



## **Decision and Reasons for Decision**

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**Application Numbers:** 2006 F0072, 2006 F0114, 2006 F0224, 2006 F0235, 2006 F0241

**Applicants:** 2006 F0072 – Caloundra City News

2006 F0114 – J Smith

2006 F0224 – A Farrand-Collins

2006 F0235 – J Wildman

2006 F0241 – P Gilmour-Walsh

**Respondent:** Caloundra City Council

**Decision Date:** 8 February 2007

**Catchwords:** **FREEDOM OF INFORMATION – application of section 43(1) of the *Freedom of Information Act 1992* – whether matter in issue qualifies for legal professional privilege – whether legal professional privilege waived – whether communications were made for an improper purpose**

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## Reasons for Decision

### Background

1. The five applicants reside in or near Maleny on Queensland's Sunshine Coast. Each applied to the Caloundra City Council ('the Council') for access, under the *Freedom of Information Act 1992 Qld* (the FOI Act), to the 'Maleny Community Precinct Probity Audit Report' (the 'Probity Report'). In 2001, the Council identified parcels of land to the east of the Maleny township as a proposed site to develop a Maleny Community Precinct including a residential development, golf course and other facilities. The Council's proposal for the Precinct was the subject of widespread debate, controversy and criticism within the local community, with allegations of improper conduct being made against Council officers in connection with aspects of the proposal, including financial expenditure. In 2005, in response to the community criticism and unrest, the Council commissioned financial consultants, KPMG, 'to conduct a probity audit with respect to the ...Project ... and report on whether the Council has conducted itself in compliance with all relevant aspects of the law, the Local Government Act, regulations, Council's policies and procedures and prudent commercial practice' (see page 1 of the Probity Report). The Probity Report examines specific issues in connection with the Project, including property issues, procurement and financial issues, governance issues and planning, joint venture and community consultation issues. It examines various aspects of the Council's development of an effluent disposal plant on land owned by the Council ('the CalAqua land'), as well as the Council's purchase of farm land for the proposed golf course and residential development.
2. Given the similarity of issues arising in each of the review applications, it is appropriate to deal with them together in this decision.
3. As noted, in their initial FOI access applications, each applicant sought access to the Probity Report. Messrs Wildman, Farrand-Collins and Gilmour-Walsh also sought access to all addenda and papers accompanying the Probity Report, while Caloundra City News also sought access to:
  - *'the review by Council's legal advisors, Allens Arthur Robinson;*
  - *the covering letter as completed by KPMG;*
  - *the Chief Executive Officer's response;*
  - *the legal advice from Allens Arthur Robinson dated 17/11/05 reference GNR:405612555; and*
  - *the legal advice from Allens Arthur Robinson dated 16/11/05 reference GNR:RLM:000000.'*
4. The table below sets out the history of each application prior to external review:

External Review Application No.	Date of Access Application	Date of Initial Decision	Date of Internal Review Application	Date of Internal Review decision	Date of External Review application
Caloundra City News 53696	21.11.05	23.12.05	9.1.06	2.2.06	7.2.06
Smith 53738	8.12.05	23.12.05	19.1.06	2.2.06	22.2.06

External Review Application No.	Date of Access Application	Date of Initial Decision	Date of Internal Review Application	Date of Internal Review decision	Date of External Review application
Farrand-Collins 53848	10.3.06	20.3.06	5.4.06	18.4.06	4.5.06
Wildman 53859	8.3.06	9.3.06	20.3.06	18.4.06	6.5.06
Gilmour-Walsh 53865	8.3.06	9.3.06	4.4.06	18.4.06	13.5.06

5. By identically worded letters dated 23 December 2005, 9 March 2006 and 20 March 2006, the Council's Director (Governance and Strategy), Mr Terry Scanlan, informed the applicants of his decision to grant access to the Probity Report and associated documentation, subject to the deletion of some matter that Mr Scanlan decided was exempt from disclosure under the FOI Act. Mr Scanlan did not identify the relevant exemption provisions upon which he relied in deciding that some matter was exempt from disclosure.
6. Each applicant sought internal review of Mr Scanlan's decision. By identically worded letters dated 2 February 2006 and 18 April 2006, Ms Dawn Maddern, Director (City Services), decided to affirm Mr Scanlan's decision, indicating in the schedule attached to her decision that the deleted matter was exempt from disclosure under section 45(1) and section 49 of the FOI Act.
7. Each applicant applied to the Office of the Information Commissioner, on the dates shown in the table above, for external review under Part 5 of the FOI Act, of Ms Maddern's decision to refuse them access to parts of the various documents.

#### **Steps taken in the external review process**

8. Copies of the documents in issue were obtained and examined. Caloundra City News raised a 'sufficiency of search' issue regarding the existence of another document referred to in the material disclosed by the Council, and apparently responsive to the terms of Caloundra City News' access application. The Council subsequently produced a copy of the document, comprising a letter dated 15 November 2005 from Allens Arthur Robinson to the Council with enclosures. Accordingly, the matter in issue in the external review initiated by Caloundra City News (review 53696) comprised:
  - document 1 - part 4.1 of KPMG's covering letter to the Council dated 27 October 2005;
  - document 2 - various sections of the Probity Report;
  - document 3 - various sections of the Chief Executive Officer's 'Without Prejudice' response to the Probity Report; and
  - document 4 - a letter dated 16 November 2005 from Allens Arthur Robinson to the Council with enclosures.
9. The matter in issue in the other four reviews comprised only documents 1-3 as described above.

10. By letter dated 6 July 2006, Assistant Information Commissioner (AC) Barker informed Caloundra City News of her preliminary view that document 4 qualified for exemption from disclosure under section 43(1) of the FOI Act. In the event that Caloundra City News did not accept her preliminary view, AC Barker invited it to lodge written submissions and/or evidence in support of its case, and advised that if she did not hear from it to the contrary by 24 July 2006, she would proceed on the basis that Caloundra City News accepted her preliminary view and withdrew its application for access to document 4. Caloundra City News did not respond within the time frame stipulated by AC Barker. Accordingly, document 4 is no longer in issue in review 53696.
11. By letter dated 7 July 2006, AC Barker informed the Council of her preliminary view that there was insufficient material before her to be satisfied that the matter in issue qualified for exemption under sections 45(1)(a), 45(1)(b), 45(1)(c), 45(3) or 49 of the FOI Act, and invited the Council to supply written submissions and/or evidence in support of its claims for exemption.
12. By telephone on 26 July 2006, Ms R Morrison of Allens Arthur Robinson advised that her firm had been instructed to act on behalf of the Council in connection with the reviews, and sought a meeting with AC Barker to discuss the nature of the material required in order to provide the Council's response to AC Barker's letter dated 7 July 2006. A meeting was held on 27 July 2006, at which Ms Morrison advised that the Council abandoned any claim for exemption under sections 45(1)(a), 45(1)(b) and 45(3) of the FOI Act, but maintained a claim for exemption under sections 45(1)(c) and 49 of the FOI Act. In addition, the Council advised that it also relied upon section 43(1) of the FOI Act in claiming exemption over some segments of matter.
13. By letter dated 7 August 2006, Allens Arthur Robinson provided the following material in support of the Council's claim for exemption:
  - a submission from the Council dated 7 August 2006;
  - a statutory declaration by the Council's Chief Executive Officer (Mr Garry Storch) dated 7 August 2006 with exhibits 'GSO1' to 'GSO11'.
14. Copies of the submission, statutory declaration and exhibits (edited so as to remove references to the matter in issue) were provided to the applicants, who were invited to lodge responses. Responses were lodged by Caloundra City News, and Messrs Smith, Farrand-Collins, Wildman and Gilmour-Walsh on 2 September 2006, 30 August 2006, 7 September 2006, 10 September 2006 and 10 September 2006, respectively.
15. The applicants raised a number of issues of concern in their responses. Caloundra City News challenged the authority of Allens Arthur Robinson and Mr Storch to represent the Council's position in the reviews (I will discuss that issue further below). Furthermore, Caloundra City News together with Messrs Farrand-Collins, Wildman and Gilmour-Walsh made additional submissions to the effect that paragraph 17 and exhibit GSO5 to Mr Storch's statutory declaration were inaccurate and misleading. Paragraph 17 referred to the tabling, at a general meeting of the Council on 5 August 2004, of a financial feasibility report dated 23 July 2004 prepared by the Council's Property Manager and which indicated that the Maleny Community Precinct Project could expect to provide a profit of nearly \$8 million. Exhibit GSO5 purported to be that report. However, the applicants contended that the exhibit was not in fact the report that was tabled at the meeting, and that paragraph 17 could not be relied upon.

16. The Council was given an opportunity to respond to the applicants' various submissions. By letter dated 28 September 2006, the Council's solicitors provided a response, which included a copy of the financial feasibility report that had, in fact, been tabled at the Council's general meeting on 5 August 2004, and which differed from exhibit GSO5 to Ms Storch's declaration.
17. By telephone to the Council's solicitors on 28 September 2006, a member of staff of my office sought clarification as the interpretation that was now to be placed on paragraph 17 of Mr Storch's statutory declaration in light of the two differing reports concerning the Precinct Project's profitability.
18. In response, the Council's solicitors provided a supplementary statutory declaration of Mr Storch dated 29 September 2006, together with exhibits GSO12 and GSO13. Copies of that material were provided to the applicants.
19. By letter dated 13 November 2006, the Council advised that, in view of the recent resolution of legal difficulties concerning the contract to purchase the farm land, it was prepared to withdraw its claims for exemption under sections 45(1)(c) and 49 of the FOI Act. However, it maintained its claim for exemption under section 43(1) in respect of some segments of matter.
20. By letter dated 27 November 2006, I authorised the Council to give the applicants access to the matter which previously had been subject to exemption claims under sections 45(1)(c) and 49 of the FOI Act. I also informed the applicants that the sole matter remaining in issue comprised segments of matter that the Council claimed were exempt under section 43(1) of the FOI Act.
21. By letter dated 4 December 2006, I informed the applicants that, having now had an opportunity to review the matter remaining in issue, I had formed the preliminary view that it qualified for exemption from disclosure under section 43(1) of the FOI Act. In the event that the applicants did not accept my preliminary view, I invited them to provide written submissions and/or evidence in support of their respective cases for disclosure of the relevant matter.
22. The Council then advised that, due to confusion regarding the highlighting of matter which it claimed qualified for exemption under section 43(1), there were, in fact, additional segments of matter that the Council claimed qualified for exemption under section 43(1) of the FOI Act, and which I had not dealt with in my letter to the applicants dated 4 December 2006. I reviewed that additional matter (which had not been disclosed to the applicants) and advised the applicants by letter dated 14 December 2006 of my preliminary view that that matter also qualified for exemption under section 43(1) of the FOI Act.
23. By letters dated 8 December 2006, 21 December 2006, 1 January 2007, 7 January 2007 and 12 January 2007, the various applicants advised that they did not accept my preliminary view, and lodged submissions in support of their respective positions.
24. In making my decision in this review, I have taken account of the following material:
  - the matter remaining in issue;
  - the applicants' FOI access applications dated 21 November 2005, 8 December 2005, 8 March 2006 and 10 March 2006; applications for internal review dated 9 January 2006, 19 January 2006, 20 March 2006, 4 April 2006 and 5 April 2006;

and applications for external review dated 7 February 2006, 22 February 2006, 4 May 2006, 6 May 2006 and 13 May 2006;

- the Council's initial decisions dated 23 December 2005, 9 March 2006 and 20 March 2006; and internal review decisions dated 2 February 2006 and 18 April 2006;
- Caloundra City News' submissions dated 2 September 2006 and 21 December 2006;
- Mr Smith's submissions dated 30 August 2006 and 8 December 2006;
- Mr Farrand-Collins' submissions dated 7 September 2006 and 1 January 2007;
- Mr Wildman's submissions dated 10 September 2006 and 7 January 2007;
- Mr Gilmour-Walsh's submissions dated 10 September 2006 and 12 January 2007;
- the Council's submissions dated 7 August 2006 and letters dated 13 November 2006 and 12 December 2006;
- Allens Arthur Robinson's letters/emails dated 28 September 2006, 5 October 2006, 2 November 2006, and 13 December 2006; and
- the statutory declarations of Mr Garry Storch dated 7 August 2006 and 29 September 2006, and exhibits GSO1 to GSO13 to those statutory declarations.

### **Matter in issue**

25. The matter remaining in issue in this review comprises:
- segments of matter contained on pages 4, 35-38, 45, 46, 95, 101 and 109 of document 2 (the Probity Report); and
  - segments of matter contained on pages 12, 14, 15, 19, 22 and 23 of document 3 (the Chief Executive Officer's 'Without Prejudice' response to the Probity Report).

### **Application of section 43(1) of the FOI Act to the matter in issue**

26. 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.*

27. 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.*

28. 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.
29. 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).
30. The matter in issue in this review is contained in non-privileged communications between the Council and KPMG (the Probity Report) or in an internal Council document prepared to respond to aspects of the Probity Report (document 3). However, the segments of matter in issue all comprise repetitions or summaries of the substance of professional legal advice provided to the Council by its legal advisers. It has been established in several cases that matter (contained in an otherwise non-privileged communication) which repeats, verbatim or in substance, the contents of a privileged communication, is itself privileged from production on the grounds of legal professional privilege. In *Re Hewitt* at paragraphs 119-120, Information Commissioner Albietz referred to the principle that a body corporate must be permitted to inform its servants or agents (who are responsible for taking some action in connection with, or to comply with, privileged legal advice which the body corporate has obtained) of the contents, or the substance, of privileged legal advice which the body corporate has obtained, without losing the benefit of the privilege. At paragraph 119 of *Re Hewitt*, Information Commissioner Albietz referred to the case of *Brambles Holdings Ltd v Trade Practices Commission (No. 3)* (1981) 58 FLR 452, in which Franki J of the Federal Court of Australia said (at pp.458-459 and p.462):

*[The disputed claim of legal professional privilege] is not limited to an internal memorandum merely setting out legal advice which has been obtained and which would be the subject of legal professional privilege if it was a record of a communication of advice from a legal adviser in the litigation. [The disputed claim of legal professional privilege] in its terms is applicable to an internal memorandum setting out legal advice together with comment on that advice by other persons in the Commission. In such a case that part of the memorandum which set out the legal advice would be privileged but not that part which set out the comment on the advice. I agree with the unreported views in this regard of Rath J in *Komacha v Orange City Council* [Supreme Court of New South Wales, Rath J, 30 August 1979, unreported]:*

The privilege attaching to a document will be accorded to copies made of it, provided confidentiality is maintained. If for example counsel's advice is circulated among officers of a corporation obtaining the advice, then privilege is preserved, whether the circulation is of the original or of copies. If in such a case an officer of the corporation were to report to another officer setting out portions of the advice, privilege would attach to the report in respect of those portions. ...

*... My decision in relation to any document which I have held not to be privileged is subject to the qualification that any part of any such document which does no more than reproduce legal advice obtained in relation to the proceedings need not be made available for inspection.*

31. A similar principle was applied by Lehane J of the Federal Court of Australia in *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2000] FCA 593.
32. Based upon my review of the matter in issue in documents 2 and 3, I am satisfied that each segment of matter repeats, verbatim or in substance, the contents of a privileged communication between the Council and its legal advisers (i.e., a communication that, of itself, was made for the dominant purpose of providing professional legal advice). I am therefore satisfied that the matter in issue attracts legal professional privilege, and is *prima facie* exempt from production under section 43(1) of the FOI Act, subject to the operation of any relevant qualification or exception to the doctrine of legal professional privilege (which I will discuss below).
33. Mr Stevenson, owner/editor of Caloundra City News, argued in his submission dated 21 December 2006 that the matter in issue could not attract legal professional privilege because it had not been created for the dominant purpose of use in existing or anticipated legal proceedings. However, as stated above, the *Esso Australia* case confirmed that legal professional privilege may arise in either of two circumstances, one of those being that the confidential communication was created for the dominant purpose of giving or receiving legal advice, and the other being that the confidential communication was created for the dominant purpose of use in existing or anticipated legal proceedings. I have explained above why I consider that the first limb of that test is satisfied by the matter in issue.
34. The applicants raised a variety of other arguments in support of a finding that the matter in issue does not qualify for exemption under section 43(1) of the FOI Act, including waiver and the improper purpose exception (see paragraph 29 above). Other arguments raised by the applicants have no relevance to a finding that the matter in issue attracts legal professional privilege. Nevertheless, I will discuss below, all of the arguments raised by the applicants.

## **Submissions by the applicants**

### Improper purpose exception

35. As I noted at paragraph 29 above, legal professional privilege can be displaced if legal advice is given in furtherance of an illegal or improper purpose. To displace legal professional privilege, however, 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. 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).

36. Messrs Farrand-Collins and Wildman argued in their submissions dated 1 January 2007 and 7 January 2007, respectively, that there was impropriety in various actions taken by the Council. They asserted that the Council was endeavouring to use section 43(1) of the FOI Act as a screen to avoid scrutiny of the way Council officers conduct Council business.
37. Mr Farrand-Collins gave, as an example, an issue concerning the boundary realignment of the CalAqua land. He submitted that material disclosed in the Probity Report supported the local community's belief that, in respect of the CalAqua land, Council officers had chosen to disregard legal advice (to the effect that there was a strong argument that the entity 'AquaGen' had some form of interest in the land) and had proceeded with a boundary realignment application regardless of the legal advice, and without resolving the issue of a possible conflicting interest in the land by AquaGen. Mr Farrand-Collins expressed concern that the Council may have disregarded other legal advice provided to it. He argued that, in respect of the contract to purchase the farm land, the Council was aware for over a year that its failure to have obtained the Treasurer's prior consent to the purchase of the farm land (in breach of state legislation), rendered the purchase contract vulnerable, but that the Council appeared in that period to have 'fished' among several firms of solicitors for 'suitable' legal advice.
38. Mr Wildman's submission was along similar lines, and argued that the sequence of events in question showed a lack of professionalism and integrity by Council officers. Mr Wildman stated that he sought access to the matter in issue to allow him to examine '... *what advice or briefs Council requested, what was given and when, then what action was taken by the parties concerned*.'
39. Information Commissioner Albiets considered the 'improper purpose' 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 in *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 and in *Propend Finance* concerning the evidentiary onus that is on a person who contests 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:
  - 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.
  - 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. 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.
  - 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.

40. 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 McLernon* [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.*

41. It is noteworthy also, 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.*

42. 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.

43. Having examined the matter in issue, I am not satisfied that there is *prima facie* evidence before me that the various communications were made in preparation for, or furtherance of, some illegal or improper purpose. For example, as regards the purchase of the farm land, it is evident from the material which has been disclosed to the applicants that Council officers were aware that the Council was first required to obtain the Treasurer's consent to the purchase of the land, and that the Council had nevertheless proceeded with the contract without obtaining the Treasurer's consent. It is also evident that the Council obtained legal advice on issues relating to the purchase and the development of the land, and that the deficiency in the purchase contract was remedied. There is nothing before me to suggest that the relevant legal advice was obtained in preparation for, or in furtherance of, an illegal or improper purpose.

44. In those circumstances, I am not satisfied that the improper purpose exception operates to displace the *prima facie* privilege which I have found attaches to the matter in issue.

#### Waiver

45. The High Court of Australia's decision in *Mann v Carnell* (1999) 74 ALJR 378 dealt with the principles relating to waiver of legal professional privilege. At pp.384-385, the High Court said:

[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...*

[29] *Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is 'imputed by operation of law'. This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. Thus, in *Benecke v National Australia Bank*, the client was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to a barrister in related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister's version of those instructions. She did not subjectively intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication. What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some over-riding principle of fairness operating at large.*

...

[34] ... *Disclosure by a client of confidential legal advice received by the client, which may be for the purpose of explaining or justifying the client's actions, or for some other purpose, will waive privilege if such disclosure is inconsistent with the confidentiality which the privilege serves to protect. Depending upon the circumstances of the case, considerations of fairness may be relevant to a determination of whether there is such inconsistency. The reasoning of the majority in *Goldberg* illustrates this.*

46. The applicants contend that various actions by the Council have resulted in privilege in the matter in issue being waived.
  - (i) *Disclosure of the legal advice to KPMG*
47. In his submission dated 8 December 2006, Mr Smith submitted that the disclosure by the Council to KPMG of legal advice obtained by the Council amounted to a waiver of the privilege attaching to that advice.
48. It is clear that the Council intentionally disclosed to KPMG the legal advice that it had obtained from its solicitors. As regards such express or intentional conduct, Information Commissioner Albietz made the following observations in *Re Hewitt* at p.338 (paragraph 19):

*... A person entitled to the benefit of legal professional privilege can waive the privilege through intentionally disclosing protected material. ... If disclosure is incompatible with retention of the confidentiality which is necessary for maintenance of the privilege, there will ordinarily be a general waiver of privilege .... However, the courts will allow an exception for a limited intentional disclosure of privileged material, if the disclosure is compatible with the retention of*

*confidentiality. Thus, disclosure of privileged information by the beneficiary of the privilege to another person for a limited and specific purpose, on the clear understanding that the recipient is not to use or disclose the information for any other purpose, will not involve a general waiver of privilege, and, subject to questions of imputed waiver, may not disentitle the beneficiary of the privilege from asserting the privilege against other persons. ...*

49. The Terms of Reference given to KPMG by the Council are reproduced on pages 131-132 of the Probity Report. The Audit Objectives as stated in the Terms of Reference (see paragraph 1 above) are as follows:

*To conduct a probity audit with respect to the Maleny Community Precinct Project ('the Project') and report on whether the Council has conducted itself in compliance with all relevant aspects of the law, the Local Government Act, regulations, Councils policies and procedures and prudent commercial practice.*

50. One of the specific Audit Requirements stated in the Terms of Reference is:

*Review and assess all relevant documentation to ensure compliance with relevant requirements and that any departures from established procedures have been appropriately approved.*

51. The Terms of Reference state that KPMG is 'to have full access to records, personnel, meetings and premises', and is to 'obtain, analyse, interpret and document information to support the outcomes of the audit'.

52. I am satisfied that the Council intentionally disclosed to KPMG all relevant material in its possession (including legal advice it had obtained from its solicitors), for the specific and limited purpose set out in the Terms of Reference, namely, to conduct a probity audit and to report back to Council on the results of that audit. While it does not appear that there was an explicit statement by the Council that KPMG was not to use the legal advice and other material for any other purpose than the conduct of its audit and the preparation of its report for the Council, I consider that it is reasonable to imply from the specific Terms of Reference by which KPMG was retained, as well as from the sensitivity of the matter, and the actual conduct of KPMG, that it was clearly understood between the Council and KPMG that all relevant material was being disclosed to KPMG only for the purpose of conducting the probity audit and for no other purpose. The fact that KPMG did not, in fact, use or disclose the legal advice other than for that specific purpose supports a finding that KPMG understood the limited purpose for which it was given access to the legal advice, and that disclosure by the Council of the advice in those circumstances was not intended to operate as a general waiver of the privilege attaching to the advice.

53. Accordingly, I do not consider that disclosure of the legal advice to KPMG for the limited and specific purpose of allowing it to conduct a probity audit and report to the Council on the results of that audit, is incompatible with the retention by the Council of confidentiality in the advice. There is no suggestion that the Council has otherwise disclosed the legal advice or acted in a manner that is inconsistent with maintaining a claim for privilege over the advice.

(ii) Undertaking to give full public access to Probity Report

54. In his submission dated 21 December 2006, Mr Stevenson stated that KPMG was aware, when it prepared the Probity Report, of an undertaking by the Mayor that the complete Probity Report would be disclosed to the public. He also submitted that the

Council's initial and internal review decision-makers did not claim exemption under section 43(1) of the FOI Act as both were aware of the Mayor's undertaking and would have believed that privilege had been waived.

55. Mr Smith contended in his submission dated 8 December 2006 that the Mayor had verbally assured Mr Smith and Mr Peter Bryant OAM (the secretary of the Caloundra City Ratepayers & Residents Association Inc) that the Probity Report would be made public when completed. Mr Smith contended that the Mayor's undertaking amounted to an implied waiver of privilege in the legal advice contained in the Probity Report.
56. These submissions by the applicants demonstrate a misunderstanding of the law relating to waiver of privilege. Whether or not privilege has been waived is a question of fact, and it is only the conduct of the client (i.e., the Council) which can amount to a waiver of privilege. What KPMG knew or did not know about what the Council intended or did not intend to do with the Probity Report is not relevant. When assessing an issue of waiver, it is necessary to examine the conduct of the client and decide whether that conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. Accordingly, regardless of what the Mayor may or may not have said about intended public disclosure of the Probity Report, the issue is whether the Council has, in fact, disclosed the content of privileged legal advice in such circumstances as to amount to a general waiver of privilege. As there is nothing before me to demonstrate that there has been public disclosure by the Council of those parts of the Probity Report or document 3 which repeat or summarise legal advice obtained by the Council, it follows that I must find that the Council has not waived privilege in that advice. I have already explained above why I am satisfied that the limited disclosure of the advice to KPMG in order to allow it to conduct its probity audit did not amount to a waiver of privilege.

*(iii) Australian Wheat Board inquiry*

57. Mr Smith referred in his submission to the 2006 Cole report (Report by Commissioner Terence Cole 'Inquiry into certain Australian companies in relation to the UN Oil-For-Food Programme' delivered 24 November 2006) in which Commissioner Cole published certain matter which he stated would have been exempt from publication on the basis that it attracted legal professional privilege, except for the fact that the matter had previously been published in a report.
58. As I noted above, there is nothing before me to demonstrate that the matter in issue has been publicly disclosed or published by the Council in circumstances that would amount to a general waiver of privilege.
59. In summary, as regards the improper purpose exception to legal professional privilege, and the principles with respect to waiver of privilege, I am satisfied for the reasons explained above that neither qualification or exception operates to displace the legal professional privilege which I have found attaches to the matter in issue.
60. I will now discuss the various other arguments raised by the applicants in favour of disclosure of the matter in issue.

Public interest

61. Mr Smith contended in his submission dated 8 December 2006 that it is in the public interest that the entire Probity Report be made public because the Council agreed to the probity audit in order to demonstrate to the public that its dealings in all matters

pertaining to the Maleny Community Precinct were both legal and ethical. Mr Smith submitted:

*In particular I refer to the following statement on page 109 of the [Probity] Report*

On 24<sup>th</sup> June 2004, when Council decided to exercise the option to purchase The Porter land on a 6-3 vote, Councillors had been further provided with, among other things;

- .....
- .....
- .....
- .....
- Information that the deferred payment arrangement under the Porter Contract breached the SBFA Act.

*This new disclosure is central to this submission, and establishes clearly that the majority of the Members of the Council were prepared to ignore the law so far as the contract with Porter was concerned.*

*This then begs the question whether the same Councillors can be trusted to act within the law insofar as other important issues in the overall dealing are concerned.*

*There can be little doubt that the answer to this question would be clearly within the public interest. The only way that the public can be satisfied that their elected Councillors have acted lawfully and with probity in the balance of dealings in the overall proposal is by the release of the total content of the Probity Report, the submission by the CEO thereon, and associated reports.*

62. Mr Gilmour-Walsh stated in his submission dated 10 September 2006:

*Lack of proper community and stakeholder consultation has provided an avenue for the provision of incomplete or inaccurate information and has been a key feature of Council behaviour in this matter. As a result of these poor practices a complex set of circumstances and issues has evolved, creating confusion and misperceptions that have already caused conflict and will influence the conduct of the community during any further stages of the project in question, impacting the quality of the final outcome.*

*As confirmed in the recent report of the abridged probity audit conducted by KPMG, Council has misled the community. During Council-controlled stakeholder consultations held via a community-based Taskforce (formed August 2003) Council provided verbal reassurances that key risks and issues were being properly addressed. For example the taskforce were not advised of the conditions of Council's joint venture arrangement that already proved itself to be unworkable. Not only were the taskforce members sufficiently qualified and knowledgeable to advise Council of the risks, each member and their associated community groups found that they potentially had agreed to Council action that was not in accord with their own interests.*

*The community has lost faith in Council and requires all the information in order to completely understand the current situation and be reassured that in getting this project back on track, all issues have been identified. The lack of trust and*

*faith in Council had already been raised as a serious issue in a Council-commissioned report in May 2003 (Tract Consultants Report, July 2003). From the information provided it would appear that Council either did not appreciate the Community's need to know or it was not in the interests of certain Council officers to release complete and accurate information. Some of these Council officers still hold office.*

...

*Whilst I am in support of Council acquiring this land for community purposes, I also require assurance that I have information that will enable me to fully assess the implications of further Council action.*

63. In his submission dated 12 January 2007, Mr Gilmour-Walsh stated:

*The subsequent disclosure of most of the withheld information through the Probity Audit and under the direction of the Information Commissioner justified some of the concerns held by myself and other members of the community.*

*The information withheld under 'legal professional privilege' is more than likely to further support my belief that Council failed to act in a professional manner.*

64. In his submission dated 7 January 2006, Mr Wildman stated:

*By the end of 2007 Council hopes to complete the community consultation process on the Community precinct (Porters/Armstrong properties). It is essential for the community to participate with a clean slate, they must know about any legal restraints that may have arisen in the original negotiations.*

65. It is clear that the Council's actions with respect to the Maleny Community Precinct Project have been the subject of much criticism within the local community, and that the applicants are of the view that the Council has withheld from the community, important information about the Project. They argue that all information held by Council concerning the probity audit of the Project should be disclosed in the public interest, given the contentious nature of the Project and its importance to, and potential impact upon, the wider community.

66. While I acknowledge the controversy surrounding the Project, and the submissions of the applicants regarding the significant public interest in disclosure of the Probity Report, section 43(1) of the FOI Act is not subject to a public interest balancing test. As I have explained, the only issue for determination under section 43(1) is whether the matter in issue satisfies the test for legal professional privilege set down by the High Court in the *Esso* case. That test does not contain any element of public interest.

#### Authority to act on behalf of the Council

67. Caloundra City News challenged the authority of Allens Arthur Robinson and Mr Storch to represent the Council's position in these external reviews. Mr Stevenson submitted on 2 September 2006:

*On Thursday, February 2 Council by resolution, ceded the authority of Principal Officer to the Director City Services, Dawn Maddern (Att. A). To my knowledge that has not been rescinded.*

*Both the AAR Submission and the Storch Declaration are dated August 7, 2006 and are in response to the Commission's preliminary decision notification to Council of July 7, 2006.*

*In the Commission's correspondence to me, of August 15, it is apparent from the words used that the Commission is of the opinion that the AAR Submission and Storch Declaration were made on behalf of, and with the full knowledge of, Caloundra City Council.*

*On or about Tuesday, August 15 the then-Acting Mayor of Caloundra City Council, Councillor Anna Grosskreutz, became aware of the existence, for the first time, of correspondence between Council and the Commission.*

*She demanded to be provided with it, and in an open General Meeting of Caloundra City Council on Thursday, August 17 it was debated.*

*It was the first occasion the elected representatives knew anything about the AAR Submission and the Storch Declaration.*

*The Sunshine Coast Daily the following day reported happenings within that meeting (Att.B).*

*An attempt during the meeting by one Councillor to get some information made public was thwarted (Att.C).*

*In such circumstances it would be dangerous for the Commission to believe that the views expressed in the AAR Submission or the Storch Declaration are representative of the wishes of Caloundra City Council.*

*Their views are not known as they were never sought or expressed.*

*And there has been no directive to either Allens Arthur Robinson or Mr Garry Storch from Caloundra City Council to respond on their behalf, in the manner in which the Commission has received.*

*In my opinion both the AAR Submission and the Storch Declaration are 'without power' and should form no part in the Commission's deliberations and final decision.*

68. The internal arrangements which an agency makes regarding its handling of FOI external review applications is not a matter over which the Information Commissioner has any jurisdiction under the FOI Act. An issue regarding who or who was not informed about the way in which the Council responded to correspondence from this office is similarly of no relevance to the exercise of the Information Commissioner's powers under Part 5 of the FOI Act. Nevertheless, I would take this opportunity to observe that section 1131 of the *Local Government Act 1993 Qld* would appear to be wide enough to authorise a Chief Executive Officer to make a statutory declaration on behalf of the Council, and to instruct solicitors on its behalf. Section 1131 provides:

**1131 Role of chief executive officer**

- (1) *The chief executive officer of a local government has the role of implementing the local government's policies and decisions.*



- (2) *On a day-to-day basis, the chief executive officer's role includes managing the local government's affairs.*
- (3) *The chief executive officer alone is responsible for—*
  - (a) *organising the presentation of reports and reporting to the local government; and*
  - (b) *conducting correspondence between the local government and other persons; and*
  - (c) *managing and overseeing the administration of the local government and its corporate plan; and*
  - (d) *coordinating the activities of all employees of the local government.*
- (4) *The chief executive officer has—*
  - (a) *all the powers necessary for performing the chief executive officer's role; and*
  - (b) *the powers the local government specifically delegates to the chief executive officer.*

69. The sole issue for my determination in this review is whether or not the matter in issue qualifies for exemption under the FOI Act. I have reviewed the matter in issue and formed the view that it meets the requirements for exemption under section 43(1) of the FOI Act. Any issue about who had authority to author the Council's submissions throughout the course of this review does not alter my view that the matter in issue attracts legal professional privilege under section 43(1) of the FOI Act.

#### Expert opinion or analysis

70. In his submission dated 8 December 2006, Mr Smith argued that the legal advice in issue constitutes expert opinion or analysis within the meaning of section 41(2)(c) of the FOI Act and, accordingly, cannot be exempt from disclosure under the FOI Act.

71. Sections 41(1) and (2) provide as follows:

#### **41 Matter relating to deliberative processes**

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

- (c) *expert opinion or analysis by a person recognised as an expert in the field of knowledge to which the opinion or analysis relates.*

72. This submission reflects a misunderstanding of the operation of the exemption provisions of the FOI Act. Under the FOI Act, matter may qualify for exemption under one or more of the exemption provisions contained in Part 3, Division 2, of the FOI Act. The mere fact that the matter in issue may not meet the requirements for exemption under section 41(1) of the FOI Act (which I am not required to decide in this case in any event) does not prevent it from qualifying for exemption under section 43(1) of the FOI Act if the requirements of that exemption provision are met. The exemption provisions contained in Part 3, Division 2, of the FOI Act operate independently of each other.

The section 43(1) exemption claim was not made by the Council at the outset

73. Mr Smith argued in his submission dated 8 December 2006 that it was inappropriate for the Council to make a claim for exemption under section 43(1) of the FOI Act during the external review stage, when it had not relied upon that provision during the initial processing of his access application. Mr Stevenson argued in his submission dated 21 December 2006 that this office did not discuss the application of section 43(1) of the FOI Act in its initial correspondence with the applicants because it presumably held the view that section 43(1) did not apply.
74. I recognise that it may be disconcerting for an applicant to be notified during the course of an external review that an agency is now relying upon an exemption provision not previously raised during the processing of the FOI access application. However, the right of agencies, on external review, to raise new grounds for exemption, has been recognised in numerous court and tribunal proceedings. A review under Part 5 of the FOI Act is a review *de novo*. The agency is not bound to adhere to the position adopted in the decision under review (although it still carries the onus, under section 81 of the FOI Act, of establishing that the Information Commissioner should give a decision adverse to the applicant). In *Re 'NKS' and Queensland Corrective Services Commission* (1995) 2 QAR 662, Information Commissioner Albietz said (at paragraph 5):

*I am empowered to make a fresh decision as to the correct application of the provisions of the FOI Act to any documents (or parts of documents) of the respondent agency or Minister, which fall within the terms of the applicant's FOI access application and to which the applicant has been refused access under the FOI Act. In the course of a review under Part 5, the respondent agency or Minister may, in effect, abandon reliance on the grounds previously given in support of the decision under review, in whole or in part, whether by making concessions to the applicant (which mean that some matter is no longer in issue) or by arguing fresh grounds to support a refusal of access to matter in issue.*

75. I am satisfied that the applicants have been accorded procedural fairness in that they were notified of the Council's fresh claim for exemption under section 43(1) of the FOI Act when it arose, and were given an opportunity to lodge submissions and/or evidence in response to that claim.

## **Conclusion**

76. For the reasons explained above, I am satisfied that the matter in issue qualifies for exemption from disclosure under section 43 of the FOI Act, and that the applicants therefore are not entitled to obtain access to it under the FOI Act.

## **Decision**

77. I decide to vary the decisions under review (being the decisions of Ms Dawn Maddern of the Council dated 2 February 2006 and 18 April 2006), by finding that the matter in issue (identified in paragraph 25 above) is exempt from disclosure under section 43(1) of the FOI Act.
78. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

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**R Moss**  
**Assistant Information Commissioner**

**Date: 8 February 2007**