileged from production or admission into evidence in a legal proceeding on the grounds of legal professional privilege (LPP).

The contentions of the parties

18. In its decision notice, the respondent said:

The document requested contains advice provided by the Government Solicitor Office (GSO)...the advice is subject to legal professional privilege as it was brought into existence for the dominant purpose of providing a legal opinion in relation to matters of employment. [The decision-maker was] satisfied that the communications were made in circumstances of confidentiality and were provided by an independent legal adviser satisfying the requirements to attract legal professional privilege.
19. In the application for Ombudsman review, the applicant said:

¹ [2015] QICmr 15.

² [2014] QICmr 45.

³ (1997) 188 CLR 501.

As a personnel file record, I believe that CMTEDD should be completely transparent in relation to employment related decisions. I am not aware of any reason that should prevent this from occurring. Therefore, I ask that the ACT Government be transparent.

...I should have also noted that on page 2 of the Executive Minute between the redacted dot points, is a dot point stating "Advice to this affect should be delivered to ['AM'] as soon as possible." I would like to know what I was meant to be informed of?

Considerations

20. I have examined an unedited copy of the information at issue together with submissions provided by the applicant and respondent.
21. For the reasons set out below, I am satisfied that access to the information at issue should be refused as it is information subject to legal professional privilege.

Information that is taken to be contrary to the public interest to disclose under Schedule 1

22. The respondent contends the information at issue is contrary to the public interest information to disclose under Schedule 1, s 1.2 of the FOI Act because it comprises confidential advice provided by an independent legal practitioner to the respondent (as the client) for the dominant purpose of giving legal advice.
23. I have reviewed the information at issue and I am satisfied it does not fall under the exceptions outlined in Schedule 1. The information at issue does not identify corruption, an offence, or misuse of power in a law enforcement investigation. As a result, Schedule 1 provisions may be relevant to the information at issue. Consequently, I will now proceed to consider whether the information at issue is contrary to the public interest information to disclose under Schedule 1 of the FOI Act.
24. The information at issue comprises a summary of advice provided to the respondent from the ACT Government Solicitor.
25. Under Schedule 1, s 1.2 of the FOI Act, LPP is information:
 - ...that would be privileged from production or admission into evidence in a legal proceeding on the grounds of legal professional privilege.
26. LPP is not defined in the FOI Act, however, in accordance with common law principles, for LPP to apply:
 - an independent legal practitioner and client relationship must exist
 - the communication (as opposed to the document per se) must have been made for the purpose of giving or receiving legal advice, or for use in litigation (actual or anticipated), and
 - the advice must have been confidential.
27. To determine whether LPP applies, I have considered below whether each of the above elements exist in this case.

Does a legal practitioner and client relationship exist?

28. I am satisfied the information at issue was created in the context of a legal practitioner-client relationship because:

- the ACT Government Solicitor provides legal services, including advice and representation to the ACT, its government agencies, ministers and office holders.
- the respondent is an ACT government agency and engaged the ACT Government Solicitor to provide advice in relation to an employment matter in the Territory.

What was the information's purpose?

29. The respondent sought independent legal advice from the ACT Government Solicitor in relation to the conduct of an employment matter and proposed action.
30. The information at issue is a summary of this advice and suggest steps to be taken by the respondent. After reviewing this information, I am of the view it was created for the purpose of seeking or providing legal advice and for use in existing or reasonably anticipated legal proceedings. As the Queensland Information Commissioner has noted, legal advice can involve more than just advising the client about the law, it also includes what can sensibly be done in the relevant legal context.⁴

Was the information communicated in confidence?

31. LPP applies to confidential communications between the client and legal practitioner.
32. The information at issue comprises a summary of the confidential advice provided to the respondent from the ACT Government Solicitor. The circumstances surrounding how the information at issue was provided to the respondent indicates there was an implied mutual understanding of confidentiality.⁵

Has privilege been waived?

33. LPP applies to the communications rather than the document in which the communication is recorded.⁶ However, a document which records the substance of privileged communications between a client and legal adviser is protected by LPP.
34. In this case, advice about the communications was summarised in an Executive Minute to assist the decision-maker to make a fully informed decision. As a result, an issue in this Ombudsman review is whether reference to the original legal advice in this document waives LPP.
35. I am not of the view that communications regarding privileged legal advice internally within the agency amounts to a waiver of LPP.
36. In making this assessment, I have taken into account the respondent's advice that:
- only the Solicitor-General has the ability to waive LPP in accordance with clause 5.1 of the *Law Officers (General) Legal Services Directions*⁷
 - the ACT Government Solicitor was consulted and asked by the respondent to consider waiving LPP in relation to the information at issue

⁴ *Jones and Queensland Police Service* [2015] QICmr 15 (26 June 2015) at [30]

<https://www.oic.qld.gov.au/decisions/jones-and-queensland-police-service-2015-qicmr-15-26-june-2015>.

⁵ *94HQWR and Queensland Police Service* [2014] QICmr 45 at [18]-[21].

⁶ *Commissioner of Australian Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501 (Propend)* at page 85.

⁷ 2012 NI 2012-292.

- the ACT Government Solicitor did not agree to waive LPP.
37. I have considered the applicant's submissions in relation to my draft consideration and make the note that as the Ombudsman does not own the information, the Ombudsman is not in the position to decide whether a "part waiver [sic] of the Legal Professional Privilege" can be done. Further, even if the respondent were to "advise the applicant in appropriate words of the "Advice to this affect" that should have been delivered to [the applicant]", such disclosure would inadvertently disclose the information at issue.
38. Therefore, I am satisfied the information at issue contains the substance of the privileged communication between the ACT Government Solicitor and the respondent, which continues to be protected by LPP.
39. For the reasons above, I consider that disclosure of the information at issue would disclose information subject to legal professional privilege as defined by Schedule 1, s 1.2 of the FOI Act.

Conclusion

40. Disclosure of the information at issue is contrary to the public interest for the purposes of s 16 of the FOI Act.
41. Under s 82(1)(a) of the FOI Act, I **confirm** the respondent's decision to partially refuse access to the information at issue as it is taken to be contrary to the public interest to disclose under Schedule 1, 1 .2 of the FOI Act.
42. Therefore, the information at issue should not be disclosed to the applicant.

Louise Macleod

Senior Assistant Ombudsman

30 September 2019