



National Education & Care Services
FOI & Privacy Commissioners & Ombudsman

National Education and Care Services FOI Commissioner (NECS IC)

Brisbane City Child Care Pty Ltd and Queensland Education and Care Services Regulatory Authority

Decision of the National Education and Care Services Freedom of Information Commissioner (NECS IC)

Review Applicant:	Mr Chris Buck, Director Brisbane City Child Care Pty Ltd (FOI Review Applicant)
Respondent:	Queensland Education and Care Services Regulatory Authority, Qld Department of Education (the Department)¹
Other parties:	RED Fire Engineers Pty Ltd (RED)
Decision Date:	19 July 2019
Application number:	FOI 04/2019
Catchwords:	Freedom of Information - (CTH) <i>Freedom of Information Act 1982</i> – Documents subject to legal professional privilege (s 42); <i>Education and Care Services National Law (Queensland) Act 2011</i>; <i>Education and Care Services National Regulations</i>.

Decision

1. Under s55k of the *Freedom of Information Act 1982* (the FOI Act) I:
 - i. vary the Department's Decision to refuse access to 314 documents pursuant to s 42 of the FOI Act - *Documents subject to legal professional privilege* - and require the Department to give full access to 32 documents identified in footnote 10 to paragraph 27 of this Decision, subject to the Applicant's right to withdraw his request to some or all of those documents within 14 days of this decision or such further period as agreed by the parties;
 - ii. affirm the Department's Decision to give partial access to 3 documents pursuant to s 42 of the FOI Act - *Documents subject to legal professional*; and
 - iii. affirm the rest of the Department's Decision

Scope of the Review

2. By correspondence dated 7 December 2018 Thomson Geer Lawyers, acting on behalf of Mr Chris Buck, Director of Brisbane City Child Care Pty Ltd (the FOI Review Applicant) applied to the Department under the *Commonwealth Freedom of Information Act 1982* (the FOI Act) for access to:
 1. *All documents about the engagement of RED² by the Department; and*
 2. *All documents about RED's involvement with BCCC.*

for the period 19 October to 7 December 2018

¹ The Director General, Queensland Department of Education is the Regulatory Authority (*Education and Care Services National Law (Queensland) Act 2011 – s 14*).

² RED Fire Engineers Pty Ltd

3. The due date for the Department's decision was extended with agreement by the FOI applicant under section 15AA of the FOI Act to allow for further processing of the request. The final decision was provided on 27 February 2019.
4. The Department found 769³ documents which fell within the scope of the FOI application as set out in paragraph 2. All documents identified were written in nature. I note that for the purposes of counting or listing documents, the Department identifies each page as a separate document.
5. 62 documents were determined by the Department to include information relating to the business interests of RED Fire Engineers Pty Ltd (RED). The documents related to a fire risk assessment report prepared by RED.
6. RED is a privately-owned consulting firm specialising in providing safety and risk engineering services to various industries. It is engaged by the Regulatory Authority to undertake fire risk assessments of early childhood services in multi-storey buildings.
7. Section 27 of the FOI Act provides for consultation with affected third parties before the disclosure of business information if it appears to the Department that the third party might reasonably wish to make an exemption contention, and it is reasonably practicable to give the third party a reasonable opportunity to do so. Under s 27(1)(b) a person, organisation or proprietor of an undertaking might reasonably wish to contend that a "document is exempt under s 47 – Documents disclosing trade secrets or commercially valuable information" or "conditionally exempt under section 47G – Business information" from disclosure.
8. On 21 February 2019 the Department invited a consultation submission from RED. RED did not provide any submission.
9. On 27 February 2019 the Department advised the FOI Review Applicant of its Decision. Of the 769 documents identified, the Department decided to:
 - a) give full access to **435** documents;
 - b) refuse access to **314** documents pursuant to section 42 of the FOI Act – *Documents subject to legal professional privilege*, because certain information contained in the documents is exempt information;
 - c) give partial access to **3** documents pursuant to section 42 of the FOI Act *Documents subject to legal professional privilege*, because certain information contained in the documents is exempt information; and
 - d) give partial access to **18** documents pursuant to section 47F of the FOI Act – *Public interest conditional exemption – personal privacy* because certain information contained in the documents is exempt information.

Application by FOI Review Applicant

10. On 27 May 2019 Thomson Geer Lawyers acting on behalf of Mr Chris Buck and Brisbane Child Care Pty Ltd requested a NECS Freedom of Information Commissioner Review (NECS FOIC Review) of the Department's decision under s 54L of the FOI Act.
11. As the application for a NECS FOIC Review was not made within the required timeframe of 60 days stipulated under s 54S of the FOI Act, I sought submissions from the Review Applicant as to the reasons for the late application. The Review Applicant subsequently sought an extension of time to make an application under s54T of the FOI Act on the basis that the Department had provided the Applicant with incorrect advice regarding the timeframe in which to seek a NECS FOIC Review. I accepted the late application and advised the Department accordingly.

³ Note some documents fall into more than one category

12. In the application, the Review Applicant requested that I review ... *“the decision of the [Department] as set out in the letter dated 27 February 2019 and the documents redacted to determine if the exemptions claimed are appropriate and lawful pursuant to the FOI Act”*. The submissions put forward by the FOI Review Applicant to support their application are included in the discussion below.
13. The Review Applicant did not seek a review of the Department’s decisions in relation to the following matters:
- the Department’s Decision listed at paragraph in 9(d), giving partial access to 18 documents pursuant to s47F of the FOI Act. In respect of this matter, the Review Applicant stated in the review application that *“as only phone numbers and what I assume to be [an identified person’s] leave have been redacted under this category, I do not take issue with these redactions as I am not seeking personal information”*. On this basis I am not reviewing the Department’s decision in paragraph 9(d); and
 - the Department’s decision listed at paragraph 9(a), giving full access to 435 documents.

Whilst the above two matters are not relevant to this review, I have at the outset in paragraph 1(iii) affirmed the Department’s decisions in respect of these matters to avoid any doubt and for the sake of completeness.

Decision Under Review

14. The decision under review is the decision of the Department dated 27 February 2019 outlined in paragraph 9 above, **specifically paragraphs 9(b) and 9(c)**, namely the refusal to grant access to 314 documents, and the granting of partial access to 3 documents.
15. In making my Decision, I have had regard to the following:
- the original FOI, and the NECS IC Review, applications;
 - the documents at issue (the documents);
 - the FOI Act, in particular s 11A, s 42;
 - the Education and Care Services National Law (Queensland) Act 2011 and the Education and Care Services National Regulation;
 - the FOI Guidelines issued under s 93A of the FOI Act;⁴ and
 - previous decisions and relevant case law.

Section 42 Exemption - Documents subject to Legal Professional Privilege

16. Section 42 of the FOI Act exempts a document from disclosure if it is of such a nature that it would be privileged from production in legal proceedings on the grounds of legal professional privilege.
17. As stated at paragraph 5.127 of the FOI Guidelines, *Legal professional privilege (LPP) is not defined in the FOI Act. To determine the application of this exemption the decision maker must turn to common law concepts of LPP. The statutory test of client legal privilege under the Evidence Act 1995 is not applicable and should not be taken into account (citing Commonwealth of Australia v Dutton (2000) 102 FCR 168)* The protection provided by LPP does not apply to all communications between legal advisers and clients. It is the purpose of the communication, between a lawyer and their client, not the information itself that is determinative.
18. The High Court of Australia has summarised the general principles of legal professional privilege (referred to in the Department’s Decision letter): *It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the **dominant** purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings*⁵.

I note in particular that the **dominant** purpose test must be satisfied as part of the overall test.

⁴ Freedom of Information Guidelines Combined January 2019

⁵ Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commissioner (2002) 213 CLR 543 at 522

19. In the FOI Guidelines⁶ the Australian Information Commissioner summarizes the considerations in determining whether a communication is privileged, drawing on relevant case law. These are:
- whether there is a legal adviser-client relationship;
 - whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation (in respect of which the Commissioner at 5.131 notes that the dominant purpose test must be satisfied);
 - whether the advice given is independent; and
 - whether the advice given is confidential⁷
20. In respect to the Decision referred to in paragraphs 9(b) and 9(c), the FOI Review Applicant argued that ...*“it seems extremely unlikely that the documents for which the legal professional privilege exemption has been claimed in this FOI request all fall within this category when applying the dominant purpose test...It is difficult to believe that all of these documents would meet the requisite test for a proper claim for exemption on the grounds of legal professional privilege given the documents relate to the engagement of RED Fire Engineers Pty Ltd (RED) by the Department and RED’s involvement with BCCC.”*
21. On examination of the documents in question, I note that there are multiple copies of the same documents identified in the file of documents referred to in the “Schedule of documents” attached to the Department’s Decision Notice. I understand the multiple copies arise from different officers in the Department providing copies of the documents to the FOI decision maker in processing the FOI application.
22. While the consideration by the decision maker of all documents discovered is appropriate in the circumstances, I note that the inclusion of the multiple copies greatly inflates the number of unique documents under Review. As such, this may cause a FOI applicant to conclude that there are more unique documents under consideration than is the case.
23. The 314 documents referred to in paragraph 9(b) comprise a number of chains of email communications and attachments. On examination of the documents I am satisfied that, with the exception of the documents discussed in paragraphs 27 to 30 the documents in question:
- a. detail a legal adviser-client relationship between an independent, external legal firm, internal Departmental lawyers and officers of the Regulatory Authority;
 - b. contain information and advice that was obtained for the dominant purpose of the giving and receiving of legal advice; and
 - c. contain confidential information to the Regulatory Authority on which it might rely in litigation proceedings.
24. In reaching this conclusion I have also considered the judgement of Lockhart J in *Trade Practices Commission v Sterling*⁸ concerning the circumstances in which legal professional privilege can arise. His Honour stated: *Legal professional privilege extends to various classes of documents including... (c) Communications between the various legal advisers of the client, for example between the solicitor and his partner or his city agent with a view to the client obtaining legal advice or assistance.*
25. I have also considered the decision of the High Court in the matter of *Commissioner of the Australian Federal Police v Propend Finance Pty Ltd*⁹ and the substantial discussion in relation to legal professional privilege attaching to copies of original documents, where the original document is not legally privileged. The High Court decided that copies of non-privileged documents are privileged if the copies are brought into existence *solely* for the purpose of obtaining or giving legal advice or *solely* for litigation that is pending, intended or reasonably apprehended.

⁶ Op.cit para 5.129

⁷ *Grant v Downs (1976) 135 CLR 674; Waterford V Commonwealth of Australia (1967) 163 CLR 54*

⁸ *Lockhart, J in Trade Practices Commissioner v Sterling [1979] FCA 33; (1979) 36 FLR 244 at 245-6*

⁹ *Commissioner of the Australian Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501 (Propend)*

26. Two years after Propend's decision, the High Court in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [(1999) 201 CLR 49] established the *dominant* purpose test in place of the *sole purpose* test, and the reference to *solely* in the above paragraph should be similarly amended. I note that Propend's decision has been cited and applied in a number of subsequent cases, including the following.

- a) In *Levy v Bablis* (2012) NSWCA 157, His Honour Beazley J held that copy documents given to lawyers for the purpose of obtaining legal advice, were privileged, even though the originals of those documents were not privileged. At paragraphs 15 and 16 His Honour stated:

As to the balance of the documents (other than draft documents), Sherwood submitted that, in accordance with the principle in Commissioner Australian Federal Police v Propend Finance Pty Ltd [1997] HCA 3; 188 CLR 501, the documents were copy documents submitted to legal advisers for legal advice and thus were privileged, notwithstanding that the original of the document was not privileged.

Propend was concerned with a claim for legal professional privilege relating to documents obtained pursuant to the execution of a search warrant under the Crimes Act 1914 (Cth) s 10. Nonetheless, the Court's reasons, which must be read subject to the now governing "dominant purpose" rule of legal professional privilege, applied to claims for privilege generally. In this regard, Brennan CJ said, at 509:

"Authority and principle thus combine to establish that, prima facie, copies of non-privileged documents are privileged if the copies are brought into existence solely for the purpose of obtaining or giving legal advice or solely for use in litigation that is pending, intended or reasonably apprehended."

- b) In *Phillip Morris Limited v Prime Minister* [2011] AATA 556, Deputy President S A Forgie, in considering s42 of the FOI Act and relying on Propend's decision stated at paragraph 44:

The fact that legal professional privilege attaches to communications rather than to documents means that the privilege may attach to documents which were not written for the dominant purpose of obtaining legal advice, but which were copied for that purpose.

27. There are 32¹⁰ documents that have been redacted in full by the Department that I am not satisfied fulfil the requirements of the LPP exemption. These are listed by document number (as assigned by the Department in its Decision Notice) in footnote 10 below. They can be categorised as:

- a. standard end of email confidentiality and disclaimer clauses;
- b. case management system references and/or
- c. seasonal greetings;

28. I am satisfied that the 32 documents do not meet the LPP exemption requirements. They do not reflect a legal adviser-client relationship or contain information or advice that was obtained for the dominant purpose of the giving and receiving of legal advice or are confidential in nature.

29. I invited submissions from the Department in relation to these documents. In response, the Department waived its claim of privilege over the documents, noting that the reason the documents were identified as being subject to the s 42 exemption "*was due to the fact the information falls at the end of what is otherwise in the Department's view privileged communication between the Regulatory Authority and its legal advisers.*" The Department made the further observation that it "*failed to see how the disclosure of this information would further any public interest*".

30. I agree with the Department's observation, but I make the point that these documents require identification for the sake of completeness and so as not to mislead the Review Applicant as to the number of relevant documents under consideration.

¹⁰ Documents: 69, 88,95,176,190,191,196, 200, 201,272, 352, 353, 358, 359, 510, 530, 536, 544, 547, 554, 560, 567, 572, 576, 593, 594, 599, 600, 605, 621, 624,761

31. In respect to the three¹¹ documents referred to in paragraph 9(c) to which partial exemption was claimed under s42, I note that documents 110 and 202 are identical. Drawing on the judgements discussed in paragraphs 24 to 26, I am satisfied that the redacted sections in the three documents fulfil the requirements of the LPP exemption for the following reasons:

- the documents have been brought into existence for the dominant purpose of obtaining and/or giving legal advice in relation to the ongoing litigation between the Department and the Review Applicant; and/or
- refer to privileged communications between a client and lawyer.

Decision

32. Under s55k of the *Freedom of Information Act 1982*(the FOI Act) I:

- i. vary the Department's Decision to refuse access to 314 documents pursuant to s 42 of the FOI Act - Documents subject to legal professional privilege - and require the Department to give full access to 32 documents identified in footnote 10 to paragraph 27 of this Decision, subject to the Applicant's right to withdraw his request to some or all of those documents within 14 days of this decision or such further period as agreed by the parties;
- ii. affirm the Department's Decision to give partial access to 3 documents pursuant to s 42 of the FOI Act - Documents subject to legal professional privilege; and
- iii. affirm the rest of the Department's Decision.

Lesley Foster

National Education and Care Services Freedom of Information Commissioner

Review rights

If a party to a NECS IC Review is dissatisfied with an IC Review decision they may apply under section 57A of the **FOI Act**, as modified by the *Education and Care Services National Regulations* r209(e) and r210, to have the decision reviewed by the relevant Tribunal. In the case of this IC Review the relevant tribunal is the Queensland Civil and Administrative Tribunal (QCAT).¹² The QCAT provides independent merits review of administrative decisions and has the power to set aside, vary or affirm a NECS IC review decision.

An application to the QCAT must be made within 28 days of the day on which the applicant is given the NECS IC review decision. An application fee may be applicable when lodging an application for review to the QCAT. Further information is available on the QCAT website www.qcat.qld.gov.au or by telephoning 1300 753 228

¹¹ Documents 96, 110 and 202 of the Schedule of documents attached to the Department's Decision

¹² Section 40 *Education and Care Services National Law (Queensland) Act 2011*