

## BACKGROUND

This matter concerned a GIPA application to Clarence Valley Council for information relating to a Concerns Notice issued by Sparke Helmore in July 2023 about allegedly defamatory statements made by members of Yamba Community Action Network Inc about Council staff, including the General Manager, Ms Laura Black.

Council had previously refused access to some information and relied on legal professional privilege for a number of documents. After an earlier Tribunal decision and a successful appeal to the Appeal Panel, the matter was sent back for reconsideration. The Appeal Panel said the earlier approach was wrong in relation to the burden of proof, the adequacy of Council's searches, and the analysis of legal professional privilege.

The issues on reconsideration were whether Council had undertaken reasonable searches, whether the remaining disputed documents were privileged, and whether any privilege had been waived.

## KEY FINDINGS

- **The applicant did not have to prove the documents existed** - The Tribunal proceeded on the basis that the GIPA Act does not impose a practical onus on an access applicant to prove requested information exists and is held by the agency. The question was whether Council had discharged its own obligation to undertake reasonable searches.
- **Reasonable searches had to extend beyond Council's main records system** - The Tribunal accepted that reasonable searches could not be confined to Council's ECM system. In the circumstances, Council also needed to search its Outlook email system, particularly because relevant material had previously been found in email inboxes and not on ECM.
- **Council needed to reconsider the scope of its email searches** - Although Council had undertaken further searches, the Tribunal was not satisfied the matter could end there. It noted that Council should reconsider and refine its Outlook search parameters before concluding that further review would involve an unreasonable and substantial diversion of resources.
- **Legal professional privilege depended on who the client was** - The Tribunal found that Council was initially the client when Sparke Helmore was first retained, but by mid-July 2023 Ms Black had become the client in her personal capacity. Privilege had to be assessed by reference to who the client was at the time each communication came into existence.
- **Common interest prevented waiver of privilege** - The Tribunal found that privilege was not waived by sharing communications between Council and Ms Black. Because the dispute arose from Ms Black's role as General Manager, Council and Ms Black had a sufficient common interest in the legal advice and related communications.
- **Not every document in a chain was privileged** - The Tribunal distinguished between privileged solicitor-client communications and other material such as correspondence with the press, councillor emails, insurance emails and letters sent to third parties. Those other documents were not automatically privileged simply because they appeared in the same chain.

## KEY TAKEAWAY

The case confirms that agencies must take responsibility for conducting reasonable searches under the GIPA Act and cannot require applicants to prove documents exist before that obligation arises. It also clarifies that legal professional privilege will not be waived simply because advice is shared between a council and its General Manager where they have a common interest in the dispute.