

Price and Department of Justice & Attorney-General

(S 295/00, 12 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 8 March 1999, the applicant made an FOI access application to the Department of Justice and Attorney-General (the Department) in the following terms:

I apply under the Freedom of Information Act for all documents of the agency related to myself.

I specifically request all documents related to the Price v Yorkston & Brennan matter, and the Brennan v Price matter.

4. The applicant had made a number of earlier FOI access applications to the Department seeking access to all documents concerning him held by the Department. The Department therefore treated this application as being for access to documents not dealt with by the Department in the applicant's earlier FOI access applications.

5. By letter dated 9 October 2000, Mr B Lovi of the Department advised the applicant that he had located 50 documents which fell within the terms of the applicant's FOI access application. Mr Lovi provided the applicant with a schedule identifying the documents and advised that he had decided to give the applicant access to 9 documents, but that the remaining documents were either wholly or partially exempt from disclosure to the applicant under s.43(1) or s.45(1)(c) of the FOI Act. Mr Lovi also decided that, pursuant to the operation of s.29(2) of the FOI Act and s.6(1) of the *Freedom of Information Regulation 1992* Qld (the FOI Regulation), an application fee was payable by the applicant.

6. By letter dated 30 October 2000, the applicant applied for internal review of Mr Lovi's decision. The application for internal review sought access to all documents for which exemption had been claimed by Mr Lovi, and requested "*a proper description of all documents*" and "*a statement of reasons for the charge*".

7. Mr D Schulz of the Department conducted the internal review and, by letter dated 2 November 2000, informed the applicant that the schedule of documents which was

attached to Mr Lovi's initial decision complied with the requirements of s.34 of the FOI Act (concerning notification of decisions and reasons). Mr Schulz affirmed Mr Lovi's decision in all other respects.

8. By letter dated 23 November 2000, the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Mr Schulz's decision.

External review process

9. Copies of the documents in issue were obtained and examined. The documents were contained on a Crown Law file (numbered 1 by the Department and described as *Price Temporary File No. 2 - File no. 2581*) and consisted of Crown Law billing work sheets, memoranda of fees, and invoices/draft invoices, as well as internal file notes and correspondence between Crown Law and the Queensland Police Service (the QPS).
10. (By way of background, the documents related to an application which the applicant brought in the Supreme Court (and subsequent appeal to the Court of Appeal) for a statutory order for review of a decision made by Mr Yorkston SM [personal information deleted]. Mr Yorkston and Sergeant Brennan were respondents to the applicant's application. The Crown Solicitor's office (Crown Law) acted for Sergeant Brennan and the QPS in the proceedings. The documents in file 1 relate to that representation.)
11. By letter dated 5 September 2001, I conveyed to the applicant my preliminary view that there was at least one document in issue (e.g., a memorandum of fees from Crown Law to the QPS) which contained no information which could properly be characterised as concerning the applicant's personal affairs. Accordingly, I conveyed to the applicant my preliminary view that s.6 of the FOI Regulation required him to pay a \$31 application fee in connection with his FOI access application. The applicant paid the application fee to the Department. The Department subsequently confirmed that the applicant's FOI access application had been processed, and that the applicant had been advised of the photocopying charges that were payable by the applicant if he wished to obtain copies of the documents to which the Department was prepared to give him access.
12. Following discussions with staff of my office, the Department withdrew its claim for exemption in respect of some information contained in the billing documents and those documents or parts of documents are no longer in issue.
13. By letter to the applicant dated 26 October 2001, I advised the applicant that I had reviewed the matter remaining in issue and formed the preliminary view that it qualified for exemption under s.43(1) or s.45(1)(c) of the FOI Act. I asked the applicant to advise me, by 12 November 2001, whether or not he wished to contest my preliminary view and, if so, to lodge, by 19 November 2001, written submissions and/or evidence in support of his case for disclosure.
14. In a telephone message left with staff of my office on 30 October 2001, the applicant contended that he was not able to reply to my letter dated 26 October 2001 because he

had not been provided with a sufficient description of the matter in issue. Specifically, the applicant stated that he had not been advised whether the relevant documents "*relate to Brennan or McDonald*". By letter dated 9 November 2001, I advised the applicant that, although my preliminary view was based upon an examination of the contents of the documents in issue themselves (such that it was irrelevant whether the documents related to one particular action or another), I had nevertheless asked the Department to clarify the particular action(s) to which the documents in issue related.

15. By facsimile received at my office on 13 November 2001, the applicant raised various issues regarding the terms of his FOI access application, particularly, that he considered that there may be other documents in the Department's possession or under its control, which fell within the general terms of his FOI access application dated 8 March 1999 and which had not been located or dealt with by the Department. (As set out above, in his FOI access application, the applicant sought access generally to all documents of the Department which related to him, as well as specifically to all documents of the Department related to the 'Price v Yorkston & Brennan' matter, and the 'Brennan v Price' matter.)
16. By letter dated 20 November 2001, I asked the Department to provide details of the particular searches which the Department had conducted in order to locate all documents falling within the terms of the applicant's FOI access application, and the results of those searches. I also asked the Department to clarify to which particular file or matter the located documents related.
17. The Department responded by letter dated 14 January 2002, a copy of which was provided to the applicant. The Department set out a description of all files held by the Department which related to the applicant, together with a history of which particular files had been considered in response to the various FOI access applications which the applicant had made to the Department since 1996. The Department also confirmed that all of the documents in issue in this review related to the 'Price v Yorkston & Brennan' action. However, it indicated that a file (numbered 7 by the Department and described as '*Price: FOI external review/advice file no. 1740*') did not appear to have been dealt with in processing any of the applicant's previous FOI access applications to the Department, and that another file (numbered 18 by the Department and described as '*Price File no. Polo 48/2586*') could not be located. (All other files had been dealt with by the Department in processing earlier of the applicant's FOI access applications or, alternatively, the documents in question did not fall within the terms of the applicant's FOI access application dated 8 March 1999 because they were created subsequent to the date of the application.)
18. I asked the Department to provide me with further information about files 7 and 18. In the meantime, I wrote to the applicant to reiterate the preliminary view which I had communicated to him in my letter dated 26 October 2001, i.e., that the matter which I had examined to date qualified for exemption under s.43(1) or s.45(1)(c) of the FOI Act. By facsimile received at my office on 22 January 2002, the applicant advised that he did not accept my preliminary view. He claimed that legal professional privilege could not apply

to any of the matter in issue because it was created in furtherance of a crime or fraud. (I will discuss the applicant's submission in that regard below.)

19. By letter dated 14 February 2002 (a copy of which was provided to the applicant), the Department advised that it had reviewed the contents of file 7. The relevant documents related to legal advice which the Department had sought from Crown Law regarding various issues arising during the course of processing the applicant's numerous FOI access applications to the Department, and, as such, appeared to fall within the terms of the applicant's FOI access application dated 8 March 1999. The Department provided a description of the documents and advised that it was prepared to give the applicant access to some documents or parts of documents, but that the remainder were claimed by the Department to be exempt from disclosure under s.43(1) and s.45(1)(c) of the FOI Act. I authorised the Department to give the applicant access to the relevant matter and it is no longer in issue in this external review. As to file 18, the Department advised that searches for file 18 had been conducted at various intervals since 1997, without success. Further searches for the file had been carried out by the Department as the result of my request, but again, without success.
20. By letter dated 26 February 2002, I conveyed to the applicant my preliminary view that the matter remaining in issue in file 7 was exempt from disclosure to him under s.43(1) or s.45(1)(c) of the FOI Act. I asked the applicant to advise, by 4 March 2002, whether or not he wished to contest my preliminary view and if so, to lodge, by 11 March 2002, written submissions and/or evidence in support of his case for disclosure. By facsimile dated 2 February 2002 (but which was received in this office on 5 March 2002), the applicant advised that he did not accept my preliminary view. The applicant did not, however, lodge any further submissions in support of his case in this review.
21. In making my decision in this matter, I have considered:
 1. the matter in issue;
 2. the applicant's FOI access application dated 8 March 1999; application for internal review dated 30 October 2000; application for external review dated 23 November 2000; and facsimiles dated 13 November 2001, 22 January 2002 and 2 February 2002; and
 3. the decisions of Mr Lovi and Mr Schulz dated 9 October 2000 and 2 November 2000, respectively; and letters from the Department dated 14 January 2002 and 14 February 2002.

Matter in issue

22. The matter remaining in issue from file 1 is as follows:

Billing documents:

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Billing work sheets: parts of folios 7, 8, 9, 13, 14, 15, 21, 22, 23, 40, 41, 42
and 43
Memoranda of fees: parts of folios 10, 17, 34 and 35
Invoices/draft invoices: parts of folios 20, 25, 37 and 39

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Internal file notes and correspondence:

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Internal Crown Law file notes: folios 26, 27, 28, 29, 33 and 44
Correspondence (b/n Crown Law
and the QPS): folios 30, 46, 47 and 48

23. The matter remaining in issue from file 7 is as follows:

Billing documents:

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Billing work sheets: parts of folios 5 and 6
Memoranda of fees: parts of folio 7
Invoices/draft invoices: parts of folios 2-4

Correspondence:

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Between Crown
Law and the Department: folios 8-24

24. As noted above, the Department claims that the matter remaining in issue is exempt from disclosure under s.43(1) or s.45(1)(c) of the FOI Act. I will discuss the application of those exemption provisions further below.

'Sufficiency of search' issues

25. The applicant had made a general assertion that there are documents in the Department's possession or under its control which fall within the terms of his FOI access application dated 8 March 1999 and which have not been identified and dealt with by the Department in the course of this review.

26. The Information Commissioner explained the principles applicable to 'sufficiency of search' issues 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.*

...

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.*
27. The applicant was asked to clarify the precise type and nature of documents which he considered should be in the possession or control of the Department and to provide all information upon which he relied in support of his assertions. However, the applicant failed to provide any specific information in response to that request. As I noted above, the Department has provided the applicant with a list of all files in its possession which contain documents relating to the applicant. The only file which cannot be located by the Department is file 18, searches for which have been carried out by the Department since 1997, including searches in the course of this review, as the result of my specific request.
28. On the evidence before me, I am satisfied that there are no reasonable grounds for believing that additional documents, falling within the terms of the applicant's FOI access application dated 8 March 1999 (and not dealt with by the Department in response to earlier FOI access applications made by the applicant), exist in the possession, or under the control of the Department. As to file 18, I am satisfied that the search efforts made by the Department to locate that file have been reasonable in all the circumstances of this case. I am unable to identify any further search avenues which I consider it would be reasonable to ask the Department to pursue, in order to try to locate file 18.

Application of s.43(1) of the FOI Act to the matter in issue

29. 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.*
30. Following the judgments of the High Court of Australia in *Esso Australia Resources Ltd v Commission of Taxation* (1999) 74 ALJR 339, the basic legal tests for whether a communication attracts legal professional privilege under Australian common law can be summarised as follows:

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

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

31. 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.

32. 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).

33. It is clear that legal professional privilege can apply to communications between legal officers of the Crown Solicitor's office (Crown Law) and their clients, or with third parties, which satisfy the tests summarised above: see *Re Smith and Administrative Services Department* (1993) 1 QAR 22 at p.54 (paragraphs 88-90).

34. The matter claimed by the Department to be exempt under s.43(1) may be categorised as either billing documents, or internal file notes and correspondence between Crown Law and the QPS, or between Crown Law and the Department. In relation to the billing documents, 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.*

35. Applying those principles to this case, and based upon my review of the matter 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 QPS and/or the Department in the course of acting for those agencies in litigation and/or in providing professional legal advice, qualify for exemption from disclosure under s.43(1) of the FOI Act.
36. In relation to the internal file notes and correspondence between Crown Law and the QPS, and between Crown Law and the Department, I have reviewed those documents and am satisfied that each comprises a confidential communication which was prepared for the dominant purpose of giving or receiving professional legal advice or assistance, or, in the case of the correspondence between Crown Law and the QPS, for use in the legal proceedings involving the applicant and Messrs Brennan and Yorkston. Accordingly, I am satisfied that each of those documents attracts legal professional privilege and qualifies for exemption from disclosure under s.43(1) of the FOI Act, subject to the application of the 'illegal/improper' purpose exception which the applicant has raised.

The 'illegal/improper purpose' exception

37. In his facsimile dated 22 January 2002, the applicant said:

The matters raised by myself relate to all my files in your Office. The prosecutions bar none were in the same corrupt vein. Find a tort or fraud etc with all files and let the Crown try to have it overturned in a real court.

Please do not try it on me with comments that these are just costs documents etc. They are part of the corrupt-false prosecution of myself and clearly identify matters such as who is promoting and paying the piper. All exemption claims have been waived by corrupt actions of the Crown.

38. The applicant has repeatedly claimed in this, and in numerous other external review applications made to this office, that the information he seeks will reveal individual wrongdoing and a conspiracy between various government agencies and other persons to act against him. The Information Commissioner has addressed those claims in a number of prior decisions, particularly in the context of considering whether or not the illegal/improper purpose exception to legal professional privilege, applies. In particular, at paragraphs 62-67 of *Re Price and Department of Justice and Attorney-General* (S 100/97, 19 December 2000, unreported), the Information Commissioner said:

62. It is apparent from the material provided by the applicant on 26 March 1999 that he is alleging that a tort or fraud has been perpetrated against him. I considered the 'improper purpose exception' at some length in Re Murphy and Queensland Treasury (No. 2) (1998) 4 QAR 446 at paragraphs 31-42, and the principles set out there are relevant to the applicant's contentions about illegal or improper purpose. At paragraphs 35-37 of Re

Murphy (No.2), *I examined the judgments of the High Court of Australia in Attorney-General (NT) v Kearney (1985) 158 CLR 500, which explain the evidentiary onus placed upon 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, I 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.*
- 63. The correspondence of the applicant in this and other external review applications has been filled with unsubstantiated allegations of fraud, corruption and criminal activity by a large number of public servants and private individuals. The applicant has particularly sought to rely on the material delivered to my office on 26 March 1999, in order to show prima facie evidence that the documents in issue were brought into existence in preparation for, or furtherance of, an illegal or improper purpose.*
- 64. The submissions delivered to me on 26 March 1999 are repetitious and attempt to weave a net of conspiracy (between many public officials, members of the legal profession, the police and the courts) against the applicant. They are based merely on the applicant's assertion, unsupported by any credible, independent, corroborative evidence. Nothing in the documents in issue in this case, or other cases presently before me involving the applicant, tends to support the existence of a prima facie case that the documents in issue in this case were brought into existence in furtherance of an illegal or improper purpose.*

65. *The applicant has supplied me with a copy of an affidavit filed by him in the High Court of Australia annexing documentation which attempts to demonstrate improper actions by Crown Law officers during the judicial review proceedings, but again, the evidence does not bear out his claims.*

66. *There is no doubt that action has been taken against the applicant on a number of occasions. It is clear that some, if not all of these actions, have offended the applicant. It may well be that in dealings with Mr Price, mistakes have been made. It would be surprising if, in the myriad of interactions between Mr Price and public officials, no error was made. But even if there was evidence of such errors before me, that is not enough to amount to prima facie evidence of crime, fraud or improper purpose.*

67. *There is nothing before me which gives colour to the charges made by Mr Price. The matter claimed to be exempt under s.43(1) in this case comprises the kind of privileged communications I would ordinarily expect to find in the files of solicitors preparing for, and conducting, a Supreme Court hearing. There is no prima facie evidence that the matter claimed to be exempt under s.43(1) was created in preparation for, or furtherance of, an illegal or improper purpose. I find that that matter is subject to legal professional privilege, and qualifies for exemption under s.43(1) of the FOI Act.*

39. Similarly, I am satisfied that there is nothing in the matter in issue in this case that tends to support the existence of a *prima facie* case that the relevant documents were brought into existence in furtherance of an illegal or improper purpose. There is nothing before me which gives colour to the charges made by the applicant. I therefore find that the relevant matter is subject to legal professional privilege, and qualifies for exemption under s.43(1) of the FOI Act.

Application of s.45(1)(c) of the FOI Act to the matter in issue

40. The Department contends that those parts of the billing documents in issue which disclose the specific hourly rates charged by Crown Law officers are exempt under s.45(1)(c) of the FOI Act.

41. Section 45(1)(c) provides:

45.(1) Matter is exempt matter if—

...

(c) *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.

42. 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.

43. The correct approach to the characterisation test required by s.45(1)(c) of the FOI Act is explained in *Re Cannon* at pp.516-520 (paragraphs 67-76). I am satisfied that the matter in issue concerns the business, professional, commercial or financial affairs of Crown Law.

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. I am satisfied that disclosure of references in the matter in issue to the specific hourly rates charged by Crown Law officers could reasonably be expected to have an adverse

effect on the business, professional, commercial or financial affairs of Crown Law, given the competitive market in which Crown Law operates. I am unable to identify any public interest considerations favouring disclosure of that information to the applicant.

46. I therefore find that those parts of the billing documents in issue which disclose the specific hourly rates charged by Crown Law officers, qualify for exemption under s.45(1)(c) of the FOI Act.

DECISION

47. For the foregoing reasons, I find that:
1. the matter remaining in issue from files 1 and 7 (identified at paragraphs 22 and 23 above) qualifies for exemption from disclosure under s.43(1) or s.45(1)(c) of the FOI Act; and
 2. there are no reasonable grounds for believing that additional documents falling within the terms of the applicant's FOI access application dated 8 March 1999 (and not dealt with by the Department in response to earlier FOI access applications made to the Department by the applicant), exist in the possession, or under the control, of the Department. As to file 18, I am satisfied that the search efforts made by the Department to locate that file have been reasonable in all the circumstances of this case. I am unable to identify any further search avenues which I consider it would be reasonable to ask the Department to pursue, in order to try to locate that file.