OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 98007
Application L 20/97

Participants:

NATHAN JOHN HOBDEN
Applicant

IPSWICH CITY COUNCIL
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to investigation of bicycle accident and possible claim for compensation by the applicant against the respondent - whether matter in issue is deliberative process matter falling within the terms of s.41(1)(a) of the *Freedom of Information Act 1992* Qld - whether disclosure of matter in issue would, on balance, be contrary to the public interest - application of s.41(1) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - documents created in the course of investigating the applicant's claim, and communications between the respondent and its insurer about whether to deny liability to compensate the applicant for injury suffered - whether subject to legal professional privilege - whether copies of non-privileged documents made solely for a privileged purpose - application of s.43(1) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.41(1), s.41(1)(a), s.41(1)(b), s.41(2)(b), s.43(1), s.44(1), s.52, s.81

Attorney-General (NT) v Kearney (1985) 158 CLR 500
Attorney-General (NT) v Maurice (1986) 161 CLR 475
Baker v Campbell (1983) 153 CLR 52
Cairns Port Authority and Department of Lands, Re (1994) 1 QAR 663
Commissioner, Australian Federal Police v Propend Finance Pty Ltd (1997) 71 ALJR 327; 141 ALR 545
Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (1993) 1 QAR 60

Grant v Downs (1976) 135 CLR 674
Hewitt and Queensland Law Society Inc, Re (Information Commissioner Qld, Decision No. 98005, 24 June 1998, unreported)
Little and Department of Natural Resources, Re (1996) 3 QAR 170
National Employers Mutual General Insurance Association Ltd v Waind & Anor (1979) 24 ALR 86
Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd (1985) 3 NSWLR 44
Pemberton and The University of Queensland, Re (1994) 2 QAR 293
Smith and Administrative Services Department, Re (1993) 1 QAR 22
Trade Practices Commission v Sterling (1979) 36 FLR 244
Trustees of the De La Salle Brothers and Queensland Corrective Services Commission, Re (1996) 3 QAR 206
Waterford v Commonwealth of Australia (1987) 163 CLR 54
Willsford and Brisbane City Council, Re (Information Commissioner Qld, Decision No. 96017, 27 August 1996, unreported)

DECISION

I set aside the decision under review (which is identified in paragraph 4 of my accompanying reasons for decision). In substitution for it, I decide that the matter remaining in issue in this review (which is identified in paragraph 10 of my accompanying reasons for decision) is not exempt from disclosure to the applicant under the *Freedom of Information Act 1992* Qld.

Date of decision: 25 June 1998

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse him access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to certain documents relating to the applicant's claim for compensation for injury suffered when the applicant allegedly was thrown from his bicycle as he was riding over an uneven footpath surface. The respondent contends that the matter remaining in issue is exempt matter under s.41(1) (the deliberative process matter exemption) or s.43(1) (the legal professional privilege exemption) of the FOI Act.

2. By letter dated 24 March 1997, Cervetto and Co, Solicitors, acting on behalf of the applicant, made an FOI access application to the Ipswich City Council (the Council) in the following terms:

> *1. We act on behalf of the above (Mr Hobden) in relation to injuries he sustained on Tuesday 19 November 1996 at about 6.00 pm on the foot path in front of Mrs O'Reilly's home at 15 School Street, Rosewood.*
>
> *2. We make application under the Freedom of Information Legislation for all documents which the Council holds relevant to the matter.*
>
> *3. The documents relevant to the matter would include:-*
> *(a)Any documents relevant to the investigation of the matter;*
> *(b) Any documents relevant to the repair of the foot path which was undertaken on 25 November 1996;*
> *(c) Any submission made to Councillor Pahlke in relation to the matter between 19 November 1996 and 25 November 1996; and*

(d) All documents in relation to File No. 45-PL-641: PO'L:LLB (Phil O'Leary).

3. By letter dated 2 May 1997, Mr C Simpson, the Council's Records Manager, informed the applicant that he had identified 59 folios falling within the terms of the FOI access application, and that he had decided to -

(a) grant access to 12 folios;
(b) refuse access to 11 folios which he found to be exempt under s.41(1) of the FOI Act; and
(c) refuse access to 36 folios which he found to be exempt under s.43(1) of the FOI Act.

4. By letter dated 19 May 1997, Cervetto and Co, on behalf of the applicant, applied to the Council for internal review of Mr Simpson's decision, in accordance with s.52 of the FOI Act.
By letter dated 13 June 1997, Mr N Craswell, the Council's Deputy Chief Executive Officer, conveyed to the applicant his internal review decision. Mr Craswell decided to give the applicant access under the FOI Act to six of the folios to which Mr Simpson had refused access under s.41(1) of the FOI Act (being correspondence between the Council and the applicant's mother, Mrs K Hobden, dated 26 and 28 November 1996), but otherwise
Mr Craswell affirmed Mr Simpson's initial decision.

5. By letter dated 8 July 1997, Cervetto and Co, on behalf of Mr Hobden, applied to me for review, under Part 5 of the FOI Act, of Mr Craswell's decision.

External review process

6. Copies of documents falling within the terms of the relevant FOI access application have been obtained from the Council and examined. It appears that the applicant, then aged 16, was injured on 19 November 1996 when he fell from his bicycle while riding on the footpath outside 15 School Street, Rosewood. The applicant's mother, Mrs Kerry Hobden, wrote to the Council on 26 November 1996, describing what had happened and asking what the Council intended to do about it. The Financial Operations Manager of the Council then notified the Queensland Local Government Mutual Liability Pool (the insurer) of a possible claim. On the same day, the Financial Operations Manager also sought a report on the incident from a Council officer. A report was prepared by the Council officer and a copy was provided to the insurer. The insurer subsequently engaged a loss assessor to prepare a report.
The insurer ultimately wrote to the applicant's solicitors on 1 April 1997 denying liability, on behalf of the Council, for payment of compensation to the applicant.

7. The documents in issue include correspondence between the Council and the insurer, copies of correspondence from Mrs Hobden to the Council, and from the insurer to the applicant, and a report and draft Statement by a Council officer. In addition, there are in issue a number of documents which record exchanges between Councillor Pahlke and the Council officer responsible for dealing with public liability insurance claims, Mr Phil O'Leary, in relation to the incident. It appears that Councillor Pahlke kept a watching brief in respect of this matter on behalf of his constituents.

8. On 6 November 1997, a member of my staff convened a conference with Mr Simpson and Mr O'Leary of the Council, in order to discuss each document claimed to be exempt, and Council's procedures for dealing with complaints of injury. Under cover of a letter dated 12 December 1997, the Council provided a schedule which particularised the exemption provision relied upon in respect of each document in issue, together with an affidavit of Philip Lawrence O'Leary sworn 9 December 1997, which described the Council's procedures for dealing with public liability insurance claims received by the Council.

9. By letter dated 11 March 1998, I informed the Council of my preliminary view that none of the documents in issue appeared to qualify for exemption under either s.41(1) or s.43(1) of the FOI Act. By letter dated 25 March 1998, the Council advised that it was prepared to withdraw its objection to the disclosure of some folios, and parts of folios, from Councillor Pahlke's file. That material has since been disclosed to the applicant, and it is no longer in issue in this external review. The Council's letter dated 25 March 1998 also set out arguments in support of its claims for exemption in respect of the matter remaining in issue. A copy of that submission was provided to the applicant, whose solicitors lodged a submission in response dated 29 April 1998. The Council was given the opportunity to lodge a reply to the applicant's written submission, but did not take advantage of that opportunity.

10. Following the concessions made by the Council, the matter remaining in issue comprises:

Folio No.	Date	Description	Exemption claimed
Council's Insurance file			
A7-11	29/11/96	Copy of letter, Mrs Hobden to Council, with attachments	s.43(1)
A12-13	29/11/96	Copy Notification Form to insurer	s.43(1)
A14	29/11/96	Letter, Council to insurer attaching original notification form and copy letter	s.43(1)
A15	29/11/96	Memorandum, Financial Operations Manager, to Roads and Drainage Manager	s.43(1)
A16		Copy of A18, unsigned	s.43(1)
A17		Photographs attached to A18	s.43(1)
A18	9/12/96	Memorandum, District Technical Officer to Financial Operations Manager	s.43(1)
A19	11/12/96	Letter, Council to insurer	s.43(1)
A20	6/12/96	Letter, Councillor Pahlke to Council Chief Executive Officer	s.43(1)
A21	11/12/96	Letter, Council to insurer	s.43(1)
A22		e-mail, P O'Leary to Councillor Pahlke	s.43(1)
A23	11/12/96	Letter, insurer to Council	s.43(1)
A24	16/12/96	Letter, Council to insurer	s.43(1)
A25-27	30/1/97	Letter, Freemans Loss Adjusters to Council, enclosing draft Statement.	s.43(1)
A28	13/4/97	Letter, insurer to Council	s.43(1)
A29	19/3/97	e-mail, P O'Leary to Councillor Pahlke	s.43(1)
A30	20/3/97	Letter, Council to insurer	s.43(1)
A31	1/4/97	Copy letter, insurer to Cervetto & Co	s.43(1)
A32	1/4/97	Letter, insurer to Council	s.43(1)
District Engineer's file			
E6-7		Duplicate of A10-11	s.43(1)
E8		Duplicate of A20	s.43(1)
E9		Duplicate of A16	s.43(1)
Councillor Pahlke's file			
P13	6/12/96	Last two paragraphs of letter, Councillor Pahlke to Council's Chief Executive Officer	s.41(1)
P15	9/12/96	Last paragraph of memorandum, District Technical Officer to Financial Operations Manager	s.41(1)
P17	13/4/97	Final two sentences in third paragraph, and the whole of fourth paragraph, in letter from insurer to Council	s.41(1)
P18	19/3/97	Fourth last paragraph of e-mail, P O'Leary to Councillor Pahlke	s.41(1)

11. I note that, pursuant to s.81 of the FOI Act, the Council has the onus of establishing that the decision under review was justified, or that I should give a decision adverse to the applicant.

Application of s.41(1) of the FOI Act

12. The Council contends that the matter remaining in issue in documents from Councillor Pahlke's file is exempt matter under s.41(1) of the FOI Act, which provides:

> ***Matter relating to deliberative processes***
>
> ***41.(1)*** *Matter is exempt matter if its disclosure—*
>
> *(a) would disclose—*
>
> *(i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or*
>
> *(ii) a consultation or deliberation that has taken place;*
>
> *in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and*
>
> *(b) would, on balance, be contrary to the public interest.*
>
> ***(2)*** *Matter is not exempt under subsection (1) if it merely consists of—*
>
> *(a) matter that appears in an agency's policy document; or*
>
> *(b) factual or statistical matter; or*
>
> *(c) expert opinion or analysis by a person recognised as an expert in the field of knowledge to which the opinion or analysis relates.*

13. A detailed analysis of s.41 of the FOI Act can be found in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60, at pp.66-72, where, at p.68 (paragraphs 21-22), I said:

> *21. Thus, for matter in a document to fall within s.41(1), there must be a positive answer to two questions:*
>
> *(a) would disclosure of the matter disclose any opinion, advice, or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, (in either case) in the course of, or for the purposes of, the deliberative processes involved in the functions of government? and*
>
> *(b) would disclosure, on balance, be contrary to the public interest?*
>
> *22. The fact that a document falls within s.41(1)(a) (ie. that it is a deliberative process document) carries no presumption that its disclosure would be contrary to the public interest. ...*

Application of s.41(1)(a)

14. Folios P13, P15, P17 and P18 were initially claimed by the Council to be exempt in full under s.41(1) of the FOI Act. However, the Council accepted my preliminary view (conveyed in my letter dated 11 March 1998) that most of the matter contained in those folios consisted merely of factual matter, which was excluded from eligibility for exemption under s.41(1) of the FOI Act by the terms of s.41(2)(b) of the FOI Act. That matter has since been disclosed to the applicant: see paragraph 9 above. The Council has, however, maintained a claim for exemption under s.41(1) in respect of those segments of the documents which are framed in terms of expressing an opinion, advice, or recommendation.

15. Folio P13 is a letter from Councillor Pahlke to the Chief Executive Officer of the Council. The matter in issue in folio P13 can be characterised as Councillor Pahlke's opinion about the way the Council should handle the applicant's claim for compensation. I have some doubts as to whether it was prepared for the purposes of the deliberative processes of the Council. It is more in the nature of a representation from a Councillor, on behalf of constituents, that proper action be taken.
Nevertheless, I will consider below whether disclosure of the matter in issue in folio P13 would, on balance, be contrary to the public interest.

16. The matter in issue in folio P15 is the conclusion expressed in a report concerning the footpath outside 15 School Street, Rosewood, made by the Council's District Technical Officer. One finding recorded in the report (in a part previously disclosed to the applicant) was that there was an 8mm difference between the height of two concrete slabs. The conclusion to the report comments on the significance of that finding. I am satisfied that the conclusion constitutes opinion prepared for the purposes of the deliberative processes of the Council in deciding its response to Mrs Hobden's letter dated 26 November 1996, and hence that it falls within the terms of s.41(1)(a) of the FOI Act.

17. Folio P17 is a letter from the insurer to the Council. The matter in issue in folio P17 comprises comment by the insurer on the significance of the 8mm height difference, as part of a discussion as to what should be the Council's response to Mrs Hobden's letter dated 26 November 1996. I find that the matter in issue in folio P17 falls within the terms of s.41(1)(a) of the FOI Act.

18. The relevant part of folio P18 is a copy of an e-mail message to Councillor Pahlke from Mr O'Leary, the Council officer responsible for processing public liability insurance claims. The matter in issue in folio P18 comprises one sentence which, again, comments on the significance of the 8mm height difference. However, in this instance, the information appears to have been provided to Councillor Pahlke, not for the purposes of the deliberative processes of the Council, but merely for the sake of providing information to a Councillor who had made representations on behalf of a constituent. I therefore find that the matter in issue in folio P18 does not fall within the terms of s.41(1)(a) of the FOI Act, and hence does not qualify for exemption under s.41(1) of the FOI Act. (In light of that finding, it is not necessary for me to consider the application of s.41(1)(b) to the matter in issue in folio P18. However, since the information in issue in folio P18 is, in substance, identical to the information in issue in folios P15 and P17, I have dealt with folio P18 when considering the application of s.41(1)(b) to the matter in issue in folios P15 and P17.)

Application of s.41(1)(b)

19. An applicant for access is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; an applicant is entitled to access unless an agency can establish that disclosure of the relevant deliberative process matter would be contrary to the public interest. In *Re Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (1996) 3 QAR 206, I said (at p.218, paragraph 34):

> *The correct approach to the application of s.41(1)(b) of the FOI Act was analysed at length in my reasons for decision in* Re Eccleston, *where I indicated (see p.110; paragraph 140) that an agency or Minister seeking to rely on s.41(1) needs to establish that specific and tangible harm to an identifiable public interest (or interests) would result from disclosure of the particular deliberative process matter in issue. It must further be established that the harm is of sufficient gravity when weighed against competing public interest considerations which favour disclosure of the matter in issue, that it would nevertheless be proper to find that disclosure of the matter in issue would, on balance, be contrary to the public interest.*

20. In a written submission on behalf of the Council dated 25 March 1998, Mr Craswell contended:

> *With regard to public interest considerations, both Mr Simpson and I considered the weight of the public interest of the (approx) 130,000 people Ipswich City Council represents in ensuring that the Council avoids loss in a matter of litigation to far outweigh the interest of a single party. Council has an obligation to the people it serves to ensure that public monies are not wasted; and, therefore, our responsibility lies with protection of their interests.*
>
> ...
>
> *Council, in having an obligation to the people it represents, has a right to create and collate documents to defend a possible litigation.*

21. The matter claimed to be exempt in folios P15, P17 and P18 comprises comment on the significance (for the applicant's claim for compensation) of the 8mm height difference between two concrete slabs outside 15 School Street, Rosewood. The substance of that information has already been disclosed to the applicant, in a letter dated 1 April 1997 from the insurer to the applicant's solicitors. In other words, the relevant deliberative process (to which the matter in issue was contributed) has been finalised, and the outcome of that deliberative process has been communicated to the applicant in a letter which also disclosed the substance of the matter in issue. For that reason alone, I am not satisfied that disclosure, under the FOI Act, of the matter claimed to be exempt in folios P15, P17 and P18 would be contrary to the public interest, and I find that it does not qualify for exemption under s.41(1) of the FOI Act.
Even if the information had not been previously disclosed, I would not have been satisfied that its disclosure under the FOI Act would, on balance, have been contrary to the public interest, having regard to the considerations discussed in paragraphs 23-28 below.

22. The matter in issue in folio P13, being Councillor Pahlke's opinion as to how the applicant's claim for compensation should be dealt with by the Council, might conceivably be construed as adverse to the position taken by the Council. However, it must be remembered that Councillor Pahlke is not an officer of the Council with expertise in the area of footpath construction or bicycle accidents. As I have indicated earlier, the letter appears to have been written in his capacity as a representative of his constituents, to ensure proper action was taken in respect of a claim made by one of his constituents. I do not consider it likely that a court would regard the opinions expressed in the matter in issue in folio P13 as relevant to the determination of any issue concerning the prospective liability of the Council. A court might regard the facts on which Councillor Pahlke's opinions were based as relevant, but those facts have already been disclosed to the applicant in another part of folio P13, which has already

been released to the applicant. I am, therefore, not satisfied that disclosure of the matter in issue in folio P13 would cause any detriment to the Council in any legal proceedings that might be initiated by the applicant; and I am not aware of any other ground on which it might be contended that disclosure of the matter in issue in folio P13 would be contrary to the public interest.

23. In any event, I do not accept that it would necessarily be contrary to the public interest for a local government authority to disclose to a citizen who has suffered injury, allegedly as a result of an unsafe footpath, information concerning the authority's maintenance and inspection of the relevant footpath, or information explaining the basis on which the authority refuses to accept liability for injury or damage claimed to have been suffered by the citizen. Indeed, it seems to me that there is a public interest consideration favouring disclosure to the applicant of the matter in issue in folios P13, P15, P17 and P18, according to the principles which I stated in *Re Willsford and Brisbane City Council* (Information Commissioner Qld, Decision No. 96017, 27 August 1996, unreported) at paragraphs 15-18.

24. In that regard, the Council was incorrect in asserting (in its written submission dated 25 March 1998) that the principles from *Re Willsford* only apply where the respondent agency, which holds documents that may be relevant to the issue of whether a legal remedy is available to an applicant or is worth pursuing, is a non-involved third party. That happened to be the factual position in *Re Willsford* itself, but the principles in *Re Willsford* are also applicable where the respondent agency is a potential defendant in legal proceedings, or potential respondent in some less formal procedure for seeking a remedy (e.g., lodging a complaint to a 'watchdog' or regulatory body). That should have been apparent from the references, in paragraph 16 of *Re Willsford*, to *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 at pp.713-714 (paragraphs 103-104), p.717 (paragraph 120), and p.723 (paragraph 142), where I applied similar principles in a situation where the respondent agency was a potential defendant in legal proceedings.

25. With respect to the public interest balancing test in s.41(1)(b), the applicant's solicitors submitted:

> ...
>
> *2. The Council's argument for exemption under the Act is based on two propositions, namely public interest and legal professional privilege.*
> *In his correspondence to yourself dated 25 March 1998, Mr Craswell reveals what we would suggest is a highly skewed understanding of the former. He states that as the Council represents 130,000 people and Nathan Hobden is a mere individual, the greater good is served by any course that serves the interest of the majority. The interest of the majority in this matter, he argues, lies in the protection of the Council's interests (apparently regardless of the justice of the case) by ensuring that public monies are not "wasted" presumably by the admission of, investigation into or potential judicial determination of the matter of liability.*
>
> *3. The Act clearly envisages a broader meaning for public interest than that propounded by Mr Craswell. Section 5, which outlines the reasons for enactment, states unequivocally that public interest is served by enhancing a government's accountability and that the community should be kept informed of government's operations, in particular the*

rules and practices followed by government in its dealings with members of the community. Exemption is granted under Section 41(1)(b) in circumstances where public interests are prejudiced. It is difficult to see how public interest is served by the Council's refusal to allow access to documentation that is fundamental to a fair and just investigation of the matter of liability. If the Council has arrived at its position of denial of liability honestly, then an examination of its supporting evidence should prove no threat. Public interest is surely not advanced by a governing body that evades its responsibility and justifies its stance on the basis of protection of revenue. That
Mr Craswell speaks of the Council being found liable in terms of monies "wasted" suggests to us a highly biased and cynical view of public liability claims.

4. *Further, in his response to your initial determination regarding this matter, Mr Craswell distinguished the present case from that of your decision number 96017* Re Willsford and Brisbane City Council *on the basis that in the latter the Council was a non-involved third party and that apparently, therefore, the "relevance to the matter under review is lost". We would argue that this conclusion has been reached less through a careful examination of the FOI issues involved in both cases than through Mr Craswell's conviction that public interest and Council interest are irrevocably bound. In* Re Willsford *it was held that it should be sufficient to found the existence of a public interest consideration favouring disclosure of information held by an agency if an applicant can demonstrate that:-*

   (a) Loss or damage or some kind of wrong has been suffered in respect of which a remedy is, or may be, available under the law;
   (b) The applicant has a reasonable basis for seeking to pursue the remedy; and
   (c) Disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available, or worth pursuing.

5. *The only public consideration Mr Craswell has offered to weigh against disclosure is the possible diminution of Council coffers. The remarks of Mason CJ in* Attorney-General (NSW) -v- Quin *(1990) 64 ALJR 327 seem particularly apposite "the public interest necessarily comprehends an element of justice to the individual". Thus, as was observed in*
Re Eccleston and Department of Family Services *"there is a public interest in individuals receiving fair treatment in accordance with the law in their dealings with government, as this is an interest common to all members of the community. Similarly, the fact that individuals and corporations have, and are entitled to pursue, legitimate private rights and interests can be given recognition as a public interest consideration worthy of protection, depending on the circumstances of any particular case".*

> *6.* *In* Re Willsford *it is stated that the greater the magnitude of the loss, damage or wrong and/or the stronger the prospects of successfully pursuing an available remedy in respect of the loss, damage or wrong, then the stronger would be the weight of the public interest consideration favouring disclosure which is to be taken into account in the application of a public interest balancing test incorporated in an exemption provision of the* Freedom of Information Act. *In this regard, to demonstrate the strength of Nathan Hobden's case, we would tender:-*
>
> > *(a)* *The letter from Mr Pahlke to Mr Quinn in which he makes mention of the Council's inaction to repair a reported footpath fault back in July and that he personally followed up as to the completion of the action on no less than three or four occasions. Further, Mr Pahlke states that there is some onus on Council for the length of time this footpath has taken to be repaired.*
>
> ...

26. I agree with the broad thrust of the submissions made by the applicant's solicitors. The public interest in acting fairly in the interests of the ratepayers of the Council as a whole is not incompatible with the public interest in acting fairly in the interests of an individual who has suffered injury, and who may or may not have a good cause of action against the Council for compensation for that injury. The public interest in not wasting funds levied from the Council's ratepayers is not entitled to paramountcy over the public interest in ensuring that the Council fairly compensates any person to whom it has incurred a legal liability. The greater public interest lies in ensuring that individuals receive fair treatment in accordance with the law in their dealings with government (see *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at pp.376-377, paragraph 190). Like the public interest in safeguarding the privacy of individuals (which is the rationale for the exemption provision in s.44(1) of the FOI Act), the public interest in individuals receiving fair treatment in accordance with the law in their dealings with government is an interest common to all members of the community, and for their benefit, even though it ordinarily applies for the benefit of particular individuals in particular cases (*cf. Re Little and Department of Natural Resources* (1996) 3 QAR 170 at p.186, paragraph 48; p.188, paragraph 52).

27. I therefore consider that the Council's contention, set out at paragraph 20 above, is misconceived. It is correct that the Council has an obligation to its ratepayers and the people it serves to ensure that public monies are not wasted. But that does not mean that the public interest necessarily favours withholding of relevant information from a person who potentially has a legal entitlement to compensation from the Council. In such circumstances, the relevant duty of the Council would be more correctly described as a duty to ensure that a claimant receives no more than the claimant's proper entitlement (if any) to compensation under the applicable law. The principles stated in *Re Willsford* do, in my view, apply in the circumstances of this case, and give rise to a public interest consideration favouring disclosure of the matter in issue, which is to be weighed in the balance with other relevant public interest considerations telling for or against disclosure.

28. It is possible that disclosure of some kinds of information created or collated by the Council to defend possible litigation could be contrary to the public interest; e.g., information evidencing the fraudulent nature of a claim, premature disclosure of which might negate a strategic or forensic advantage in deploying the information in the most appropriate manner to ensure that Council funds are not wasted. However, I am not satisfied that disclosure of the matter in issue in folios P13, P15, P17 and P18 would conflict with the Council's duties to the people it serves, or would otherwise, on balance, be contrary to the public interest, and I therefore find that it does not qualify for exemption under s.41(1) of the FOI Act.

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

29. The Council claims that 30 folios (A7-A32 and E6-E9) are exempt under s.43(1) of the FOI Act, which provides:

> ***43.(1)*** *Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.*

30. The s.43(1) exemption turns on the application of those principles of Australian common law which determine whether a document, or matter in a document, is subject to legal professional privilege.
The grounds on which a document can attract legal professional privilege are fairly well settled in Australian common law. In brief terms, legal professional privilege attaches to confidential communications between lawyer and client for the sole purpose of seeking or giving legal advice or professional legal assistance, and to confidential communications made for the sole purpose of use, or obtaining material for use, in pending or anticipated legal proceedings (see *Re Smith and Administrative Services Department* (1993) 1 QAR 22 at pp.51-52 (paragraph 82), which sets out a summary of the principles established by the High Court authorities of *Grant v Downs* (1976) 135 CLR 674, *Baker v Campbell* (1983) 153 CLR 52, *Attorney-General (NT) v Kearney* (1985) 158 CLR 500, *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, and *Waterford v Commonwealth of Australia* (1987) 163 CLR 54). There are qualifications and exceptions to that broad statement 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 principles with respect to waiver of privilege (see *Re Hewitt and Queensland Law Society Inc* (Information Commissioner Qld, Decision No. 98005, 24 June 1998, unreported) 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) 71 ALJR 327; 141 ALR 545).
However, none of those exceptions or qualifications requires any detailed consideration in the present case.

31. Copies or originals of many of the documents in issue (folios A7-11, A16-18, A20, A28-29, A31 and E6-8) have already been disclosed to the applicant (in some instances, subject to deletion of matter which was claimed to be, but which I have found is not, exempt matter under s.41(1) of the FOI Act). Subject to the consideration addressed in paragraph 43 below, those documents lack the necessary element of confidentiality for a claim of legal professional privilege to be maintained as against the applicant. If any of those documents attracted legal professional privilege in the first place, the privilege would certainly have been waived by intentional disclosure to the applicant (see *Re Hewitt* at paragraph 19), but for reasons explained below, I am not satisfied that any of the documents in issue have ever attracted legal professional privilege.

32. Some of the documents in issue are communications between Mr O'Leary and Councillor Pahlke (folios A20, A22, A29, E8). From my examination of those documents, it is clear that they were either -

(a) created by Councillor Pahlke for the purpose of making representations on behalf of his constituents as to how the Council should deal with the applicant's claim; or

(b) created by Mr O'Leary for the purpose of informing Councillor Pahlke of the progress made in dealing with the applicant's claim.

They are not communications of a kind, or made for a purpose, which attracts legal professional privilege. The same is true of folios A7-11 and E6-7, which are duplicates of correspondence to the Council from the applicant's mother (who was writing on the applicant's behalf), and true also of folio A31, which is a copy of a letter from the insurer to the applicant's solicitor, denying liability to compensate the applicant.

33. The balance of the documents in issue consists of correspondence between the Council and the insurer (or the loss assessor retained by the insurer to assist it), or of internal Council memoranda relating to the applicant's accident and claim for compensation. None of the documents is a communication between the Council, as client, and a professional legal adviser.
In fact, there is no indication, on the material before me, that either the Council or the insurer has ever retained or instructed a professional legal adviser to provide legal advice or professional legal assistance in connection with the applicant's claim for compensation. Those documents all appear on their face to have come into existence for the initial purpose of notifying the insurers of a potential claim, and thereafter of enabling the Council and the insurer to assess whether to admit or deny liability for any injury suffered in the accident. The only established category of privilege into which the correspondence passing between the Council and the insurer (or its loss assessor) could conceivably fall is category (f) identified by Lockhart J in *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at p.246:

> *(f) Communications passing between the party* [in the circumstances of this case, the Council] *and a third person (who is not the agent of the solicitor to receive the communication from a party) if they are made with reference to litigation either anticipated or commenced, and at the request or suggestion of the party's solicitor; or, even without any such request or suggestion, if they are made for the purpose of being put before the solicitor with the object of obtaining his advice or enabling him to prosecute or defend an action. ...*
> (Case citations omitted)

34. However, to attract legal professional privilege, the purpose referred to in the quoted passage must have been the sole purpose for which the relevant communications were made: see *Grant v Downs* at p.688; *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44 at p.52. Likewise, the documents in issue comprising internal Council memoranda relating to the applicant's accident and claim for compensation would attract legal professional privilege only if they were brought into existence for the sole purpose of submission to legal advisers for obtaining advice or professional legal assistance, or for use in pending or anticipated legal proceedings.

35. On the material before me, the 'sole purpose' test is not satisfied. In his affidavit sworn 9 December 1997, Mr O'Leary said:

> ...
>
> *2. My duties ... include the responsibility for processing public liability insurance claims received by Council.*
>
> *3. Public liability insurance claims are, generally, received through normal mail delivery by Council's Records Section and are forwarded to me via my supervisor, the Financial Operations Manager, for processing.*
>
> *4. On receipt of a written claim (or written advice that could potentially lead to a claim):*
>
> *(a) the Financial Operations Manager calls for a report from a relevant officer, the report forms part of Council's litigation strategy, to assist in defence of a possible litigation;*
>
> *(b) receipt of the claim is acknowledged to the claimant;*
>
> *(c) a notification form is completed and forwarded to Council's insurers.*
>
> *5. Officer's reports of incidents are forwarded to Council's insurers.*
>
> *6. In all matters involving insurance claims, or possible claims, documentation relating to the claim is prepared and collated on the assumption that the matter could proceed to litigation.*

36. In a letter to me dated 12 December 1997, Mr Craswell stated:

> *I advise that once a matter is referred to the insurers, further referral to solicitors is a decision for the insurers, but as indicated in the affidavit*
> [of Mr O'Leary], *documentation in these matters is prepared on the assumption that the matter could proceed to litigation.*

37. Both Mr Craswell's statement and Mr O'Leary's affidavit confirm what is apparent on the face of the documents themselves, i.e., that the primary purpose for the creation of the documents now under consideration was to enable the Council and its insurer to assess whether they should accept or deny liability in respect of the applicant's claim for compensation, and that possible submission of the documents to a solicitor for use in respect of anticipated litigation (which was a choice for the insurer rather than the Council itself) was at best a secondary or contingent purpose, but certainly not the sole purpose for the creation of the documents.

38. Indeed, it is not clear on the material before me that matters had proceeded so far as to justify a finding that, at the time the documents now under consideration were created, litigation was reasonably anticipated. (The test is an objective one, to be judged according to the circumstances shown to exist at the time the document in issue was created: see *Grant v Downs* at p.682, *Nickmar* at p.55.) Mrs Hobden's letter did not expressly threaten litigation.
It merely asked what the Council was going to do in respect of the injuries suffered by the

applicant. If the Council had responded in a fashion acceptable to the applicant, there would probably have been no question of litigation arising. Presumably, the Council would contend that any claim for compensation carries an implicit threat of litigation if the claim is rejected, and that this is sufficient to warrant a finding that litigation was reasonably anticipated at the time the Council and the insurer were investigating the accident and assessing whether to accept or deny liability. I do not need to express a concluded view on that issue because, even if litigation was reasonably anticipated at the time of their creation, the documents in issue do not satisfy the 'sole purpose' test.

39. Some of the documents (in particular folios A15-19, which have about them the flavour of routine reports such as would be made by any institution or corporation relating to an occurrence of the kind that befell the applicant so as to inform itself, and/or its insurer, of the circumstances in which it occurred) are analogous in their general character to the ones considered by the High Court of Australia in *Grant v Downs* (see paragraph 42 below), and the rest are analogous to those considered by the High Court in *National Employers Mutual General Insurance Association Ltd v Waind & Anor* (1979) 24 ALR 86.

40. In my letter to the Council dated 11 March 1998, I adapted segments of the following passages from the judgment of Mason J in *Waind's* case (at pp.90-92), to illustrate how the 'sole purpose' test applies to the documents which are now under consideration (the square brackets signify my paraphrasing):

> *The appellant says that the business of a* [public liability] *insurer stands in a very special category.*
>
> *... The appellant submits that ... the written claim is to be likened to a summons or originating process. The comparison cannot be sustained. It is the* [originating process filed in court] *that commences proceedings for an award of* [damages in negligence]. *Accordingly, on receipt of the written claim it is necessary for the* [Council], *and consequently the insurer, to decide whether it will pay compensation or deny liability. Ordinarily that decision will be made before the* [injured person] *commences proceedings by filing an* [originating process].
>
> ...
>
> *... In this instance again, documents are brought into existence to enable the appellant to decide what it will do. In this situation, if the appellant decides to* [deny liability], *litigation is likely to ensue. 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.*
>
> *... the appellant contends ...* [that, if], *on the facts, the documents are brought into existence for the dual purpose of deciding what it will do and for use in litigation by legal advisers when appropriate, that purpose should be considered as one purpose which, including as it does submission to legal advisers, would attract the relevant head of privilege. That is the argument.*
> *Unfortunately for the appellant, it is an argument which runs headlong into* Grant v Downs. *As Glass JA observed in the Court of Appeal when he applied the remarks of Stephen, Mason and Murphy JJ in* Grant v Downs *...:* "If the purpose which actuates the party who commissions documents is not single but

> multiple each must be identified. Unless all of them fall within the protected group of purposes, namely submission to legal advisers or use in litigation, no privilege attaches." *The argument ...* [also] *fails to satisfy the test proposed by Jacobs J (CLR at 692; ALR at 591): Does the purpose of supplying the material to the legal adviser account for its existence?*

41. I should, for the sake of completeness, deal with two further arguments raised by Mr Craswell in his written submission on behalf of the Council dated 25 March 1998:

> *(a) If these documents are released Council would be forced to place itself in the difficult situation where we could not call for reports to assist in defence of a possible future litigation for fear of such a report being accessible to the other side in litigation. Such matters are often drawn out and Council's position may be compromised if adequate reporting of the situation at the time of the event had not occurred.*
>
> *(b) I still contend that documents prefixed A & E listed in the schedule ... were created or collated for the sole purpose of defending a litigation. ...*
> *I request that, regardless of duplicates of the same documents as those in the A & E series of documents existing elsewhere and possibly being released, you consider a principle that the documents in those series were created for the sole purpose of defending a litigation and should not be released ...*

42. The first argument refers to an allegedly difficult situation faced by the Council, but, with respect, it is one with which any body corporate, whether in the private or public sectors, has had to deal since the High Court's 1976 decision in *Grant v Downs*. In that case, Stephen, Mason and Murphy JJ described (at p.689) the documents they were considering as having about them "*a flavour of routine reports such as would be made by any institution or corporation relating to an occurrence of the kind that took place* [the death of a psychiatric patient after admission to a government institution] *so as to inform itself of the circumstances in which the death of the patient occurred and with a view to disciplinary action and the reform of any procedures that might be found to be defective.*" Those documents did not satisfy the 'sole purpose' test to attract legal professional privilege, which test was explained by Stephen, Mason and Murphy JJ in these terms (at pp.686-688):

> *... These difficulties are magnified in cases when privilege is claimed by a corporation, whether it be a statutory authority or a company, because the corporation conducts its business through servants, brings into existence voluminous records and institutes systematic standing procedures calling for the preparation of reports and other documents which may serve a variety of purposes, included in which is the submission of documents to a solicitor for the purpose of obtaining legal advice, or for use in existing or anticipated litigation.*
>
> *With the advent of large corporations, documents necessarily proliferate; the knowledge of servants of the corporation is, in legal theory, the knowledge of the corporation itself but will only become so in fact when communicated to that corporation. It is in the course of converting legal theory into fact that corporations require their servants to furnish to management reports of activities known only, in the first instance, to the servants. Hence the proliferation of documents.*

An individual seeking legal advice cannot be required to disclose the information he communicated to his legal adviser nor the nature of the advice received; nor may the legal adviser disclose it. However, a litigant is, of course, bound to disclose his own knowledge of relevant facts. It would be curious if, because the litigant happens to be a corporation, the rule was for that reason different. Yet it is said that a corporation, necessarily having recourse to documents in the form of reports for the purpose of informing its management of the knowledge of its agents, may claim privilege if one of the purposes of management was to make available such reports to its legal advisers should litigation ensue, the probability or possibility of litigation being anticipated at the time. ...

It is difficult to see why the principle which lies behind legal professional privilege should justify its extension to material obtained by a corporation from its agents with a double purpose. The second purpose, that of arming central management of the corporation with actual knowledge of what its agents have done, is quite unconnected with legal professional privilege; it is but a manifestation of the need of a corporation to acquire in actuality the knowledge that it is always deemed to possess and which lies initially in the minds of its agents. That cannot itself be privileged; quite the contrary. If the party were a natural person or, more accurately, an individual not acting through servants or agents, it would be precisely that knowledge which would be discoverable and the party cannot be better off by being a corporation.
The fact that a second purpose may also be being served, a purpose to which the privilege would extend, does not cover with that privilege information which would otherwise be discoverable.

...

All that we have said so far indicates that unless the law confines legal professional privilege to those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings the privilege will travel beyond the underlying rationale to which it is intended to give expression and will confer an advantage and immunity on a corporation which is not enjoyed by the ordinary individual. It is not right that the privilege can attach to documents which, quite apart from the purpose of submission to a solicitor, would have been brought into existence for other purposes in any event, and then without attracting any attendant privilege. It is true that the requirement that documents be brought into existence in anticipation of litigation diminishes to some extent the risk that documents brought into existence for non-privileged purposes will attract the privilege but it certainly does not eliminate that risk. For this and the reasons which we have expressed earlier we consider that the sole purpose test should now be adopted as the criterion of legal professional privilege.

43. The second argument quoted in paragraph 41 above may have been intended to invoke reliance on one of the principles established by the decision of the High Court of Australia in the *Propend Finance* case, i.e., that legal professional privilege may attach to a copy document, the original of which does not itself attract legal professional privilege, provided the copy was brought into existence solely for the purpose of obtaining or giving legal advice or solely for use in litigation that is pending or reasonably anticipated. It seems to me that there is limited utility for an agency in invoking exemption on that ground, since the agency would be obliged to grant access to the non-

privileged originals (and any other non-privileged copies of them) provided they were (a) in the possession or control of the agency, (b) covered by the terms of the relevant FOI access application, and (c) not exempt from disclosure on other grounds. However, it is possible that an agency may wish to avoid disclosing the contents of a file (or perhaps attachments to a brief to counsel) comprising copies of non-privileged documents that have been copied solely for a privileged purpose, because to do so would disclose its process of selection of material considered relevant for the purpose of submission to legal advisers. In such circumstances, the agency can avail itself of the principle established in the *Propend Finance* case, and I expect that most reasonable applicants would not even wish to challenge a claim for exemption made on that basis, provided the applicant was assured that access had been granted to all non-privileged originals, and non-privileged copies thereof, covered by the terms of the relevant FOI access application.

44. However, the Council's argument fails in the present case because it has not discharged the onus which it carries, under s.81 of the FOI Act, of satisfying me that the documents prefixed A and E in the schedule set out at paragraph 10 above are copy documents that were brought into existence solely for the purpose of obtaining legal advice, or solely for use in litigation that was pending or reasonably anticipated. The documents prefixed A and E were contained on Council files respectively referred to by the Council itself as "Council's Insurance file", and "District Engineer's file". Neither description suggests that the contents of the respective files were created or collated solely for the purpose of submission (by the Council as client) to legal advisers for advice or for use in legal proceedings. Even if I were to accept the assertion in paragraph 6 of Mr O'Leary's statutory declaration (see paragraph 35 above), it would not establish that copy documents on those two files were brought into existence solely for a purpose or purposes which attract legal professional privilege. I remain satisfied that the documents on those two files were brought into existence for multiple purposes, one or more of which were not purposes which attract legal professional privilege, as explained at paragraphs 32-40 above.

45. On the material before me, I am not satisfied that any of the documents claimed by the Council to be exempt under s.43(1) of the FOI Act qualify for exemption under that provision.

Conclusion

46. For the foregoing reasons, I set aside the decision under review. In substitution for it, I decide that the matter remaining in issue (which is identified in paragraph 10 above) is not exempt from disclosure to the applicant under the FOI Act.

…….
F N ALBIETZ
INFORMATION COMMISSIONER