Kelly and Department of Justice & Attorney-General

(S 41/00, 13 March 2002, Assistant Information Commissioner Moss)

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

1.- 2. These paragraphs deleted.

REASONS FOR DECISION

Background

3. By letter dated 18 December 1999, the applicant (who was known as Terry Sharples prior to changing his name to Edward Kelly by deed poll during the course of this review) applied to the Department of Justice and Attorney-General (the Department) for access to certain documents which he described as "concerning myself or my affairs", i.e.,

> *All letters minutes inter-office memo's* [sic] *reports facsimiles* [sic] *transmissions and covering facsimile sheets telephone notes or diary notes registers or electronic photographic or computer records held by the Crown Law or under its control.*

4. The Department failed to process the applicant's FOI access application within the time limit specified under s.27(4) of the FOI Act. By letter dated 21 February 2000, the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of the Department's deemed refusal of access to the requested documents.

5. By way of background, I should explain that, in July 1998, the applicant filed proceedings in the Supreme Court of Queensland seeking a declaration that Pauline Hanson's One Nation Party was not a validly registered party pursuant to the *Electoral Act 1992* Qld, and an injunction restraining the payment to One Nation of electoral monies flowing from the 1998 Queensland election. (By the time the hearing commenced, the matter of the injunction was no longer in issue, and the applicant had, with the Court's leave, amended his case so that it became an application to review under the provisions of the *Electoral Act*.) Mr Des O'Shea, the Electoral Commissioner of Queensland, and a Mr Peter Jones, on behalf of One Nation, were originally named as first and second defendants, respectively, to the proceedings, although Ms Hanson was later substituted as second defendant in place of Mr Jones. The Crown Solicitor was retained to represent the Electoral Commissioner in the proceedings. The parties to the litigation appeared before both the Supreme Court and the Court of Appeal on a number of occasions from

July 1998, in connection with various interlocutory matters and in relation to costs orders arising from those matters. On hearing dates in March, April and May 1999, the trial of the substantive issues was heard in the Supreme Court before Atkinson J. Her Honour delivered a judgment on 18 August 1999 in which she found that the registration of One Nation had been induced by fraud or misrepresentation, and set aside the Electoral Commissioner's decision to register the party - see *Sharples -v- O'Shea & Anor* [1999] QSC 190 (see paragraphs 1 to 7 of Her Honour's reasons for decision for a fuller account of the background to the litigation). Following her decision on the substantive issues, Atkinson J heard submissions as to costs, and delivered orders in that regard on 12 November 1999. The applicant subsequently filed an appeal seeking to challenge the costs orders made against him, and, after a considerable period of delay arising from the applicant's failure to diligently prosecute the appeal, the appeal was eventually struck out by McMurdo P on 23 November 2000: see *Sharples -v- O'Shea & Anor* [2000] QCA 481.

6. The bulk of the matter in issue in this review relates to the proceedings referred to above, and arises from the Crown Solicitor's representation of the Electoral Commissioner in those proceedings.

External review process

7. Copies of the documents identified by the Department as falling within the terms of the applicant's FOI access application were requested from the Department. The Department responded by advising that it anticipated that the documents in question would exceed 10,000 folios. By letter dated 4 April 2000, the Department formally advised that, *"to date, 53 files have been located containing over 13,000 documents"* that were responsive to the terms of the applicant's FOI access application.

8. By letter dated 15 May 2000, the Department provided schedules (identifying the nature of the documents located in response to the applicant's FOI access application) for 15 of the 53 files referred to above. Copies of the 15 schedules were sent to the applicant with a request that he identify from the schedules, documents to which he had already obtained access as the result of an earlier FOI access application to the Queensland Electoral Commission (QEC). The applicant identified such documents and confirmed that he did not seek access to them again in this review.

9. By letter dated 26 June 2000, the Department advised that it was prepared to give the applicant access to those documents in issue which had been tendered during court proceedings involving the applicant, or to correspondence exchanged between the applicant and Crown Law, or to Crown Law file notes of attendances upon the applicant. However, the Department maintained that the remainder of the matter in issue on the 53 files was exempt from disclosure under s.43(1) of the FOI Act. The Department also contended that the applicant was required to pay an

application fee to the Department in connection with the making of his FOI access application.

10. By letter dated 29 June 2000, the Deputy Information Commissioner wrote to the applicant to confirm that the Department was prepared to give him access to certain documents, upon payment by the applicant of the required application fee. By letter dated 10 July 2000, the applicant sought, amongst other things, a waiver of the application fee. In a letter to the applicant dated 9 August 2000, the Deputy Information Commissioner explained that the FOI Act does not provide for the waiver of fees and charges. The Department subsequently advised that the application fee had been paid by the applicant.

11. By letter dated 19 September 2000, the Deputy Information Commissioner wrote to the applicant to inform him that the Department had located an additional 9 folders of documents falling within the terms of his FOI access application (making a total of 62 folders). The applicant was provided with a copy of a revised schedule of the documents contained in the 62 folders, prepared by the Department. The Deputy Information Commissioner also expressed to the applicant his preliminary view that some of the documents in issue qualified for exemption under s.43(1) of the FOI Act.

12. In a response dated 16 October 2000, the applicant advised that, of the schedule of 62 folders, he continued to seek access only to folders 30-41, 42-46, 47, 49, 51-53, and 54-60. Accordingly, the other folders are no longer in issue in this review.

13. Correspondence was then exchanged between this office, the Department and the applicant, regarding the contents of the folders in issue. The Deputy Information Commissioner expressed the preliminary view that some of the documents in question qualified for legal professional privilege under s.43(1) of the FOI Act, and that some fell outside the terms of the applicant's FOI access application. The Department agreed to withdraw its claim for exemption in respect of some documents which the Deputy Information Commissioner considered did not qualify for exemption under the FOI Act, and the applicant was provided with access to those documents. As a result of concessions made by both the applicant and the Department, the documents still remaining in issue were confined to folders 30-39, 47 and 49. On 23 November 2000, the Department delivered copies of those documents to this office.

14. By letter dated 2 April 2001, the Deputy Information Commissioner wrote to the applicant and enclosed a 20 page schedule which listed the documents contained in folders 30-39, 47 and 49 which, in his preliminary view, qualified for exemption, or partial exemption, under s.43(1), s.45(1)(b) or s.45(1)(c) of the FOI Act. The Deputy Information Commissioner also communicated to the applicant his preliminary view that a letter which was supposed to be contained in folder 58, but which the Department had misplaced (namely, a letter dated 3 June 1999 from the Members' Ethics and Parliamentary Privileges Committee to the Attorney-General), would, given the Deputy Information Commissioner's review of the other

correspondence contained in folder 58, attract Parliamentary privilege and therefore qualify for exemption under s.50(c)(i) of the FOI Act. The Deputy Information Commissioner advised the applicant that the Department had been authorised to give the applicant access to those documents contained in folders 30-39, 47 and 49 in respect of which the Department no longer made a claim for exemption.

15. On 18 April 2001, the applicant attended at the Department to inspect the documents which the Department was prepared to disclose to him. The Department's FOI Coordinator was absent from the Department that day [personal information deleted], and the applicant was mistakenly permitted to inspect documents in respect of which the Department claimed legal professional privilege, and exemption from disclosure under s.43(1) of the FOI Act. The applicant has contended that the disclosure to him of the documents in question has resulted in a waiver by the Department of the legal professional privilege claimed to attach to the documents. Both the applicant and the Department have lodged submissions in respect of legal professional privilege and the issue of waiver. The applicant has also argued that legal professional privilege cannot attach to the documents in issue because the communications contained therein were made in furtherance of an illegal or improper purpose. I will deal further with those issues below.

16. By letter dated 24 April 2001, the applicant complained that he was unable to *"verify by any means, whether all the documents which the Department has granted me access to have been shown to me, as no schedule or logical document numbering or identification system seems to exist"*. He also raised a 'sufficiency of search' issue both in general terms, and specifically, regarding the Department's inability to locate the letter from the Members' Ethics and Parliamentary Privileges Committee referred to at paragraph 14 above, and its failure to produce a Deed of Settlement which the applicant contended should be in the Department's possession but which had not been disclosed to him. I will deal further with those issues below.

17. Following some additional inspection and cross-referencing of documents by staff of this office, on 9 November 2001 I wrote to the applicant, enclosing a schedule listing all of the documents remaining in issue. Since then, however, the Department has withdrawn its claim for exemption in respect of a small number of additional documents, or, alternatively, has exercised its discretion under s.28(1) of the FOI Act to give the applicant access to additional documents. Those documents have been disclosed to the applicant and are no longer in issue in this review. In addition, a small number of scheduling errors were identified. The schedule has been amended accordingly. A copy of the amended schedule, which lists all documents remaining in issue in this review, is attached to, and forms part of, these reasons for decision *.

18. In making my decision in this matter, I have taken into account the following:

1. the contents of the documents remaining in issue (identified on the attached schedule) *;
2. the applicant's FOI access application dated 18 December 1999; application for external review dated 21 February 2001; written submissions dated 29 May 2001; statutory declarations dated 23 July 2001 and attachments to those declarations; and other communications and correspondence passing between the applicant and my office relevant to the issues for my determination in this review; and
3. the statutory declaration dated 1 June 2001 by Mr Lovi of the Department; written submissions dated 19 June 2001 by Mr Lovi on behalf of the Department; and other communications and correspondence passing between the Department and my office relevant to the issues for my determination in this review.

Documents falling outside the terms of the applicant's FOI access application

19. I consider that a number of the documents located by the Department in response to the applicant's FOI access application do not fall within the terms of that access application. It is clear from the terms of the access application that the applicant sought access to documents held by the Department which related to him personally, or which concerned or involved him in some way. The bulk of documents identified by the Department as responsive to the applicant's FOI access application relate to the litigation initiated by the applicant in 1998, the particulars of which I have outlined at paragraph 5 above. However, having reviewed the documents remaining in issue, I am satisfied that there are several (identified on the attached schedule and discussed below)* that do not relate to that litigation, and do not relate in any other way to the applicant or his affairs generally.

20. Folio 230 in folder 30, folios 741-742 in folder 31 and folio 1430 in folder 33, comprise documents concerning actions or matters which do not refer to or concern the applicant or the litigation in which he was involved in any way, and appear to have been included on Crown Law's files in error. Similarly, folios 26-28 in folder 38 comprise Federal Court documents concerning an action which appears to have no connection with the applicant or his affairs. Those folios also appear to have been included on Crown Law's files in error.

21. Folios 21-23 and 58-63 in folder 37 comprise copies of correspondence from Mr David Ettridge (then National Director of Pauline Hanson's One Nation Party) to various persons. The correspondence does not refer to or concern the applicant or the litigation in which he was involved in any way and simply appears to have been included on Crown Law's files for background information only.

22. I find that the above-mentioned documents do not fall within the terms of the applicant's FOI access application and, consequently, do not form part of the matter in issue in this review.

'Sufficiency of search' issues and numbering of documents

23. As noted at paragraph 16 above, the applicant contended that the Department's failure to provide him with a schedule which identified the documents to which the Department was prepared to grant him access, together with the Department's failure to number or identify the documents "in a logical manner", resulted in him being unable to verify whether the Department had identified all documents in its possession or under its control falling within the terms of his FOI access application, and whether he had inspected all documents to which he was entitled.

24. By letter dated 1 June 2001, the Department provided a statutory declaration by Mr Brian Lovi, Manager of the Department's Freedom of Information Unit, in which Mr Lovi stated:

> *This Department had located over 14,000 documents (contained in 62 Crown Law folders) which appeared relevant to* [the applicant's] *request. The majority of these documents related to litigation in which* [the applicant] *was the plaintiff.*
>
> *Ms Joanne Daniels, a lawyer employed by Crown Law until October 1999, had the carriage and conduct of the litigation on behalf of a defendant in* [the applicant's] litigation.
>
> Ms Daniels has advised and I verily believe it to be true, that at an early stage in the litigation she numbered documents in the possession of this Department to assist with the preparation of the defendant's List of Documents and the Affidavit of Privilege.
>
> *The Crown Law files involving* [the applicant] *are all active files. The documents that were initially sequentially numbered by Ms Daniels have been re-organised, copied, and also used for the preparation of briefs for Counsel. I understand and verily believe it to be true, that the movement of documents for the operational convenience of Crown Law* [has] *resulted in the documents initially numbered by Ms Daniels now being in non-sequential order.*
>
> *During the course of the external review this Department has provided* [the applicant] *with the opportunity to inspect all documents that have not been considered by the Deputy Information Commissioner (Qld) to be totally exempt from release.*

25. In a statutory declaration dated 23 July 2001, the applicant stated that Mr Lovi's reply was inadequate. The applicant again asserted that he had not been given access to all documents to which he should have been given access:

> *Since 29 June 2001 I have conducted an FOI search of documents held by the Queensland Electoral Commission ("QEC").*

I was shown an agreement to settle, as drawn up by … Joanne Daniels. No such document has been shown to me in this FOI application, but the same must exist on the Department's files.

The schedule supplied to me does no more than list a folio number and folio description and leaves me no way [of] *knowing what documents have or have not been shown to me, other than on trust, which I don't. …*
…
… bonafide documents [are] *missing without explanation (letter Members Ethics and Parliamentary Privileges Committee to the Attorney-General, dated 3 June 1999).*

26. I will deal with the issue of the letter from the Members' Ethics and Parliamentary Privileges Committee separately below.

27. As to the Deed of Settlement prepared by Ms Daniels of Crown Law, to which the applicant contends he was given access as the result of an FOI access application which he made to the QEC, the applicant did not provide a copy of the Deed or identify it in any specific manner. I raised the matter with the QEC which located a copy of a draft Deed of Settlement prepared by Crown Law and advised that, although the applicant was not given access to the Deed as the result of the FOI access application he had made to the QEC, he may have been shown a copy during the course of the relevant litigation. In any event, the QEC advised that it did not object to the applicant being given access to a copy of the draft Deed. The QEC's position in that regard was communicated to the Department which advised that, in light of the QEC's position, the Department was prepared to exercise its discretion under s.28(1) of the FOI Act to give the applicant access to a copy of the Deed, which comprised folios 52-57 in folder 34 of the Department's files. The applicant has been given a copy of that document and it is therefore no longer in issue in this review.

28. With the exception of the particular documents specified by the applicant (referred to in paragraph 25 above), the applicant has simply made the general assertion that he is not satisfied that the Department has identified and dealt with all documents falling within the terms of his FOI access application. He has provided no other evidence in support of that assertion.

29. The Information Commissioner explained the principles applicable to 'sufficiency of search' cases in *Re Shepherd and Department of Housing, Local Government & Planning* (1994) 1 QAR 464 (pp. 469-470, paragraphs 18 and 19) as follows:

> *18. It is my view that in an external review application involving 'sufficiency of search' issues, the basic issue for determination is whether the respondent agency has discharged the obligation, which is implicit in the FOI Act, to locate and deal with (in accordance with Part 3, Division 1 of the FOI Act) all documents*

of the agency (as that term is defined in s.7 of the FOI Act) to which access has been requested. It is provided in s.7 of the FOI Act that:

> "'**document of an agency**' or '**document of the agency**' means a document in the possession or under the control of an agency, or the agency concerned, whether created or received in the agency, and includes -
>
> (a) a document to which the agency is entitled to access; and
>
> (b) a document in the possession or under the control of an officer of the agency in the officer's official capacity;"

19. In dealing with the basic issue referred to in paragraph 18, there are two questions which I must answer:

(a) whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency (as that term is defined in s.7 of the FOI Act);

and if so

(b) whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case.

30. As set out at paragraph 24 above, Mr Lovi of the Department has attested to the full disclosure by the Department of all documents in respect of which the Department does not maintain a claim for exemption, and has explained the basis upon which documents were identified and numbered. As noted by Mr Lovi, the total number of documents identified by the Department as falling within the terms of the applicant's FOI access application exceeded 14,000 folios. There is no evidence before me to suggest that it is reasonable to expect that further documents falling within the terms of the applicant's FOI access application exist in the possession, or under the control, of the Department, or that the Department's search efforts for documents responsive to the applicant's FOI access application have been inadequate.

31. Accordingly, on the evidence before me, I find that:

1. there are no reasonable grounds to believe that further documents which fall within the terms of the applicant's FOI access application dated 18 December 1999 exist in the possession, or under the control, of the Department; and

2. the search efforts made by the Department to identify all responsive documents have been reasonable in all the circumstances of this case.

Letter dated 3 June 1999 from the Members' Ethics and Parliamentary Privileges Committee to the Attorney-General and the application of s.50(c)(i) of the FOI Act

32. This letter was at one time contained in folder 58, titled '*Sharples - (Chairman) Parliamentary Privileges Committee/Issue of Blank Subpoenas'*. The letter was misplaced by the Department, and, despite reasonable search efforts by the Department, could not be located. The Department sought to obtain a copy of the letter from the Parliamentary Committee, however, the Parliamentary Committee declined to provide the requested copy.

33. The s.7 definition of "document of an agency" is reproduced in the passage quoted at paragraph 29 above. As regards the issue of whether the Department is "entitled to access" the copy of the letter which is held by the Parliamentary Committee, I note that in *Re Price and the Nominal Defendant* (1995) 5 QAR 80, the Information Commissioner said (at paragraph 18):

> *Included in the concept of documents which are under the control of an agency are documents to which the agency is entitled to access. This concept is apt to cover a document in respect of which an agency has legal ownership, and hence a right to obtain possession, even though the document is not in the physical possession of the agency. … I consider that, for a document to be one which is under the control of an agency (or one in respect of which an agency is entitled to access), the agency must have a present legal entitlement to take physical possession of the document (at least for so long as necessary to discharge all of the agency's obligations under the FOI Act in respect of the document).*

34. I am satisfied that the Department does not have legal ownership of the copy of the letter which is held by the Parliamentary Committee, and has no legal entitlement to take physical possession of that copy. Accordingly, the copy of the letter held by the Parliamentary Committee cannot be regarded as a document of the Department for the purposes of s.7 of the FOI Act, and is therefore not subject to the right of access conferred by s.21 of the FOI Act.

35. In any event, even if the Department were able to obtain possession of a copy of the letter, I reiterate and endorse the views which the Deputy Information Commissioner expressed in his letter to the applicant dated 2 April 2001:

> *Notwithstanding that the letter from the Members' Ethics and Parliamentary Privileges Committee to the Attorney-General (dated 3 June 1999) has not been produced, it is apparent to me from my review of*

the other correspondence on the folder that the letter would qualify as exempt matter under s.50(c)(i) of the FOI Act, which provides:

> **50.** Matter is exempt matter if its public disclosure would, apart from this Act and any immunity of the Crown—
>
> …
>
> (c) infringe the privileges of—
>
> (i) Parliament; …

Disclosure of the letter without the authorisation of the Parliamentary Committee (which has clearly communicated its opposition to disclosure) would infringe the privileges of Parliament.

36. It is clear that the relevant letter was prepared under the authority of the Members' Ethics and Parliamentary Privileges Committee and was therefore a "proceeding in Parliament" within the terms of s.3(3)(g) of the *Parliamentary Papers Act 1992* Qld. I accept that it was a document that was prepared for the purposes of, or incidental to, transacting the business of that Parliamentary Committee. I am satisfied that neither the Parliamentary Committee nor the Legislative Assembly has authorised its public disclosure. I find that its public disclosure would infringe the privileges of Parliament and hence that it is exempt matter under s.50(c)(i) of the FOI Act.

37. In his submission dated 29 May 2001, the applicant argued that Parliamentary privilege could not apply to the letter on the grounds that no proper election of the members of the 49th and 50th Parliaments had occurred and that the Parliaments were therefore *ultra vires.* In essence, the applicant's argument is that the Queensland Parliament is not lawfully constituted, and hence Parliamentary privilege cannot apply. I am satisfied that there is no substance in the applicant's arguments, some of which have been rejected by the Queensland Court of Appeal: see *Sharples v Arnison & Ors* [2001] QCA 518. In respect of the applicant's other arguments, I note that s.128 of the *Electoral Act 1992* Qld provides:

> ***128.(1)*** *The election of a person may be disputed under this part by a petition to the Court of Disputed Returns in accordance with this division.*
>
> ***(2)*** *The election may not be disputed in any other way.*

38. Accordingly, in respect of the letter dated 3 June 1999 from the Members' Ethics and Parliamentary Privileges Committee to the Attorney-General, while there are reasonable grounds for believing that the letter remains (lost) in the possession of the Department, I find that:

1. the search efforts made by the Department to locate the copy of the letter which it mislaid have been reasonable in all the circumstances of this case;
2. the Department does not have legal ownership of the copy of the letter held by the Parliamentary Committee, and has no legal entitlement to take physical possession of that copy; and
3. the letter is exempt under s.50(c)(i) of the FOI Act in any event.

Application of s.45(1)(c) of the FOI Act

39. The Department claims that references in the matter in issue to hourly charging rates contained on Crown Law memoranda of accounts and billing work sheets, and references to amounts charged by Counsel, are exempt from disclosure under s.45(1)(b) or s.45(1)(c) of the FOI Act. For the reasons which I will explain below, I am satisfied that references to hourly rates charged by professional officers of Crown Law qualify for exemption under s.45(1)(c) of the FOI Act.

40. Section 45(1)(c) of the FOI Act provides:

> ***45.(1)*** *Matter is exempt matter if—*
>
> …
>
> *1. its disclosure—*
>
> *(i) would disclose information (other than trade secrets or information mentioned in paragraph (b)) concerning the business, professional, commercial or financial affairs of an agency or another person; and*
>
> *(ii) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government;*
>
> *unless its disclosure would, on balance, be in the public interest.*

41. The correct approach to the interpretation and application of s.45(1)(c) is explained in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at pp.516-523 (paragraphs 66-88). In summary, matter will be exempt under s.45(1)(c) of the FOI Act if:

(a) the matter in issue is properly to be characterised as information concerning the business, professional, commercial or financial affairs of an agency or another person (s.45(1)(c)(i)); and

(b) disclosure of the matter in issue could reasonably be expected to have either of the prejudicial effects contemplated by s.45(1)(c)(ii), namely:

(i) an adverse effect on the business, professional, commercial or financial affairs of the agency or other person, which the information in issue concerns; or

(ii) prejudice to the future supply of such information to government;

unless disclosure of the matter in issue would, on balance, be in the public interest.

42. In the Deputy Information Commissioner's letter to the applicant dated 2 April 2000, he said:

> *You will see from the enclosed schedule that segments of information on memoranda of accounts, Counsel's fee notes and billing work sheets are claimed to be exempt under s.45(1)(b) or s.45(1)(c) of the FOI Act. As I explained in my letter to you dated 27 October 2000, it is the usual practice with regard to the disclosure of legal accounts (and correspondence concerning the same) to delete matter identifying the hourly charging rate, so as to preclude reliance upon s.45(1)(b) or (c) as a reason to exempt the entire document from being disclosed. Accordingly, you will see on the enclosed schedule that, where reliance upon s.45(1)(b) or (c) of the FOI Act is proposed, you are to be accorded access subject to deletion of matter that would disclose hourly charging rates.*
>
> *It is my preliminary view that that matter in issue qualifies for exemption under s.45(1)(b) or s.45(1)(c) of the FOI Act.*

43. The applicant did not contest the Deputy Information Commissioner's preliminary view in that regard; however, nor did he state that he accepted it.

44. The Deputy Information Commissioner discussed hourly charge-out rates charged by Crown Law (and private sector legal firms) in his recent decision in *Re Macrossan & Amiet and Queensland Health & Ors* (S 116/99, 27 February 2002, unreported) at paragraphs 104-110. The Deputy Information Commissioner accepted that Crown Law operates in a commercially competitive environment with private sector legal firms. The Deputy Information Commissioner decided that disclosure of hourly charge-out rates for professional staff of Crown Law could reasonably be expected to assist Crown Law's competitors to compete with it more effectively in the legal services market generally.

45. In relation to those documents which are identified on the attached schedule* as being the subject of a claim by the Department for exemption under s.45(1)(b) or s.45(1)(c) of the FOI Act, I find that references in those documents to the hourly charge-out rates of professional officers of Crown Law, qualify for exemption under s.45(1)(c) of the FOI Act, on the basis that disclosure of the relevant matter could

reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of Crown Law. I am unable to identify any public interest considerations weighing in favour of the disclosure of that matter to the applicant.

46. As regards references in the documents in question to amounts paid to Counsel, I note that the relevant references are to lump sum amounts only, and give no indication of, for example, fee structure with respect to particular tasks performed by Counsel, or discounts applied to fees charged by Counsel *et cetera*. In those circumstances, I am not satisfied that disclosure simply of lump sum amounts paid to Counsel could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the barrister in question, such as to qualify for exemption under s.45(1)(c) of the FOI Act.

47. I will forward copies of the relevant billing documents to the Department, with the matter which I am satisfied qualifies for exemption under s.45(1)(c) of the FOI Act, highlighted.

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

48. As can be seen from the attached schedule, the bulk of the documents remaining in issue are claimed by the Department to be exempt from disclosure to the applicant under s.43(1) of the FOI Act. Those documents can be categorised as follows:

1. Communications between the QEC and/or Crown Law and/or Counsel (briefed to advise and appear on the Electoral Commissioner's behalf in the proceedings commenced by the applicant) and/or third parties requested to provide material for use in that litigation ('Category A matter');
2. Copies of non-privileged documents made for use in the litigation, or for the purposes of seeking legal advice ('Category B matter');
3. Communications between Crown Law and Watkins Stokes Templeton (solicitors representing Ms Hanson) ('Category C matter'); and
4. Descriptions contained in Crown Law billing documents of work performed by Crown Law officers on behalf of the Electoral Commissioner ('Category D matter').

49. 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.*

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

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

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

1. Legal professional privilege also attaches to confidential communications between the client or the client's lawyers (including communications through their respective servants or agents) and third parties, provided the communications were made for the dominant purpose of use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication.

51. There are qualifications and exceptions to this statement of the basic tests, which may, in a particular case, affect the question of whether a document attracts the privilege, or remains subject to the privilege; for example, the principles with respect to waiver of privilege (see *Re Hewitt and Queensland Law Society Inc* (1998) 4 QAR 328 at paragraphs 19-20 and 29), and the principle that communications otherwise answering the description above do not attract privilege if they are made in furtherance of an illegal or improper purpose (see *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501). As I noted above, the applicant has raised both the issue of waiver and the "illegal/improper purpose" exception during the course of this review. I will deal further with both issues below.

` **Category A matter**

52. The bulk of the documents claimed to be exempt under s.43(1) of the FOI Act comprise Category A matter. Based on my review of the contents of those documents, I am satisfied that they either comprise confidential communications between the QEC and its professional legal advisers made for the dominant purpose of giving or receiving legal advice, or confidential communications between the QEC or its professional legal advisers, and third parties, made for the dominant purpose of obtaining material for use in litigation. As such, I am satisfied that the Category A matter attracts legal professional privilege, and is *prima facie* exempt from disclosure under s.43(1) of the FOI Act, subject to a consideration of the applicant's contentions in respect of waiver and the illegal/improper purpose exception.

Category B matter

53. The documents in this category fall within the principles established in the High Court's decision in *Propend Finance*. From that decision, it is clear that copies of non-privileged documents made and communicated for the dominant purpose of use in litigation or for obtaining legal advice (e.g., through their inclusion in a brief to Counsel) attract legal professional privilege.

54. In his letter dated 2 April 2001, the Deputy Information Commissioner advised the applicant that he had reviewed the documents in question and formed the preliminary view that they fell within the principles outlined by the High Court in *Propend*, and that they therefore qualified for exemption under s.43(1) of the FOI Act. The applicant did not provide any submissions and/or evidence to dispute the Deputy Information Commissioner's preliminary view in that regard. It is clear from my examination of the Category B matter that it consists of copies of documents made and communicated for the dominant purpose of obtaining legal advice, or for use in litigation. Accordingly, I find that the Category B matter is *prima facie* exempt from disclosure under s.43(1), again, subject to a consideration of the applicant's contentions in respect of waiver and the illegal/improper purpose exception.

Category C matter

55. There are several documents remaining in issue that consist of communications between Crown Law and Ms Hanson's then solicitors, Watkins Stokes Templeton. As noted above, Ms Hanson was second defendant in the proceedings instituted by the applicant, and the Electoral Commissioner (represented by the Crown Solicitor) was first defendant.

56. Included within the category of third party communications that can attract legal professional privilege is the head of "common interest" privilege, i.e., communications between parties with a common interest in litigation (see *Buttes Gas & Oil Co and Anor v. Hammer and Anor* (No.3) [1981] QB 223; *Bulk Materials (Coal Handling) Services Pty Ltd v. Coal and Allied Operations Pty Ltd* (1988) 13 NSWLR 689). Common interest privilege protects confidential communications between co-plaintiffs or co-defendants and their lawyers, and confidential documents prepared by co-plaintiffs or co-defendants and their lawyers for the purposes of an action. In *Buttes Gas & Oil*, Brightman LJ said (at pp.267-268):

> *The judge then spelt out his proposition of law, with which I agree, that if two parties with a common interest and a common solicitor exchange information for the dominant purpose of informing each other of the facts, or the issues, or the advice received, or of obtaining legal advice in respect of contemplated or pending litigation, the documents or copies containing the information are privileged from production in the hands of each. I think that this proposition follows from* Jenkyns v Bushby *(1866)*

L.R. 2 Eq. 547 and other cases in the same line and is a legitimate extension of the principle that protects confidential communications between co-plaintiffs or co-defendants for the purposes of an action.

57. It has subsequently been held in Australia that it is not necessary that the parties have a common solicitor. Further, it is not necessary that the identity of interests between the parties be so close that they could have used the same lawyer (see *Bulk Materials v Coal & Allied Operations* at 694-5; and *Network Ten Ltd v. Capital Television Holdings Ltd* (1995) 36 NSWLR 275 at 282).

58. In *Farrow Mortgage Services v Webb* (1996) 39 NSWLR 610 at 609, Sheller JA said:

Common interest is not in this context a rigidly defined concept. A mere common interest in the outcome of litigation will be sufficient to enable any party with that interest to rely on it...

59. In *Network Ten Ltd v Capital Television Holdings Ltd*, Giles J said at pp.279-280:

If two parties with a common interest exchange information and advice relating to that interest, the documents or copy documents containing that information will be privileged from production in the hands of each: thus, if one of the parties obtains a letter of advice attracting legal professional privilege and provides it to the other, the other can also claim legal professional privilege. Some remarks in the earlier English cases suggested that the parties must have a common solicitor, but I do not think that is necessary...

60. I have reviewed the contents of the documents in question. They relate to three issues that arose during the course of the litigation - concerns shared by the defendants as to the state of the applicant's pleadings, seeking indemnity for costs and the pursuit of costs orders in respect of interlocutory applications, and the form and substance of settlement proposals to be put to the applicant by the defendants on a joint basis. In respect of interlocutory contests over issues of the type indicated, and in respect of the formulation of settlement proposals to be put to the applicant, I am satisfied that the Electoral Commissioner and Ms Hanson, as co-defendants, shared a common interest in the outcome of those issues, such that confidential communications between their legal representatives concerning those issues attract legal professional privilege and are *prima facie* exempt from disclosure under s.43(1) of the FOI Act.

61. In his statutory declaration dated 29 May 2001, the applicant submitted:

Administrative documents and correspondence between the first and second defendants do not attract and (sic) *privilege under FOI under*

conditions of litigation. Guardian Investments Pty Ltd v Commissioner of Corporate Affairs

62. Although it is not entirely clear, it appears that the applicant is contending that documents of a purely administrative nature, including correspondence, passing between Crown Law and Ms Hanson's solicitors cannot attract legal professional privilege and thus cannot qualify for exemption under s.43(1) of the FOI Act. I am uncertain of what exactly the applicant means by his reference to "administrative documents". Certainly, to attract privilege, the dominant purpose of the communications must have been one of the privileged purposes identified in paragraph 50 above. As to correspondence, it is quite clear from the cases cited above that correspondence passing between co-defendants to litigation is capable of attracting common interest privilege, if it constitutes a confidential communication the dominant purpose of which was one of the privileged purposes identified in paragraph 50 above.

63. I have reviewed the authority upon which the applicant purports to rely in support of his contentions - *Guardian Investments Pty Ltd v Commissioner for Corporate Affairs* (unreported, Full Court of Supreme Court of Victoria, 11 February 1986). That case simply re-states the law relating to legal professional privilege as it applied in 1986 (i.e., the "sole purpose" test) and discusses whether certain documents sought to be obtained by the appellant under the *Freedom of Information Act 1982* Cth attract legal professional privilege. It is certainly not authority for the proposition that administrative documents and correspondence passing between co-defendants to litigation cannot attract legal professional privilege.

64. I find that the Category C matter attracts legal professional privilege and is *prima facie* exempt from disclosure under s.43(1) of the FOI Act, again, subject to a consideration of the applicant's contentions in respect of waiver and the illegal/improper purpose exception.

Category D matter

65. The Information Commissioner discussed the application of s.43(1) of the FOI Act to bills of costs and related legal billing documents in *Re Murphy and Queensland Treasury* (1998) 4 QAR 446 where he said at paragraph 20:

> 20. … *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.*

66. Applying those principles to the Crown Law billing documents which are in issue, I am satisfied that those parts of the billing documents which describe or disclose the particular nature of the professional legal advice or assistance which Crown Law provided to the Electoral Commissioner in the course of acting for the Commissioner in the relevant litigation, or in otherwise providing professional legal advice to the Commissioner, qualify for exemption from disclosure under s.43(1) of the FOI Act, subject to a consideration of the applicant's contentions in respect of waiver and the illegal/ improper purpose exception.

Waiver of legal professional privilege

67. As I noted at paragraph 15 above, on 18 April 2001, the Department mistakenly permitted the applicant to inspect some documents in respect of which the Department has, in the course of this review, consistently asserted legal professional privilege, and maintained a claim for exemption under s.43(1) of the FOI Act. The applicant has argued that the disclosure of the documents to him by the Department on 18 April 2001 has resulted in a waiver of the legal professional privilege attaching to the documents.

68. The events surrounding the disclosure of the documents to the applicant were described by Mr Lovi in the Department's submissions dated 19 June 2001:

> *A chronology of events leading to this inadvertent disclosure is as follows:*
>
> 1. *By letter dated 2 April 2001, the Deputy Information Commissioner (Qld) expressed a preliminary view that certain documents relevant to* [the applicant's] *application were exempt from release and also authorised this Department to provide* [the applicant] *with access to those documents which were not exempt from release.*
>
> 1. *It is the practice of the FOI Unit to clearly mark those documents which are exempt from release and those documents which the FOI applicant may inspect.*
>
> 2. *On 12 April 2001,* [the applicant] *attended this Department to inspect documents that were not exempt from release.* [The applicant] *was provided with three folders each containing a red cover sheet marked* "Documents to be released" *and five Court Documents folders.* [The applicant] *did not complete the inspection of documents and it was arranged for him to re-commence the inspection on 18 April 2001.*
>
> *At no stage during this inspection was* [the applicant] *given access to six folders which all contained a yellow cover sheet marked* "Documents Containing Exempt or Partially Not Relevant Information".

1. *On 18 April 2001 I was absent from work due to illness and by telephone I arranged for another officer to coordinate the continued inspection with* [the applicant]. *Later that afternoon I had a telephone conversation with that officer and it became apparent that* [the applicant] *had inadvertently been provided access to the six folders which all contained a yellow cover sheet marked "Documents Containing Exempt or Partially Not Relevant Information". This officer immediately terminated the inspection with* [the applicant] *and advised him of the oversight. Photocopies of the exempt documents were not provided to* [the applicant].

1. *At about 4.45pm on 18 April 2001 I attended the office and had a discussion with* [the applicant] *in which I indicated that there had been an inadvertent disclosure of documents and that he should not consider that legal professional privilege in the documents should be waived.*

69. On 20 April 2001, the Department formally wrote to the applicant and advised him that his access to the folders of exempt documents should not be considered to be a waiver of the Department's claim for legal professional privilege in respect of the documents, and that the Department would object to any attempt by the applicant to rely on the documents to which he had mistakenly been given access.

70. It is a fundamental aspect of legal professional privilege that the privilege is the client's to claim, and the client's to waive. In *Mann v Carnell* (1999) 74 ALJR 378, the High Court said at paragraph 28:

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

71. In this case, the legal professional privilege claimed by the Department is claimed on behalf of the Electoral Commissioner, who was the first defendant in the relevant proceedings and who was represented in those proceedings by the Crown Solicitor. The Electoral Commissioner, as client, has done nothing inconsistent with the maintenance of confidentiality in the documents in question. It has been recognised in some cases, however, that a party may authorise its legal representatives to waive privilege, and, in certain circumstances, a legal representative may have ostensible, if not actual, authority to waive privilege; for example, in the discovery process (see *Meltend Pty Ltd and Anor v Restoration Clinics of Australia Pty Ltd & Ors* (1975) FCR 511 and *Citicorp Aust Ltd & Ors v Cirillo & Anor* [2001] SASC 219). However, in this case, the Electoral Commissioner's legal representative was the Crown Solicitor. While the Crown Solicitor's office (Crown Law) forms part of the Department of Justice and

Attorney-General, I do not consider that the inadvertent disclosure of documents by administrative officers of the Department's FOI Unit can properly be regarded as authorised disclosure by the Electoral Commissioner's legal representative, the Crown Solicitor. I am not satisfied that the officers of the Department's FOI Unit had any authority, ostensible or otherwise, to waive privilege in the relevant documents on behalf of the Electoral Commissioner.

72. But, in any event, even if I am mistaken in that regard, and it were to be found that the Department's FOI Unit had ostensible authority, in processing the applicant's FOI access application, to represent the Electoral Commissioner's interests, and to waive privilege on his behalf, I am satisfied that, by inadvertently permitting the applicant to inspect documents claimed to be privileged, the Department has not waived that privilege.

73. The High Court reviewed the law relating to waiver of privilege in *Mann v Carnell.* (For a detailed discussion of the principles established in that case, see the Information Commissioner's decision in *Re Noosa Shire Council and Department of Communication, Local Government and Planning* (2000) 5 QAR 428.) It was made clear in *Mann v Carnell* that what brings about the waiver is the inconsistency which the courts (informed by considerations of fairness, where necessary) perceive between the conduct of the client and the maintenance of confidentiality in the relevant communication.

74. In his submissions, the applicant focussed on the question of fairness and contended that it would be unfair to refuse him access to the documents which had inadvertently been disclosed to him. In his submission dated 29 May 2001, the applicant argued:

> *3.2 failure to disclose documents sighted read and notated by the applicant could reasonably be expected to:-*
>
> 1. *prejudice the applicants right to justice in his appeal against costs awarded by the trial judge Atkinson J. against him.*
> 2. *prejudice and frustrate the applicants complaints to and a criminal investigation by the Criminal Justice Commission (Qld)*
> 3. *prejudice and frustrate the applicants complaints to the Parliamentary Commissioner of unethical and improper behaviour.*
> 4. *allow wrongdoers to escape and pervert the course of justice.*
> 5. *undermine the implied rights of the applicant under the Constitution Act 1865 (Qld) and the Australian Constitution 1901.*
> 6. *erode any public confidence left in the doctrine of responsible government and the rule of law.*

Re Colonial Mutual Life Assurance Society Ltd and Department of Resources and Energy (1987) 6 AAR 80, Independent Commission against Corruption v Cripps & Anor SC N.S.W. ALD No. 30082/96

75. I do not accept the applicant's contentions quoted immediately above. I do not consider that the Department's inadvertent disclosure constitutes conduct inconsistent with the maintenance by the client of confidentiality in the documents in question. The Department always maintained that the documents in question were subject to a claim of privilege. It was not a question of the Department disclosing the documents and then realising that a claim of privilege ought to have been made. Once the Department's mistake was realised, it moved quickly to terminate the inspection process, and to re-assert its claim for privilege. It did not provide the applicant with copies of the documents, and there is nothing before me to suggest that the applicant has relied upon the contents of the documents he inspected such that he would be prejudiced if denied access to copies of the documents. Despite his submissions that the documents would assist him in commencing further legal proceedings, or in furthering complaints he has apparently made to various investigatory bodies, the applicant has not made any attempt to explain how particular documents would so assist him.

76. In *Hooker Corporation Ltd v Darling Harbour Authority and Ors* (1987) 9 NSWLR 538, Rogers J discussed the waiver of privilege by a litigant inadvertently disclosing protected material and said at p.541:

> *… in my view, such disclosure will not necessarily carry with it the consequence of waiver of privilege where production can be shown to be the result of inadvertence or some other unintentional act. I hasten to say that if there is production of protected material in the foregoing circumstances, a further question will arise as to whether it is fair in the circumstances of the case to allow the privilege to be maintained.*

77. There is no similar requirement here to evaluate considerations of fairness as between contesting parties in the context of current litigation. In this case, I do not consider that the Department's inadvertent disclosure of protected material, in a situation where:

1. the Department's FOI coordinator was absent due to illness and many hundreds of documents were in issue;
2. the Department moved quickly to re-assert its claim of privilege and refused to supply the applicant with copies of the documents; and
3. there is no evidence to suggest that the applicant has relied upon the documents to his detriment,

to be conduct inconsistent with the maintenance of confidentiality in the relevant documents. Nor do I consider that it would be unfair to permit the Department and

the Electoral Commissioner to maintain the claim of privilege in the relevant documents.

78. I have set out at paragraphs 52 - 66 above, my reasons for finding that the documents or parts of documents claimed by the Department to attract legal professional privilege under s.43(1) of the FOI Act, qualify for exemption under that provision. For the reasons explained above, I find that the Department's inadvertent disclosure to the applicant of some of those documents did not involve a waiver of the legal professional privilege which attaches to those documents.

Illegal/improper purpose exception

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

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

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

> *The next question is, what would amount to furtherance of such a* [dishonest] *purpose? I accept that a purpose of merely concealing previous dishonest conduct, and avoiding adverse consequences, such as*

penalties or claims for damages, which could flow therefrom, would not amount to furtherance of the improper purpose. The policy of the law is to encourage people to get legal advice so that they can be aware of their rights in relation to such matters. However, if the person seeking advice proposes to continue the dishonest conduct, … and proposes to use legal advice to assist in this purpose, then in my opinion that would be sufficient to amount to a furtherance of the improper purpose.

81. I also note that in the Federal Court decision of *Freeman v Health Insurance Commission and Ors* (1998) 157 ALR 333 at 342, Finkelstein J said:

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

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

83. In his written submissions dated 29 May 2001, the applicant particularised his allegations regarding the existence of an illegal/improper purpose as follows:

1. *A notation by Ms Daniels the solicitor acting for the Respondent in June 1998 evidences the following advise* [sic] *from Mr Flanagan of counsel using word to the effect "don't put those documents in they will only add weight to Mr Sharples allegations."*

2. *The Respondent on the face of notations and correspondence for which legal privilege is claimed entered into a pattern of behaviour to pervert the course of justice and the fact finding task of Her Honour Atkinson J in the proceedings* Sharples v O'Shea and Hanson SC 6318 of 1998

3. *The state of mind evidenced in the notations and correspondence for which privilege is alleged demonstrate a clear patter* [sic] *of deceit and cover up of the administrative mistake in registering the second respondent as a political party in Queensland.*

4. *The deception was motivated for the political purposes of avoiding a challenge to the Beattie Government purportedly elected on June 13, 1998 with the support of an Independent Mr. Wellington.*

5. *Had Respondent properly put before the Court all the evidence and not entered into* "ambush" *against an unfunded* "litigant in person" *there exists a real likelihood that the judgment of Her Honour Atkinson J in respect of the Respondents culpability may well have been different.* [S]*uch a decision would have added considerable weight to the prospect that the election had miscarried.*

6. *The documents for which exemption is claimed also evidence the sharing of legal resources opinion and tactics between the first and second defendants contrary* [to] *the doctrine of the model litigant of statutory bodies and public servants administering legislation are bound by their office to exercise impartiality.*

84. In response, Mr Lovi, on behalf of the Department, cited the relevant extracts from *Re Murphy* quoted above and stated:

> *I have reviewed the submissions made by* [the applicant] *and I am satisfied that he has not identified any prima facie evidence which establishes that the subject documents were created in preparation for, or furtherance of, an illegal or improper purpose. Accordingly, I submit that the '*improper purpose exception' *to legal professional privilege has no application.*
>
> *Significantly, I note that the Supreme Court has never made any adverse findings against the Electoral Commission of Queensland during the subject trial.*

85. I have examined the "notation" which I assume the applicant is referring to in paragraph 2.1 of his submission quoted above (the applicant has provided no specific description of the relevant document). The document in question is a file note of a telephone conversation between Ms Daniels of Crown Law and Mr Flanagan of Counsel regarding matters appropriate for inclusion in an affidavit that was being prepared for the purposes of an interlocutory proceeding. The file note merely reflects the participants' deliberations as to the content of the affidavit and the manner in which it should best be presented having regard to the Electoral Commissioner's defence of the case brought against him by the applicant. I consider that the Electoral Commissioner's legal representatives were entitled to hold discussions in that regard, and indeed, had a duty to act in the best interests of their client in presenting his defence. There is nothing to suggest that the Electoral Commissioner's legal representatives were attempting to withhold evidence from the Court. In short, I am satisfied that the notation referred to by the applicant does not constitute *prima facie* evidence (sufficient to afford reasonable grounds for believing) that the relevant communication was made in preparation for, or furtherance of, some illegal or improper purpose. There is nothing to give colour to the applicant's charge in that respect.

86. With the exception of paragraph 2.6, which I will discuss below, the remainder of the applicant's submissions are general in nature and I find them to be without substance. I have examined the documents claimed by the Department to be the subject of legal professional privilege and I am satisfied that there is nothing on their face to suggest that the relevant communications were made in preparation for, or furtherance of, some illegal or improper purpose. There is nothing before me to support the applicant's assertion that the Electoral Commissioner "entered into a pattern of behaviour to pervert the course of justice" or "a pattern of deceit and cover up". Again, there is nothing to give colour to the applicant's charge.

87. Paragraph 2.6 of the applicant's submissions is apparently directed towards those documents in issue that comprise communications between the QEC or Crown Law, and Ms Hanson's solicitors. I have discussed the nature of those communications at paragraph 60 above, and recorded my finding that the Electoral Commissioner and Ms Hanson shared a common interest in certain issues arising out of the litigation, such that the relevant documents attract legal professional privilege. It was perfectly legitimate for the co-defendants to explore a joint approach to those issues, and I am satisfied that there is nothing on the face of the documents to suggest that the relevant communications were made in preparation for, or furtherance of, some illegal or improper purpose.

88. It is clear that the model litigant concept referred to by the applicant does not prevent a public entity from undertaking a robust and sensible defence of proceedings brought against it, so as to avoid prejudice to its position or unnecessary protraction of litigation and the associated waste of public monies. The Commonwealth of Australia has, in fact, formalised the model litigant obligation, promulgating a series of principles that form components of a Legal Service Direction issued by the Attorney-General pursuant to s.55ZF of the *Judiciary Act 1903* Cth. I note that the relevant principles expressly recognise that:

> *The* [model litigant*] obligation does not prevent the Commonwealth and its agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and its agencies and testing or defending claims against them. …*

89. I note that, in the litigation commenced by the applicant, serious allegations of fraud and improper conduct were made against the Electoral Commissioner. I consider that he was entitled to take all legitimate steps to defend himself against those allegations.

90. On the material before me (including the contents of the documents in issue), I am not satisfied of the existence of a prima facie case that any of the communications comprised in the documents in issue were made in furtherance of an illegal or improper purpose. I find that all of the documents in issue in Categories A, B, C and D described above are subject to legal professional privilege, and are exempt

matter under s.43(1) of the FOI Act. (As regards the Category D matter, I will highlight on copies of the billing documents which I will forward to the Department, the matter which I am satisfied qualifies for exemption under s.43(1) of the FOI Act).

DECISION

91. For the reasons explained above, I find that -

1. some of the documents identified by the Department as falling within the terms of the applicant's FOI access application dated 18 December 1999 (as referred to on the attached schedule*) do not, in fact, fall within the terms of the applicant's FOI access application, and consequently do not form part of the matter in issue in this review;
2. the remainder of the documents (or parts of documents) in issue, as identified on the attached schedule*, comprise exempt matter under s.43(1) or s.45(1)(c) of the FOI Act;
3. the Department's search efforts to locate a letter dated 3 June 1999 from the Members' Ethics and Parliamentary Privileges Committee to the Attorney-General have been reasonable in all the circumstances of this case; the copy of the letter held by the Parliamentary Committee is not a document of the Department for the purposes of the FOI Act; and, in any event, the letter comprises exempt matter under s.50(c)(i) of the FOI Act; and
4. there are no reasonable grounds to believe that further documents which fall within the terms of the applicant's FOI access application dated 18 December 1999 exist in the possession, or under the control, of the Department; and that the search efforts made by the Department to identify all responsive documents have been reasonable in all the circumstances of this case.

* Schedule not included