

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Application 323/05

Participants:

Mr Russell Mathews
Applicant

Brisbane City Council
Respondent

DECISION AND REASONS FOR DECISION

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REASONS FOR DECISION**1. Background**

- 1.1 The applicant seeks review of the decision of the Brisbane City Council (the Council) to refuse him access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to legal advice obtained by the Council concerning the property at St Lucia on which the applicant lives. The Council entered the property between 29 November and 1 December 2004 to clean the yard, after having issued two notices to the applicant to do so under s.209 of the *Health Regulation 1996*. Prior to entering the property, the Council obtained legal advice from Mr W Tolton of Counsel.
- 1.2 By e-mail dated 10 April 2005, the applicant applied to the Council under the FOI Act for access to documents in the following terms:
- I have attached a scan copy of the BCC letter dated 25 November 2004, wherein your Joanne Whiting, solicitor, relies upon "legal advice" to "authorise" entry to my yard. ... I require a copy of that "advice".*
- 1.3 By letter dated 20 April 2005, Mr Paul Wesener, the Council's FOI and Administration Manager, advised the applicant that the legal advice had been the subject of an earlier FOI access application (no. 271/2004) lodged by the applicant in 2004, in which access had been refused pursuant to s.43(1) of the FOI Act. Mr Wesener decided that the documents still qualified for exemption.
- 1.4 The applicant sought internal review of Mr Wesener's decision by e-mail dated 21 April 2005. The internal review was conducted by Mr David Askern, Manager, Brisbane City Legal Practice. By letter dated 9 May 2005, Mr Askern advised the applicant that he had decided to affirm Mr Wesener's decision that the documents were exempt from disclosure under s.43(1) of the FOI Act.
- 1.5 By e-mail dated 17 May 2005, the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Mr Askern's decision.

2. Steps taken in the external review process

- 2.1 Copies of the documents in issue were obtained and examined.
- 2.2 By letter dated 30 August 2005, Assistant Information Commissioner (AC) Newbery informed the Council of her preliminary view that legal professional privilege in some segments of matter in the legal advice had been waived, and that those parts of the advice therefore did not qualify for exemption under s.43(1) of the FOI Act. AC Newbery also informed the Council of her preliminary view that associated facsimile cover sheets, forwarding the advice to and within the Council, did not attract legal professional privilege, and so did not qualify for exemption under s.43(1) of the FOI Act.
- 2.3 The Council agreed to give the applicant access to the facsimile cover sheets, to all of page 4 of the legal advice, and to segments of matter on pages 1, 2 and 3 of the legal advice. That matter is therefore no longer in issue in this review.
- 2.4 By letter dated 20 September 2005, AC Newbery informed the applicant that it was her preliminary view that the matter remaining in issue qualified for exemption under s.43(1) of the FOI Act.

- 2.5 In a number of e-mails dated 21 September 2005 (sent at 4.03pm and at 7.32pm), 23 September 2005, 24 September 2005, 27 September 2005 (sent at 11.45am and at 2.04pm), 10 October 2006 (sent at 3.37pm and at 7.53pm), and 11 October 2006 (sent at 10.29am and at 1.13pm), the applicant advised that he maintained his claim for access to the matter remaining in issue and provided submissions, in response to AC Newbery's preliminary view, to support his case for disclosure of that matter. The applicant also contended that the Council had waived privilege in other documents associated with its obtaining legal advice (the instructions to counsel, notes recording conversations, and a Council file) and sought access to those documents.
- 2.6 Having perused the applicant's submissions I informed him, by way of a letter dated 21 March 2006, of my preliminary view that the matter remaining in issue was subject to legal professional privilege; that the Council had not waived privilege in that matter; and that the 'improper purpose' exception to legal professional privilege had not been made out, so that the matter remaining in issue qualified for exemption from disclosure under s.43(1) of the FOI Act. I also informed the applicant of my preliminary view that the additional documents to which he sought access did not fall within the terms of his FOI access application dated 10 April 2005 (see paragraph 1.2 above) and, accordingly, the Information Commissioner had no jurisdiction to deal with his request for access to those additional documents.
- 2.7 While he did not maintain a claim for access to the additional documents the applicant advised, by e-mails dated 24 March 2006 (sent at 12.39 and at 2.07pm), that he maintained his claim for access to the matter remaining in issue, and provided further submissions in support of his case for disclosure of that matter in response to my preliminary view.
- 2.8 In making my decision, I have taken into account the following material:
- the matter in issue;
 - the applicant's FOI access application dated 10 April 2005, application for internal review dated 21 April 2005, and application for external review dated 17 May 2005;
 - the Council's initial and internal review decisions, dated 20 April 2005 and 9 May 2005 respectively; and
 - the applicant's submissions dated 21 September 2005, 23 September 2005, 24 September 2005, 27 September 2005, 10 October 2006, 11 October 2006 and 24 March 2006 and the documents attached to them.

3. Matter in issue

- 3.1 The matter in issue in this review comprises items 2, 3, 5 and 6 of the advice of Mr Tolton dated 19 October 2004, appearing on pages 1, 2 and 3 of that advice. (The Council holds duplicate copies of the advice.)

4. Application of s.43(1) of the FOI Act

- 4.1 Section 43(1) of the FOI Act provides:

43 *Matter affecting legal proceedings*

- (1) *Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.*

(a) Requirements for exemption

- 4.2 Following the judgments of the High Court of Australia in *Esso Australia Resources Ltd v Commission of Taxation* (1999) 74 ALJR 339, the basic legal tests for whether a communication attracts legal professional privilege under Australian common law can be summarised as follows:

Legal professional privilege attaches to confidential communications between a lawyer and client (including communications through their respective servants or agents) made for the dominant purpose of –

- seeking or giving legal advice or professional legal assistance; or
- use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication.

- 4.3 Legal professional privilege also attaches to confidential communications between the client or the client's lawyers (including communications through their respective servants or agents) and third parties, provided the communications were made for the dominant purpose of use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication.
- 4.4 There are qualifications and exceptions to this statement of the basic tests, which may, in a particular case, affect the question of whether a document attracts the privilege, or remains subject to the privilege; for example, the principles with respect to waiver of privilege (see *Re Hewitt and Queensland Law Society Inc* (1998) 4 QAR 328 at paragraphs 19-20 and 29), and the principle that communications otherwise answering the description above do not attract privilege if they are made in furtherance of an illegal or improper purpose (see *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501).

(b) Application to the matter in issue

- 4.5 Based upon my examination of the matter in issue, identified at paragraph 3.1 above, I am satisfied that it comprises confidential communications between lawyer (Mr Tolton, a barrister) and client (the Council), made for the dominant purpose of giving legal advice or professional legal assistance.
- 4.6 I am therefore satisfied that, on its face, the matter in issue attracts legal professional privilege. I will now give consideration to the applicant's submissions as to why the matter in issue cannot qualify for exemption under s.43(1) of the FOI Act.

(c) Applicant's submissions

- 4.7 In summary, the applicant contends that:

- (1) the Council has waived legal professional privilege in the matter in issue, in that:
 - (a) the legal advice has been discussed in conversations between officers of the Council and the applicant's brother-in-law, Mr McVean (who owns the property on which the applicant lives, through a superannuation fund), thereby waiving the Council's privilege in the advice;
 - (b) a statement appearing in an internal Council memorandum, to which the applicant has been given access, constitute a waiver of privilege in the advice; and

- (c) the references in Ms Whiting's letter to the applicant dated 25 November 2004 to matter discussed in the legal advice constitute waiver of the whole advice;

and/or

- (2) legal professional privilege does not attach to the matter in issue because the advice was obtained for an improper purpose; i.e. to clear the applicant's yard beyond what was necessary to comply with the *Health Regulation*, so as to assist the applicant's brother-in-law in a plan to dispose of the property.

Waiver of privilege by the Council

- 4.8 Information Commissioner Albietz discussed the circumstances in which legal professional privilege will be waived in *Re Hewitt*, and in *Re Noosa Shire Council and Department of Communication and Information, Local Government and Planning* (2000) 5 QAR 428. The leading High Court authorities on waiver of legal professional privilege are *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, *Goldberg v Ng* (1995) 185 CLR 83, and *Mann v Carnell* (1999) 74 ALJR 378. There are two kinds of waiver – express or intentional waiver, and waiver imputed by operation of law (also referred to in the cases as implied waiver). As to express or intentional waiver, Commissioner Albietz made the following observations in *Re Hewitt* at (p.338, paragraph 19):

... A person entitled to the benefit of legal professional privilege can waive the privilege through intentionally disclosing protected material (see Maurice at p.487, per Mason and Brennan JJ). If disclosure is incompatible with retention of the confidentiality which is necessary for maintenance of the privilege, there will ordinarily be a general waiver of privilege: see Goldberg v Ng (1995) 185 CLR 83 per Deane, Dawson and Gaudron JJ at p.95, per Toohey J at p.106. However, the courts will allow an exception for a limited intentional disclosure of privileged material, if the disclosure is compatible with the retention of confidentiality. Thus, disclosure of privileged information by the beneficiary of the privilege to another person for a limited and specific purpose, on the clear understanding that the recipient is not to use or disclose the information for any other purpose, will not involve a general waiver of privilege, and, subject to questions of imputed waiver, may not disentitle the beneficiary of the privilege from asserting the privilege against other persons: see Goldberg v Ng per Deane, Dawson and Gaudron JJ at p.96, per Toohey J at pp.106-109, and per Gummow J at p.116.

- 4.9 In *Re Hewitt* (at pp.338-351; paragraphs 20-61), Commissioner Albietz examined the concept of implied (or imputed) waiver in the context of s.43(1) of the FOI Act, and analysed relevant authorities at some length, concluding (at p.351, paragraph 61):

... Therefore, I have reached the view that Australian law with respect to legal professional privilege allows for the application of principles of imputed waiver of privilege in the context of an extra-curial dispute, by reference to some act or omission of the privilege holder which, though falling short of intentional waiver, is inconsistent with maintenance of the privilege, and by reference to what ordinary notions of fairness require having regard to all relevant circumstances attending the extra-curial dispute.

- 4.10 Commissioner Albietz's decision in *Re Hewitt* on implied waiver of privilege was upheld by the Supreme Court of Queensland in judicial review proceedings: see *Queensland Law Society v Albietz and Hewitt* (1998) 4 QAR 387, [2000] 1 Qd R 621. Since then, the High Court of Australia has published its decision in *Mann v Carnell* (1999) 74 ALJR 378. The comments of the majority judges in *Mann v Carnell* on implied waiver of

privilege (set out below from pp.384-385) allow that fairness is still a relevant consideration, but do not give it emphasis as the determinative consideration bearing on implied waiver of privilege:

[28] ... *Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege. ...*

[29] *Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law". This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. Thus, in Benecke v National Australia Bank, the client was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to a barrister in related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister's version of those instructions. She did not subjectively intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication. What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some over-riding principle of fairness operating at large.*

...

[34] ... *Disclosure by a client of confidential legal advice received by the client, which may be for the purpose of explaining or justifying the client's actions, or for some other purpose, will waive privilege if such disclosure is inconsistent with the confidentiality which the privilege serves to protect. Depending upon the circumstances of the case, considerations of fairness may be relevant to a determination of whether there is such inconsistency. The reasoning of the majority in Goldberg illustrates this.*

- 4.11 The application of these principles is illustrated Commissioner Albietz's reasons for decision in *Re Noosa Shire Council*.
- 4.12 With respect to 1(a) above, other than the applicant's assertions that such disclosures were made, there is no evidence before me in support of the applicant's claim. The fact that the applicant believes that Council officers made such disclosures does not, of itself, provide sufficient grounds to demonstrate that this occurred. In the absence of any evidence to demonstrate that such disclosures were made, I am unable to accept the applicant's submission in this respect.
- 4.13 With respect to 1(b) above, the applicant relies upon a statement, appearing in paragraph 2 on page 1 of an internal Council memorandum dated 2 December 2004, from Mr Steve Beck to Mr Michael Bell, which states:

Legal advice was obtained from BCLP [Brisbane City Legal Practice] that Council had power to enter by authority of Section 200(1) of the Health Regulation 1996, without the need to obtain a court order.

4.14 I have examined the memorandum and Mr Tolton's advice. I accept the applicant's submission that the sentence from Mr Beck's memorandum, mentioned above, discloses matter contained in Mr Tolton's advice. However, the matter disclosed in Mr Beck's memorandum does not disclose any more of Mr Tolton's advice than was disclosed in Ms Whiting's letter to the applicant dated 25 November 2004. In providing the applicant with a copy of Mr Beck's memorandum, I find that the Council did not waive privilege in any part of Mr Tolton's advice in which it had not been waived by the letter dated 25 November 2004 from Ms Whiting.

4.15 The applicant is concerned that he has not been given access to all of the legal advice seemingly disclosed in the letter from Ms Whiting dated 25 November 2004; specifically, the matter to which he has been given access does not state that the applicant's consent to entry by the Council was not required, a statement which appears in Ms Whiting's letter:

Council has obtained legal advice that confirms that your consent to that entry is not required, and Council is authorised to do all acts necessary to obtain entry and perform the work.

4.16 I have examined the whole of the advice and can confirm that the material to which the applicant was given access is all the material in the advice that is disclosed in Ms Whiting's letter (and in Mr Beck's memorandum). The legal advice does not state that the applicant's consent to entry was not required. (The right to enter without consent is implied by the terms of s.200 of the *Health Regulations*.)

4.17 With respect to 1(c) above, the applicant claims that by giving him access to parts of Mr Tolton's advice, the Council has waived privilege in the whole of that advice. I am satisfied, however, that the matter in issue has not been disclosed to the applicant and that it deals with topics not discussed in any matter to which the applicant has been given access. There is clear authority that a waiver of privilege may be confined to parts of a privileged communication on a particular subject matter, while privilege is maintained for communications on separate and distinct subject matters appearing in the same document: see *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529, which was cited with approval in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475.

4.18 I do not consider that there is any basis for the argument that the Council has waived privilege in respect of the remainder of the contents of the advice, and I am satisfied that the conduct of the Council was not inconsistent with the maintenance of confidentiality of that material. I am not satisfied that there are any considerations of fairness to the applicant in this case which would warrant a finding of imputed waiver in respect of the matter in issue. The balance of Mr Tolton's advice deals with other distinct issues and, consistent with the approach taken by Commissioner Albietz in *Re Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (1996) 3 QAR 206, as the matter in issue has remained confidential to the Council it remains subject to legal professional privilege.

4.19 I am satisfied that there has not been express or imputed waiver by the Council of legal professional privilege in respect of the matter in issue.

'Improper purpose' exception

4.20 The applicant contends that legal professional privilege cannot attach to Mr Tolton's advice because, in obtaining the advice, the Council was acting in preparation for, or furtherance of, an illegal or improper purpose.

4.21 Commissioner Albietz considered the 'improper purpose' exception at some length in *Re Murphy and Queensland Treasury (No. 2)* (1998) 4 QAR 446 at pp.457-462, paragraphs 31-42. At paragraphs 35, 36 and 37, he considered the judgments in *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 and in *Propend Finance* concerning the evidentiary onus on a person contesting the existence of legal professional privilege to demonstrate a *prima facie* case that the relevant communications were made in furtherance of an illegal or improper purpose. At paragraph 38, he drew the following principles from those cases:

- to displace legal professional privilege, there must be *prima facie* evidence (sufficient to afford reasonable grounds for believing) that the relevant communication was made in preparation for, or furtherance of, some illegal or improper purpose;
- only communications made in preparation for, or furtherance of, the illegal or improper purpose are denied protection, not those that are merely relevant to it (see *Butler v Board of Trade* [1970] 3 All ER 593 at pp.596-597). In other words, it is not sufficient to find *prima facie* evidence of an illegal or improper purpose. One must find *prima facie* evidence that the particular communication was made in preparation for, or furtherance of, an illegal or improper purpose; and
- knowledge, on the part of the legal adviser, that a particular communication was made in preparation for, or furtherance of, an illegal or improper purpose is not a necessary element (see *R v Cox and Railton* (1884) 14 QBD 153 at p.165; *R v Bell: ex parte Lees* (1980) 146 CLR 141 at p.145); however, such knowledge or intention on the part of the client, or the client's agent, is a necessary element.

4.22 Some assistance in understanding the second principle above is afforded from the observations of Hodgson CJ in Eq of the Supreme Court of New South Wales in *Watson v McLernon* [2000] NSWSC 306, 13 April 2000, at paragraph 116:

The next question is, what would amount to furtherance of such a [dishonest] purpose? I accept that a purpose of merely concealing previous dishonest conduct, and avoiding adverse consequences, such as penalties or claims for damages, which could flow therefrom, would not amount to furtherance of the improper purpose. The policy of the law is to encourage people to get legal advice so that they can be aware of their rights in relation to such matters. However, if the person seeking advice proposes to continue the dishonest conduct, ... and proposes to use legal advice to assist in this purpose, then in my opinion that would be sufficient to amount to a furtherance of the improper purpose.

4.23 It is noteworthy also, that in the Federal Court decision of *Freeman v Health Insurance Commission and Ors* (1998) 157 ALR 333 at 342, Finkelstein J said:

Notwithstanding the submissions made by the applicant, I do not believe that the exception should be extended so that the privilege is lost if there is an inadvertent abuse of statutory power. Legal professional privilege is an important right and the public interest does not require it to be lost except by conduct which is morally reprehensible. ... if the exception was now to be extended to cover inadvertent conduct it might endanger the basis of the privilege.

(There was a successful appeal against parts of Finkelstein J's judgment (see *Health Insurance Commission and Anor v Freeman* (1998) 158 ALR 26), but no issue was taken with the above statement of principle.)

- 4.24 In this case, I am not persuaded that the improper purpose exception to legal professional privilege is made out. The applicant has provided material which demonstrates that his brother-in-law, Mr McVean, had made known to the Council his interest in obtaining a demolition order for the property on which the applicant lives, and his concerns about the applicant's occupation of the property. I cannot however infer from this that the Council intended to act improperly or illegally.
- 4.25 Having reviewed Mr Tolton's advice I am satisfied that it does not, on its face, indicate that it was made in preparation for, or furtherance of, an illegal or improper purpose. Nothing in the documents which the applicant has provided with his various submissions indicates that the Council considered that its entry onto the applicant's property or its clean up of his yard were unlawful, but that it nonetheless proceeded to enter and perform the clean up. Material provided by the applicant indicates that:
- the Council intended to enter the property and clean up the yard, owing to its concerns about the public health issues arising from the state of the yard;
 - at one point, the Council considered that it required a court order to enter the applicant's property, and gave the applicant written notice of its intention to obtain a court order pursuant to s.160 of the *Health Regulation*, authorising it to enter the property; and
 - the Council was in fact entitled to enter the applicant's property under s.200 of the *Health Regulation*.
- 4.26 Moreover, there is nothing before me to suggest that the Council's entry or clean up were unlawful. The applicant relied upon cases dealing with powers of entry onto land without warrant (*Halliday v Nevill* (1984) 155 CLR 1; and *Plenty v Dillon* (1991) 171 CLR 635). In the present case, however, no question arises as to whether the common law authorised the Council's entry onto the land, as a statutory right to enter was conferred by s.200 of the *Health Regulation*.
- 4.27 I find that the improper purpose exception to legal professional privilege is not made out.

(d) Conclusion

- 4.28 I am satisfied that the matter in issue comprises a confidential communication between lawyer and client, made for the dominant purpose of giving legal advice or professional legal assistance. I am satisfied that the matter in issue attracts legal professional privilege and I find that it comprises exempt matter under s.43(1) of the FOI Act.

DECISION

- 5.1 I affirm the decision under review (being the decision made on 9 May 2005 on behalf of the Council by Mr David Askern) that the matter in issue, identified in paragraph 3.1 above, is exempt from disclosure under s.43(1) of the FOI Act.

- 5.2 I have made this decision as a delegate of the Information Commissioner's powers under s.90 of the FOI Act

.....
Susan Barker
Assistant Information Commissioner

Date: 23 May 2006