

# OFFICE OF THE INFORMATION COMMISSIONER (QLD)

**Decision No. 97003**  
**Application S 108/96**

## **Participants:**

MYLES THOMPSON  
**Applicant**

QUEENSLAND LAW SOCIETY INC  
**Respondent**

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - memorandum from an officer of the respondent to the respondent's Professional Standards Committee - whether deliberative process matter under s.41(1)(a) of the *Freedom of Information Act 1992* Qld - whether disclosure would be contrary to the public interest - application of s.41(1) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - documents recording communications to and from a firm of solicitors retained to give advice in respect of an investigation undertaken by the respondent's Professional Standards Committee - whether documents subject to legal professional privilege - application of s.43(1) of the *Freedom of Information Act 1992* Qld.

*Freedom of Information Act 1992* Qld s.41(1), s.41(1)(a), s.41(1)(b), s.43(1)  
*Queensland Law Society Act 1952*

*Clarkson and Attorney-General's Department, Re* (1990) 4 VAR 197  
*Dalleagles Pty Ltd v Australian Securities Commission* (1991) 3 WAR 325; 6 ACSR 498  
*Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re*  
(1993) 1 QAR 60  
*Smith and Administrative Services Department, Re* (1993) 1 QAR 22  
*Trade Practices Commission v Sterling* (1979) 36 FLR 244

## **DECISION**

1. I vary the decision under review (being the decision made on behalf of the respondent by Dr A A Tarr dated 26 June 1996) in that I find that document 7 (described in paragraph 6 of my accompanying reasons for decision) is not exempt from disclosure to the applicant under the *Freedom of Information Act 1992* Qld.
2. I affirm that part of the decision under review by which it was decided that documents 1, 4, 5 and 6 (described at paragraph 6 of my reasons for decision) are exempt matter under s.43(1) of the *Freedom of Information Act 1992* Qld.

Date of decision: 28 February 1997

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F N ALBIETZ  
**INFORMATION COMMISSIONER**

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## **REASONS FOR DECISION**

### **Background**

1. The applicant seeks review of the respondent's decision to refuse him access under the *Freedom of Information Act 1992* Qld (the FOI Act) to certain documents relating to an investigation undertaken by the Professional Standards Department of the Queensland Law Society Inc (the Law Society). In the conduct of this matter, the applicant has been represented by the firm of solicitors of which he is a partner, Myles Thompson & Co.
2. By letter dated 22 April 1996, Myles Thompson & Co, on behalf of the applicant, applied to the respondent for access under the FOI Act to "copies of all the documents in the Law Society's power or possession which relate to Myles Thompson and the estate of Royce Dunbar".
3. By letter dated 5 June 1996, Mr T N Joyce, on behalf of the respondent, informed the applicant of his decision, in the following terms:

*The Society will grant access to all documents contained in the relevant files pertaining to Myles Thompson and the Estate of Royce Dunbar, with the exception of the following material:-*

- (a) *Three page letter dated 2nd April, 1996, from the Queensland Law Society to Minter Ellison, seeking legal advice in respect of the possibility of charges before the Statutory Committee or Disciplinary Tribunal;*
- (b) *Letter dated 4th April, 1996, from Minter Ellison, to the Society acknowledging receipt of instructions from the Society;*

- (c) *Letter dated 29th April, 1996, from the Society to Minter Ellison forwarding copy of Myles Thompson letter of 23rd April, 1996, to form part of the instructions;*
- (d) *Letter dated 14th May, 1996, from the Society to Minter Ellison regarding legal advice;*
- (e) *Internal file note re: telephone conversation with Minter Ellison concerning legal advice;*
- (f) *Memorandum dated 27th May, 1996, from David Franklin to Professional Standards Committee, and seven-page annexure being a letter from Minter Ellison to Queensland Law Society, relating to and including legal advice.*

*The grounds for refusal in respect of all of the above documents is that of legal professional privilege [s.43(1) of the FOI Act], in that all the aforesaid documents came into existence in the course of obtaining or seeking legal advice.*

4. By letter dated 12 June 1996, the applicant applied for internal review of Mr Joyce's decision on the following grounds:

*It is apparent that this matter has been conducted by way of inquisition. Any documents passing between the Society and Mr Ashton [of Minter Ellison, solicitors] are not documents relating to legal or quasi-legal proceedings. Those documents are communications made between the inquisitor and another party assisting the inquisition. On that basis there is no solicitor/client relationship and therefore no basis for claiming privilege pursuant to [s.43(1)] of the Freedom of Information Act. We request that you provide all documents listed as (a) to (f) in your letter of 5 June 1996.*

5. By letter dated 26 June 1996, the Law Society's Chief Executive Officer, Dr A A Tarr, informed the applicant that he had conducted an internal review of Mr Joyce's decision, and that he affirmed that decision. By letter dated 24 June 1996, the applicant applied to me for review, under Part 5 of the FOI Act, of Dr Tarr's decision.

### **External review process**

6. The documents claimed by the respondent to be exempt from disclosure to the applicant were obtained and examined. The applicant advised my office that he was not interested in pursuing access to letters which merely enclosed other documents or confirmed receipt of instructions. Thus the following documents remain in issue in this review:
  - document 1 - three page letter from the Law Society to Mr R Ashton, Minter Ellison, dated 2 April 1996;
  - document 4 - one page letter from the Law Society to Mr Ashton, Minter Ellison, dated 14 May 1996;
  - document 5 - internal Law Society file note of advice given by Mr Ashton, Minter Ellison, in a telephone conversation on 20 May 1996;

- document 6 - seven page letter from Mr Ashton, Minter Ellison, to the Law Society, dated 23 May 1996;
  - document 7 - internal memorandum, dated 27 May 1996, to the Professional Standards Committee, forwarding document 6 as an attachment, and containing recommendations by an officer of the Law Society for consideration by the Committee.
7. All documents remaining in issue were claimed by the Law Society to be exempt under s.43(1) of the FOI Act, and document 7 was also claimed by the Law Society to be exempt under s.41(1) of the FOI Act.
  8. By letter dated 6 December 1996, I provided the applicant with my preliminary assessment of the validity of the exemptions claimed in respect of the documents in issue, and invited him, in the event that my preliminary assessment was not accepted, to lodge a submission in support of his case that the documents in issue were not exempt under the FOI Act. A written submission dated 19 December 1996 was lodged on behalf of the applicant.
  9. By letter dated 14 January 1997, I wrote to the Law Society informing it that the applicant did not wish to pursue access to some documents, and confirming the documents remaining in issue in the external review. I also provided the Law Society with a copy of the applicant's submission dated 19 December 1996, and conveyed my preliminary view that document 7 did not qualify for exemption under s.43(1) of the FOI Act. I invited the Law Society to lodge any written submission and/or evidence on which it wished to rely to support its case that documents 1, 4, 5, 6 and 7 were exempt under s.43(1), and in support of its claim that document 7 was exempt under s.41(1) of the FOI Act.
  10. In a written submission dated 11 February 1997, the Law Society accepted my preliminary view that document 7 did not qualify for exemption under s.43(1) of the FOI Act, but maintained its claim that document 7 was exempt under s.41(1) of the FOI Act. The Law Society's written submission also set out arguments in support of its case that documents 1, 4, 5 and 6 were exempt under s.43(1) of the FOI Act. A copy of the Law Society's written submission was forwarded to the applicant, who lodged a brief reply, dated 18 February 1997.

#### **Application of s.41(1) of the FOI Act to document 7**

11. Section 41(1) of the FOI Act provides:

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

##### ***41.(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.*

12. I am satisfied that document 7 contains matter that falls within the terms of s.41(1)(a) of the FOI Act (as to the meaning of the term "deliberative processes", see *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp.70-71, paragraphs 27-30). Document 7 is a memorandum from an officer of the Law Society to the Professional Standards Committee, forwarding a copy of document 6, and making two recommendations for consideration by the Committee with regard to the courses of action which it might take following an investigation into the applicant's professional conduct in the handling of a particular matter.
13. Whether matter which falls within the terms of s.41(1)(a) qualifies for exemption under s.41(1) of the FOI Act depends on whether its disclosure would, on balance, be contrary to the public interest (see s.41(1)(b) of the FOI Act). In its written submission dated 11 February 1997, the Law Society made the following submissions in relation to the application of the s.41(1)(b) public interest balancing test:

*Under the provisions of the Queensland Law Society Act 1952, the Society is charged with the responsibility to investigate complaints against practitioners. Administratively, written complaints making allegations of malpractice, professional misconduct or unprofessional conduct are received and dealt with by the Professional Standards Department. The Society can also, as happened here, initiate such investigations of its own volition. These investigations, often of their very nature, deal with sensitive material. They often involve the investigation of the relationship between a solicitor and a client. The Society has the power under the Act and Rules to compel solicitors to produce sensitive, and in some cases privileged, documentation for the purposes of the complaint. It is inappropriate that such material be exposed to the possibility of disclosure to the public pursuant to the Freedom of Information legislation.*

*Further, the investigation process could well be prejudiced by allowing public access to recommendations as to how the investigation is to proceed. It should be kept firmly in mind that such investigations can lead to a solicitor being struck off (deprived of his livelihood) and in some cases criminally prosecuted.*

14. The above submission by the Law Society appears to be putting a very broad claim, tantamount to a 'class claim', for exemption on public interest grounds of any material arising out of investigations conducted by the Law Society into allegations of malpractice, professional misconduct or unprofessional conduct, because of the inherent sensitivity of the material. That is not an acceptable approach to the application of s.41(1) of the FOI Act (see *Re Eccleston* at p.97, paragraph 192, and at p.111, paragraph 149): a 'class claim' will not be accepted, rather the apprehended consequences of disclosure of the particular matter in issue must be evaluated in each case.
15. The correct approach to the application of s.41(1)(b) of the FOI Act was analysed at length in *Re Eccleston* where I indicated (see p.110; paragraph 140) that an agency or Minister seeking to rely on s.41(1) needs to establish that specific and tangible harm to an identifiable public interest (or interests) would result from the disclosure of the particular deliberative process matter in issue. It must further be established that the harm is of sufficient gravity that, when weighed against competing public interest considerations which favour disclosure of the matter in issue, it would nevertheless be proper to find that disclosure of the matter in issue would, on balance, be contrary to the public interest.

16. As to the first paragraph quoted above from the Law Society's submission, the matter in issue does not comprise, or even refer to, sensitive or privileged matter that a solicitor has been compelled to produce to the Law Society. The Law Society also argued, in the second paragraph from its submission quoted above, that *"the investigation process could well be prejudiced by allowing public access to recommendations as to how the investigation is to proceed"*. This argument is not relevant to the circumstances of this particular case. In this case, the investigation has concluded, the Committee did not accept the recommendations comprised in document 7, and the applicant has been informed of the Committee's decision.
17. The Law Society has not raised any public interest consideration capable of applying to the particular matter in issue so as to favour its non-disclosure. Having examined document 7, I consider that it contains no information of particular sensitivity (except perhaps to the solicitor under investigation, but that solicitor is the applicant for access), or information the disclosure of which could harm the public interest. Disclosure of document 7 to the applicant would not, on balance, be contrary to the public interest. I find that document 7 is not exempt from disclosure to the applicant under s.41(1) of the FOI Act.

**Matter claimed to be exempt under s.43(1) of the FOI Act**

18. 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.*

19. In *Re Smith and Administrative Services Department* (1993) 1 QAR 22, I discussed (at pp.51-57; paragraphs 82-98) the requirements for exemption under s.43(1) of the FOI Act. At paragraph 82 of my decision, I referred to the useful summary of principles set out in the decision of Mr K Howie, a member of the Victorian Administrative Appeals Tribunal, in *Re Clarkson and Attorney-General's Department* (1990) 4 VAR 197, at p.199, of which the following extracts are relevant in the present case:

(1) *To determine whether a document attracts legal professional privilege consideration must be given to the circumstances of its creation. It is necessary to look at the reason why it was brought into existence. The purpose why it was brought into existence is a question of fact.*

(2) *To attract legal professional privilege the document must be brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings. Submission to legal advisers for advice means professional legal advice. It includes the seeking or giving of advice. Use in legal proceedings includes anticipated or pending litigation.*

...

(4) *Legal professional privilege attaches to confidential professional communications between salaried legal officers and government agencies. It must be a professional relationship which secures to the advice an independent character. The reason for the privilege is the public interest in those in government who bear the responsibility of making decisions having free and ready confidential access to their*



*legal advisers. Whether or not the relationship exists is a question of fact.*

...

20. Useful analyses of the general principles of legal professional privilege can be found in *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at pp.245-246, and in *Dalleagles Pty Ltd v Australian Securities Commission* (1991) 4 WAR 325; 6 ACSR 498. In the former case, Lockhart J said (so far as relevant for present purposes):

*Legal professional privilege extends to various classes of documents including the following:*

- (a) *any communication between a party and his professional legal adviser if it is confidential and made to or by the professional adviser in his professional capacity and with a view to obtaining or giving legal advice or assistance; notwithstanding that the communication is made through agents of the party and the solicitor or the agent of either of them. ...*
- (b) *any document prepared with a view to its being used as a communication of this class, although not in fact so used. ...*
- (c) *communications between the various legal advisers of the client, for example between the solicitor and his partner or his city agent with a view to the client obtaining legal advice or assistance. ...*
- (d) *notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications which are themselves privileged, or containing a record of those communications, or relate to information sought by the client's legal adviser to enable him to advise the client or to conduct litigation on his behalf. ...*

(Case citations omitted)

21. In his submission dated 19 December 1996, the applicant argued that:

- 1. *The Statutory Committee and the Standards Committee of the Law Society is made up (mostly) of solicitors for the general purpose of making investigations and determinations as to the conduct of practitioners.*
- 2. *The Standards Committee is an administrative body which in this instance delegated Mr Ashton to assist the Committee in their task. Mr Ashton was not acting as a solicitor but an Administrator and Inquirer.*
- 3. *As such Mr Ashton was not involved in a situation where legal professional privilege applies in that in this instance there is not a situation of a solicitor providing legal advice to lay persons on Committee, but rather conducting an administrative function.*
- 4. *The letters listed as 1, 4, 5, and 6 are not subject to legal professional privilege as there is no solicitor and client relationship.*

5. *Further, these documents are not documents for the sole purpose of giving legal advice. They are documents which are wholly or sufficiently created in the process of administering the function of the Committee. Further, we submit that the "sole purpose" is the relevant test as defined in High Court authority.*

22. The applicant has raised two issues. Firstly, whether the documents claimed to be exempt under s.43(1) comprise communications between Mr Ashton and the Law Society pursuant to a solicitor/client relationship, having the attributes to enable legal professional privilege to attach to the documents. The applicant claims that Mr Ashton was acting as an administrator and inquirer performing an administrative function, rather than as a solicitor providing legal advice. Secondly, the applicant has claimed that the information in issue does not satisfy the 'sole purpose' test.
23. In its submission dated 11 February 1997, the Law Society responded to the applicant's claims as follows:

*The existence of the lawyer/client relationship is fundamental to the existence of the privilege. Where the relationship is between a lawyer in independent private practice and a client, the existence of the requisite relationship is non-controversial and obvious. I am not aware of any case involving a lawyer in private practice where the existence of the necessary relationship was seriously questioned. The issue is usually only raised in the context of "in house" government and private lawyers. The critical test is whether the relationship is "a professional relationship which secures to the advice an independent character" [Waterford v the Commonwealth of Australia (1986-87) 163 CLR 54 at 62].*

*Minter Ellison and Ron Ashton are lawyers in independent private practice. The Society as client retained their services for the purposes of obtaining independent legal advice. That advice was provided by letter of 23 May 1996 and the Society paid the appropriate professional fee for the advice.*

*It is not entirely certain what the applicant means when he refers to Mr Ashton acting as a delegate of the Society, Administrator and Inquirer. Certainly neither Minter Ellison nor Mr Ashton are employees of the Society. They are independent professionals retained by the Society to provide legal advice. This is abundantly clear from the subject documents.*

*Whilst not directly stated, the applicant seems to imply that because the Professional Standards Committee is comprised mainly of lawyers there is some problem with establishing the requisite lawyer/client relationship between the Committee on the one hand and Minter Ellison and Mr Ashton on the other. The Professional Standards Committee and the Society generally regularly obtain legal advice from the private profession on a wide variety of matters. There is no authority or principle that a lawyer cannot obtain professional legal advice from another lawyer. The logical extension of the applicant's argument is that neither the Professional Standards Committee nor the Society generally could ever obtain legal advice in circumstances which would attract the privilege. This proposition is clearly absurd.*

*Even if Ron Ashton and Minter Ellison had provided the legal professional service free of charge, there would be no warrant for denying the privilege on the present facts. However, the fact that a proper professional fee was charged serves to emphasise that it was a usual professional payment.*

**(b) Sole purpose test**

*It is abundantly clear from the documents themselves that documents 1, 4, 5 and 6 were brought into existence solely for the purpose of either obtaining or providing legal advice. Documents 1 and 4 are letters providing initial instructions and then further instructions to Ron Ashton and Minter Ellison. They are not documents which would have been brought into existence "in any event" (Waterford p.362). Document 6 has only one purpose - the giving of an independent legal opinion. It is not, for instance, an administrative document which would have had to have been created anyway in order to administer the complaint. The Committee could well have proceeded without obtaining the professional advice of Minter Ellison and Ron Ashton. The obtaining of a legal opinion was not a necessary step in the administration of the complaint.*

*Document 5 reports a discussion between the Society and Ron Ashton when Mr Ashton sought further instructions and discussed the matter generally with the Society's representatives. It is clearly privileged.*

24. In his reply to the Law Society's submission dated 11 February 1997, the applicant asserted the following:

*As to documents number 1, 4, 5 and 6 and without the benefit of having seen those documents, the Law Society is insistent that these documents are documents passing between a solicitor and client. This cannot be the case. It is apparent that the documents are documents which relate to communications between members of a tribunal inter se. The contents of the documents should be viewed as recommendations between one party acting or assisting the tribunal and other members of the tribunal. The documents do not appear to be documents which are brought into existence for the sole purpose of a party obtaining legal advice. The relationship between the Law Society and Mr Ashton is simply not a relationship of solicitor and client.*

*Please note that the Law Society has a number of committees which decide on a number of various issues. These committees generally consist of members of the Society who are acting in either a voluntary capacity or, at times, paid for their time. These committees are acting as committees of the Law Society and their members are not acting as independent professionals retained by the Law Society to provide legal advice. The committee in this particular case is sitting for the purpose of making inquiries. This is merely a professional society along the same lines as the AMA or the REIQ. Just because the association is one of lawyers does not automatically mean that the documents attract privilege. This inquisition is an administrative matter and the members of the committee as well as those assisting the members of the committee are acting in an administrative function, the same as any other professional society. All documents were brought into existence for the purpose of the administrative functions of the inquisition.*

25. The Law Society has informed my office that, contrary to the applicant's assertion, Mr Ashton was not a member of the Professional Standards Committee at the relevant time. I do not accept the applicant's argument that, because a solicitor is a member of the Law Society, the solicitor cannot also be an independent professional retained by the Law Society to provide legal advice in respect of one of the Law Society's regulatory functions. The

applicant's assertion that "*Just because the association is one of lawyers does not automatically mean that the documents attract privilege*" is clearly correct. However, the applicant also seems to assert that a solicitor, who is a member of the Law Society, can never be in a solicitor/client relationship with the Law Society, nor able to provide the Law Society with legal advice which satisfies the 'sole purpose' test. This is clearly incorrect. Whether a solicitor is in a solicitor/client relationship with the Law Society, and whether a communication passing between them is a confidential communication for the sole purpose of seeking or giving legal advice, are issues which must be assessed from an examination of the relevant circumstances, and the particular communication in question, in any given case.

26. s clear from the face of document 1 that the Law Society retained Minter Ellison to provide certain legal advice and professional legal assistance in respect of anticipated quasi-judicial proceedings. It is also clear that Minter Ellison and the Law Society had a lawyer/client relationship, and that Mr Ashton was not acting as an administrator for the Law Society, but was providing the Law Society with independent legal advice. It is clear from my examination of them that documents 1, 4 and 6 fall within category (a) described by Lockhart J in *Trade Practices Commission v Sterling*, that document 5 falls within category (d) described by Lockhart J in *Trade Practices Commission v Sterling*, and that each of these documents satisfies the 'sole purpose' test. Documents 1, 4, 5 and 6 attract legal professional privilege at common law, and I find that they comprise exempt matter under s.43(1) of the FOI Act.

### **Conclusion**

27. I vary the decision under review, in that I find that document 7 is not exempt from disclosure to the applicant under the FOI Act, but I affirm that part of the decision under review by which it was decided that documents 1, 4, 5 and 6 comprise exempt matter under s.43(1) of the FOI Act.

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F N ALBIETZ

**INFORMATION COMMISSIONER**