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Determination

External review - *section 180 Return to Work Act 2014*

Applicant:	[REDACTED]
Agency:	Return to Work SA
Ombudsman reference:	2025/02562
Agency reference:	AA24/2500
Determination:	The determination of the Corporation is varied as outlined in Appendix 2, the effect of which is that the documents are not protected by legal professional privilege
Date of Ombudsman's determination:	12 November 2025
Issues considered:	Legal professional privilege
Sections relied upon:	180(3)(b)
Legislation considered:	<i>Return to Work Act 2014</i>

REASONS

Application for access

1. By application under the *Return to Work Act 2014* (**the RTW Act**) the applicant requested access from the Corporation to:

surveillance films and photos and associated surveillance reports relating to the various claims.

Background

2. For ease of reference, the procedural steps relating to the application are set out below in Appendix 1.

Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman pursuant to section 180(8) of the RTW Act. Pursuant to section 9(1) of the Ombudsman Act 1972, the

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Ombudsman has delegated her powers under the RTW Act to me as the Deputy Ombudsman to conduct this review.

4. Section 180(10) provides that the Ombudsman may confirm, vary or reverse the Corporation's determination in a review, based on the circumstances existing at the time.

Provisional determination

5. Tentative views about the Corporation's determination were provided to the parties, by the provisional determination dated 29 August 2025. The parties were informed that subject to receipt and consideration of submissions, the Corporation's determination was proposed to be varied.
6. The applicant did not provide a response. The agency confirmed it had no issues with the provisional and that there were no further submissions.
7. On 4 November 2025 the parties were provided a further opportunity to provide submissions given my view in this determination is more conclusive than the way in which it was expressed in the provisional. The applicant did not respond by the relevant due date and the Corporation confirmed it had no further submissions.
8. I have confirmed the view tentatively expressed in the provisional determination that the documents in question are not subject to legal professional privilege, and accordingly I find it unnecessary to consider the issues of waiver discussed in the provisional determination.

Relevant law

9. The applicant, who acts on behalf of the worker, is a worker for the purpose of the RTW Act. A worker has a legally enforceable right to be given access to all documentary material in the possession of the Corporation relevant to their claim for compensation, except in certain circumstances.
 10. Section 180(1)(a) of the RTW Act provides:
 - (1) Subject to this section, the Corporation must, at the request of a worker-
 - (a) provide the worker, within 45 days after the date of the request, with copies of all documentary material in the possession of the Corporation or the delegate relevant to a claim made by the worker;
 11. Section 180(3) of the RTW Act provides:
 - (3) However, the Corporation or delegate is not obliged to provide copies of material, or to make material available for inspection by the worker if-
 - (a) The material is relevant to the investigation of suspected dishonesty in relation to the claim; or
 - (b) The material is protected by legal professional privilege; or
 - (c) The disclosure of the material could reasonably be expected to endanger the life or physical safety of any person.
 12. Section 180(4) of the RTW Act provides:
 - (4) a worker who is aggrieved by a decision under subsection (3) is entitled to a review of the decision by the Corporation or the delegate (as the case may be).
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13. Section 180(6) of the RTW Act provides:
 - (6) On an application for review, the Corporation or delegate may confirm, vary or reverse the decision under review.
14. Section 180(8) of the RTW Act provides:
 - (8) A worker who is aggrieved by a decision under subsection (6) may apply to the Ombudsman for a review of the decision.
15. Section 180(10) of the RTW Act provides:
 - (10)The Ombudsman may, in relation to a review under subsection (8)-
 - (a) exercise the powers of the Ombudsman under the *Ombudsman Act 1972* as if carrying out an investigation under that Act, subject to such modifications as may be necessary, or as may be prescribed; and
 - (b) at the conclusion of the review confirm, vary or reverse the decision under review.
16. It follows from sections 180(3), (4), (6) and (8) of the RTW Act that the decision that the Ombudsman reviews is the decision by the Corporation or delegate to refuse the applicant access to documents by reliance upon any of the grounds in section 180(3).

Issues in this review

17. Following the applicant's request for information, on 15 January 2025 the Corporation issued a determination where it purported to release the documents in full.
18. On 15 January 2025 the Corporation sent a link to the applicant to access all the documents inclusive of surveillance footage and surveillance reports.
19. On the same day, the applicant identified that footage was missing and emailed the Corporation about that footage, specifically the footage dated [REDACTED] that formed part of document 11.
20. On 11 February 2025 the Corporation confirmed it was undertaking searches for the footage to be later provided.
21. On 6 March 2025 the Corporation advised the applicant that any information created post [REDACTED] were mistakenly provided and attempted to claim legal professional privilege by virtue of section 180(3)(b) of the RTW Act. The Corporation sought the return of the information and destruction of the material under section 180(15) of the RTW Act, which provides that information mistakenly provided to the worker must be returned.
22. The Corporation also refused to provide the missing footage.
23. On 1 April 2025 the applicant sought an internal review.
24. On 10 April 2025 on the internal review the Corporation determined that any documents created post [REDACTED] were mistakenly provided and would be legally privileged.
25. The applicant has then submitted a request for review to this Office in relation to the documents created after [REDACTED] and as such this review will be limited to consideration of that material only.

26. Having regard to the Corporation's submissions and section 180(3) of the RTW Act, the issue for me to determine in this review is whether to confirm, vary or reverse the Corporation's determination in regard to the documents in issue.

Consideration

Documents withheld on the ground of legal professional privilege

27. Pursuant to section 180(3)(b) of the RTW Act the Corporation is not obliged to provide copies of material, or to make material available for inspection, if the material is protected by legal professional privilege.

Are the communications protected by legal professional privilege?

28. Legal professional privilege exists to protect confidential communications between a client and lawyer. It has been established that it attaches to communications made with the dominant purpose of giving advice or for use in actual or anticipated litigation.¹ The privilege can attach to communications received from salaried lawyers employed by government but only if they are made independently, in a professional capacity, are confidential and arise from the relationship between lawyer and client.²
29. While a document attracts legal professional privilege, at common law, a person who would otherwise be entitled to the benefit of the privilege may waive that privilege. It is the *client* who is entitled to the benefit of the privilege and who may waive it.³
30. The applicant firstly contends that legal professional privilege does not apply in the circumstances as:

Robbins v Harbord (1994) 62 SASR 229 makes it clear⁴ that film that has come into existence for the purposes of deciding a statutory claim for workers compensation or to subsequently defend such a decision does not attract LPP. Its purpose is not "use by a litigant in the course of litigation, but use by a statutory decision maker in discharging its statutory functions."⁵

31. The Corporation states that the above case has no relevance to the RTW Act because it was referring to now repealed legislation, namely the *Workers Rehabilitation and Compensation Act 1986*. It would be incorrect to state that simply by virtue of repealed legislation, the authorities no longer apply, particularly where the provisions under the RTW Act are largely the same.
32. The question is whether the creation of all the documents satisfies the dominant purpose test which I consider to be arguable.
33. There is often a lack of clarity around workers compensation claims and whether the creation of the document/s came into existence either for the dominant purpose of obtaining legal advice, or for use in proceedings, or anticipated proceedings. Presumably, if a document passes between the party's solicitor and a third party, which in this case would be the investigator, and the purpose was to obtain advice in relation to it, or to rely on it as evidence for anticipated litigation,⁶ the test *could* be satisfied.

¹ *Eso v The Commissioner of Taxation* [1999] HCA 67, per Gleeson CJ, Gaudron and Gummow JJ at [35] and [61].

² *Waterford v The Commonwealth* (1987) 163 CLR 54, per Mason and Wilson JJ at 61-62.

³ *Baker v Campbell* (1983) 153 CLR 52 at 84.

⁴ at [25]-[26].

⁵ At [26].

⁶ *Trade Practices Commission v Sterling* (1979) FCA at 245-246.

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34. *'It is accepted that information provided or documents created by third parties for the dominant purpose of use by a lawyer in litigation is protected'*.⁷ Therefore it could be argued that even if the decision maker relied on the document in order to discharge its statutory functions, the evidentiary value of the document and its use in a litigation setting, could mean that it could attract privilege.
35. That said, the High Court discussed legal professional privilege in the context of workers compensation claims and this reasoning has been cited and upheld by several authorities since. In the context of that matter, an employer's workers compensation insurer obtained reports from loss assessors regarding the employee injured in the workplace. Mason J commented:
- Ninety per cent of the claims do not result in litigation and the documents are brought into existence so that the appellant can decide in the first instance whether it will pay compensation or dispute liability. In these circumstances the purpose of submitting the documents to solicitors is very much of a secondary consideration because a small proportion of the cases only proceed that far.
- ...
- Although there is a greater likelihood that documents of this class will be submitted to solicitors for use in litigation, the primary function for which they are called into existence is, as the trial judge said, to enable the appellant to make a decision in the ordinary course of its business.⁸
36. There is ambiguity as to the dominant purpose of the documents' creation in this matter.
37. I acknowledge that the workers compensation scheme is different in nature and purpose to that of ordinary litigation. I am more persuaded by the applicant's submissions on this point; namely that the purpose and creation of the surveillance footage and reports were for the decision maker in discharging its statutory functions rather than for the dominant purpose of obtaining legal advice or use in anticipate litigation.
38. I note that the documents are marked "privileged - for use in anticipated litigation". However, notwithstanding this marker, the surveillance footage appears to have been obtained in the course of making a routine business decision whether to accept or deny the claim, and the Corporation has not provided any information particular to the circumstances of this matter that would satisfy me otherwise.
39. On my viewing of the documents, including the surveillance footage considered to be missing as part of the request, I do not consider that the documents are protected by legal professional privilege.
40. As I do not consider that legal professional privilege attaches to the documents, I do not propose to address the question of waiver.

⁷ Douglas v Morgan 92019) 133 SASR 387.

⁸ [National Employers' Mutual General Insurance Association Limited v Waind \(1979\) 141 CLR 648.](#)

Determination

41. In light of my views above, I vary the Corporation's determination as outlined in Appendix 2.

A handwritten signature in black ink, appearing to read 'M. Carter', with a stylized flourish at the end.

Megan Carter
Deputy Ombudsman

12 November 2025

APPENDIX 1

Procedural steps

Date	Event
2 December 2024	The applicant submitted an application to access information pursuant to section 180(1) of the RTW Act with the Corporation.
15 January 2025	The Corporation made a decision to release information to the applicant, excepting certain information pursuant to section 180(3).
1 April 2025	Pursuant to section 180(5) the applicant sought a review of the decision under subsection (3)
10 April 2025	Pursuant to section 180(6) of the RTW Act the Corporation confirmed its decision.
7 May 2025	The Ombudsman received the applicant's request for external review of the Corporation's decision pursuant to section 180(8) of the RTW Act.
9 May 2025	The Ombudsman advised the Corporation of the external review and requested submissions and documentation.
19 May 2025	The Corporation provided the Ombudsman with its submissions and documentation.
19 May 2025	The Corporation provided the Ombudsman with its submissions and documentation.
29 August 2025	The Ombudsman's delegate issued her provisional determination and invited submissions from the parties.
10 September 2025	The Corporation confirmed it had no submissions in response to the provisional determination.
4 November 2025	The parties were provided with a further opportunity for submissions.
10 November 2025	The Corporation confirmed it had no further submissions.

APPENDIX 2

Document in issue	Description	Agency's determination	Ombudsman's determination	Information to be released
1	Email from [REDACTED]	Exempt - s180(3)(b)	Not exempt	All
2	Confidential Surveillance Summary from [REDACTED] (& footage)	Exempt - s180(3)(b)	Not exempt	All
3	Confidential Surveillance Summary from [REDACTED] (& footage)	Releasable	Confirmed	All
4	Confidential Surveillance Summary from [REDACTED] (& footage)	Exempt - s180(3)(b)	Not exempt	All
5	Duplicate of Document 3	Releasable	Confirmed	All
6	Duplicate of Document 3	Releasable	Confirmed	All
7	Online Profile Report from [REDACTED]	Releasable	Confirmed	All
8	Duplicate of Document 4	Exempt - s180(3)(b)	Not exempt	All
9	Confidential Surveillance Summary from [REDACTED]	Exempt - s180(3)(b)	Not exempt	All
10	Email from [REDACTED]	Exempt - s180(3)(b)	Not exempt	All
11	Partnerlink confirmation from [REDACTED] & Confidential Surveillance Summary (& footage)	Exempt - s180(3)(b)	Not exempt	All
12	Email from [REDACTED] & Confidential Surveillance Summary	Exempt - s180(3)(b)	Not exempt	All
13	Duplicate of Document 12	Exempt - s180(3)(b)	Not exempt	All

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14	Duplicate of Document 9	Exempt - s180(3)(b)	Not exempt	All
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