



## **Decision and Reasons for Decision**

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**Application Number:** 210460

**Applicant:** Mr G Harris

**Respondent:** Department of Justice and Attorney-General

**Decision Date:** 21 January 2009

**Catchwords:** **FREEDOM OF INFORMATION – refusal of access – section 43(1) of the *Freedom of Information Act 1992* – whether matter in issue would be privileged from production in a legal proceeding on the ground of legal professional privilege – whether the advice is of an independent character – whether communications made in furtherance of an illegal or improper purpose so as to preclude the communications from attracting legal professional privilege**

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## REASONS FOR DECISION

### Summary

1. For the reasons set out below, I am satisfied that the relevant matter in issue is exempt from disclosure under section 43(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**).

### Background

2. By way of background, the applicant lodged a petition for exercise of the royal prerogative of mercy with the Governor of Queensland in 2000 (**First Petition**). The petition was refused.
3. In 2007, the applicant lodged a second petition for exercise of the royal prerogative of mercy with the Governor of Queensland (**Second Petition**).
4. By application to the Department of Justice and Attorney-General (**Department**) dated 2 February 2007, the applicant requested access under the FOI Act to:
  - all notes, file notes, correspondence, reports, records, files, memos and brief of evidence held by the Office of the Director of Public Prosecutions (in relation to the appeal heard by the Court of Appeal on 10 September 1992)
  - all notes, file notes, correspondence, reports, records, opinions, files, memos, brief of instructions and evidence from the Department in relation to the petition for the exercise of the royal prerogative of mercy dated 4 February 2000 (**FOI Application**).
5. On 13 September 2007 and 11 December 2007, the applicant advised the Department that he did not seek access to certain types of documents.
6. By letter dated 12 December 2007, the Department issued a considered decision<sup>1</sup> and advised the applicant that it decided to:
  - refuse access to documents held by the Office of the Director of Public Prosecutions under section 28A(2) of the FOI Act as the documents could not be found
  - refuse access to 1628 pages under section 43(1) of the FOI Act
  - grant partial access to 27 pages
  - grant full access to 10 pages.
7. By letter dated 8 January 2008, the applicant sought internal review of the considered decision.
8. The Department did not issue an internal review decision within the time limit set out in the FOI Act and is therefore taken to have affirmed the considered decision (**Deemed Decision**)<sup>2</sup>.
9. By letter dated 17 March 2008, the applicant sought external review of the Deemed Decision.

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<sup>1</sup> Section 27B(4) of the FOI Act.

<sup>2</sup> Section 52(6) of the FOI Act.

## **Decision under review**

10. The decision under review is the Deemed Decision.

## **Steps taken in the external review process**

11. By letter dated 27 March 2008, I wrote to the applicant advising him that this Office would review the Deemed Decision and seeking clarification as to the scope of his external review application. I advised the applicant that based on his internal review application, I assumed that he did not seek external review in relation to the documents responding to the first part of the FOI Application (that is, documents held by the Office of the Director of Public Prosecutions). I asked the applicant to advise me by no later than 11 April 2008 if that was not the case.
12. The applicant did not respond to my correspondence dated 27 March 2008.
13. By letter dated 27 March 2008, I wrote to the Department and requested documents relevant to the review and a copy of the matter claimed to be exempt.
14. By letter dated 21 May 2008, the Department provided the requested documents.
15. On 16 July 2008, a staff member of this Office contacted the Department and requested further documents relevant to the review.
16. By letter dated 16 July 2008, the Department provided the further requested documents.
17. By letter dated 11 September 2008, I provided the applicant with a preliminary view that:
  - a number of documents fall outside the scope of the FOI Application
  - one document is partially exempt from disclosure under section 44(1) of the FOI Act
  - the remainder of the matter in issue is exempt from disclosure under section 43(1) of the FOI Act.

I invited the applicant to provide submissions in support of his case by 25 September 2008 if he wished to contest the preliminary view.

18. By letter dated 25 September 2008, the applicant requested an extension of time to provide submissions in response to the preliminary view. I granted the applicant an extension of time until 9 October 2008 to provide submissions in support of his case.
19. By letter dated 3 October 2008, the applicant advised that he did not accept the preliminary view relating to the application of section 43(1) of the FOI Act and provided submissions and supporting documentation in support of his case.
20. By letter dated 27 November 2008, I provided the applicant with a further preliminary view and invited the applicant to provide submissions in support of his case by 11 December 2008 if he wished to contest the further preliminary view.
21. By letter dated 3 October 2008, the applicant advised that he did not accept the further preliminary view relating to the application of section 43(1) of the FOI Act and provided submissions and supporting documentation in support of his case.

22. In making this decision, I have taken the following into account:

- the FOI Application
- the file notes dated 13 September 2007 and 11 December 2007 recording conversations between the applicant and the Department
- the considered decision dated 12 December 2007
- the applicant's internal review application dated 8 January 2008
- the applicant's external review application dated 17 March 2008
- the applicant's submissions dated 3 October 2008 and 9 December 2008 and supporting documentation
- the matter in issue
- relevant case law and previous decisions of this Office
- relevant provisions of the FOI Act.

### **Issue for determination**

23. The issue for determination in this review is whether the matter in issue qualifies for exemption from disclosure under section 43(1) of the FOI Act.

### **Matter in issue**

24. I have categorised the remaining matter in issue in the following manner:

- communications and correspondence between relevant parties<sup>3</sup> (**Category A Matter**)
- internal Crown Law memoranda, annotations, file and research notes (**Category B Matter**)
- copies of otherwise non-privileged documents (**Category C Matter**).

25. The matter in issue in this review (**Matter in Issue**) comprises the Category A, B and C matter to which access was refused by the Department under section 43(1) of the FOI Act.

### **Findings**

26. Pursuant to section 21 of the FOI Act, a person has a legally enforceable right to be given access to documents of an agency and official documents of a Minister. This right of access is subject to other provisions of the FOI Act, in particular, section 28 of the FOI Act, under which an agency can refuse access to exempt matter or an exempt document.

27. The Department refused the applicant access to the Matter in Issue under section 43(1) of the FOI Act. My findings with respect to the application of that provision to the Matter in Issue are set out below.

### **Section 43(1) of the FOI Act**

28. Section 43(1) of the FOI Act provides:

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<sup>3</sup> Including the Attorney-General and the Director General of the Department of Premier and Cabinet.

**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.*

29. The section 43(1) exemption turns on the application of those principles of Australian common law which determine whether matter is subject to legal professional privilege.
30. Legal professional privilege protects confidential communications between a lawyer and client, including communications through their 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.<sup>4</sup>
31. Legal professional privilege also protects confidential communications between the client or the client's lawyers (including communications through their 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.<sup>5</sup>
32. There are qualifications and exceptions to those broad statements of principle, 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 principle that communications otherwise answering the description above do not attract privilege if they are made in furtherance of an illegal or improper purpose may affect the question of whether a document attracts legal professional privilege.

***Application of section 43(1) of the FOI Act to the Matter in Issue***

**Category A Matter**

33. A table listing the documents comprising the Category A Matter is set out in Annexure A to this decision.
34. Based on my review of the contents of the Category A Matter, I am satisfied that the matter either comprises:
- confidential communications between the Attorney-General and the Director-General of the Department of Premier and Cabinet made for the dominant purpose of seeking or giving legal advice
  - confidential communications between Crown Law and a third party made for the dominant purpose of seeking or giving legal advice.
35. Accordingly, I am satisfied that the Category A Matter attracts legal professional privilege and is therefore exempt from disclosure under section 43(1) of the FOI Act.

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<sup>4</sup> *Esso Australia Resources Ltd v Commission of Taxation* (1999) 74 ALJR 339.

<sup>5</sup> *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217.

### Category B Matter

36. A table listing the documents comprising the Category B Matter is set out in Annexure A to this decision.
37. I note the Department's decision that documents comprising 'working documents' generated by Crown Law officers in the course of preparing legal advices and communications (that is, internal Crown law memoranda, annotations, file and research notes) are exempt from disclosure under section 43(1) of the FOI Act based on the decisions in *Price and Nominal Defendant*<sup>6</sup> and *Norman and Mulgrave Shire Council*.<sup>7</sup>
38. I also note that in *Norman*,<sup>8</sup> the Information Commissioner cited the decision of the Supreme Court of Western Australia in *Dalleagles Pty Ltd v Australian Securities Commission & Ors*<sup>9</sup> and stated that:

*What is protected, of course, is that which is communicated between solicitor and client. It is the communication that is privileged. But this is not to say that material that is not literally a communication or manifestly the record of a communication is never protected. There are many instances of protection being extended to such material. The examples of the draft letter that never leaves the solicitor's office, the draft agreement and the draft statements of claim have already been referred to. **The reason why such material is protected is often stated to be that disclosure of it will, or will tend to, reveal the privileged communication.** A-G (NT) v Maurice per Dawson J at 496. Thus a note made by a solicitor of a conference with his client will be privileged in so far as it is a record of the communication from the client (that communication being privileged) but also in so far as it might contain notes of the solicitor's own thoughts in regard to the matters communicated to him. Protection is afforded in the latter case on the ground that disclosure of that material might tend to reveal what had been communicated to the solicitor. There is much in the cases to support the view that this is the true basis upon which draft agreements, draft letters, draft pleadings and the like have long been accepted as privileged; that it is not so much because they are themselves "advice" or "communication" but because they will, if disclosed, reveal, or tend to reveal, the content of privileged communications. **Material created by the solicitor in fulfillment of his engagement "is the result of the solicitor's mind working upon and acting as professional adviser with reference to" material communicated to him confidentially in his professional capacity (Kennedy v Lyell [1883] 23 Ch D 387 at 407) and, as such, will by its very nature tend to reveal the content of the communication in response to which it had been prepared.***

*Of course there are limits and these have often been stated. The material must have been created solely for the purpose of fulfilling the engagement. The material must be confidential. No protection can extend to agreements in their final form intended to constitute the actual transaction between the parties or to records made for the purpose of evidencing an actual transaction, or to letters sent or to forms lodged at public offices or to pleadings filed in courts. This is because legal professional privilege exists to secure confidentiality and such material is no longer confidential.*

[emphasis added]

39. Based on my review of the Category B Matter, I am satisfied that it was created for the dominant purpose of providing legal advice, is confidential and if disclosed, would reveal the content of privileged communications.

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<sup>6</sup> (Unreported, Queensland Information Commissioner, 24 November 1999).

<sup>7</sup> (1994) 1 QAR 574 (**Norman**).

<sup>8</sup> At paragraph 23.

<sup>9</sup> (1991) 4 WAR 325 at pages 331 – 4.

40. Accordingly, I am satisfied that the Category B Matter attracts legal professional privilege and is exempt from disclosure under section 43(1) of the FOI Act.

### **Category C Matter**

41. A table listing the documents comprising the Category C Matter is set out in Annexure A to this decision.
42. I note that a majority of the High Court in *Commissioner, Australian Federal Police v Propend Finance Pty Ltd*,<sup>10</sup> held that privilege could exist in copies of non-privileged documents made and communicated for the dominant purpose of use in litigation or for obtaining or giving legal advice.
43. I specifically note Justice Gaudron's comment that:<sup>11</sup>

*It follows that a copy document which has been brought into existence by a lawyer solely for the purpose of obtaining counsel's advice, solely for inclusion in his or her brief on hearing or solely for the purpose of advising his or her client is the subject of legal professional privilege.*

44. Based on my review of the Category C Matter, I am satisfied that it:
- comprises copies of documents made and communicated for the dominant purpose of giving legal advice
  - falls within the principles established in the High Court's decision in *Propend Finance*.
45. Accordingly, I am satisfied that the Category C Matter attracts legal professional privilege and is exempt from disclosure under section 43(1) of the FOI Act.

### **The applicant's submissions and evidence**

46. The applicant submits that the illegal/improper purpose exception to legal professional privilege applies in the circumstances on account of the Crown's alleged lack of independence on various occasions.
47. In his letter dated 3 October 2008, the applicant submits that:

*... It appears we are at different ends of the spectrum with respect to your claim that a claim of legal professional privilege exists ... it would be trite law and repugnant to our society as a whole for the State to use legal professional privilege to hide the criminal activities of persons and then to use the State powers to prosecute a person who exposed the crimes.*

*We would accept your claim of legal professional privilege, if the Crown and its officers had obtained independent legal advice from the private bar or a retired judge. They did not and they choose to keep their advice in a position where they could control the outcome. Such choice, in our view undermines any claim they may have. The Crown made the choice to keep the legal advice in house, in our view so their actions could not be properly scrutinize[d].*

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<sup>10</sup> (1997) 141 ALR 545 (*Propend Finance*).

<sup>11</sup> *Propend Finance* at 577.

*We enclose for your consideration, our recent Petition. The Petition outlines conduct which repudiates the claim that there was independence in the Crown's case. We would respectfully ask you to read it and compare the voice recordings and transcripts on the disk provided in the petition.*

48. Further, in the Second Petition<sup>12</sup>, the applicant relevantly states that:

*On 4 February 2000, I forwarded a petition to His Excellency (your predecessor) in which I showed that fresh evidence was improperly withheld at my trial and that this allowed the Trial and Appeal Courts of Queensland to be misled. I would ask that Your Excellency reconsider the decision of your predecessor in respect of my petition.*

...

*As stated above, the Attorney-General and Premier of Queensland gave advice in respect of my petition to your predecessor; they advised him that my conviction was correct in law. That advice is wrong and is outside the established rule of law. ...*

*The advice, as we understand it, came from the Crown Solicitor's office, to the Attorney General and the Premier, to your office. Given the circumstances of my case, one would have thought the advice should have come from an independent source, an eminent and highly respected member of the legal profession, possibly a Queen's or Senior Counsel. As this document and the facts of the case show, the role of the Crown is in question.*

...

*Throughout this case, the Crown has been able to protect itself and escape scrutiny. There is no transparency in the Crown's case. There have been many investigations, but none have examined the source material. The transcripts of evidence and tape recordings have been ignored, as though they do not exist.*

...

*I would ask Your Excellency to advise the Premier and Attorney General to seek an eminent and highly respected member of the legal profession, possibly a Queen's or Senior Counsel to review my case. I do not believe the Crown can properly investigate themselves.<sup>13</sup>*

...

*As previously stated, the personal involvement of the Premier, the Crown Solicitor and the Office the Solicitor-General requires independence to be at the forefront to return it to the Court of Appeal. ... I would again respectfully ask that Your Excellency advise the Attorney-General to seek independent advice with respect to my case.<sup>14</sup>*

49. Further, the applicant alleges that:

- *'Part of the quandary for the Court of Appeal is whether or not the Crown has established the correct position on [two other persons] with respect to their criminal proceedings and the consequential proceedings which were brought against me ... [If the two other persons] did commit [an offence] in line with the established principles, then the ... only question for the Court of Appeal to answer is was I [properly] exercising my powers ... This requires a decision from the Court of Appeal.'<sup>15</sup>*

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<sup>12</sup> Provided in support of the applicant's case under cover of his letter dated 3 October 2008.

<sup>13</sup> At pages 68 – 69 of the Second Petition.

<sup>14</sup> At pages 74 -75 of the Second Petition.

<sup>15</sup> Page 54 of the Second Petition.



- *'... wilful blindness radiates outwardly from the Crown to the very cornerstones of our society. The courts, the media, the parliament and the police certainly suspected the fact, but they refrained from obtaining the final confirmation because they wanted ... to deny knowledge. The core issue is the abuse of power which infringes upon my rights. Rights such as a fair trial are jeopardised because the Crown protected criminal behaviour.'*<sup>16</sup>

50. In summary, the applicant asks this Office to reassess evidence previously put before the courts of Queensland<sup>17</sup>, in order to establish his claim that the Crown engaged in conduct 'lacking independence' over a lengthy period of time, which he submits supports his:

- First and Second Petitions
- claim that legal professional privilege does not attach to the Matter in Issue in the circumstances.

51. By letter dated 9 December 2008, the applicant made the following submissions in support of his case:

*It is our position that we placed before you sufficient material, which includes our recent petition, the voice recording and the transcripts to show as police officers we were investigating the criminal offence of perjury. It was our view that the offence of perjury was committed. The Crown adopted a position that no perjury was committed. The divergence of the interpretation over what constitutes perjury becomes a question of law, Our view is that you should seek guidance from the Supreme Court as to whether or not the offence of perjury was committed.*

*The other aspect is whether or not a report being a report of a parliamentary committee tabled in the House and ordered to be printed is produced in a criminal trial to establish guilt is in conflict with Article 9 of the Bill of Rights 1688. Our view is that you should seek guidance from the Supreme Court as to whether or not it is lawful to use a parliamentary document as evidence to prosecute in criminal offences. Our view is that this is a question of law.*

*The above questions need to be answered so that you may make a decision with respect to section 43(1) of the FOI Act.*

*We do not have access to those documents and can only assume the contents of the documents. Our view is that not only was the law with respect to perjury misinterpreted by the Crown to protect criminal behaviour, but the protection still continues.*

52. The applicant refers to the following extract of the judgement of Gibbs CJ in *Attorney-General (NT) v Kearney*:<sup>18</sup>

*One exception to which the general rule is subject is that communications by a client for the purpose of being guided or helped in the commission of a crime or fraud are not privileged from discovery. This exception is frequently stated as though it were confined to crime and fraud. ...*

...

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<sup>16</sup> Page 74 of the Second Petition.

<sup>17</sup> And in respect of which adjudications have been made.

<sup>18</sup> (1985) 158 CLR 500 (*Kearney*).

*However, not all the authorities state the principle of the exception in a way that would confine it to crime or fraud. In Russell v Jackson (1851) 9 Hare 387 at 392–3 ; (68 ER 558 at 560) Turner V-C said: “Can it then be said that the communication should be protected because it may lead to the disclosure of an illegal purpose? I think that it cannot; and that evidence which would otherwise be admissible cannot be rejected upon such a ground. On the contrary, I am very much disposed to think that the existence of the illegal purpose would prevent any privilege attaching to the communication. Where a solicitor is party to a fraud no privilege attaches to the communications with him upon the subject because the contriving of a fraud is no part of his duty as solicitor; and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law.”*

*This passage has frequently been cited with apparent approval — for example by Isaacs J in Varawa v Howard Smith & Co Ltd (10 CLR) at p 389 and by Stephen J in R v Bell; Ex parte Lees (1980) 146 CLR 141 at 152 ; 30 ALR 489 at 499. There are other authorities in which the principle is stated with equal width. One of them, Gartside v Outram (1856) 26 LJ Ch 113, is cited in R v Cox and Railton (1884) 14 QBD 153 at 169–70 together with Russell v Jackson. In another, Bullivant v Attorney-General for Victoria [1901] AC 196, the Earl of Halsbury LC said (at p 201) “that no court can be called upon to protect communications which are in themselves parts of a criminal or unlawful proceeding”. In the same case Lord Shand and Lord Davey spoke of “fraud or illegality” (see at pp 203, 204–5*

...

*The explanation given by Turner V-C for the principle on which the exception rests, namely that a communication in furtherance of an illegal purpose is not within the ordinary scope of professional employment, was in substance accepted as correct in R v Cox and Railton (at pp 168–9) and is now generally accepted. Cardozo J put it shortly in Clark v United States (1933) 289 US 1 (77 Law Ed 993 at 1000): “The privilege takes flight if the relation is abused.”*

*These statements of the principle, and the reason on which is based, suggest that the exception is not confined to cases of crime and fraud, even in the wide sense in which “fraud” has been used in this context, unless the meaning of that word is extended to include anything that might be described as a fraud on justice.*

and submits that:

*We note that Mason and Brennan JJ agreed with the Chief Justice. We further note that the view of Wilson J is of a similar view in that “The presence of such dishonesty is enough to cause the privilege to “take flight”, to use the words of Cardozo J. in Clark v. United States (1933) 289 US 1 at p 15, because it precludes a true professional relationship from arising”*

## **Analysis of the applicant’s submissions and evidence**

### **Jurisdiction**

53. Section 101C of the FOI Act:

- sets out the Information Commissioner’s functions
- provides that the functions of the Information Commissioner are to investigate and review decisions of agencies and Ministers of the kinds listed.

54. Consistent with section 101C of the FOI Act, I am satisfied that section 101C of the FOI Act does not confer power on the Information Commissioner<sup>19</sup> to:
- broadly review the Crown's conduct over a lengthy period of time including in respect of matters which have been heard and concluded by the Queensland Courts
  - re-examine and determine issues relating to alleged perjury and breach of parliamentary privilege, which the applicant submits must be undertaken before a decision can be made in respect of the application of section 43(1) of the FOI Act to the Matter in Issue.
55. The scope of this external review is confined to a consideration of whether the Matter in Issue qualifies for exemption from disclosure under the FOI Act which requires me to apply the law relating to legal professional privilege to the Matter in Issue and determine whether it is exempt from disclosure on this basis.

### **Independence**

56. The High Court of Australia has established that legal professional privilege may protect communications between salaried employee legal advisers of a government department or statutory authority and his/her employer as client (including communications through other employees of the same employer) provided there is a professional relationship of solicitor and client, which secures to the advice an independent character notwithstanding the employment.<sup>20</sup>
57. In *Waterford*, Mason and Wilson JJ considered relevant authorities from other jurisdictions on this issue, including the English Court of Appeal decision in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioner (No. 2)*.<sup>21</sup> Their Honours concluded that:<sup>22</sup>

*In our opinion, given the safeguards to which reference is made in the various citations, there is no reason to place legal officers in government employment outside the bounds of legal professional privilege. The proper functioning of the legal system is facilitated by freedom of consultation between the client and the legal adviser. ...*

*To our minds it is clearly in the public interest that those in government who bear the responsibility of making decisions should have a free and ready confidential access to their legal advisers. Whether in any particular case the relationship is such as to give rise to the privilege will be a question of fact. It must be a professional relationship which secures to the advice an independent character notwithstanding the employment.*

58. Further in *Waterford*, I note that Mason and Wilson JJ<sup>23</sup>, Deane J<sup>24</sup> and Dawson J<sup>25</sup> focus on the nature of advice given and the quality of the relationship between adviser and client in determining whether legal professional privilege arises.
59. This accords with the views expressed in *Kearney* by Gibbs CJ<sup>26</sup> and Dawson J.<sup>27</sup>

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<sup>19</sup> Or delegate.

<sup>20</sup> *Waterford v Commonwealth of Australia* (1987) 163 CLR 54 (**Waterford**).

<sup>21</sup> [1972] 2 QB 102.

<sup>22</sup> At 62.

<sup>23</sup> At 62.

<sup>24</sup> At 81-2.

<sup>25</sup> At 95-97.

<sup>26</sup> At 510.

<sup>27</sup> At 530-1.

60. I also note the Information Commissioner's statement in *Potter and Brisbane City Council*<sup>28</sup> that:

- 24 *Despite the number of cases that have considered the point, discussion of the requirements for establishing the necessary degree of independence (that, in the words of Mason and Wilson JJ in Waterford, will secure to the advice an independent character notwithstanding the employment) has been limited. In Kearney, Gibbs CJ (at p.510) indicated that privilege would extend to legal advice given by employees provided that, in giving the advice, they are acting in their capacity as legal advisers. His Honour went on to say that advice would only be privileged if the lawyer who gives it has been admitted to practice and (His Honour inclined to think) remains subject to the duty to observe professional standards and the liability to professional discipline.*
- 25 *In Waterford, Deane J, while not deciding the point, suggested that the privilege would be restricted to persons who "in addition to any academic or other practical qualifications were listed on a role of current practitioners, held a current practising certificate, or worked under the supervision of such a person" (pp.81-82). Dawson J (at p.96-97) referred to the requirement that the legal adviser be qualified to practise law and be subject to the duties to observe professional standards and the liability to professional discipline. In Waterford, Brennan J (at p.70) suggested that admission to practice as a barrister or solicitor is a necessary condition for attracting legal professional privilege. (This suggestion was made in the context of raising a separate requirement, namely, that the legal adviser must be competent, as well as independent. His Honour indicated that there was much to be said for the view that admission to practice is the sufficient and necessary condition for attracting the privilege so far as the requirement of competence is concerned).*
- 26 *The requirements were further discussed by the Commonwealth Administrative Appeals Tribunal in Re Proudfoot and Human Rights and Equal Opportunity Commission (1992) 16 AAR 411, where the importance of the legal adviser holding a current practising certificate was emphasised (at pp.414-415). This was not, however, a requirement mentioned by the majority judges in Waterford. It would not, therefore, appear to be a necessary requirement for establishing the requisite degree of independence; although, where present, it will doubtless be of some weight in assisting to establish the requisite degree of independence.*

61. On the information available to me, it is clear that legal professional privilege can apply to communications between legal officers employed by Crown Law, and Crown Law's clients, provided those communications satisfy the tests for legal professional privilege summarised above.<sup>29</sup>
62. The applicant makes various allegations about the role and motivations of the Crown in his prosecution and subsequent appeal. The applicant claims that as he has made allegations in respect of the Crown, it was inappropriate for the Attorney-General to seek advice from Crown Law in relation to the First Petition and that the advice should have been provided by an 'independent source'.
63. The applicant's submissions on this issue suggest that he is not satisfied with the process followed by the Crown in coming to a decision in respect of the First Petition. Accordingly, he requests that the current Governor reconsider the former Governor's decision and that the Governor advise the Attorney-General to seek independent legal advice in relation to the Second Petition.

<sup>28</sup> (1994) 2 QAR 37.

<sup>29</sup> *Smith and Administrative Services Department* (1993) 1 QAR 22 at paragraphs 88-90.

64. In this respect I note the decision of Morris J of the Victorian Civil and Administrative Tribunal in *Osland v Dept of Justice (General)*,<sup>30</sup> where Morris J specifically commented on the practice for a petition for mercy as follows:<sup>31</sup>

*A petition for the exercise of the prerogative of mercy is a request made to the Crown by an individual seeking release from the effects of a conviction in circumstances where all avenues of appeal to the courts have been exhausted or where the courts have no jurisdiction. The Governor of Victoria has the power to exercise the prerogative of mercy as a representative of Her Majesty the Queen. ...*

*On 14 February 1986 the Queen issued Letters Patent relating to the Office of the Governor of Victoria. Clause III of the Letters Patent states, among other things, that the Premier shall tender advice to the Governor in relation to the exercise of powers and functions of the Governor not permitted or required to be exercised in Council. **By convention, the accepted practice is and has been that the Premier seeks the advice of the Attorney-General in relation to whether the prerogative should be exercised. In turn, when the advice of the Attorney-General is sought, it is practice for the Attorney-General to ask his or her department to consider, evaluate and make recommendations in relation to the petition. Sometimes the advice of the Victorian Government Solicitor is sought. ...***

***Before tendering his advice to the Premier, the Attorney-General may wish to follow up the advice he or she has received in relation to the matter. Generally the Attorney-General advises the Premier and it is then a matter for the Premier to proffer advice to the Governor. ...***

[emphasis added]

65. On the basis of the matters set out above, I am satisfied that:

- The applicant's submissions on this point do not relate to the question of independence in the sense contemplated by the High Court in *Waterford* which is relevant to the application of section 43(1) of the FOI Act.
- The Crown Law officers were appropriately qualified legal practitioners (or were under the supervision of a legal practitioner) who conducted their practice with the requisite degree of independence, such that the legal advice given in the course of conducting their practice was capable of attracting legal professional privilege.
- The relevant Matter in Issue was created in the course of a professional relationship which secures an independent character to it.

#### **The illegal/improper purpose exception**

66. Communications between a lawyer and client which facilitate a crime or fraud are not protected by legal professional privilege.
67. In *AWB Ltd v Hon Cole (No 5)*<sup>32</sup> Young J of the Federal Court of Australia explained that:

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<sup>30</sup> [2005] VCAT 1648 (16 August 2005).

<sup>31</sup> At paragraphs 22 – 24.

<sup>32</sup> [2006] FCA 1234 (**AWB**).

- the principle encompasses a wide species of fraud, criminal activity or actions taken for illegal or improper purposes<sup>33</sup>
- the fraud exception is based on public policy grounds and is sufficiently flexible to capture a range of situations where the protection of confidential communications between lawyer and client would be contrary to the public interest.<sup>34</sup>

68. In *Propend Finance*, Brennan CJ said:<sup>35</sup>

*In determining whether a claim of legal professional privilege can be upheld, it is open to the party resisting the claim to show reasonable grounds for believing that the communication effected by the document for which legal professional privilege is claimed was made for some illegal or improper purpose, that is, some purpose that is contrary to the public interest. I state the criterion as "reasonable grounds for believing" because (a) the test is objective and (b) it is not necessary to prove the ulterior purpose but there has to be something "to give colour to the charge", a "prima facie case" that the communication is made for an ulterior purpose.*

[footnotes omitted]

69. The illegal/improper purpose exception to legal professional privilege was considered by this Office in *Murphy and Treasury Department*.<sup>36</sup> In this decision, it was found that:<sup>37</sup>

- 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.
- There is an 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.
- 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.<sup>38</sup> 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.
- 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;<sup>39</sup> however, such knowledge or intention on the part of the client, or the client's agent, is a necessary element.

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<sup>33</sup> *AWB* at paragraph 211 referring to *Clements, Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police* [2001] FCA 1858 at paragraphs 35 – 44.

<sup>34</sup> *AWB* at paragraph 215 referring to *Kearney* at 64.

<sup>35</sup> *Propend Finance* at 553.

<sup>36</sup> (1998) 4 QAR 446 (*Murphy*).

<sup>37</sup> *Murphy* at paragraph 38.

<sup>38</sup> See *Butler v Board of Trade* [1970] 3 All ER 593 at pages 596-597.

<sup>39</sup> See *R v Cox and Railton* (1884) 14 QBD 153 at page 165; *R v Bell: ex parte Lees* (1980) 146 CLR 141 at page 145.

70. As the applicant contests the application of legal professional privilege to the Matter in Issue, the evidentiary onus is on the applicant to demonstrate a *prima facie* case that the communications which are the subject of the claim of privilege were made in furtherance of an illegal or improper purpose.
71. With respect to this issue, the applicant makes submissions including that:
- In the prosecution of the applicant, the Crown misinterpreted the law with respect to perjury in order to protect criminal behaviour. The protection of this criminal behaviour continues (by asserting that legal professional privilege applies in relation to the Matter in Issue).
  - A report of a parliamentary committee, which the applicant claims was protected by parliamentary privilege, was unlawfully used as evidence in prosecuting the applicant.
  - Crown Law should not have been involved in providing the relevant advice for the reasons set out above.
72. The issue for determination is whether there is *prima facie* evidence that the relevant communications were made in preparation for, or in furtherance of an illegal or improper purpose.
73. I have carefully considered the Matter in Issue and the applicant's submissions and evidence. On the information available to me, I am satisfied that:
- The communications which are the subject of this review relate to Crown Law advice in relation to the applicant's First Petition.
  - The advice was sought by the Governor for the purpose of determining whether a pardon should be granted.
  - There is no evidence before me which supports the applicant's submission that relevant communications were made in preparation for, or in furtherance of, an illegal or improper purpose.
74. For the reasons set out above, I am satisfied that the illegal or improper purpose exception to the application of legal professional privilege is not made out in the circumstances.

## **DECISION**

75. For the reasons set out above, I affirm the Deemed Decision.
76. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

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**Assistant Commissioner Henry**  
**Date: 21 January 2009**

**ANNEXURE A**

<b>Category A Matter</b>	
<b>Page numbers</b>	<b>Description</b>
953 – 950	Correspondence
949	Ministerial Correspondence Request
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892	Ministerial Correspondence Request
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832 – 831	Correspondence
794	Ministerial Correspondence Request
793	Correspondence
681 – 678	Facsimile transmission
504	Ministerial Correspondence Request
503	Correspondence

<b>Category B Matter</b>	
<b>Page numbers</b>	<b>Description</b>
1912 – 1908	File notes
1189	Letter
1189A – 1189B	File notes
1185	(Annotation) Letter BME Solicitors to Crown Law 7 September 2000
1184 – 955	Memorandum
954	Annotation
948 – 940	Memorandum
909 – 893	Memorandum
866 – 856	Memo Crown Solicitor to A-G
830 – 795	Memorandum
792 – 754	Memorandum
745 – 739	Draft advice
724 – 719	Draft advice
695 – 690	Draft advice
689 – 686	Draft advice
685 - 684	Facsimile transmission
683	File note
682	Telephone note
677	File note



<b>Category B Matter</b>	
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676	Research notes
648 – 644	Research notes
606	Memorandum (partially)
563 – 541	Research notes
540 – 518	Research notes
517	Correspondence
513	Correspondence
512	Correspondence
501 - 404	Memorandum + attachments

<b>Category C Matter</b>	
<b>Page numbers</b>	<b>Description</b>
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2119 - 2112	Copy affidavit
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2107 – 2105	Copy court order
2104 – 2092	Copy transcript
2091 – 2065	Copy letter + attachments
1188	Copy 1 x page petition for mercy
1187	Copy 1 x page petition for mercy
605	Memorandum (partially)