

Decision and reasons of Acting Senior Assistant Ombudsman

Application number:	AFOI-RR/23/10045
Applicant:	'DG'
Respondent:	Office of the Director of Public Prosecutions
Respondent reference:	200929085
Date:	2 October 2024
Decision reference:	[2024] ACTOFOI 17
Catchwords:	<i>Freedom of Information Act 2016</i> – deciding access – reasonable searches – consulting applicant before refusing to deal with certain applications – refusing to deal with an application – frivolous or vexatious – abuse of process – application expressed to relate to information taken to be contrary to the public interest to disclose under Schedule 1 – information subject to legal professional privilege

Decision

1. I am a delegate of the ACT Ombudsman for the purpose of s 82 of the *Freedom of Information Act 2016* (FOI Act).
2. The applicant applied for Ombudsman review of the Office of the Director of Public Prosecutions' (DPP) decision of 25 July 2023 to refuse to deal with their access application on the ground it is frivolous, vexatious and an abuse of process.

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3. For the reasons set out below, I have decided to **set** aside the decision made by the DPP under s 82(2)(c) of the FOI Act. I do not consider the application is frivolous, vexatious or an abuse of process.
4. I make a **substitute** decision to refuse to deal with the parts of the application expressed to relate to information subject to legal professional privilege (LPP) as information of that kind is taken to be contrary to the public interest to disclose.
5. The remainder of the application is not expressed to relate to confidential communications made for the dominant purpose of providing legal advice or professional legal services to the Director of Public Prosecutions (DPP). I find the DPP should make a further decision on the remainder of the application.

Background to Ombudsman review

6. On 11 May 2023, the applicant applied for access to:
 - ... in relation to the [proceeding] and the criminal proceedings in [citation]:
 1. All emails, correspondence, meeting minutes or written interactions on any digital communications platforms between Margaret Jones, Madelaine Lehmann, Elizabeth Wren, Hannah Roberts, Trent Hickey, Shane Drumgold and Jon White in relation to the [proceeding].
 2. All emails, correspondence, meeting minutes or written interactions on any digital communications platforms between Margaret Jones, Madelaine Lehmann, Elizabeth Wren, Hannah Roberts, Trent Hickey, Shane Drumgold and Jon White in relation to the [proceeding].
 3. All emails, correspondence, meeting minutes or written interactions on any digital communications platforms between Margaret Jones, Madelaine Lehmann, Elizabeth Wren, Hannah Roberts, Trent Hickey, Shane Drumgold and Jon White in relation to the criminal proceeding [citation]. This includes any content containing the words '[applicant first name]' and/or '[applicant family name]'.
 4. All emails, correspondence, meeting minutes or written interactions on any digital communications platforms in relation to Margaret Jones and Hannah Roberts inspecting exhibit [reference] '[description]' on the [date].

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5. All emails, correspondence, meeting minutes or written interactions on any digital communications platforms between Margaret Jones, Madelaine Lehmann, Elizabeth Wren, Hannah Roberts, Trent Hickey and Shane Drumgold relating to post-trial decisions regarding the matter or in relation to the meeting held by the DPP post-trial.
7. On 17 May 2023, the DPP sent the applicant an acknowledgement letter and sought the applicant's agreement to an extension of time to decide the application. The applicant did not respond to the extension request and was taken to agree to the extension request.¹
8. On 25 July 2023, the DPP decided to refuse to deal with the application on the ground the application was frivolous, vexatious and an abuse of process.
9. On 20 August 2023, the applicant applied for Ombudsman review of the DPP's decision to refuse to deal with their application.
10. On 24 October 2023, the Office of the ACT Ombudsman (the Office) wrote to the DPP to notify of the receipt of an Ombudsman review application and requested information relevant to the review.
11. On the same day, the DPP sought an extension to provide the requested information and enquired about the authority of the Ombudsman to obtain information subject to LPP noting the requirement legislation must be interpreted to preserve LPP.²
12. On 17 November 2023, the DPP provided information and additional submissions to the Office.
13. On 28 November 2023, the Office wrote to the DPP to request access to the information sought in the application by way of inspection.

¹ [Freedom of Information Act 2016 \(ACT\)](#) (FOI Act) ss 41(4).

² [Legislation Act 2001 \(ACT\)](#) s 171.

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14. On 7 December 2023, the Office wrote to the DPP to note proposed amendments to s 68 of the FOI Act were before the Assembly, which clarify the Ombudsman is entitled to full and free access at reasonable times to all relevant information of the agency or Minister concerned, including information subject to LPP.³
15. On 12 December 2023, the amendment to s 68 of the FOI Act commenced.
16. On 10 January 2024, staff from the Office attended the offices of the DPP to inspect records that fell within the scope of the application for the purpose of this review.
17. On 24 January 2024, the Office wrote to the applicant to provide a copy of additional submissions of the DPP dated 17 November 2023 and information about the results of the inspection.
18. On 6 February 2024, the applicant provided the Office with a copy of an Australian Federal Police (AFP) Forensics Case Note regarding the inspection of the exhibit by DPP officers referred to in item 4 of the application.
19. On 29 February 2024, the applicant advised they were willing to submit an amended application following consultation with the DPP on the scope of their application.
20. On 13 March 2024, the DPP advised it was unlikely informal resolution would be possible as their position the information was subject to LPP had not changed. At this time the Office ceased informal resolution activities.
21. On 2 September 2024, I provided my preliminary view to the parties in a draft consideration.
22. On 9 September 2024, the applicant accepted the draft consideration.

³ [Justice and Community Safety Legislation Amendment Act 2023 \(No 3\) \(ACT\)](#) s 21; FOI Act s 68.

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23. On 27 September 2024, the DPP provided submissions in response to the draft consideration. The DPP did not wish to be heard in respect of my preliminary view on items 1-4 of the application. The DPP provided submissions in respect of item 5 of the application.

Preliminary issue – consulting applicant before refusing to deal with application

24. Before refusing to deal with an access application, the respondent is required under s 46 of the FOI Act to notify the applicant of its intention to refuse to deal with the application, the ground for refusal and consultation period; and give the applicant:

- a reasonable opportunity to consult with the respondent, and
- any information that may assist the applicant to make an application in a form that would remove the ground for refusal.

25. After any consultation with the respondent, the applicant may give an amended application.⁴ An agency must consider any submissions made or information provided by the applicant during the consultation period before deciding to refuse the request.⁵

26. The consultation period is the period of 10 working days starting on the day after the day the notice was given under s 46(1)(a), or any longer period agreed between the parties before or after the end of the 10 working days.

27. The DPP contacted the applicant, prior to refusing to deal with their application, to acknowledge receipt of the application and request an agreement to an extension of time.

⁴ FOI Act s 46(2).

⁵ [Explanatory Statement, Freedom of Information Bill 2016](#).

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28. The acknowledgement letter noted careful consideration would have to be given to possible redactions in relation to LPP, public interest immunity, and sensitive personal information in approximately 1000 pages of material. The letter did not identify the DPP intended to refuse to deal with the application.
29. I note the decision letter does not identify how the different items of the application were determined to be expressed to relate to information subject to LPP or how the information reviewed during the decision-making process was confirmed as subject to LPP.
30. In submissions to the Office, the DPP stated approximately 100 documents within the scope of the request were reviewed (being emails stored on the DPP's electronic records management system) to confirm the information sought was subject to LPP.
31. The DPP did not consult the applicant before refusing to deal with their access application as required. The DPP did not tell the applicant of the intention to refuse to deal with their application and the ground for refusal. Consequently, the applicant did not have an opportunity to discuss the scope of the application with the DPP or receive information which have may assisted the applicant make an amended application removing the ground of refusal.
32. Even if the DPP determined the entire application was expressed to relate to information subject to LPP and that an amended application would not remove the ground for refusal, the DPP was nonetheless still required to consult the applicant and give them an opportunity to provide additional information before refusing to deal.
33. While I find the DPP did not consult with the applicant, additional submissions from the DPP have been shared with the applicant and the Office has provided information to the applicant following the inspection of DPP records.

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The parties have also had an opportunity to respond to my draft consideration.

34. As the DPP intends to make a further decision in respect of items 4 and 5 of the application following this review, I consider further consultation is not required.

Preliminary issue – reasonable searches

35. In their Ombudsman review application, the applicant submitted the DPP failed to take reasonable steps to identify all government information within the scope of the application.
36. Section 34 of the FOI Act provides an agency or Minister deciding an access application must take reasonable steps to identify all government information within the scope of the application.
37. The DPP in its submissions noted that the application covered a potentially large volume of records. The DPP submitted that while they suspected any information that fell within the scope would be subject to LPP (noting the scope and character of the information sought), the information officer reviewed approximately 100 emails.
38. The information officer confirmed that in those emails there was no information to provide a reasonable basis to substantiate a claim of illegality, misconduct or unfairness (i.e. information which may not be subject to LPP).
39. As the DPP refused to deal with the application on the grounds it was frivolous, vexatious or an abuse of process and ultimately did not decide the application, I consider the DPP was not obligated to take further steps to identify all the information within scope.

Key issue in Ombudsman review

40. The key issue to be decided in this Ombudsman review is whether the application is frivolous, vexatious or an abuse of process.

41. In making my decision, I have had regard to:

- the applicant's access application and review application
- the respondent's decision of 25 July 2023 and additional submissions of 24 October 2023, 13 March 2024 and 27 September 2024
- the results of an inspection of information held by the DPP conducted by staff of the Office on 10 January 2024
- the FOI Act, particularly ss 35, 43, 46 and Schedule 1.2
- the Freedom of Information Guidelines (**FOI Guidelines**) made under s 66 of the FOI Act
- the *Evidence Act 2011* (ACT (**Evidence Act**)), and
- relevant case law, including:
 - [*Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* \[2022\] HCA 49 \(7 November 2002\)](#)
 - [*Esso Australia Resources v Commissioner of Taxation* \[1999\] HCA 67 \(21 December 1999\)](#)
 - [*Commissioner of Taxation v PricewaterhouseCoopers* \[2022\] FCA 278](#)
 - [*Waterford v Commonwealth* \[1987\] HCA 25 \(24 June 1987\)](#)
 - [*Prior v South West Aboriginal Land and Sea Council Aboriginal Corporation* \[2020\] FCA 808 \(10 June 2020\)](#)
 - [*Walton v Gardiner* \[1993\] HCA 77](#)
 - [*'CN' and Transport Canberra and City Services* \[2023\] ACTOFOI 22 \(3 October 2023\)](#)

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- [Re Cameron \[1996\] 2 Qd R 218](#)
- [Aouad v R; El-Zayet v R \[2013\] NSWSC 760.](#)

Relevant law

42. Section 7 of the FOI Act gives every person 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.⁶
43. A respondent may refuse to deal with an access application wholly or in part if the application is frivolous or vexatious (s 43(1)(b)); or involves an abuse of process (s 43(1)(c)).
44. A respondent may also refuse to deal with an access application wholly or in part if the access application is expressed to relate to government information of a stated kind and information of that kind is taken to be contrary to the public interest to disclose under Schedule 1.
45. 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.
46. Information that would be privileged from production or admission into evidence in a legal proceeding on the ground of LPP is contrary to the public interest information under Schedule 1, s 1.2 of the FOI Act.

⁶ [FOI Act](#) s 35(1)(c).

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47. At the time the application was made to the DPP, information mentioned in Schedule 1, including information subject to LPP, would be taken to be contrary to the public interest unless the information identified corruption or the commission of an offence by a public official or that the scope of a law enforcement agency investigation has exceeded the limits imposed by law.⁷
48. Following amendments to the FOI Act, information mentioned in Schedule 1 (other than information subject to LPP under Schedule 1, s 1.2) is not taken to be contrary to the public interest information if it identifies corruption; or the commission of an offence by a public official; or that the scope of a law enforcement investigation has exceeded the limits imposed by law.⁸
49. LPP operates as an immunity to resist the disclosure of information which would reveal communications between a client and their lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of services for legal proceedings.⁹
50. LPP extends to information which has been copied and provided to a legal advisor for the dominant purpose of obtaining legal advice; and information prepared by the client or the legal adviser from which the nature of the advice sought or given might be inferred.¹⁰

⁷ [Freedom of Information Act 2016 \(ACT\) \(effective 1 January 2022 – 23 May 2023\) Schedule 1.](#)

⁸ [Freedom of Information Act 2016 \(ACT\) s 16\(2\).](#)

⁹ [Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission \[2002\] HCA 49 \(7 November 2002\) at \[9\] – \[11\]. See also Esso Australia Resources v Commissioner of Taxation \[1999\] HCA 67 \(Esso\) \(21 December 1999\) at \[61\].](#)

¹⁰ [Commissioner of Taxation v PricewaterhouseCoopers \[2022\] FCA 278, \[141\]–\[142\] citing Commissioner of Australian Federal Police v Propend Finance Pty Ltd \(1997\) 188 CLR 501; Esso; AWB Ltd v Cole \(No 5\) \(2006\) 155 FCR 30; AWB Ltd v Cole \[2006\] FCA 571.](#)

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51. Evidence must not be presented if, on objection by a client, the court finds that presenting the evidence would result in the disclosure of:

- a confidential communication made between the client and a lawyer; or between 2 or more lawyers acting for the client; or the contents of a confidential communication prepared by the client, lawyer, or someone else for the dominant purpose of the lawyer, or 1 or more of the lawyers, providing legal advice to the client (**legal advice privilege**)¹¹
- a confidential communication between the client and someone else, or between a lawyer acting for the client and someone else, that was made; or the contents of a confidential document that was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party (**litigation privilege**).¹²

52. The Evidence Act provides a 'client' includes an employer of a lawyer if the employer is the Commonwealth or a State or Territory; or a body established by law of the Commonwealth or a State or Territory. The meaning of 'client' also includes an employee or agent of a client.¹³

53. The following elements are also relevant to determine whether a 'lawyer-client relationship' exists and if information is subject to LPP:¹⁴

- an independent professional legal practitioner and client relationship must exist where the lawyer is acting in their professional capacity

¹¹ [Evidence Act 2011 \(ACT\)](#) s 118.

¹² *Ibid* s 119.

¹³ *Ibid* s 117(1).

¹⁴ [Waterford v Commonwealth \[1987\] HCA 25; \(1987\) 163 CLR 54 \(24 June 1987\)](#).

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- the communication between a client and their legal adviser must have been made for the dominant purpose of giving or receiving legal advice, or for use in litigation (actual or anticipated)
- the communication must have been confidential, and
- LPP has not been waived by the client.

The contentions of the parties

54. The DPP's decision notice of 25 July 2023 said:

"...Given that your request, in essence, seeks the release of the internal correspondence between prosecutors with carriage of your previous criminal and confiscation of criminal assets proceedings, in my view it is frivolous, vexatious and an abuse of process. That is to say, it is clearly 'foredoomed to fail' in the sense that it will inevitably be refused as all of the documents falling within its scope of your request are squarely covered by legal professional privilege. So much is confirmed by my analysis of the documents I have reviewed thus far..."

55. In the Ombudsman review application, the applicant said:

The DPP has failed to administer the act with a pro-disclosure bias. The DPP has not established, supported or evidenced that legal professional privilege exists over all of the documents within the scope of my request. The information I requested would not be privileged from production or admission into evidence in a legal proceeding on the ground of legal professional privilege.

....The DPP has not provided any information as to the circumstances and context in which the documents came into existence, the purpose of the person who authored the documents or procured their creation or the nature of the documents as supported by argument or submissions. The DPP has not provided any information or reasons as to how the requested information satisfies the dominant purpose test. The DPP has not addressed whether all of the recipients of the information requested fulfil the requirements for a client lawyer relationship...

I assert that some of the information within scope of my request was made for an improper purpose, namely that the DPP abused their authority to bring a malicious prosecution against me.

56. The DPP's additional submissions of 17 November 2023 said:

"...the five categories of information listed in the access application each include a list of names. I recognised each of the persons named...to be persons who were staff of the DPP generally at the time of the proceedings referred to in the access application..."

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the content (or subject matter) identified for each of the five categories, is records between those prosecutors either "in relation to" the identified criminal prosecutions and confiscations proceedings (categories 1-3), or records about specific conduct related to the carriage of those proceedings, such as inspection of exhibits (category 4) and decisions made by prosecutors with carriage post-trial (category 5)...

the form of records requested is described as "all emails, correspondence, meeting minutes or written interactions on any digital communications platform...therefore, the access application calls for all internal electronic communications between prosecutors of the ODPP...relating to the prosecution's carriage and conduct of criminal and confiscations proceedings in accordance with the DPP in exercising [their] statutory functions...

Each of the documents I reviewed fell within legal professional privilege. That is, they fell within the definition of a communication, or record or such, that was between lawyers, lawyers and police, or lawyers and another person, being lawyers providing the Director (client) with legal services...

Communications between the Director, or amongst prosecutors employed by the Director, which are made for the dominant purpose of giving legal advice or providing the Director with "professional legal services in relation to the litigation", (i.e. criminal litigation in the nature of a prosecution), are subject to legal professional privilege...".

Consideration

Refuse to deal – application is frivolous, vexatious, or an abuse of process

57. In the original decision, the DPP refused to deal with the application on the ground it is frivolous, vexatious and an abuse of process.¹⁵

58. The meaning of 'frivolous' in relation to applications may include where it is made without sufficient grounds, substance or is fanciful.¹⁶

¹⁵ FOI Act ss 43(1)(b)-(c).

¹⁶ [Prior v South West Aboriginal Land and Sea Council Aboriginal Corporation \[2020\] FCA 808 \(10 June 2020\) \(Prior\)](#) at [37] citing [Crocker v Toys 'R' Us \(Australia\) Pty Ltd \(No 3\) \[2015\] FCA 728 \(Crocker\)](#) at [9], [Pickering v Centrelink \[2008\] FCA 561](#) at [27], [MCG Quarries Pty Ltd v Beach \[2017\] FCA 1601](#) at [4].

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59. The meaning of 'vexatious' in relation to applications may include where the application is without foundation and cannot succeed or is brought for an ulterior and collateral purpose (such as annoyance or embarrassment).¹⁷
60. The meaning of 'abuse of process' includes harassment or intimidation of a person, and an unreasonable request for personal information about a person.¹⁸
61. Determining whether an application is frivolous, vexatious or an abuse of process will depend on the content of the request, noting the standard required to conclude there is simply no merit in the application whatsoever is relatively high.¹⁹
62. Refusing to deal with an access application should be used as a last resort, where the agency must first consult with the applicant, because it has the practical effect of preventing a person from exercising an important legal right conferred by the FOI Act.²⁰
63. In the original decision, the DPP determined the application 'in essence' sought all internal communications between the prosecutors who were involved in the prosecution of the criminal charges and other proceedings against the applicant. The DPP concluded the application was frivolous, vexatious and an abuse of process because it was 'doomed to fail' as the information sought was subject to LPP and access would be refused in accordance with Schedule 1, s 1.2 of the FOI Act.

¹⁷ *Prior* at [38] citing *Crocker* at [9].

¹⁸ FOI Act s 43(4).

¹⁹ [Explanatory Statement, Freedom of Information Bill 2016](#).

²⁰ [FOI Guidelines, Dealing with access applications, Part 8.6](#). See pages 44 – 45 for discussion of frivolous or vexatious access applications

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64. In submissions to the Office, the DPP explained once it was determined the information was subject to LPP, the task of reviewing every remaining document simply to confirm all the information held was subject to LPP would be both frivolous (in the sense there would be no utility in it) and a vex to the DPP (given the burden on resourcing).
65. In *Walton v Gardiner* [1993] HCA 77, Mason CJ, Deane and Dawson JJ held proceedings will constitute an abuse of process if they can be clearly seen to be foredoomed to fail.²¹ I do not consider an access application is 'doomed to fail' simply because there is a possibility an information officer may refuse to give information to the applicant in response to their application.
66. By making the access application, the applicant sought to exercise their right to access government held information.²² Importantly, the FOI Act is not intended to prevent or discourage agencies or Ministers from publishing or giving access to information (including contrary to the public interest information) otherwise than under the FOI Act.²³ I also note the pro-disclosure bias the FOI Act is to be administered, where it is intended discretions be exercised as far as possible, in favour of disclosing information.²⁴
67. I do not consider an access application would involve abuse of process only because the information requested is contrary to the public interest information. The FOI Act gives information officers discretion to decide or refuse to deal with an application in more than one way.²⁵ It is possible an information officer could decide to give access to information that is contrary to the public interest information.

²¹ [Walton v Gardiner](#) [1993] HCA 77 [23].

²² FOI Act s 7.

²³ FOI Act s 10.

²⁴ FOI Act s 9.

²⁵ FOI Act s 35(2).

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68. While the application specifically names officers who were involved in the applicant's prosecution, I do not consider the reference to these individuals involves harassment or intimidation, or an unreasonable request for personal information. It is evident those individuals were named because of their professional involvement in the matters and because the applicant was seeking information about the proceedings.²⁶ I do not consider the application involves an abuse of process.
69. In the original decision, the DPP identified relevant case law which held a claim would be vexatious if there is a "*...lack of reasonable grounds for the claims sought to be made....*".²⁷ In submissions to this review, the DPP noted the applicant had included in their Ombudsman review application they are seeking the information in contemplation of a claim for malicious prosecution.
70. The DPP explained material within the scope of the request was examined to ensure there was nothing that could provide a reasonable basis to substantiate a claim for illegality, misconduct or unfairness affecting a claim of LPP over the information sought. I note the DPP did not provide any information or submissions detailing any previous interactions between the applicant and the DPP concerning the release of information held by the DPP about the applicant or the proceedings.
71. Following an inspection of records held at the offices of the DPP, I am satisfied staff of the Office did not locate any information that would identify alleged corruption, the commission of an offence by a public official or that the scope of a law enforcement investigation exceeded the limits imposed by law.

²⁶ ['CN' and Transport Canberra and City Services \[2023\] ACTOFOI 22 \(3 October 2023\)](#) [41]-[45].

²⁷ [Re Cameron \[1996\] 2 Qd R 218.](#)

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72. Staff of the Office have also not identified any information indicating privilege over the information has been waived or that the DPP has acted inconsistently with the claim of privilege.
73. The applicant raised in their Ombudsman review application their view the information is not subject to LPP or that the DPP should not maintain privilege because the related proceedings are now concluded. It is apparent the applicant expected some of the information within the scope of their application to be provided. I note the applicant was also willing to consult with the DPP to submit an amended application during the review.
74. Having reviewed the content of the application, and the nature of the information sought, I consider the application was not made for a purpose other than to exercise a right of access to information (i.e. to cause annoyance to the DPP).
75. I find the application is not frivolous, vexatious or an abuse of process.

Refuse to deal – application expressed to relate to information subject to legal professional privilege (s 43(1)(e) of the FOI Act)

76. A respondent may refuse to deal with an access application wholly or in part only if the application is expressed to relate to government information of a stated kind and information of that kind is taken to be contrary to the public interest to disclose under Schedule 1.²⁸
77. In submissions to the Ombudsman, the DPP noted their reasoning for refusing to deal with the application concerned the fact the information sought was information subject to LPP. It would have been open to the DPP to refuse to deal with the application on the ground the application was expressed as a request for information subject to LPP under Schedule 1, s 1.2 of the FOI Act.

²⁸ FOI Act s 43(1)(e).

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78. I agree the nature of the application is a request for information about the prosecution of matters involving the applicant. However, I do not agree all items of the application are expressed to relate to confidential communications between a lawyer and a client in relation to the proceedings which would be subject to LPP.
79. I accept the application is expressed as a request for communications between named individuals who are lawyers employed by the DPP in relation to identified proceedings. I consider the relationship between the Director of Public Prosecutions and prosecutors employed by the Office of the DPP is a lawyer-client relationship for the purpose of the Evidence Act.²⁹
80. I note items 1 - 3 of the application specifically refer to communications between DPP staff in relation to the identified proceedings.
81. In response to the draft consideration, the DPP submitted that part of item 5 of the application seeking communications between prosecutors 'relating to post-trial decisions regarding the matter', being legal advice or decisions concerning the conduct of litigation in respect of the proceeding, are communications subject to LPP.
82. I accept part of item 5 of the application specifically refers to communications between DPP staff relating to 'post-trial decision regarding the matter' (being the proceedings).

²⁹ [Aouad v R; El-Zayet v R \[2013\] NSWSC 760](#) at [31].

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83. I consider disclosure of these parts of the application would involve the disclosure of confidential communications between a lawyer employed by the DPP and the DPP for the dominant purpose of providing legal advice or professional legal services related to the proceedings. I consider this information is subject to legal advice privilege and litigation privilege as set out in ss 118 and 119 of the Evidence Act.
84. I find items 1 -3 and part of item 5 of the application (referred to above at [81]) are expressed to relate to information subject to LPP.
85. Item 4 of the application is expressed as a request for communications in relation to 2 DPP officers inspecting an exhibit related to the proceedings. I note this item of the application does not identify the people which the communications are between.
86. The applicant has submitted as an example that correspondence between the AFP and DPP about planning to inspect the exhibit would fall into the scope of item 4 of the application (based on file note provided see [18]). The DPP submits confidential communications between lawyers acting on behalf of the DPP and other persons for the purpose of providing legal services in relation to anticipated or actual litigation (such as inspection of exhibits) is information subject to LPP.
87. I acknowledge the DPP's view the identified officers would only be inspecting the exhibit for the purpose of providing professional legal services to the DPP in relation to the proceedings. While I agree it is possible item 4 of the application may capture information subject to LPP or which is in the possession of a court (Schedule 1, s 1.1A of the FOI Act), I am not satisfied item 4 of the application is 'expressed to relate to' information subject to LPP or otherwise taken to be contrary to the public interest information under Schedule 1 of the FOI Act.

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88. I consider the scope of item 4 of the application is expressed in a manner where it is possible the information requested does not relate to information subject to LPP. For example, communications relating to the inspection of the exhibit could have been made by parties who are not part of the lawyer-client relationship, or which are not confidential (e.g. response to media enquiry, or communications to or from the applicant).
89. I find item 4 of the application is not expressed to relate to information subject to LPP.
90. In respect of item 5 of the application, I consider the way part of this item is expressed is potentially unclear where consultation or clarification with the applicant would have been beneficial. For example, part of item 5 of the application refers to communications between lawyers and the DPP about a meeting held by the DPP post-trial. It is not clear when this meeting occurred, the attendees or possible connections to the proceedings.
91. In response to the draft consideration, the DPP accepted the portion of item 5 of the application expressed as 'in relation to the meeting held by the DPP post-trial' does not necessarily call for information subject to LPP, though this may be the case.
92. I find this part of item 5 of the application is not expressed to relate to information subject to LPP.

Conclusion

93. For the reasons set out above in this decision, I set aside the original decision made by the DPP that the application is frivolous, vexatious or an abuse or process.

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94. I make a substitute decision to refuse to deal with items 1 – 3 of the application and part of item 5 of the application on the ground this part of the application is expressed as a request for information subject to LPP.

95. I make a substitute decision that item 4 and part of item 5 of the application are not expressed to relate to information taken to be contrary to the public interest under Schedule 1. I consider the DPP should deal with these parts of the application.

Georgia Ramsay

Acting Senior Assistant Ombudsman

2 October 2024