

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 05/2000
Application S 157/96

Participants:

NOOSA SHIRE COUNCIL
Applicant

DEPARTMENT OF COMMUNICATION AND INFORMATION,
LOCAL GOVERNMENT AND PLANNING
Respondent

T M BURKE ESTATES PTY LTD
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - 'reverse-FOI' application - legal opinion - whether disclosure to State government departments of a legal opinion obtained by a local council, and/or disclosure to the access applicant and to regional newspapers of the conclusions reached in the legal opinion, involved a waiver of legal professional privilege otherwise attaching to the legal opinion - implied waiver of legal professional privilege - application of s.43(1) of the *Freedom of Information Act 1992 Qld*.

Freedom of Information Act 1992 Qld s.43(1), s.51

Evidence Act 1995 NSW s.122

Local Government (Planning and Environment) Act 1990 Qld s.1.3; s.2.18, s.2.19

Amalgamated Television Services Pty Limited v Marsden [2000] NSWCA 63

Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd (1996) 40 NSWLR 12

Attorney-General (NT) v Maurice (1986) 161 CLR 475

Australian Unity Health Ltd v Private Health Insurance Administration Council
[1999] FCA 1770

Commissioner, Australian Federal Police v Propend Finance Pty Ltd
(1997) 188 CLR 501

Esso Australia Resources Ltd v Commissioner of Taxation (1999) 74 ALJR 339

Goldberg v Ng (1995) 185 CLR 83

Hewitt and Queensland Law Society Inc, Re (1998) 4 QAR 328

Mann v Carnell (1999) 74 ALJR 378

Queensland Law Society v Albietz and Hewitt (1998) 4 QAR 387; [2000] 1 Qd R 621

Weeks and Shire of Swan, Re (Information Commissioner WA, Decision No. D00595,
24 February 1995, unreported)

DECISION

I affirm the decision under review (which is identified in paragraph 5 of my accompanying reasons for decision) that the legal opinion of Mr Hampson QC dated 7 July 1994 is not exempt from disclosure to the applicant under s.43(1) of the *Freedom of Information Act 1992* Qld.

Date of decision: 15 December 2000

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. This is a 'reverse FOI' application by the Noosa Shire Council (the Council), seeking review of the respondent's decision to give T M Burke Estates Pty Ltd (Burke) access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to a legal opinion dated 7 July 1994, prepared for the Council by Mr C E K Hampson QC. The Council contends that the document is exempt matter under s.43(1) of the FOI Act (the legal professional privilege exemption). The respondent decided that legal professional privilege in the opinion had been waived, and that the opinion no longer qualified for exemption under s.43(1).
2. The legal opinion was sought from Mr Hampson QC at a time when the Council had prepared a draft Development Control Plan (DCP) in relation to part of the Marcus Shores area in the Noosa Shire, held by Burke under a Special Lease from the government of the State of Queensland. The terms of the lease envisaged that land held under the lease would be developed and sold by Burke. At the time the legal opinion was given, Burke had already developed part of the land subject to the lease, and had made unsuccessful applications to the Council for permission to develop that part of the land which would later be subject to the DCP. The DCP, which was approved by the Governor in Council on 4 May 1995, significantly limited the ways in which Burke can use the subject land. This prompted Burke to commence legal proceedings against the Council claiming substantial compensation for the reduction in value of the land. The Council has strenuously contested that Burke has any legal entitlement to compensation. (For additional background, see *T. M. Burke Estates Pty Ltd v Noosa Shire Council* [1998] 2 Qd R 448; *Noosa Shire Council v T. M. Burke Estates Pty Ltd* [2000] 1 Qd R 398; *T. M. Burke Estates Pty Ltd v Noosa Shire Council* [2000] QPE 026. I note that, at the time of publication of these reasons for decision, judgment was reserved in an appeal to the Queensland Court of Appeal from the last-mentioned decision).
3. One issue which arose in the regional political controversy over whether further development

should be permitted at Marcus Shores was whether significant compensation was likely to be payable by the State of Queensland to Burke if Burke's rights to develop the land at Marcus Shores were altered. In this regard, the Council sought advice from Mr Hampson QC. The legal opinion given by Mr Hampson QC is the document in issue. As the DCP was made by the Governor in Council, it was necessary for State government departments to become involved in the planning approval process. The approach of the State government was co-ordinated through the Department of Local Government and Planning (the Department). The existence of Mr Hampson's legal opinion was mentioned in a telephone conversation between a solicitor employed by the Council and a senior officer of the Department. The latter asked if the Council would provide a copy of Mr Hampson's legal opinion, and the Council obliged, forwarding it under cover of a letter dated 21 July 1994.

4. By letter dated 12 June 1996, Burke applied to the Department under the FOI Act for access to the document in issue. In accordance with s.51 of the FOI Act, the Council was consulted. By letter dated 12 July 1996, the Shire Solicitor advised that he considered that the legal opinion had been provided to the Department to expedite consideration of the DCP and that, in his opinion, legal professional privilege had not been waived, nor did the Council wish to waive it.
5. The initial decision of the Department was made by Mr V Tumath, who determined that the legal opinion was exempt matter under s.43(1) of the FOI Act. Burke subsequently applied for internal review of Mr Tumath's decision, raising the issue of waiver. The internal review was conducted by Ms L Apelt, who, by letter dated 10 September 1996, advised the Council that she had decided that there had been an imputed waiver of legal professional privilege, and that the legal opinion was not exempt from disclosure to Burke under the FOI Act.
6. By letter dated 4 October 1996, the Council applied to me for review, under Part 5 of the FOI Act, of Ms Apelt's decision.

External review process

7. A copy of the legal opinion by Mr Hampson QC was obtained from the Department and examined. It was clear, from my examination of it, that the opinion must have satisfied the legal tests to attract legal professional privilege at the time of its creation. No participant has disputed that the document attracted legal professional privilege upon its creation and communication to the Council, and I am satisfied that that is the case. The issue I have to determine is whether legal professional privilege has been waived, so that the legal opinion no longer qualifies for exemption under s.43(1) of the FOI Act.
8. Upon being notified of my review, Burke applied for, and was granted, status as a participant in the review. I invited the Council to lodge a written submission and/or evidence in support of its case that legal professional privilege had not been waived. There followed an exchange of submissions between the participants. In making my decision, I have taken into account:
 - correspondence between the participants preparatory to the making of the Department's initial and internal review decisions;
 - the application for external review by the Council dated 4 October 1996;
 - copies of the newspaper articles referred to at sub-paragraphs 18(c) to 18(e) below;
 - letters from the Shire Solicitor dated 12 November 1996, 5 June 1997, 13 November 1998, 24 November 1998 and 21 November 2000;
 - letter from the Department dated 8 April 1997;
 - submissions on behalf of Burke dated 16 September 1998.

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 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.

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), 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).
12. As stated above, there is no doubt that the legal opinion in issue attracted legal professional privilege at the time of its creation. The only issue is whether legal professional privilege has been waived by the Council.

Waiver of legal professional privilege - general principles

13. The leading High Court authorities on waiver of legal professional privilege are *Attorney-General (NT) v Maurice* (1986) 161 CLR 475; *Goldberg v Ng* (1995) 185 CLR 83, and *Mann v Carnell* (1999) 74 ALJR 378. There are two kinds of waiver - express or intentional waiver, and waiver imputed by operation of law (also referred to in the cases as implied waiver). As to the former, I 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 (see Maurice at p.487, per Mason and Brennan JJ). 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: see Goldberg v Ng (1995) 185 CLR 83 per Deane, Dawson and Gaudron JJ at p.95, per Toohey J at p.106. 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: see Goldberg v Ng per Deane, Dawson and Gaudron JJ at p.96, per Toohey J at pp.106-109, and per Gummow J at p.116.

14. In *Re Hewitt* (at pp.338-351; paragraphs 20-61), I examined the concept of imputed waiver in the context of s.43(1) of the FOI Act, and analysed relevant authorities at some length, concluding (at p.351, paragraph 61):

... Therefore, I have reached the view that Australian law with respect to legal professional privilege allows for the application of principles of imputed waiver of privilege in the context of an extra-curial dispute, by reference to some act or omission of the privilege holder which, though falling short of intentional waiver, is inconsistent with maintenance of the privilege, and by reference to what ordinary notions of fairness require having regard to all relevant circumstances attending the extra-curial dispute.

15. My decision in *Re Hewitt* on imputed waiver of privilege was upheld by the Supreme Court of Queensland in judicial review proceedings: see *Queensland Law Society v Albietz and Hewitt* (1998) 4 QAR 387; [2000] 1 Qd R 621. Since then, the High Court of Australia has published its decision in *Mann v Carnell*. In it, two of the judges of the High Court proposed a significant revision/simplification of the principles with respect to waiver of legal professional privilege. In his dissenting judgment, McHugh J was prepared to hold that *Goldberg v Ng* had been wrongly decided, if it were to be taken as deciding, as a matter of law, that questions of waiver always depend on notions of fairness. McHugh J proposed that the relevant rule of law should be (at p.401, paragraph 134):

Once there is a voluntary disclosure of privileged material to a stranger to the privileged relationship (i.e., to a person who is not the lawyer or the client), privilege in that material is waived as against the world.

Kirby J concurred with McHugh J on this issue (at p.403, paragraphs 147-148).

16. However, in their joint majority judgment, Gleeson CJ, Gaudron, Gummow and Callinan JJ were not prepared to overrule *Goldberg v Ng*. At p.385 (paragraph 30), they stated: "*However, the reasoning of all members of the [High] Court [in Goldberg v Ng] was inconsistent with the proposition that any voluntary disclosure to a third party necessarily waives privilege.*" Therefore, the passage quoted at paragraph 13 above appears to correctly state current Australian law on that issue.
17. Perhaps influenced by the push from the minority judges for revision/simplification of the principles relating to waiver of privilege, the comments by the majority judges on implied waiver of privilege disclose a difference of emphasis from that which is apparent in the judgments of all judges in *Maurice*, and *Goldberg v Ng*. The majority judges in *Goldberg v Ng* observed (at p.96) that: "*... it was accepted in all judgments [in Maurice] that the question of whether a limited disclosure gives rise to an implied or imputed waiver of legal professional privilege ultimately falls to be resolved by reference to the requirements of fairness in all the circumstances of the particular case.*" It was clear that the majority judges in *Goldberg v Ng* endorsed and applied that view, as did the minority judges (Toohey J at p.109-110; Gummow J at pp.120-121). The comments of the majority judges in *Mann v Carnell* on implied waiver of privilege (set out below from pp.384-385)

allow that fairness is still a relevant consideration, but do not give it emphasis as the determinative consideration bearing on implied waiver of privilege:

[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.*

Instances of disclosure

18. The most common instance of conduct inconsistent with maintenance of the confidentiality of a privileged communication (thereby giving rise to questions of whether a waiver of privilege has occurred) is disclosure of the whole, a part, or a summary, of a privileged communication. Before considering the submissions and evidence of the parties, I will list the instances of disclosure that have been identified, with respect to the document in issue:

- (a) The whole of the legal opinion was disclosed to the Department under cover of a letter from the Shire Solicitor dated 21 July 1994.
- (b) Copies of the legal opinion were later passed on by the Department to the Office of the Crown Solicitor and the Department of the Premier and Cabinet.
- (c) The following reference appeared in the *Noosa News* on 26 July 1994:

Marcus can be stopped: QC's report

A Report from one of Queensland's top legal advisers has discounted claims the State Government is in a legal bind over the Marcus Shores development.

Queen's Counsel Cedric Sampson [sic] has advised Noosa Council that the developer's lease could be revoked with compensation only payable for improvements done on the site.

Noosa Mayor, Noel Playford released details of the QC's report, which counteracts the Government's argument that development may be unavoidable for legal reasons.

He said the report showed the Government had the legal power to stop developers from building on the environmentally-acclaimed site at a minimal cost.

- (d) The following reference appeared in the *Sunshine Coast News* on 28 August 1994:

The Council, however, has produced a report from one of Queensland's top legal advisers which states that the compensation payable would be minimal.

Queen's Counsel Cedric Hampson advised the Council that the lease could be revoked with compensation only payable for improvements done on the site.

Noosa Mayor Noel Playford has said that the report shows the government has the legal power to stop development on the prized site at a minimal cost.

- (e) A brief reference to the legal opinion appeared in the *Noosa News* on 30 August 1994.
- (f) The following reference appeared in a letter from the Shire Solicitor to the solicitors for Burke, dated 19 September 1994:

Your client will also doubtless know that the Council has obtained an Opinion from Mr C.E.K. Hampson QC which supports the Council's assertion that the resumption clause should apply unless there are reasons, which are presently unknown, which would indicate to the contrary.

- (g) The following reference appeared in a letter from the Shire Solicitor to the Department dated 12 September 1994:

On behalf of the Council, it has been asserted that the Crown has the contractual right to resume the subject land pursuant to the express terms of the Special Lease, and that the quantification of any compensation is to be assessed in accordance with those clearly expressed terms. That assertion has been supported by an Opinion of Mr C.E.K. Hampson QC.

19. Copies of the letters referred to in (f) and (g) above were annexed to the written submission dated 16 September 1998 lodged on behalf of Burke.

Whether the intentional disclosure of the legal opinion to the Department involved a general waiver or a limited waiver

20. At paragraph 29 of *Re Hewitt*, I observed that where a privilege holder has intentionally disclosed privileged material in such a manner as to result in a general waiver of privilege in that material, such material would not be privileged from production in any legal proceeding on the ground of legal professional privilege, and s.43(1) of the FOI Act could not apply.
21. The letter from the Shire Solicitor which forwarded the legal opinion to the Department did not contain any indication that the legal opinion was being provided under some understanding that it would be treated in confidence. There is no evidence that any express undertaking of confidential treatment was sought or given. In the absence of circumstances giving rise to an implicit mutual understanding that the legal opinion would be treated in confidence, I consider that disclosure of the opinion to the Department would have constituted a voluntary act inconsistent with continuation of privilege in the document. I consider that the Shire Solicitor had ostensible authority to waive privilege on behalf of the Council. I do not consider that the relationship of the Council and the Department was such that they could be regarded as the same party, or parties with a common interest. Councils and the Department have quite distinct roles to play in government in Queensland, and no doubt the two levels of government often find themselves at odds in relation to particular cases. Unless there was some understanding or obligation binding the Department to treat the legal opinion in confidence, it would have been free to further disseminate the legal opinion, a situation which is clearly inconsistent with maintenance of privilege in the legal opinion.
22. The Shire Solicitor has submitted that the disclosure of the legal opinion to the Department was for the limited purpose of assisting the Department's consideration of whether to recommend that the Governor in Council approve the draft DCP, stating:

Of course there was no specific mention of reserving privilege because I did not then, or do I now, consider that any such reservation was necessary. Here is a case of the Crown, through one of its Departments, requesting a local government authority for a copy of a document to assist it to carry out its statutory duty. In the normal course of events, I do not regard the Crown as being in the same category as others. If a citizen, and more so a local authority, can not deal with the Crown in confidence, without placing some restriction on its publication, there is a public interest aspect at jeopardy. The Crown well knew of the litigation and potential for further litigation involving several millions of dollars. I feel sure that confidentiality was assumed by both the Department and by me.

.....

Neither the Department nor the Council adverted to the prospect of the advice being made available to the Developer/Lessee, perhaps because it was assumed on both sides that it would not. Remember that the Developer/Lessee was litigating with Council and there was a very public political contest concerning the proposed development of the area. They were regarded as opponents.

23. In a letter dated 8 April 1997, Ms Apelt of the Department made the following response to my request for further information on the circumstances attending the provision of the legal opinion to the Department:

(a) ***the purpose for which the opinion was requested or supplied:***

Telephone advice was received on 14 July 1994 from Mr Graham Rees-Jones (Solicitor, Noosa Shire) to the effect that Council had obtained an opinion from Cedric Hampson QC who was of the view that no compensation was payable to T M Burke Estates Pty Ltd by the Lands Department in the event that the development did not proceed.

Mr Rees-Jones was asked by Mr Stan Wypych, Manager, South East Queensland Planning Division, if Council would provide the Department with a copy of the opinion for the purpose of expediting the Department's consideration of the Development Control Plan for Marcus Shores.

(b) ***any understanding, express or implied, that the opinion was communicated in confidence;***

There existed an implied understanding that the opinion was released for a specific purpose to be used only by the Department as part of the symbiotic process between local government and the Local Government Department.

The Departmental officers involved did not consider that communication of the document to Crown Law and to the Office of Cabinet would compromise any privilege attaching to the document.

However, it was clearly understood by both parties that the opinion would not be disclosed to T M Burke Estates Pty Ltd.

(c) ***any understanding that the opinion was supplied for a limited purpose only;***

It was understood by both parties that the opinion was provided to the Department for the sole purpose of expediting its consideration of the Development Control Plan for Marcus Shores.

(d) ***any understanding limiting its use and/or distribution by the Department;***

Noosa Council apparently understood that the opinion was for Departmental purposes only. Noosa Council was not expressly made aware that copies of the document would be provided by the Department to Crown Law and to the Office of Cabinet.

24. It appears that circumstances relating to the dispute between the Council and Burke gave rise to an implicit understanding on the part of the Department, as well as on the part of the Council, that the legal opinion supplied by the Council to the Department was to be treated in confidence, certainly as against Burke, and to be used only for purposes relating to the State government's consideration of the proposed DCP for Marcus Shores. Burke has been given access to the above statements, and has not disputed that they accurately reflect the understanding between the Department and the Council.

25. I am satisfied that the legal opinion of Mr Hampson QC was disclosed by the Council to the Department for a limited and specific purpose, on the understanding that it would be treated in confidence. I consider that the further disclosure of the legal opinion by the Department to the Office of the Crown Solicitor, and the Department of the Premier and Cabinet, was consistent with the purpose for which the opinion was supplied. I am satisfied that disclosure of the legal opinion by the Council to the Department could not properly be seen as constituting an intentional general waiver of legal professional privilege, or as destroying the confidentiality which is necessary for maintenance of the privilege (*cf. Goldberg v Ng* at p.95).

Implied Waiver

26. However, the reasoning and result in *Goldberg v Ng* indicate that a disclosure of this kind may nevertheless give rise to an issue of implied waiver. In that case, Mr Goldberg's privilege was held to have been waived by imputation of law, notwithstanding that his disclosure of privileged material to a third party occurred on the basis of an express undertaking by the third party that the privileged material would be treated in confidence.
27. In *Goldberg v Ng*, the Ngs were concerned that their solicitor Mr Goldberg, had taken improper action in relation to them, which had resulted in financial loss to them. They commenced Supreme Court proceedings, but also lodged a complaint with the New South Wales Law Society (the Law Society) foreshadowing a possible claim against the Solicitors' Fidelity Fund. In the context of the Law Society dealing with the Ngs' complaint, Mr Goldberg provided to the Law Society, on the basis of a strict undertaking as to confidentiality, copies of statements prepared by him for the purposes of the Supreme Court proceedings. The Ngs subsequently attempted to obtain copies of the statements in the Supreme Court proceedings, on the basis that legal professional privilege had been waived by Mr Goldberg providing copies of the statements to the Law Society. The majority of the High Court affirmed the decision that legal professional privilege had been waived. The following factors were relevant in the finding by the majority judges in the High Court that ordinary notions of fairness required that legal professional privilege was waived in the circumstances of the particular case:
- the fact that Mr Goldberg had voluntarily used documents generated for use in the court proceedings to assist him in rebutting the Ngs' complaint to the Law Society;
 - the fact that the statements were provided for the calculated purpose of assisting Mr Goldberg to rebut the Ngs' complaint - for a purpose adverse to the Ngs - and that it probably assisted in doing so;
 - that the usual procedure adopted by the Law Society was to seek a written response from the practitioner and that, if the normal course had been followed, that response would not have been subject to legal professional privilege.
28. In that case, no part of the privileged statements, or information as to their contents, had previously been disclosed to the Ngs. In the present case, there have been the disclosures referred to in subparagraphs 18(c) to (g) above, which, in light of the passage from *Mann v Carnell* quoted at paragraph 17 above, appear to me to have more significance than the disclosure referred to in subparagraph 18(a) above, and indeed to have been inconsistent with the understanding that applied between the Council and the Department as at 21 July 1994 that the Council regarded Mr Hampson's legal opinion as a confidential document.

29. The Council's conduct in making public disclosures of the substance of Mr Hampson's legal advice is not too dissimilar from the conduct considered by the Western Australian Information Commissioner in *Re Weeks and Shire of Swan* (Information Commissioner WA, Decision No. D00595, 24 February 1995, unreported). In that case, an officer of the respondent Council had read aloud to the applicant "selected but relevant parts" of a four page legal advice (amounting to approximately 7 per cent thereof), which related to an application for a land use approval that had been made by the applicant to the respondent Council. The case involved an extra-curial dispute over access to an otherwise privileged document. The Western Australian Information Commissioner decided that there had been an intentional waiver of privilege in the parts of the legal advice that were read out to the applicant, and that the act of reading out parts of the legal advice to the applicant amounted to a waiver, by imputation, of privilege in the whole document.
30. At paragraph 64 of *Re Hewitt*, I observed:

*... Although it may seem a fine distinction in practical terms, the difference between stating "I have received legal advice and I deny liability", and stating "I have received legal advice that I am not liable to compensate you", is nevertheless a real and material one, in that the former involves no conduct inconsistent with maintaining privilege in the legal advice, but the latter does. At least in extra-curial contexts, I tend to agree with the contention put by the QLS that a mere reference to the existence of legal advice, or a statement that a person or company was adopting a certain course of action (e.g., denying liability to compensate a claimant for damages) based on legal advice, should not ordinarily, of itself, involve an imputed waiver of privilege in the content of the legal advice. (In the context of litigation, even an implicit assertion, in pleadings or evidence, about the content of privileged material, may involve an imputed waiver of privilege if fairness requires it: see *Bayliss v Cassidy & Ors* (Supreme Court of Queensland - Court of Appeal, No. 1225 of 1998, *Williams J, Davies and McPherson JJA*, 11 March 1998, unreported) at p.3.) However, the reference in the passage from *Goldberg v Ng* quoted at paragraph 21 above to "a limited actual or purported disclosure of the contents of the privileged material" extends, in my opinion, to disclosure of a summary of the conclusions reached in legal advice. I consider that support for that view can be found in the following statement by Deane J in *Maurice* (at p.493):*

Thus, ordinary notions of fairness require that an assertion of the effect of privileged material or disclosure of part of its contents in the course of proceedings before a court or quasi-judicial tribunal be treated as a waiver of any right to resist scrutiny of the propriety of the use he has made of the material by reliance upon legal professional privilege.
(my underlining).

*(See also *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 40 NSWLR 12 at pp.14-15, and p.18. In that case, Ampolex sought declarations that the proper conversion ratio of certain convertible notes issued by it was one share for one note. In a report prepared by an independent valuer, which report had entered the public domain, it was stated that "Ampolex maintains that the correct ratio is 1:1 and has legal advice supporting this position." Rolfe J found that this statement had voluntarily disclosed the substance of the legal advice, and held that privilege in that legal advice had been waived. That issue was, however, decided under s.122 of the Evidence Act 1995 NSW, rather than under common law principles. See also the decision of Kirby J of the High Court of Australia dismissing an application for a stay of the decision that privilege in the relevant legal advice had been waived:*

Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd & Ors (1996) 137 ALR 28. A similar conclusion was reached, in similar circumstances, applying s.122 of the Evidence Act 1995 Cth, in BT Australasia Pty Ltd v State of New South Wales & Anor (No 7) (1998) 153 ALR 722 at pp.743-744.)

31. Although the *Ampolex* case, referred to in the passage quoted above, was decided under s.122 of the *Evidence Act 1995 NSW*, I note that in *Australian Unity Health Ltd v Private Health Insurance Administration Council* [1999] FCA 1770 at paragraphs 15-19, Goldberg J of the Federal Court of Australia applied the same principles in deciding an issue as to waiver of legal professional privilege in circumstances where the common law was applicable:

15. *I commence with the proposition that the legal advice which is referred to in the two exhibits was, in its inception, the subject of legal professional privilege. So much flows from the evidence of Mr O'Callaghan. In Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd (1996) 40 NSWLR 12, Rolfe J had to consider whether there had been a waiver of legal professional privilege in the legal advice which had been given to Ampolex by counsel. He drew a distinction between two statements which had been made in a Pt B statement issued by Ampolex on 8 May 1996.*

16. *In one part of the statement, it was stated:*

"Ampolex's views as to the likely outcome of the Convertible Note litigation. The views set out below have regard to the pleadings, the evidence available to Ampolex and the advice of the barristers and the solicitors engaged by Ampolex for the purposes of the litigation, as at 1 May 1996."

Ampolex's views were then set out. Later in the Pt B statement, there was reference to a report which was incorporated in the Pt B statement. That report stated:

"There is a dispute about the conversion ratio. Ampolex maintains that the correct ratio is 1:1 and has legal advice supporting this position."

Rolfe J concluded that the statement that Ampolex's views had regard to the advice of the barristers and the solicitors was not a disclosure of the legal advice, whereas the statement that Ampolex has legal advice supporting the position of the ratio being 1:1 was a disclosure of the terms or the substance of that legal advice.

17. *That decision was the subject of appeal to the Court of Appeal of New South Wales which was dismissed. An application was made to the High Court for a stay, pending the hearing of an application for special leave to appeal. In Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd (1996) 137 ALR 28, Kirby J refused a stay. At 34 his Honour said:*

"Ampolex stated that it had 'legal advice supporting its position'. Rolfe J concluded this statement was, within s.122, disclosure of the

'substance of the evidence'. The disclosure suggested, to reasonable inference, that the legal advice supported Ampolex's stated position. Ampolex drew attention to the limit of 'substance' suggested by such decisions as *Derby and Co Ltd v Weldon No. 10* (1991) 1 WLR 660 at 668. I agree that a mere reference to the existence of legal advice would not amount to a waiver of its contents. Rolfe J appears to have acknowledged this distinction by later rulings to which I was taken during the course of argument. But at least in respect of the substance of the legal advice supporting Ampolex's assertion about the correct ratio, which is in contest here, it is strongly arguable that the public reference to the supporting legal advice, waived the privilege as to the precise content of the legal advice, on that point I cannot say that the ruling is attended by such doubt as to promise a substantial prospect of a grant of special leave to appeal to this court. On the contrary, on my present understanding of the facts and as a tentative view, the opinion expressed in the ruling seems arguably correct."

That decision was given in the context of s.122 of the Evidence Act, which as I have indicated earlier is not relevant for present purposes. Nevertheless, I consider that it is of assistance by way of analogy in determining whether there has been either a disclosure of the legal advice or a waiver of privilege in the circumstances of this case.

18. *I do not consider that the statement made in para 2.23 of the s.13 statement is a disclosure of the legal advice. It simply says that it is part of the evidence and other material on which the finding was based. Consistently with the reasoning of Rolfe J and Kirby J, I do not consider that is a disclosure of the contents of the advice or a waiver of legal professional privilege. However, I form a different view in relation to the recommendation where it is explicitly stated that legal advice supporting the respondent's view of Rule No 4 has been received. Again, I reach the conclusion by analogy with the reasoning of Rolfe J and Kirby J in the Ampolex cases (supra) above. It seems to me that by stating the respondents' view of the rule, and that legal advice supports that view, the existence of legal advice is being disclosed, the contents of which say that it supports the respondent's view of the rule.*
19. *Consistently with the reasoning of the High Court in Attorney-General Northern Territory v Maurice (1986) 161 CLR 475, and Goldberg v Ng (1995) 185 CLR 83, I am of the opinion that there is at the least an implied waiver of legal professional privilege, and at the most an actual waiver of the legal advice because the contents of the advice are referred to. So far as an implied waiver is concerned, it seems to me that it can be said that there is an implied or an imputed waiver because the recommendation sets out a justification for the policy and an explanation of it which is supported by legal advice. That recommendation is now before the Court and it seems to me that the fairness principle requires that that advice be disclosed.*

Submissions and evidence of the participants

32. In its submission dated 16 September 1998, Burke gave a history of its interactions with the Council in relation to the Marcus Shores site. In essence, following refusal of applications to rezone the site, the Council prepared a draft DCP which would have the effect of significantly limiting the development potential of the site. Burke was opposed to the making of the DCP. In the course of State government consideration of the draft DCP, concern was expressed about the potential for significant compensation payments to Burke. One potential option was the exercise by the State of a resumption clause in the Special Lease held by Burke. It was at this stage that advice was sought by the Council from Mr Hampson QC. The DCP was subsequently approved. The submission continued:

18. *It is submitted that the compensation issue was a factor (and the Respondent says a significant factor) in whether the State Government approved the Development Control Plan prepared by the Applicant ...*

19. *Indeed, the Respondent submits that the Applicant has used the Opinion (which is apparently favourable to the Applicant) to persuade, or endeavour to persuade, the Department and the State Government that the approval of the Development Control Plan would not result in any significant compensation being payable to the Respondent.*

20. *As a result of the gazettal of the Development Control Plan, the Respondent contends that it has suffered significant loss and has brought proceedings against the Applicant in the Planning & Environment Court (Appeal No. 1193 of 1996) claiming compensation. The amount claimed was 4.53 million dollars together with interest and costs, although that amount is likely to significantly increase in light of subsequent land sales data.*

...

24. *Further, it is clear from [Re Hewitt] that the principle of imputed waiver of legal professional privilege is based on the notion of fairness. In assessing fairness, it is necessary to look at the place which the principle of legal professional privilege has in the administration of justice.*

25. *Relevant factors to consider in relation to the issue of fairness are as follows:-*

(a) *The Department is exercising a regulatory function; in this case, to give advice to the State Government as to whether the State Government should approve the Development Control Plan promulgated by the Applicant which prohibited development on the Respondent's land.*

(b) *As part of its determinative process, the Department was required to look at the effect of the "resumption clause" in the Special Lease and consider whether the approval of the Development Control Plan could result in a significant claim for compensation on the part of the Respondent.*

(c) *The Applicant provided the Opinion to the Department with a view to persuading the Department to recommend that the Development Control Plan be approved by the State Government.*

(d) *The subsequent approval of the Development Control Plan by the State Government has caused significant loss to the Respondent and is now the subject of a claim for compensation in the Planning and Environment Court (Appeal No. 1193 of 1996).*

26. *The Respondent contends that it is entitled to know, as a matter of fairness, what information the Department had before it when considering the terms of the draft Development Control Plan.*

33. In her internal review decision, Ms Apelt found that the Council's conduct in providing the legal advice to the Department, and disclosing information to the media, amounted to imputed waiver, finding that a copy of the advice was requested by an officer of the Department to assist Crown Law in the formulation of legal advice as to compensation payable and also to assist in expediting the approval of the DCP, and that the advice was provided voluntarily to the Department with an intention that it would assist in a decision regarding the DCP being made favourably to the Council. In relation to publication in the newspaper, Ms Apelt stated: *"I consider that this would amount to an implied waiver as it would be unfair to allow the Council to rely on the privilege after the election by Council to use a portion of the opinion to its advantage."*
34. I consider that the submissions of the Council are adequately set out in the following extracts from the letters of the Shire Solicitor:

The Council contends that it has not used the opinion or referred to it in any way which would be unfair or misleading to the applicant. Secondly, the report in the Sunshine Coast Daily hardly amounts to anything other than a conclusion reached by Mr Hampson and does not disclose his reasoning - which is the important aspect of the document.

It is further submitted that disclosure to a third-party - particularly as in this case, the Crown, in response to a request by an independent authority, should not render the document accessible. It would otherwise be contrary to public policy to deprive the Crown of relevant material through any fear of later disclosure to a litigious opponent.

(letter dated 4 October 1996)

... Certainly, there was no intention by the Council to waive the privilege either by some mention in the local press - which is a very weak point - or by my having sent a copy to the Department of Local Government at its request.

...

Finally, I point out that legal professional privilege is a long established and important exemption to disclosure of documents, which is recognised by the Freedom of Information Act. In my submission, you should only find that there has been a waiver in the clearest of circumstances as outlined in the decided cases. Such circumstances do not exist concerning the release of a copy of the Opinion of Mr Hampson QC to the Crown.

(letter dated 12 November 1996)

...

...[Burke's] solicitors knew or should be assumed to have known, suspected or guessed that Council had obtained a barrister's advice in a case of this type. Any press report was merely confirmation.

Of course in [Re Hewitt], the publication of the existence of the Opinion or advice was quite different and is of no assistance.

Again, I strongly assert that it would be contrary to public interest if legal professional privilege were to be lost by a Local Government when a document is supplied to the Crown at its request, in order to assist the Crown in determining some aspect which requires a Crown decision in the exercise of a Statutory function.

I remind you that a Local Government is the creature of the Crown and that the Crown is under a fiduciary duty to act in the best interest of the Shire and its ratepayers. On that basis, it is important that the Council should be able to communicate freely with departments of the Crown and to inform them of legal opinions which support a particular position, without fear of losing legal professional privilege to the Council's litigious opponent or others.

Finally, I suggest that no unfairness is occasioned to [Burke] by protection of Council's privilege, and that there are more substantial and compelling reasons of public interest to deny access to the document.

(letter dated 13 November 1998)

... after reviewing [the newspaper articles] I repeat my assertion that there is no unfairness to TM Burke flowing from publication from any source because it already knew through its Solicitors of Council's assertions concerning the resumption clause in the Special Lease.

I pose the question - if I write to the Solicitors and inform them that I have the advice of Counsel which confirms my assertions, what unfairness flows from my giving others similar information?

The decided cases really do not assist TM Burke because the "unfairness" arises in different circumstances and are of a substantial nature.

(letter dated 24 November 1998)

... In this particular case, the publication of [reports about] Council's advice was of general information, and did not state any detailed reasons. That may not be of importance in other cases, but here it is, I submit, little different from my having said to the solicitors for T.M. Burke - "Richard, I have advice from Cedric Hampson that the Special Lease is invalid".

Surely it would not be suggested that such a statement is a waiver of privilege. The fact that the statement is in a newspaper makes the maintenance of privilege no more "unfair". It may be different if some detailed reasons had been given.

(letter dated 21 November 2000)

Analysis

35. There is no public interest balancing test incorporated in the s.43(1) exemption. However, the Council's concerns do serve to reinforce the rationale of the principle of legal professional privilege and its importance under the general law. In *Re Hewitt* (at pp.354-355, paragraph 68), I said that I found the following judicial statements most apposite:
- *An important part of the rationale of the principle of legal professional privilege is the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law... . Another aspect of the rationale ... is ... that the ready availability of confidential legal advice and of skilled and adequate legal representation is in the public interest in that it promotes both the observance of the law generally and the administration of justice in particular. That aspect of the rationale of the principle applies with as much force to a public official as it does to a private individual ... (per Deane J in *Waterford v Commonwealth of Australia* (1987) 163 CLR 54 at p.82).*
 - *To our minds it is clearly in the public interest that those in government who bear the responsibility of making decisions should have free and ready confidential access to their legal advisers. ... The growing complexity of the legal framework in which government must be carried on renders the rationale of the privilege ... increasingly compelling when applied to decision-makers in the public sector. The wisdom of the centuries is that the existence of the privilege encourages resort to those skilled in the law and that this makes for a better legal system. Government officers need that encouragement, albeit, perhaps, for reasons different to those which might be expected to motivate the citizen (per Mason and Wilson JJ in *Waterford* at p.62, p.64).*
36. I have already indicated at paragraph 21 above, that I do not think there is any basis for finding a special relationship between local authorities and the State which would justify a finding that there was a "common interest" between them. I do not regard local authorities as being in any different position, for present purposes, from other proponents of development or planning control measures, who may wish to provide information to the State government to advance the position they favour. Local authorities are certainly arms of government but they are distinct entities from the State and their aims will frequently vary from those of the State. I do not consider that public policy dictates that a Council should be treated differently under the law from any other person seeking to assert privilege.
37. I am also unable to see what benefit the Council can gain by asserting that Burke was already aware of the Council's position. The more the Council has disclosed to Burke about Mr Hampson's opinion, the stronger is Burke's case in respect of waiver.
38. The Council was in this case performing a statutory function under Part 2 of the *Local Government (Planning and Environment) Act 1990* Qld (the LGP & E Act) as part of its obligation to facilitate orderly development and protect the environment (see s.1.3). Pursuant to s.2.18 of the LGP & E Act, the Council was empowered to propose an amendment to a planning scheme including a DCP for a particular area. Burke had a right to view the draft DCP, to make submissions opposing it, and to have those submissions passed on to the Governor-in-Council when the Council forwarded the draft DCP for consideration (see ss.2.18 and 2.19 of the LGP & E Act). Burke did not have a right to appeal the approval of the DCP to the Planning and Environment Court. However, it clearly had a significant interest in the outcome of the DCP approval process.

39. In addition to disclosing the whole of Mr Hampson's legal opinion to the Department, on the understanding that it would be treated in confidence, the material before me establishes that the Council made numerous disclosures about the substance of the advice given in Mr Hampson's legal opinion. The Council made disclosures to newspapers, apparently in order to contradict public comments by the then Premier of Queensland that the State government might be subject to a significant compensation payout if Burke's development rights regarding Marcus Shores were altered. The Council's solicitors made a disclosure directly to the solicitors for Burke (see paragraph 18(f) above).
40. Following *Mann v Carnell*, the test for implied waiver of privilege has been formulated by the New South Wales Court of Appeal, in *Amalgamated Television Services Pty Limited v Marsden* [2000] NSWCA 63 (per Giles JA at paragraph 29, with Mason P and Handley JA agreeing), as follows:

In Mann v Carnell at [28-9] it was said that it is the inconsistency between the conduct of the client and maintenance of the confidentiality protected by the privilege which effects a waiver of the privilege. What brings about the waiver is the inconsistency, informed by notions of fairness, not "some overriding principle of fairness operating at large".

41. I also find assistance from the following passage from the judgment of Gummow J (who was one of the majority judges in *Mann v Carnell*) in *Goldberg v Ng* (at p.120):

... in answer to the question what constitutes waiver by implication, [Wigmore] said:

Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.

(I note that the same passage from Wigmore was endorsed in *Maurice* by Gibbs CJ at p.481, by Mason and Brennan JJ at p.488, and by Dawson J at p.498.)

42. I consider that the conduct of the Council exceeded that "certain point of disclosure" referred to by Wigmore. I am satisfied that the instances of disclosure of the substance or effect of the legal opinion of Mr Hampson QC that are particularised at subparagraphs 18(c) to (g) above involved voluntary conduct on the part of the Council, as client, that was inconsistent with maintenance of the confidentiality, in the legal opinion, which legal professional privilege exists to protect. I am satisfied that the conduct of the Council requires a finding that privilege in the relevant legal opinion has been waived, whether the Council intended that result or not. I consider that my finding in this regard can be supported without reference to any wider considerations of fairness to Burke, although I have referred to such considerations at paragraphs 44-45 below.
43. I do not consider that there is any substance in the Council's submission to the effect that it has disclosed only Mr Hampson's conclusions, and is still entitled to privilege in respect of the reasoning which supported those conclusions. All of the authorities of which I am aware are consistent with the

principle stated by Mason and Brennan JJ in *Maurice* (albeit with a context of curial proceedings in mind) at p.488:

The holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication. ... In order to ensure that the opposing litigant is not misled by an inaccurate perception of the disclosed communication, fairness will usually require that waiver as to one part of a protected communication should result in waiver as to the rest of the communication on that subject matter: see Great Atlantic Insurance Co v Home Insurance Co [1981] 1 WLR 529; [1981] 2 All ER 485.

The cases referred to in paragraphs 29-31 above also illustrate this point.

44. The basis on which Burke has put its case that fairness requires a finding of imputed waiver of privilege (at least for its benefit) reflects an inaccurate assumption as to the use to which the Council was seeking to put the relevant legal opinion. Burke has submitted that the Council "... *has used the Opinion ... to persuade, or endeavour to persuade, the Department and the State Government that the approval of the Development Control Plan would not result in any significant compensation being payable to [Burke]*" and that Burke should be "... *entitled to know, as a matter of fairness, what information the Department had before it when considering the terms of the draft Development Control Plan.*" On the material available to me, I consider that the Council's purpose in supplying a copy of the legal opinion was to interest the State government in a different course of action, i.e., resumption of the relevant parcel of land pursuant to a resumption clause in the Special Lease, with the State government's liability to compensation being limited to the value of improvements only. However, the State government did not wish to pursue that option, preferring to allow the DCP to be approved, and to leave the Council liable for any compensation that might be payable as a consequence. Since the legal opinion in issue deals only with an option which was not pursued, I do not consider it possible to say, at this point in time, that considerations of fairness require disclosure of the legal opinion to Burke in order to allow it to review the approval process in respect of the DCP.
45. Nevertheless, at the time of the Council's conduct in August-September 1994 that gave rise to an issue of implied waiver, the Council was urging on the State government a course of action that would have been detrimental to Burke's commercial interests, and for so long as that course of action was under consideration by the State Government, there were considerations of fairness telling in favour of disclosure to Burke, so as to enable Burke to put its views to the State government as to the legal validity, and fairness, of the State government pursuing that course of action to the detriment of Burke's commercial interests. The implied waiver of privilege in the legal opinion occurred as a result of the disclosures made by the Council in August-September 1994, and there were considerations of fairness to Burke that supported an implied waiver of privilege in favour of Burke, at that time, even though the same considerations appear to me to have no practical force today.
46. While I am not aware of any authority dealing with the issue, I consider that a waiver of privilege imputed by operation of law must logically be effective from the date of the conduct, on the part of a client, which is inconsistent with maintenance of the privilege (if necessary, in combination with the existence of circumstances in which requirements of fairness support the finding of implied waiver). Therefore, if a finding of implied waiver in this case had been dependent on wider considerations of fairness to Burke (and I have stated my view at paragraph 42 above that my finding is not), it would not avail the Council that, by the time a tribunal had come to rule on the issue of Burke's entitlement to disclosure, the passage of time had negated the considerations of fairness which previously supported the finding of implied waiver. I do not consider that the privilege would be revived on that account.

47. I find that the legal professional privilege which initially attached to the legal opinion of Mr Hampson QC dated 7 July 1994 has been waived by imputation of law. I therefore find that the legal opinion is not exempt from disclosure to Burke under s.43(1) of the FOI Act.

Conclusion

48. For the foregoing reasons, I affirm the decision under review.

.....
F N ALBIETZ
INFORMATION COMMISSIONER