

Community and Public Sector Union and the Office of the Legislative Assembly [2023] ACTOFOI 12 (29 June 2023)

Application number:	AFOI-RR/22/10034
Agency reference:	OLA22-0213
Decision reference:	[2023] ACTOFOI 12
Applicant:	Community and Public Sector Union
Respondent:	Office of the Legislative Assembly
Date:	29 June 2023
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 Ombudsman for the purpose of s 82 of the *Freedom of Information Act 2016 (FOI Act)*.
2. For the reasons set out below, I have decided to **confirm** the decision of the Office of the Legislative Assembly (**OLA**) dated 6 December 2022 under s 82(2)(a) of the FOI Act.

Background of Ombudsman review

3. On 9 November 2022, the applicant, on behalf of the Community and Public Sector Union (**CPSU**) applied to the OLA for:

Information pertaining to Worksafe ACT Prohibition Notice, including any correspondence between Mr Tom Duncan and Mr Peter Garrison AM SC.

This should include any emails, letters or other correspondence regarding the Worksafe ACT Prohibition notice issued on the Legislative Assembly and should be for the time period of 15 August to today's date (09/11/2022).

4. On 6 December 2022, the OLA information officer advised the applicant that they had identified 5 documents containing information within the scope of the application, and decided, under s 35 of the FOI Act, to:
 - grant full access to 4 documents, and
 - grant partial access to 1 document (document 3).
5. On 8 December 2022, the applicant applied for Ombudsman review of the OLA's decision not to release information redacted in document 3.
6. On 20 April 2023, I provided my preliminary view to the parties in a draft consideration.
7. On 20 April 2023, OLA accepted the draft consideration.
8. The CPSU has not responded to the draft consideration, despite several reminder emails from staff of the ACT Ombudsman.

Information at issue

9. The information at issue in this Ombudsman review is limited to the information OLA refused access to on the ground it would be privileged from production in legal proceedings due to legal professional privilege (**LPP**).
10. The information is contained in an email dated 15 August 2022 from Mr Peter Garrisson AM SC, Solicitor-General for the Australian Capital Territory to Mr Tom Duncan, Clerk of the ACT Legislative Assembly (document 3).
11. The issue to be decided in this Ombudsman review is whether the information at issue is 'contrary to the public interest information' for the purposes of the FOI Act.
12. In making my decision, I have had regard to:
 - the applicant's access application and review application
 - the respondent's decision of 9 November 2022
 - the FOI Act, in particular ss 6, 7, 16, 17, 35, Schedule 1, and Schedule 2
 - the respondent's FOI processing file relating to the access application
 - the *Evidence Act 2011* (**Evidence Act**)
 - the *Legislation Act 2001* (**Legislation Act**)
 - the *Law Officers Act 2011* (**Law Officers Act**)
 - the *Law Officers Legal Services Directions 2023* (**Legal Services Directions**)
 - an unedited copy of the information at issue

- relevant case law including:
 - *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49
 - *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278
 - *Waterford v the Commonwealth of Australia* (1987) 163 CLR 54
 - *Mann v Carnell* (1999) 201 CLR 1.

Relevant law

13. 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.¹
14. 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.
15. The public interest test set out in s 17 of the FOI Act involves a process of balancing public interest factors favouring disclosure against public interest factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.
16. Section 35(1)(c) of the FOI Act provides 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.
17. Schedule 1 of the FOI Act sets out categories of information taken to be contrary to the public interest information for the purpose of the definition in s 16(a) of the FOI Act.
18. Schedule 2 of the FOI Act sets out the public interest factors which must be considered, where relevant, when determining the public interest in accordance with ss 16(b) and 17.

The parties' submissions

19. In the decision notice dated 1 December 2022, the OLA's information officer said:

I have decided that some parts of documents that contain the information you requested contain information would, on balance, be contrary to the public interest to disclose under the test set out in section 17 of the FOI Act...

... I have applied Schedule 2, section 2.2(b)(ii) to parts of document 3...

¹ Section 35(1)(c) of the FOI Act.

... I am satisfied the disclosure of some information contained in document 3 could reasonably be expected to be privileged from production in a legal proceeding on the ground of legal professional privilege.

The information I have decided not to disclose includes correspondence between Mr Garrison and Mr Duncan. I consider the information is not well-known or publicly available and the information provided by... Mr Garrison is in the form of legal advice.

On this basis, I am satisfied disclosure of some information contained in document 3 could reasonably be expected to breach legal professional privilege.

20. In the application for Ombudsman review, the applicant submitted:

In that decision, Mr Row cited as the decision maker, he could not provide the document to the CPSU as the documents were covered by legal privilege.

I bring to your attention the submission by Minister Gentleman [here](#)² to the enquiry, which indicates he had engaged the Solicitor-General and this privilege for this matter was held by him.

As you would be aware, legal practitioners must deal with conflicts. They cannot provide privileged information to differing parties with a matter.

If the Solicitor General has legal privilege with Minister Gentleman, then he cannot have legal privilege with the Clerk. As such the documents should be released.

Consideration

21. The OLA decided that document 3 contains information that would, on balance, be contrary to the public interest to disclose under the test set out in s 17 of the FOI Act primarily relying on Schedule 2, s 2.2(b)(ii), that is, the information would be privileged from production in a legal proceeding on the ground of legal professional privilege (**LPP**).

22. In making my decision, I have reached the same conclusion but on a different ground.

23. For the reasons set out below, I consider the information at issue is contrary to the public interest information under s 16(a) – because it is information that would be privileged from production or admission into evidence in a legal proceeding on the ground of LPP under Schedule 1, s 1.2 – and therefore it is unnecessary to apply the public interest test set out in s 17.

Legal professional privilege

24. Information that would be privileged from production in a legal proceeding is taken to be contrary to the public interest information under the FOI Act.³

² *Inquiry into possible contempt of the Assembly: Imposition of prohibition notice by WorkSafe ACT, Submission Number 6.*

³ Schedule 1, s 1.2 of the FOI Act.

25. Client legal privilege is protected by section 118 of the Evidence Act which provides:

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

- (a) a confidential communication made between the client and a lawyer; or
- (b) a confidential communication made between 2 or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) 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.

26. Client legal privilege may be lost if the client or party has acted in a way that is inconsistent with an objection to the presenting of evidence because it would result in disclosure of privileged information.⁴

27. 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.⁵

28. 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.⁶

29. In accordance with common law principles, for LPP to apply the following elements need to be met:⁷

- an independent legal adviser and client relationship must exist
- 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.

Legal adviser-client relationship

30. The applicant has submitted that no legal adviser-client relationship could have existed between the Clerk of the ACT Legislative Assembly and the Solicitor-General because Minister Gentleman (**Minister**) had already engaged the Solicitor-General for this matter.

⁴ Section 122 of the Evidence Act.

⁵ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49 (7 November 2002) at [9] – [11].

⁶ *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278, [141]-[142].

⁷ *Waterford v the Commonwealth of Australia* (1987) 163 CLR 54.

31. It is possible for a solicitor to act for two or more clients in the same or related matters in accordance with the *Legal Profession (Solicitors) Conduct Rules 2015 (ACT)* (Rules).
32. The fact a legal adviser has provided legal advice to one client does not mean there cannot be a legal adviser-client relationship with another client, provided conflicts are appropriately managed under the Rules.
33. I am satisfied based on the documents before me that a legal adviser-client relationship existed between the Solicitor-General and the Clerk (on behalf of the OLA), as I consider the Solicitor-General was acting as a legal adviser, engaged by the Clerk, in their professional capacity regarding a particular matter.

Dominant purpose

34. The OLA has confirmed the email containing the information at issue was sent following a telephone conversation between the Clerk and the Solicitor-General, in which the Clerk asked for legal advice. I am satisfied the information at issue was created for the dominant purpose of giving legal advice.

Confidential communications

35. Information is provided on a 'confidential' basis if there is an express agreement that the information will be kept confidential, or the surrounding circumstances indicate that there was an implied mutual understanding of confidentiality.
36. I consider the information at issue was communicated in confidence, as the information was not widely circulated and was marked with dissemination limiting markers to indicate its sensitivity.

Waiver of LPP

37. LPP will not apply in circumstances where privilege has been waived, either expressly or impliedly, by the client.⁸ I do not consider the OLA has expressly or impliedly waived privilege.

Conclusion

38. For the reasons set out above, I confirm the OLA's decision under s 82(2)(a) of the FOI Act.

David Fintan
Senior Assistant Ombudsman
29 June 2023

⁸ *Mann v Carnell* (1999) 201 CLR 1 at [28]-[29].