

Sharples and Queensland Police Service

(S 68/01, 7 December 2001, Assistant Information Commissioner Shoyer)

(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 removed.]

REASONS FOR DECISION

Background

3. In May 1999, the applicant, Mr Sharples, gave evidence before the Members Ethics and Parliamentary Privileges Committee (MEPPC) of the Legislative Assembly. He was provided with a copy of the transcript of his evidence for the sole use of himself and his legal advisers. At some point, he provided his only copy to the Queensland Police Service (the QPS). He was denied a request for the return of that document, and made an FOI access application (dated 9 October 2000) to the QPS seeking a copy of that document, and other documents concerning the applicant's complaint to the QPS about Ms Dorothy Pratt MP.
4. The QPS did not deal with the access application within the prescribed time limit (see s.27(4) of the FOI Act) and the applicant applied to the Information Commissioner on 20 March 2001 for review of the QPS's deemed refusal of access to the requested documents: see s.79(1) of the FOI Act.

External review process

5. Copies of the documents in issue were obtained from the QPS and, as a result of further consultations, an additional document was disclosed to the applicant. By letter dated 8 June 2001, I informed the applicant of my preliminary view that, of the remaining documents, two were exempt from disclosure to him under s.43(1) (the legal professional privilege exemption) of the FOI Act, and two were exempt under s.50(c)(i) (the parliamentary privilege exemption) of the FOI Act.
6. The applicant has not contested the preliminary view I conveyed with respect to the former two documents. However, in order to avoid any suggestion of a misunderstanding if I were to treat that as a concession on his part, I have made findings below in respect of those two documents.
7. The applicant has contested the exemption claims made under s.50(c)(i) of the FOI Act.
8. In making this decision, I have taken into account the following:

1. the contents of the matter in issue;
2. the initial access application dated 9 October 2000;
3. the application for external review dated 21 March 2001;
4. the applicant's letter dated 21 June 2001, and sections 6-10 of the applicant's submissions dated 29 May 2001, lodged in respect of external review S 41/00.

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

9. 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.

10. Following the judgments of the High Court of Australia in *Esso Australia Resources Ltd v Commissioner 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 -

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.

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.

11. 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). However, there is no indication in the present case of conduct involving a waiver of privilege, or of any circumstances that might attract the application of any other exception to legal professional privilege.
12. Communications to and from salaried employee legal advisers in government agencies are capable of attracting legal professional privilege (see *Re Potter and Brisbane City Council* (1994) 2 QAR 37 and the cases there cited) and I am satisfied that the communications to and from the Queensland Police Service Solicitor which are now under consideration are likewise capable of attracting legal professional privilege, in accordance with the principles explained in the cases referred to.
13. The documents now under consideration comprise:

1. an internal QPS memorandum dated 1 September 1999 requesting a legal opinion from the Queensland Police Service Solicitor; and
 2. a letter dated 16 September 1999 from the Queensland Police Service Solicitor providing the requested legal opinion.
14. It is clear from my examination of the contents of those documents that they comprise confidential communications between lawyer and client made for the dominant purpose of seeking and giving legal advice. I am satisfied that the documents attract legal professional privilege, and I find that they comprise exempt matter under s.43(1) of the FOI Act.

Section 50(c)(i) of the FOI Act

15. The documents claimed to be exempt under s.50(c)(i) of the FOI Act are the transcript of the applicant's evidence before the MEPPC dated 5 May 1999, and a letter from the Chairman of the MEPPC to the QPS dated 1 December 1999.

16. Section 50(c)(i) of the FOI Act 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; ...

17. I note that the Information Commissioner has previously discussed the application of s.50(c)(i) of the FOI Act in *Re Ainsworth; Ainsworth Nominees Pty Ltd and Criminal Justice Commission; Others* (1999) 5 QAR 284 at paragraphs 54-63. There is no public interest balancing test attached to this exemption.

18. I consider that the transcript of the applicant's appearance before the MEPPC is clearly a proceeding in Parliament: see s.3(2) and s.3(3)(a) of the *Parliamentary Papers Act 1992 Qld.* Further, I am satisfied that disclosure of the transcript would be contrary to Standing Order 197 of the Legislative Assembly, which provides:

The evidence taken by a Committee and documents presented to it which have not been presented or reported to the House, shall not, unless authorised by the House or the Committee, be disclosed to any person other than a Member or officer of the Committee.

19. I am satisfied that the evidence recorded in the transcript has not been presented or reported to the Legislative Assembly, and that its general disclosure has not been authorised by the MEPPC or the Legislative Assembly. However, the applicant contends

that the prior disclosure of the transcript to him means that s.50(c)(i) does not preclude disclosure of the transcript to him under the FOI Act.

20. The test for exemption under s.50 is worded in different terms to other exemption provisions. Most exemption provisions use the words "Matter is exempt if its disclosure ...". However, s.50 uses the words "if its public disclosure ...". This imports a different test. In particular, the test imposed by the words "public disclosure" in s.50 appears to negate the possibility of taking into account the effect of a limited waiver of privilege for the benefit of a particular individual, where that individual is the applicant for access to a document under the FOI Act (*cf.* the position of the applicant for access in *Re Hewitt*, where waiver of legal professional privilege, rather than parliamentary privilege, was considered). It appears that only an intentional general waiver of parliamentary privilege (most commonly, through tabling, or other authorised publication, of a document) may be taken into account in the application of s.50 of the FOI Act, rather than a limited waiver of parliamentary privilege for the benefit of a particular individual. (Where such an individual is an applicant for access under the FOI Act, the fact that such a limited waiver has occurred may, in my view, be a relevant factor for an agency to take into account in the exercise of the discretion conferred on agencies by s.28(1) of the FOI Act, which enables an agency to choose whether or not to refuse access to matter which qualifies for exemption: see *Re Norman and Mulgrave Shire Council* (1994) 1 QAR 574 at p.577, paragraphs 11-13. However, in a review under Part 5 of the FOI Act, I am not permitted to exercise the discretion possessed by agencies to permit access to exempt matter: see s.88(2) of the FOI Act.)
21. I am satisfied that the previous limited disclosure of the transcript to the applicant does not mean that its public disclosure would not constitute an infringement of the privileges of Parliament. I therefore find that the transcript is exempt matter under s.50(c)(i) of the FOI Act.
22. The other document in issue is a letter dated 1 December 1999 from the Chairman of the MEPPC to a QPS officer. I am satisfied that it is a document prepared under the authority of the MEPPC and therefore a "proceeding in Parliament" within the terms of s.3(3)(g) of the *Parliamentary Papers Act*. I accept that it is a document that was prepared for the purposes, or incidental to, transacting the business of the MEPPC. I am satisfied that neither the MEPPC nor the Legislative Assembly has authorised its public disclosure. I am satisfied that its public disclosure would infringe the privileges of Parliament, and I find that it is exempt matter under s.50(c)(i) of the FOI Act.
23. In sections 6-10 of his submission dated 29 May 2001 (lodged in respect of application for review no. S 41/00), the applicant has made numerous submissions concerning the Australian Constitution, the validity of the Queensland Parliament, elections to Parliament, and acts of the Parliament. In essence, his 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:

Election may be disputed under this division

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.*

DECISION

24. I set aside the decision under review (being the QPS's deemed refusal of access to requested documents: see paragraph 4 above). In substitution for it, I decide that:
- (a) the documents identified in paragraph 13 above comprise exempt matter under s.43(1) of the FOI Act; and
 - (b) the documents identified in paragraph 15 above comprise exempt matter under s.50(c)(i) of the FOI Act.