Ellis and Department of Environment
(S 46/98, 20 October 1998, Information Commissioner)

(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)

1.-4. These paragraphs deleted.

REASONS FOR DECISION

Background

5. The applicant seeks review of a decision of the Department of Environment (the Department) to refuse him access, under the FOI Act, to a letter dated 23 October 1997 from the Crown Solicitor to the Department, and the invoice for legal services that it enclosed. The Department initially contended that the matter in issue was exempt under s.43(1) of the FOI Act. At a late stage of this external review, the Department also submitted that the matter in issue was exempt under s.40(c), s.42(1)(a) and s.42(1)(e) of the FOI Act.

6. The applicant is an officer of the Department. He holds the position of Manager, Aboriginal and Torres Strait Islander Cultural Heritage, Cultural Heritage Branch, Conservation Division, although I understand that he currently is acting as a special project officer with the National Parks and Wildlife Service. In September 1997, the applicant was contacted by a group of Aboriginal elders based in Mt Isa, with whom he had had previous contact through his work in the Cultural Heritage Branch. The applicant stated that he considered a number of the group to be personal friends. The group required advice regarding the proposed construction of an electricity transmission line by North Queensland Electricity Corporation Limited (NORQEB) across certain land in respect of which the group had lodged a native title application, and in respect of which some members of the group held a pastoral lease.

7. In a series of meetings/discussions aimed at negotiating (between NORQEB and the Aboriginal group) an agreement for the construction of the transmission line, the applicant (acting in a personal capacity, while on leave from the Department) represented the Aboriginal group. A complaint was made to the Department by a representative of NORQEB regarding the applicant's actions.

8. By letter dated 7 November 1997, the applicant applied to the Department for access, under the FOI Act, to:

... all documents relating to me held by the Department of Environment and to those under the control of or originating from, the Department of the Premier and Cabinet and Crown Law.

The documents that I specifically seek are, but are not limited to, those that relate to any reference to possible Conflict of Interest or Official Misconduct since 1 January 1997.

I understand that the documentation held includes such records as telephone and diary notes including those made by persons who may have been in acting positions at the relevant time.

9. By letter dated 12 January 1998, Ms Rhonda Morse, the Department's Acting Freedom of Information Co-ordinator, advised the applicant that she had located 82 folios in response to his FOI access application. Ms Morse decided to grant the applicant access to 50 folios, but she decided that the remaining 32 folios were exempt from disclosure to the applicant under s.43(1) of the FOI Act. She did not provide the applicant with a description of any of those folios, save to say that, in her opinion, they comprised privileged communications between the Department and its legal advisers. She also indicated that some other documents were excluded from the application of the FOI Act by the operation of s.11A of the FOI Act, which deals with documents of government owned corporations.

10. After inspecting the documents to which he was granted access, the applicant applied (by letter dated 5 February 1998) for internal review of Ms Morse's decision. So far as relevant to the matter which remains in issue in this review, the applicant made the following comments:

An account from Crown Law for the provision of advice on this matter is likewise not identified in your schedule. An account is not a document created solely for the purpose of litigation and I assert that the account should be amongst the documents identified and provided for release in accordance with my request. If your decision not to schedule such a document is made under the provisions of s.43 I believe your decision to be incorrect and I seek to have the decision reviewed. If the document is not among those provided to you, I believe insufficient disclosure has occurred by the person(s) responsible.

11. The then Executive Director (Conservation) of the Department, Mr Boyland, conducted the internal review. By letter dated 19 February 1998, Mr Boyland affirmed Ms Morse's decision that 32 folios were exempt from disclosure under s.43(1) of the FOI Act. Again, the applicant was not provided with a description of those documents. Mr Boyland also responded to the various 'sufficiency of search' issues which the applicant had raised. Copies of some additional documents were provided to the applicant. In respect of the documents claimed to fall within s.11A of the FOI Act, Mr Boyland confirmed Ms Morse's decision that the FOI Act did

not apply to such documents. He further advised that he considered that the applicant was not entitled to receive a description of those documents. With respect to the matter which remains in issue, Mr Boyland stated his decision in the following terms:

> *You have requested a copy of the account provided by Crown Law for the provision of legal advice. In my opinion, the account is a document prepared for this Department by a legal adviser in response to a request from this Department to provide legal advice. Accordingly, the account attracts legal professional privilege and is therefore covered by s.43 of the Act. I therefore consider that this document (consisting of three pages) should not be provided to you.*

12. By letter dated 6 March 1998, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Boyland's decision. He provided me with a summary of the background to his FOI access application and his dispute with the Department.

External review process

13. Copies of the documents then in issue were obtained and examined, including those that the Department contended fell within s.11A of the FOI Act. My office then consulted with the applicant, NORQEB and the Department. As a result of concessions made by the participants, the only documents remaining in issue are the letter and invoice described at paragraph 5 above (which were initially described in the Department's records as "document 1", a description which I will continue to use even though it now constitutes the only document in issue).

14. By letter dated 29 July 1998, I communicated to the Department my preliminary view that document 1 was not exempt from disclosure under s.43(1) of the FOI Act. The Department did not accept my preliminary view and lodged a submission dated 19 August 1998 in support of its position. The Department continued to argue that document 1 was exempt from disclosure under s.43(1) of the FOI Act, but also asserted for the first time that document 1 was exempt under s.40(c) and s.42(1)(a) of the FOI Act, although it provided no substantive arguments in support of the application of those two exemption provisions.

15. When further information in support of its submission was sought from the Department, the Department stated that it did not intend to provide any detailed argument as to how the constituent elements of the tests for exemption under s.40(c) and s.42(1)(a) were satisfied by document 1. It further stated that it objected to the applicant being advised that it had raised the application of s.42(1)(a) of the FOI Act. By letter dated 4 September 1998, I advised the Department that I could not accept its submission on those terms. I stated that procedural fairness ordinarily required that the applicant be informed of the exemption provisions relied on by the Department, and of the substance of the Department's case in support of the application of those exemption provisions to

document 1. I advised the Department that in my formal decision I must, in any event, make findings on the application of the exemption provisions relied upon by the Department. It therefore was not possible to keep confidential, from the applicant, the exemption provisions relied on by the Department. I also advised the Department that I had formed the preliminary view that document 1 did not qualify for exemption from disclosure under either s.40(c) or s.42(1)(a) of the FOI Act.

16. The Department lodged a further submission dated 18 September 1998. With respect to document 1, it was unclear whether the Department continued to rely upon s.40(c) of the FOI Act as a ground of exemption, but the Department now also raised the application of s.42(1)(e). Again, it provided little argument of substance in support of the application of s.42(1)(e). It also continued to rely upon the application of s.42(1)(a) and s.43(1) of the FOI Act.

17. In the interests of expediting finalisation of this case, the applicant subsequently made further concessions, stating that he did not wish to pursue access to some items of information in document 1 (see paragraph 32 below). I will discuss below the application of each of s.43(1), s.40(c), s.42(1)(a) and s.42(1)(e) of the FOI Act to the matter remaining in issue in document 1.

Section 43(1) of the FOI Act

18. Section 43(1) of the FOI Act 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.*

19. 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) 188 CLR 501; 71 ALJR 327).

20. In my recent decision in *Re Murphy and Queensland Treasury (No.2)* (Information Commissioner Qld, Decision No. 98009, 24 July 1998, unreported) at paragraphs 11-26, I examined the application of s.43(1) of the FOI Act to invoices for the cost of legal services performed by the Crown Solicitor for a government agency. A copy of that decision was forwarded to the Department in support of my preliminary view that document 1 did not qualify for exemption under s.43(1) of the FOI Act. The Department responded with the following arguments:

> *With respect to document 1 you have referred this Department to the reasons set out in paragraphs 11 to 26 of* Re Murphy*, and reiterated your preliminary view that document 1 does not comprise exempt matter under s.43(1) of the FOI Act. It appears that your reasoning is based on the principle that legal professional privilege extends only to communications brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings, and you say you have difficulty in accepting that solicitors' bills of costs are brought into existence for this sole purpose. In support of your argument you make the following comment with respect to the case* Packer v Deputy Commissioner of Taxation *[1985] 1 Qd R 275:*
>
> > "All of the cases concerning legal professional privilege and solicitors' bills of costs that were referred to by McPherson J and Shepherdson J predated the High Court's insistence (commencing from *Grant v Downs* in 1976) that relevant communications must satisfy the "sole purpose" test to attract legal professional privilege".
>
> *However in* Packer v DCT*, both McPherson J and Shepherdson J referred to the latest High Court decision on legal professional privilege at the time, namely,* Baker v Campbell *(1983) 49 ALR 385. In particular Shepherdson J said at p257:*
>
> > "The matter of legal professional privilege has been considered recently by the High Court of Australia in two cases - *O'Reilly v Comr of the State Bank of Victoria* (1983) 44 ALR 27; 57 ALJR 130 and *Baker v Campbell*, supra. Some years earlier, in *Grant v Downs* (1976) 135 CLR 674; 11 ALR 577 the High Court held that legal professional privilege was confined to documents which are brought into existence for the sole purpose of their being submitted to legal advisers for advice or for use in legal proceedings. It

> took a similar view in *National Employers' Mutual General Insurance Association Ltd v Waind* (1979) 141 CLR 648; 24 ALR 86."
>
> *Hence there is no evidence to show that either McPherson J or Shepherdson J were not aware of the relevant law on the matter. The fact that they also referred to and made use of decisions which predated* Grant v Downs, *shows that they believed the current law was that solicitors' bills of costs attract privilege.*
>
> *Later on in paragraph 18 of* Re Murphy *you refer to a recent High Court case,* Commissioner Federal Police v Propend Finance Pty Ltd (1997) 71 ALJR 327, *and state that members of the Court affirmed the sole purpose test for legal professional privilege. You then go on in paragraph 19 to say that you have difficulty in accepting that solicitors' bills of costs meet this sole purpose test. However one member of the Court in* Propend Finance, *Gummow J, who acknowledged the existence of the sole purpose test laid down in* Grant v Downs, *later went on to say -*
>
> > "It also is significant, as Beaumont J emphasised in the present case [275] that the privilege extends to any document prepared by a lawyer or client from which there might be inferred the nature of the advice sought or given. Examples include communications between the various legal advisers of the client, draft pleadings, draft correspondence with the client or the other party, and bills of costs [276]." *(the Department's underlining).*
>
> *It seems clear from the case reports that documents such as bills of costs meet the sole purpose test for legal professional privilege under current law.*

21. In *Packer v Deputy Commissioner of Taxation* [1985] 1 Qd R 275, the remarks by McPherson J (at pp.286-287) and Shepherdson J (at pp.295-296) which suggest that solicitor's bills of costs attract legal professional privilege were, in the context of that case, strictly *obiter dicta*, and hence not binding law in Queensland. I do not believe that those remarks correctly state the current position under Australian common law, and I am not prepared to follow them. The approach evident in those remarks was criticised by Pincus J (then of the Federal Court of Australia, now of the Queensland Court of Appeal) in *Allen, Allen & Helmsley v Deputy Commissioner of Taxation* (1988) 81 ALR 617 at p.626 (the relevant passage is reproduced in *Re Murphy (No. 2)* at paragraph 15).

22. The view which I reached in *Re Murphy (No. 2)* was consistent with *obiter* remarks by Andrews SPJ in *Packer's* case at p.281-282 (the relevant passage is reproduced

in *Re Murphy (No. 2)* at paragraph 13). The *obiter* remarks of Andrews SPJ (rather than those of McPherson J and Shepherdson J) have been followed in subsequent Court and Tribunal decisions, as referred to in paragraphs 21-23 of *Re Murphy (No. 2)*. Most notably, the view which I reached in *Re Murphy (No. 2)* was consistent with that stated by Tamberlin J of the Federal Court of Australia in the passage from *Lake Cumbeline Pty Ltd v Effem Foods Pty Ltd* (1994) 126 ALR 58 (at p.68) which is reproduced in paragraph 21 of *Re Murphy (No. 2)*, and which formed part of the *ratio decidendi* of Tamberlin J's judgment.

23. Since my decision in *Re Murphy (No. 2)* was published, I have become aware of another Tribunal decision which supports the view I reached in *Re Murphy (No. 2)*. In *Re Corrs Chambers Westgarth and Legal Aid Commission of Victoria* (1996) 10 VAR 388 at p.402, Mr A Moshinsky QC, sitting as the Presiding Member of the Victorian Administrative Appeals Tribunal, followed the *obiter* remarks of Andrews SPJ in *Packer's* case in finding that the 'sole purpose' test was the relevant test to be applied in deciding whether the bill of costs which was in issue before him was subject to legal professional privilege. He found that there was nothing before him to suggest that disclosure of the bill of costs in issue would disclose communications made, or brought into existence, for the sole purpose of seeking or giving advice or for the sole purpose of use in existing or anticipated litigation, and that it therefore was not subject to legal professional privilege.

24. I am not satisfied that the brief *obiter* remarks by Gummow J in the *Propend Finance* case (to which the Department's submission draws attention: see paragraph 20 above) can be properly interpreted as indicating that His Honour believed that a solicitor's bill of costs will, as a matter of course, whatever its contents, attract legal professional privilege. In my view, the key words in the quoted passage from Gummow J are "... from which there might be inferred the nature of advice sought or given." The principles which I stated in paragraph 20 of *Re Murphy (No. 2)* allow that privilege would apply to any information in a solicitor's bill of costs which constitutes a record of a prior privileged communication, e.g., information that would reveal the nature of legal advice sought or given. In my view, the proper application of the 'sole purpose' test to a solicitor's bill of costs will ordinarily involve the principles and findings which I stated in paragraphs 19-21 of *Re Murphy (No. 2)*:

> *19. I have difficulty in accepting that solicitors' bills of costs are brought into existence for the sole purpose of providing legal advice or professional legal assistance, or for the sole purpose of use in pending or anticipated legal proceedings. They ordinarily are brought into existence for the purpose of rendering an account for legal services performed. Although a solicitor's bill of costs may (and in the case of a detailed bill of costs inevitably will) refer to communications between solicitor and client, or with third parties, (e.g., instructions received, and advice or professional legal assistance given, by the solicitor) which are*

prima facie *privileged communications, those references are included as a record of instructions received and services performed, for the purpose of rendering an account for payment.*

20. *A strict application of the 'sole purpose' test as stated in paragraphs 17 and 18 above would, in my view, ordinarily have the result that a solicitor's bill of costs does not attract legal professional privilege because it would not ordinarily have been brought into existence solely for a privileged purpose. However, any segments of a solicitor's bill of costs which comprise a record of prior privileged communications would, in my view, attract legal professional privilege (cf. Lockhart J's category (d) of material to which legal professional privilege extends, as stated in* Trade Practices Commission v Sterling *(1979) 36 FLR 244 at p.246: "Notes, memoranda, minutes or other documents made by the client, or officers of the client, or the legal adviser of the client, of communications which are themselves privileged, or containing a record of those communications, ..."). I consider that the common law principles of legal professional privilege must permit severance from a solicitor's bill of costs (and continued protection from compulsory disclosure) of those segments of the bill which record prior privileged communications. That seems to me to be necessary to preserve the efficacy of the doctrine of legal professional privilege (cf.* Re Hewitt *at paragraphs 119-120, and the cases there discussed), given the frequent necessity to include in a solicitor's bill of costs records of prior privileged communications, albeit not for the sole purpose which attracted legal professional privilege to those prior communications. In my view, the rationale for legal professional privilege requires that protection from compulsory disclosure be extended only to any record, contained in a solicitor's bill of costs, of a communication which itself satisfies the requirements to attract legal professional privilege. The balance of a solicitor's bill of costs would not ordinarily, in my opinion, attract legal professional privilege under the prevailing High Court authorities.*

21. *The views I have expressed are similar, in essence, to the views expressed in* Packer v DCT *by Andrews SPJ ... whose views were accepted and applied, in an FOI context, in the two Tribunal decisions referred to in paragraphs 22 and 23 below. My views also accord with the approach adopted by Tamberlin J of the Federal Court of Australia in* Lake Cumbeline Pty Ltd v Effem Foods Pty Ltd *(1994) 126 ALR 58 at p.68:*

> Disclosure of the memoranda of fees and other documents does not in any way disclose the nature or

> contents of the advice or communications between the applicants and their legal advisers. The memoranda of fees simply set out the dates and refer to the action taken in respect of which a charge is made. The memoranda of fees were brought into existence, on their face, not solely for the purpose of obtaining legal advice or for use in legal proceedings but for the purpose of recording and raising charges in respect of work which had been already completed. It is evident that the documents were made or brought into existence for a purpose different from, or beyond, the obtaining of legal advice or use in legal proceedings.
>
> ...

25. In the present case, I am not satisfied that document 1 was brought into existence for the sole purpose of providing legal advice or professional legal assistance, or for the sole purpose of use in pending or anticipated legal proceedings. I consider that document 1 was brought into existence for the purpose of rendering an account for legal services performed. I find that, considered as a whole document, document 1 does not satisfy the 'sole purpose' test to attract legal professional privilege, and does not qualify for exemption under s.43(1) of the FOI Act.

26. However, consistently with the principles stated in paragraph 20 of *Re Murphy (No. 2)*, while document 1 as a whole may not satisfy the 'sole purpose' test, any segments of information in it which comprise a record of a prior privileged communication between the Crown Solicitor and the Department may attract legal professional privilege. In my opinion, the only matter in document 1 which could arguably be said to record anything regarding the nature of the Department's instructions to the Crown Solicitor, or the Crown Solicitor's advice to the Department, are the underlined headings which appear on each of the three pages comprising document 1. The remainder of the information in document 1 describes, in general terms, the type of legal services performed, e.g., 'all necessary perusals' and 'all necessary attendances', and gives a total charge for the performance of those services on a time-costed basis. As I said at paragraph 25 of *Re Murphy (No. 2)*, descriptions of legal services performed, given in such broad and general terms, convey nothing about the nature or content of privileged communications, and they do not, in my opinion, constitute information of a kind that attracts legal professional privilege.

27. The underlined headings in document 1 do give a brief indication of the nature of the issue on which legal advice was sought and given. Were I required to determine in this case whether the underlined headings attract legal professional privilege, there would be a real issue as to whether those headings still retain the quality of confidentiality which a communication between lawyer and client must possess in order to attract legal professional privilege.

28. It is clear that the Department, in response to the applicant's FOI access application and application for internal review (see paragraphs 8-11 above) has itself confirmed that it obtained a legal opinion from the Crown Solicitor, which was responsive to the terms of the applicant's FOI access application. The Department's decision-makers were careful, however, to frame their decisions in terms which gave no precise indication of the nature of the advice that was sought. The applicant, however, lodged an FOI access application with the Department of Justice, which in response disclosed to him a document entitled "New Matter Form" (a copy of which has been provided to me by the applicant). It is a pro-forma document used by the Crown Solicitor's office for various administrative purposes (including the creation of a new file, and the recording of client details) when instructions are received to act on behalf of a client in a new matter. The document records, amongst other things, that the client was the Department of Environment, and that the date upon which the Crown Solicitor was instructed by the Department was 9 October 1997. It also states brief details of the nature of the advice sought by the Department from the Crown Solicitor. Clearly, the document as a whole was brought into existence for administrative purposes of the Crown Solicitor's office and would not attract legal professional privilege, although it may be arguable that the brief details of the nature of the advice sought comprised a record of a privileged communication, a record which has now been disclosed to the applicant.

29. The Department has argued, in essence, that legal professional privilege cannot be waived without the consent of the client, that it has not consented to waive its privilege in respect of any communications between the Department and the Crown Solicitor, and that it would be improper to treat its privilege as having been waived by an unauthorised disclosure by the Department of Justice of a privileged communication.

30. I do not consider the relevant legal position to be quite so simple as contended by the Department. This is not a situation where the Crown Solicitor has inadvertently disclosed a privileged communication without the consent of its client. The disclosure to the applicant was made by an authorised decision-maker under the FOI Act, in response to a valid FOI access application lodged by the applicant under s.25 of the FOI Act. Legal professional privilege is a privilege which may be abrogated by statute, provided the legislature make its intention to do so sufficiently clear: see *Baker v Campbell* (1983) 153 CLR 52. In my opinion, the FOI Act is such a statute. As I said in *Re Woodyatt and Minister for Corrective Services* (1995) 2 QAR 383 at p.403, paragraph 48:

> *48. In my view, the correct analysis (which is supported by the Victorian authorities quoted in paragraphs 44 and 45 above) is that when a person lodges an application for access to documents of an agency or official documents of a Minister, which application complies with the requirements of the FOI Act, the person has a legally enforceable right to be given access under the FOI Act to the requested documents, other*

> *than any of the requested documents to which the relevant agency or Minister is entitled to refuse (or defer) access in accordance with exceptions to be found in the FOI Act itself. The most significant exception is s.28(1) of the FOI Act which confers on agencies or Ministers a discretion to refuse access to exempt matter or exempt documents. An agency or Minister has no discretion to refuse access to matter which is not exempt matter, unless it is caught by some other exception in the FOI Act itself (e.g. s.11 or a regulation made under s.11(1)(q), s.22, s.23, s.28(2), s.31). ...*

31. Also relevant for present purposes are my remarks in *Re Norman and Mulgrave Shire Council* (1994) 1 QAR 574 at pp.577-578, paragraphs 12-16, and in *Re Murphy (No. 2)* at paragraphs 61-62. The only source of power in the FOI Act by which an agency, in receipt of a valid application for access to a document in its possession or control, may refuse access to matter that falls within an exemption provision such as s.43(1) of the FOI Act, is the power conferred by s.28(1) of the FOI Act, and that power is conferred in discretionary terms. For an analysis of how the statutory scheme operates in respect of another exemption provision which imports general law principles as the test for whether exemption is established (i.e., s.46(1) of the FOI Act, which imports as a test for exemption whether disclosure would found an action for breach of confidence), see *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.321-322, paragraph 100. That analysis applies, *mutatis mutandis*, to the s.43(1) exemption provision. It means that the authorised decision-maker in the Department of Justice had the legal authority to disclose a communication that would otherwise be subject to legal professional privilege, if he/she decided to do so in response to a valid access application under the FOI Act. It may be that in this instance the authorised decision-maker in the Department of Justice overlooked the requirement, imposed by s.51 of the FOI Act, to consult with an agency to which the disclosure of a document may reasonably be expected to be of substantial concern. (On the other hand, it may be that the authorised decision-maker took the view that disclosure of the document could not reasonably be expected to be of substantial concern to the Department.) However, I do not think that that could affect the question of whether the relevant document was obtained by the applicant by lawful means, rather than through an unauthorised disclosure of a privileged communication, without the consent of the client. That of course would, in turn, affect the question of whether the communication claimed to attract legal professional privilege still retained the character of a confidential communication as against the applicant.

32. As it turns out, I do not need to make formal findings on that issue, since the applicant has indicated that he does not wish to pursue access to the headings which appear in document 1. The applicant has also indicated that he does not wish to pursue access to the only information recorded in document 1 which, in my opinion, could arguably be regarded as having some commercial sensitivity for the Crown Solicitor's office (now that it operates on a commercial footing in competition with private sector legal firms), namely the hourly charge out rates for

legal officers of different levels of seniority that are recorded in the column headed "Hourly Rate" on one of the pages comprising document 1. Thus, the segments of information referred to in this paragraph are no longer in issue in this review. I am satisfied that it is practicable to give the applicant access to document 1 with those segments of information deleted. I am satisfied that the balance of document 1 does not attract legal professional privilege, and I find that it is not exempt from disclosure to the applicant under s.43(1) of the FOI Act.

33. At paragraph 24 of *Re Murphy (No. 2)*, I stated that even if, contrary to my views, the principles applied in the older English cases referred to with apparent approval in the *obiter* remarks of McPherson J and Shepherdson J in *Packer's* case, remained applicable in Australian law (with the result that a solicitor's bill of costs ordinarily attracts legal professional privilege), I considered that the result I had described in the last two sentences of paragraph 20 of *Re Murphy (No. 2)* (quoted above), would ordinarily be arrived at by the application of the provisions of the FOI Act to a solicitor's bill of costs. I stated that that result would be required by the application, in conjunction with s.32 of the FOI Act, of the principles stated in *Waterford v Commonwealth of Australia* (1987) 163 CLR 54 (at p.66 per Mason and Wilson JJ):

> *Moreover the* [Freedom of Information Act 1982 Cth] *contemplates that where an exempt document contains material which, standing alone, would not render the document exempt, the agency or Minister should, if it is reasonably practicable to do so, delete the privileged material and grant access to the remainder: s.22.*
> [I note that s.32 of the Queensland FOI Act is similar, in purpose and effect, to s.22 of the *Freedom of Information Act 1982* Cth.]

34. Thus, I found in *Re Murphy (No. 2)* that, even if it were correct that privilege usually attaches to solicitors' bills of costs because they record or refer to privileged communications, an authorised decision-maker under the FOI Act should, where it is practicable to do so, grant access to any matter in a bill of costs which, standing alone, would not be privileged from production in a legal proceeding on the ground of legal professional privilege. The Department's submission in the present case did not attempt to address this issue. Applying the principles quoted above to document 1 in the present case, I find that, since the underlined headings on each page of document 1 are no longer in issue (as a result of the concession made by the applicant), the balance of document 1, standing alone, would not qualify for exemption under s.43(1) of the FOI Act, and (unless it qualifies for exemption on other grounds) the applicant should be given access to it under the FOI Act.

Other exemption provisions raised by the Department

35. Section 42(1)(a) and s.42(1)(e) of the FOI Act provide:

> ***42.(1)*** *Matter is exempt matter if its disclosure could reasonably be expected to—*
>
> *(a) prejudice the investigation of a contravention or possible contravention of the law (including revenue law) in a particular case; or*
>
> *...*
>
> *(e) prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law); ...*

36. Section 40(c) of the FOI Act provides:

> ***40.*** *Matter is exempt matter if its disclosure could reasonably be expected to -*
>
> *...*
>
> *(c) have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; ...*
>
> *...*
>
> *unless its disclosure would, on balance, be in the public interest.*

37. Each of the above exemption provisions turns on the test imported by the words "could reasonably be expected to". In my decision in *Re "B"* at pp.339-341 (paragraphs 154-160), I analysed the meaning of the phrase "could reasonably be expected to", by reference to relevant Federal Court decisions interpreting the identical phrase as used in exemption provisions of the *Freedom of Information Act 1982* Cth. In particular, I said in *Re "B"* (at pp.340-341, paragraph 160):

> *The words call for the decision-maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.*

The ordinary meaning of the word "expect" which is appropriate to its context in the phrase "could reasonably be expected to" accords with these dictionary meanings: "to regard as probable or likely" (Collins English Dictionary, Third Aust. ed); "regard as likely to happen; anticipate the occurrence ... of" (Macquarie

Dictionary, 2nd ed); "Regard as ... likely to happen; ... Believe that it will prove to be the case that ..." (The New Shorter Oxford English Dictionary, 1993).

38. In a letter to the Department dated 15 September 1998, I stated that the Department had sought, at a very late stage in the review, to raise new arguments (invoking s.40(c) and s.42(1)(a) of the FOI Act) which, irrespective of whether or not they may have some merit in an appropriate case, were untenable having regard to the particular facts of this case. (I explained why I held that view, both in that letter, and in a prior letter to the Department dated 4 September 1998.) I remain of that view, and it is equally applicable to the Department's belated invocation of s.42(1)(e) of the FOI Act as a ground of exemption.

39. Such case as the Department has attempted to make out under s.40(c), s.42(1)(a) and s.42(1)(e) was dependent on its assertion that I must not take into account the information which the applicant obtained in response to his FOI access application to the Department of Justice, because that information was obtained through an unauthorised disclosure of privileged communications, without the consent of the client. I have already explained above why I consider that disclosure to have been lawful under the terms of the FOI Act. The Department may wish to contend that information previously obtained by the applicant continues to be privileged from compulsory disclosure by the Department on the ground of legal professional privilege, but it is difficult to see why, in principle, that constitutes any warrant for approaching the application of s.40(c), s.42(1)(a) or s.42(1)(e) on the basis that the applicant should be treated as if he does not know that which he clearly does know.

40. In any event, the application of s.40(c), s.42(1)(a) and s.42(1)(e) has been made much simpler by the applicant's concession that he no longer wishes to pursue access to the underlined headings in document 1. The only information that would be disclosed in the balance of document 1 is the fact that the Department sought and obtained a legal opinion from the Crown Solicitor on some unstated topic relevant to the applicant, and the amount charged by the Crown Solicitor for providing that legal opinion. The former has already been disclosed to the applicant by the Department's responses to his FOI access application and his application for internal review (see paragraphs 8-11 above). I am not satisfied that any reasonable basis exists for expecting that disclosure to the applicant of information which merely confirms information previously disclosed by the Department, or of the amount charged for a legal opinion which the applicant knows was obtained by the Department, could reasonably be expected to have any of the prejudicial consequences contemplated by s.40(c), s.42(1)(a) or s.42(1)(e) of the FOI Act.

41. The gist of the Department's argument was that an agency's efforts to investigate (and take appropriate action in respect of) misconduct by an officer would be prejudiced if the officer, by seeking access under the FOI Act to invoices for legal costs for advice relating to possible misconduct by the officer, could be alerted to the fact that he/she was subject to investigation and possible legal action (giving an

opportunity to destroy evidence, *et cetera*). As I endeavoured to explain in my letter to the Department dated 4 September 1998, various provisions of the FOI Act can be employed to prevent any reasonably apprehended prejudice of the kind suggested, in an appropriate case. However, I am not satisfied that any reasonable basis exists for expecting any relevant prejudice to follow from disclosure to the applicant of the matter remaining in issue in document 1, which will do no more than disclose information of which (apart from the cost of obtaining the legal opinion) the applicant is already aware from official sources.

DECISION

42. I decide to vary the decision under review (being the decision made on behalf of the Department by Mr D Boyland on 19 February 1998) by finding that the matter which remains in issue in this review (i.e., document 1, except for the underlined headings which appear on each of the three pages comprising document 1, and except for the two figures which appear in the column headed "Hourly rate" on one of the pages of document 1) is not exempt from disclosure to the applicant under the FOI Act.