



## Decision and Reasons for Decision

---

**Application Number:** 310107

**Applicant:** Ozcare

**Respondent:** Department of Justice and Attorney-General

**Decision Date:** 13 May 2011

**Catchwords:** ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – applicant sought access to letters provided to agency by third party – whether disclosure of letters would disclose information that would be privileged from production in a legal proceeding – whether legal professional privilege in legal advice waived – whether access to letters can be refused under section 47(3)(a) of the *Right to Information Act 2009* (Qld) on the basis that the letters comprise exempt information

## Contents

REASONS FOR DECISION.....	2
Summary .....	2
Background.....	3
Decision under review .....	3
Information in issue.....	3
Evidence considered .....	3
Relevant law .....	3
Findings of fact .....	5
Does the Information in Issue attract LPP? .....	5
Does the information in issue comprise a confidential communication between the Society and the third party? .....	5
The parties' arguments .....	5
Consideration .....	6
Was the Information in Issue communicated for the dominant purpose of preparing for, for use in, or in relation to, existing or reasonably anticipated proceedings? .....	7
Reasonably anticipated proceedings .....	7
Dominant purpose .....	7
The parties' arguments .....	7
Consideration .....	8
Conclusion .....	8
Waiver.....	9
DECISION .....	12
APPENDIX .....	13
Significant procedural steps.....	13

## REASONS FOR DECISION

### Summary

1. The Society of St Vincent de Paul (**Society**) is engaged in litigation with Ozcare (**applicant**). Prior to the litigation commencing, the Society, through its solicitors, had informed the Attorney-General by letter of its proposed proceedings against the applicant. The Attorney-General sought further information from the Society, which was provided by letter from the Society's solicitors.
2. The applicant subsequently applied to the Department of Justice and Attorney-General (**Department**) for access to documents concerning itself, including its relationship with the Society. The Department refused access to the two letters (**Information in Issue**) under sections 47(3)(a) and 48 of the *Right to Information Act 2009* (Qld) (**RTI Act**) on the basis that the Information in Issue is exempt from disclosure<sup>1</sup> as it would be privileged from production in a legal proceeding on the ground of legal professional privilege (**LPP**).
3. The applicant contends that:
  - the Information in Issue is not subject to LPP because it does not comprise confidential communications between a party's solicitor and a third party and was not created for the dominant purpose of use in litigation; and
  - in respect of part of the Information in Issue, comprising legal advice given to the Society by its legal representatives<sup>2</sup> (**Legal Advice**) – any LPP subsisting in the Legal Advice was waived by the Society providing that advice to the Attorney-General.
4. Having considered the parties' submissions and the relevant law, I am satisfied that the Information in Issue satisfies the requirements for LPP. Specifically, the communications were intended to be and remained confidential. On this point, the decision in *Seven Network Limited and Anor v News Limited*<sup>3</sup> (**Seven**) is distinguishable. The communication was for the dominant purpose of the Society obtaining legal advice in respect of its litigation, which was reasonably anticipated at the time.
5. With respect to the applicant's submission that the Society has waived any LPP subsisting in the Legal Advice by providing it to the Attorney-General, I am satisfied that the disclosure was for a specific and limited purpose which was not inconsistent with the confidentiality of the Legal Advice and this limited disclosure does not prevent the Society from maintaining the privilege against Ozcare.
6. For the reasons set out below, I affirm the Department's decision by finding that the Information in Issue would be privileged from production in a legal proceeding on the ground of LPP and the LPP subsisting in the Legal Advice has not been waived. Accordingly, access may be refused under section 47(3)(a) on the ground that the Information in Issue is exempt from disclosure in accordance with section 48 and schedule 3 section 7 of the RTI Act.

<sup>1</sup> Under schedule 3 section 7 of the RTI Act.

<sup>2</sup> Folios 18/00144 - 18/00123 which form attachments to the second letter and segments of information in both letters which refer to or replicate the advice.

<sup>3</sup> [2005] FCAFC 12.

## Background

7. Significant procedural steps relating to the application are set out in the Appendix.

## Decision under review

8. The decision under review is the Department's decision<sup>4</sup> to refuse access to the Information in Issue under section 47(3)(a) of the RTI Act on the basis that it comprises exempt information that would be privileged from production in a legal proceeding.

## Information in issue

9. The Information in Issue comprises two letters and their attachments, being a letter dated 30 January 2006 (with attachments) from the Society to the Attorney-General (**First letter**)<sup>5</sup> and a letter dated 19 May 2006 (with attachments) from the Society to Crown Law (**Second letter**).<sup>6</sup>

## Evidence considered

10. In making this decision, I have considered the following:
- the applicant's access and internal review applications to the Department and external review application to the Office of the Information Commissioner (**OIC**)
  - the Department's initial and internal review decisions
  - the applicant's submissions to OIC dated 19 October 2010
  - the Society's submissions to OIC dated 28 February 2011
  - Information in Issue
  - file notes of conversations held between OIC staff members and the applicant's solicitors, Departmental officers and the Society's solicitor during the external review
  - relevant sections of the RTI Act;
  - previous decisions of the Information Commissioner as set out in this decision; and
  - relevant case law and decisions of other jurisdictions as referred to in this decision.

## Relevant law

11. Under section 23 of the RTI Act, a person has a right to be given access to documents of an agency. However, this right is subject to a number of exclusions and limitations, including grounds for refusal of access. These grounds are contained in section 47 of the RTI Act. Section 47(3)(a) of the RTI Act provides:

### **47 Grounds on which access may be refused**

... ..

(3) *On an application, an agency may refuse access to a document of the agency and a Minister may refuse access to a document of the Minister—*

... ..

(a) *to the extent the document comprises exempt information under section 48; or*

...

<sup>4</sup> Internal review decision dated 22 January 2010.

<sup>5</sup> Folios 4/00157-4/00093.

<sup>6</sup> Folios 18/00147-18/00117.

Section 48 of the RTI Act provides relevantly:

**48 Exempt information**

.....

(4) *In this Act –*

**exempt information** means the information that is exempt information under schedule 3.

Schedule 3, section 7 of the RTI Act provides:

**7 Information subject to legal professional privilege**

*Information is exempt information if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.*

12. A 'legal proceeding' in this context means a hypothetical rather than a specific legal proceeding<sup>7</sup> and I note that schedule 3, section 7 of the RTI Act reflects the requirements for establishing LPP at common law.<sup>8</sup>
13. The general principles of LPP were summarised by the High Court of Australia in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*<sup>9</sup> as follows:

*It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.*

14. For the purposes of this review, the second limb of the privilege – litigation privilege – is in contention. In *Australian Competition and Consumer Commission v Cadbury Schweppes*<sup>10</sup> (**Schweppes**), a Full Court of the Federal Court of Australia explained that the rationale for litigation privilege:

*...rests on the basis that, in the adversarial system, the legal representatives and their clients generally control and decide for themselves which evidence they will adduce at trial, without any obligation to make disclosure to the opposing party of the material acquired in preparation of the case.*

15. This review centres on communications between the Society's legal adviser and a third party. LPP will protect confidential communications between a solicitor and a third party made for the dominant purpose of preparing for, of use in, or in relation to, existing or reasonably anticipated proceedings.<sup>11</sup> As explained by Justice Lockhart in *Trade Practices Commission v Sterling* (**Sterling**),<sup>12</sup> LPP will attach to:

*Communications and documents passing between the party's solicitor and a third party, if they are made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence.*

<sup>7</sup> See *Hewitt and Queensland Law Society Inc.* (1998) 4 QAR 328 (**Hewitt**) at [30].

<sup>8</sup> The Electoral and Administrative Review Commission Report states that 'the exemption incorporates the common law concept of legal professional privilege', and this was subsequently confirmed by the Information Commissioner in *Hewitt* at [11].

<sup>9</sup> (2002) 213 CLR 543 at [9].

<sup>10</sup> [2009] FCAFC 32 at [38] at 11 citing Cross on Evidence.

<sup>11</sup> *Allen v State of Queensland* [2010] QSC 442; *Mitsubishi Electric Pty Ltd v Victorian WorkCover Authority* [2002] 4 VR 332 (**Mitsubishi Electric**) at 6 – 7 and the cases cited there.

<sup>12</sup> (1979) 36 FLR 244 at [4].

## Findings of fact

16. After carefully considering all of the information available to me, I am satisfied that:

- the author of the letters wrote them in his capacity as solicitor for the Society;
- the recipients of the First and Second letters were the Attorney-General and Crown Law respectively;
- the First letter raises with the Attorney-General the Society's claim against the applicant;
- the Second letter comprises a response to a request for further information made by Crown Law, the Attorney's legal advisers;
- the First letter is clearly marked 'confidential' and the Second letter is marked 'strictly confidential' and contains a clear and express reservation of the privilege subsisting in both the letter and accompanying attachments; and
- neither the First nor Second letter has been disclosed to the external review applicant.

## Does the Information in Issue attract LPP?

17. To determine whether the Department was entitled to refuse access to the Information in Issue in its entirety, I must first consider whether the Information in Issue attracts LPP. To be privileged the elements of LPP discussed above must be met. As I explain below, these requirements are satisfied.

## ***Does the information in issue comprise a confidential communication between the Society and the third party?***

18. Yes, for the reasons that follow.

### **The parties' arguments**

19. The Department contends that the Information in Issue was disclosed on a confidential basis as the:

- letters are clearly identified as being confidential; and
- Legal Advice attached to the Second letter was disclosed to the Attorney-General for a specific, limited purpose.

20. The applicant contends that the communications in issue were not confidential. In support of its claim the applicant relies on the decision of the Full Court of the Federal Court in *Seven*. Relevantly in that case, representatives of Seven Network Limited met with the Australian Competition and Consumer Commission (**ACCC**) with a view to persuading the ACCC to investigate or take action against rival bidders. In doing so, Seven Network Limited disclosed legal advice it had received to the ACCC. The Court found that, while undoubtedly an ACCC policy existed requiring it to treat information provided by informants or under compulsory process with a degree of confidence, the communication was not confidential in this case as Seven Network Limited and the ACCC must have realised that the legal advice could be disclosed by the ACCC to the extent that the ACCC needed to publicly justify its actions, if it took the course of action urged upon it by Seven Network Limited.<sup>13</sup>

<sup>13</sup> See Allsop J at [35], with whom Edmonds J agreed.

21. The applicant argues that the circumstances in this external review are analogous to those in *Seven*, as the Society in the present circumstances was attempting to persuade the Attorney-General to take action against the applicant.

### Consideration

22. In my view, *Seven* is distinguishable from the facts of this matter for the following reasons.
- Both the First and Second letters were clearly and expressly marked confidential.<sup>14</sup>
  - The recipient of the communications, the Attorney-General, acknowledges their confidentiality, has not disclosed them and is resisting their disclosure to the applicant under the RTI Act.
  - I consider that the observations of Allsop J do not apply in the present circumstances because, in my view, had the Attorney-General decided to initiate proceedings against the applicant and to publicly justify such action, it would have been open to her to explain her action in light of her obligations under legislation regulating the operation of charities and therefore unnecessary for her to justify her action by reference to another litigant's legal advice.
  - His Honour regarded volunteering its legal advice was the *Seven Network Limited's* central plank in seeking to persuade the ACCC to take action against other bidders for broadcast rights. However, in the present circumstances, the existence of legal advice was not the foundation of the Society's approach to the Attorney-General; the Society provided its Legal Advice in response to a request from solicitors for the Attorney-General.
23. Although there has been divided opinion as to the need for confidentiality in litigation privilege, a Full Court of the Federal Court of Australia recently stated that '*whatever the extent of confidentiality arising from litigation privilege, one element of confidentiality is essential, namely non-disclosure to one's opponent*'.<sup>15</sup> This requirement is clearly satisfied in this matter.
24. Further, in *Public Transport Authority of Western Australia v Leighton Contractors Pty Ltd*<sup>16</sup> (**Public Transport Authority**) the Court was required to determine whether litigation privilege attached to third party communications in the possession of an independent witness. In that case the majority held that where a solicitor intended the communications to be and remain private, the third party was aware of this intention, and the solicitor was under a duty to keep the information confidential, litigation privilege should attach to the communications in the possession of the third party.<sup>17</sup>
25. In this matter I am satisfied that:
- both the First and Second letters were clearly intended to be confidential when communicated by the Society's solicitor to the Attorney-General and to her solicitors, Crown Law;

<sup>14</sup> As noted above at paragraph 16, the two letters were marked as being confidential; and the letter dated 19 May 2006 contained additional explicit caveats on the use and distribution of the Legal Advice which it stated was to ensure its confidentiality.

<sup>15</sup> *Schweppes* at [38].

<sup>16</sup> [2007] WASCA 151.

<sup>17</sup> *Public Transport Authority* at [34].

- the Attorney-General, the recipient of the communications, acknowledges their confidentiality<sup>18</sup> and resists their disclosure; and
- the Society's solicitor was under a duty to keep the information confidential.

Further, there is no evidence in the material I have considered indicating that the Information in Issue has not been treated in a confidential manner.

26. Accordingly, this element is satisfied.

***Was the Information in Issue communicated for the dominant purpose of preparing for, for use in, or in relation to, existing to existing or reasonably anticipated proceedings?***

27. Yes, for the reasons that follow.

### **Reasonably anticipated proceedings**

28. At the time the Information in Issue was communicated, proceedings had not been instituted. Nonetheless, litigation will be reasonably anticipated where there is a '*real possibility of litigation, as distinct from a mere possibility, but it does not have to be more likely than not.*'<sup>19</sup> A judgment as to whether litigation is reasonably anticipated requires an objective view of the circumstances.<sup>20</sup>
29. After carefully considering the submissions and examining the Information in Issue, it is clear that, at the time the Information in Issue came into existence, litigation by the Society against the applicant was reasonably anticipated.
30. I note also that the Society issued Supreme Court proceedings against the applicant shortly afterwards, thus reinforcing the conclusion above.<sup>21</sup>

### **Dominant purpose**

31. The dominant purpose is '*the ruling, prevailing, paramount or most influential purpose*'<sup>22</sup> and is to be determined objectively, having regard to the evidence, the nature of the document and the parties' submissions.<sup>23</sup>

### ***The parties' arguments***

32. The Department contends<sup>24</sup> that the:
- First letter is properly characterised as an approach to a third party made for the dominant purpose of obtaining material assistance in imminent legal proceedings; and
  - Second letter may be characterised as a communication made in furtherance of the efforts of the Society's solicitors to obtain the Attorney-General's assistance in anticipated litigation of potential common interest.

<sup>18</sup> In accordance with the Department's decision refusing access.

<sup>19</sup> *Mitsubishi Electric*.

<sup>20</sup> *Mitsubishi Electric* at [20] and *Visy* at [28].

<sup>21</sup> The Department's internal review decision, at page four, notes the claim was filed on 27 June 2006.

<sup>22</sup> *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at 416, see also *AWB v Cole* (No. 1) (2005) 152 FCR 382 at 411.

<sup>23</sup> *Grant v Downs* (1976) 135 CLR 674 at 692.

<sup>24</sup> At page four of its internal review decision dated 22 January 2010.

33. The applicant submits<sup>25</sup> that the Information in Issue was brought into existence for the purpose of endeavouring to persuade the Attorney-General to commence litigation against the applicant in her own name - either by commencing new proceedings against the applicant or by seeking to be joined to existing or proposed proceedings and seeking alternative and additional relief against the applicant - and that this purpose is an anterior purpose. The applicant contends that the information in issue was not brought into existence for the purpose of:
- obtaining legal advice from the Attorney-General; or
  - litigation – with a view to obtaining aid as to that litigation, or evidence to be used in that litigation, or information which may result in the obtaining of such evidence.

### **Consideration**

34. The Society indicates that the:<sup>26</sup>
- First letter is a confidential communication brought into existence for the dominant, if not sole, purpose of obtaining information with reference to litigation which was then in contemplation between the Society and the applicant; and
  - above considerations also applied at the time the Second letter was written.
35. On 20 December 2010, OIC officers met with the Society's solicitor and were able to confirm to my satisfaction that the Society's dominant purpose in creating the Information in Issue was to explore the impact on its proposed proceedings of the involvement of the Attorney-General and thereby, for the Society to be able to obtain advice in respect of its anticipated litigation.<sup>27</sup> Whilst I accept that this may be one among a number of purposes, including to obtain assistance/involvement from the Attorney-General, I am satisfied that the dominant purpose of the communication was for the Society's solicitors to be in a position to properly and fully advise the Society in relation to the pending litigation.

### **Conclusion**

36. Based on my analysis of the Information in Issue, the relevant case law and circumstances surrounding the communications, I am satisfied that the Information in Issue:
- comprises confidential communications between a legal adviser and a third party made for the dominant purpose of seeking information in preparation for litigation and which would enable the legal adviser to advise their client in relation to the litigation;
  - meets the requirements for LPP, specifically, litigation privilege;
  - would therefore be privileged from production in a legal proceeding on the ground of LPP; and
  - qualifies for exemption from disclosure under section 47(3)(a) of the RTI Act as it comprises exempt information for the purposes of section 48 of the RTI Act, being information that satisfies the requirements of schedule 3, section 7 of the RTI Act.

<sup>25</sup> At paragraphs 43 and 44 and 63(i) of its submissions dated 19 October 2010.

<sup>26</sup> By email dated 28 February 2011.

<sup>27</sup> Regrettably I am constrained in explaining further my reasons on this point because to do so, would, in my view, risk disclosing information subject to the claim for non-disclosure. Section 108(3) of the RTI Act provides that the Information Commissioner must not, in reasons for a decision on external review, include information that is claimed to be exempt information or contrary to public interest information.



**Waiver<sup>28</sup>**

37. Part of the Information in Issue comprises the Legal Advice provided to the Society by its legal advisers. The applicant contends<sup>29</sup> that, in voluntarily providing the Legal Advice to the Attorney-General, the Society impliedly waived any LPP then subsisting in the Legal Advice.
38. Confidential communications between a legal adviser and client made for the dominant purpose of obtaining or providing legal advice attract LPP.<sup>30</sup> Having examined the relevant information, I am satisfied that (notwithstanding my conclusions above regarding litigation privilege subsisting in the Information in Issue in its entirety) advice privilege subsisted in this part of the documentation at the time the letters were communicated to the Attorney-General because they comprised confidential communications to the Society from its legal advisers, acting in their professional capacity, made for the dominant purpose of providing legal advice. This is not contested by the applicant.
39. In *Spotless Group Ltd v Premier Building & Consulting Pty Ltd*,<sup>31</sup> Chernov JA, with whom Warren CJ agreed, characterised the disclosure of an already privileged communication to a third party as a 're-communication', in respect of which one must inquire whether the re-communication effected a waiver of LPP. His Honour stated:

*It is common ground that the original communication, namely, the legal advice that was provided to the respondent, was subject to legal professional privilege. And it was that communication — that advice — that was passed on to the third parties. That the re-communication was in written form is, as I have said, irrelevant to this issue. What is of relevance is that, on its proper characterisation, the communication that was made to the third parties, effectively by the respondent, was the legal advice which it had received and to which privilege attached. There is no need, in those circumstances, to ask whether the re-communication was made for a "privileged purpose". Rather, the relevant question is, as it was in Mann, whether by "passing on" that communication to the third parties the respondent had waived the privilege.<sup>32</sup>*

40. LPP may be waived either:

- intentionally, by the client or the client's agent disclosing a privileged communication to persons outside of the privileged relationship (express waiver);<sup>33</sup> or
- by implication of law, in circumstances where there is conduct by, or on behalf of, the client which is inconsistent with the maintenance of the privilege, whether the client intended that result or not (implied / imputed waiver).<sup>34</sup>

<sup>28</sup> Another basis on which LPP may be negated is where the communication was in the furtherance of an improper purpose. This is explained in *Murphy and Treasury Department* (1998) 4 QAR 446 at [31]-[42]. No submissions were made suggesting that the communication in issue came into existence on that basis and there is no evidence of any such purpose in the creation of the communications in issue. In addition, the applicant's argument regarding possible waiver of LPP is confined to the Legal Advice, rather than Information in Issue in its entirety, as it is contended that information in issue, in its entirety, cannot be privileged. As there is no evidence before me suggesting that any LPP subsisting generally in the Information in Issue has been waived, my discussion focuses only on the issue of waiver only in respect of the re-communication of the Legal Advice.

<sup>29</sup> At paragraphs 43 and 63(a) of its submissions.

<sup>30</sup> *AWB v Cole (No.5)* (2006) 155 FCR 30 at 44; *Waterford v Commonwealth* (1986) 163 CLR 54 at 95; *Commissioner of Taxation (Commonwealth) v Pratt Holdings Pty Ltd* [2004] FCAFC 122.

<sup>31</sup> [2006] VSCA 201.

<sup>32</sup> At [20].

<sup>33</sup> *Goldberg v Ng* (1994) 33 NSWLR 639 at 670.

<sup>34</sup> *Osland v Secretary to the Department of Justice* [2008] HCA 37 (*Osland*) at [45].

41. LPP will be expressly waived when the client, or agent of the client, deliberately and intentionally discloses the confidential communications.<sup>35</sup> Clearly there has been no express waiver in this matter.
42. When maintenance of the privilege is inconsistent with the actions of the person entitled to the privilege, then waiver of LPP will be implied or imputed by law.<sup>36</sup>
43. In *Mann* the High Court of Australia considered circumstances in which LPP will be impliedly waived:

*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 the 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...*<sup>37</sup>

44. The question of implied waiver must be considered in the context of the relevant circumstances and the facts of the particular case.<sup>38</sup> The High Court has recognised that disclosure of a privileged communication, for a limited purpose in a specific context, does not necessarily amount to a general waiver of LPP.<sup>39</sup>
45. The Department submits<sup>40</sup> that disclosure of the Legal Advice was for a confidential, limited purpose and was not inconsistent with the confidentiality of the Legal Advice.
46. The applicant contends, relying on *Seven*, that had the Attorney-General been persuaded to a course of action by the Society, the advice conveyed may have had to be disclosed to publicly justify that action. Further, referring to the High Court decisions in *Goldberg v Ng Hango Holdings Pty Ltd*<sup>41</sup> (**Goldberg**), *Mann* and *Osland*, that the facts and circumstances in this matter align more closely with *Goldberg* than with *Mann* or *Osland*, contending that '*the disclosure was made for the purpose of gaining an advantage for the Society and securing a disadvantage for Ozcare*'. Specifically, that the disclosure was for the purpose of '*securing the involvement of the Attorney-General against Ozcare*'.
47. In *Goldberg*, the appellant solicitor had provided privileged documents to the Law Society in answer to a complaint of professional misconduct lodged against him by a former client, Mr Ng. Subsequently, the Law Society rejected Mr Ng's complaint on the basis that there was no evidence of professional misconduct. The respondents issued a subpoena for the discovery of all documents provided to the Law Society for the purposes of a concurrent equitable proceeding against the appellant in the NSW Supreme Court. Finding that waiver of LPP was imputed by law, the majority<sup>42</sup> noted the documents were provided to the Law Society '*for the calculated purpose of assisting [Mr Goldberg] in having the complaint against him resolved adversely to Mr Ng*'. Further, that the documents presumably contributed to that outcome and it appeared that Mr Goldberg had provided no other written statement to the Law Society in answer to the complaint. As was noted by Clarke JA in the Court of Appeal

<sup>35</sup> *Goldberg v Ng* (1994) 33 NSWLR 639 at 670.

<sup>36</sup> *Mann v Carnell* (1999) 201 CLR 1 (**Mann**).

<sup>37</sup> *Mann* at paragraph [28]-[29].

<sup>38</sup> *Osland* at [49] (Gleeson CJ, Gummow, Heydon and Keifel JJ) and [93] (Kirby J)

<sup>39</sup> *Mann* at [29].

<sup>40</sup> At pages four to seven of its internal review decision dated 22 January 2010.

<sup>41</sup> (1995) 185 CLR 83.

<sup>42</sup> Deane, Dawson and Gaudron JJ.

decision,<sup>43</sup> in the ordinary course, statements provided in response to a complaint of this nature would not have been privileged and would have been discoverable. His Honour considered that Mr Goldberg *'should not be permitted to enjoy the benefits derived from the submission ... without being subjected to the normal consequences of the submission of his own arguments to it'*.<sup>44</sup> As explained by the majority in the High Court decision:<sup>45</sup>

*In these circumstances, it would be unfair if the fact that Mr Goldberg saw fit to rely, in answer to Mr Ng's complaint to the Law Society, upon privileged communications to his solicitor in relation to the equity proceedings should have the effect that the Ngs were deprived of access to, and possible use of, the substance of that answer. That unfairness is heightened in the present case where, in the absence of access to the material before the Law Society, one can only speculate about why the Complaints Committee concluded that Mr Ng's complaint that Mr Goldberg had failed to account for \$100,100 allegedly paid on account of professional costs did "not involve a question of professional misconduct or unsatisfactory professional conduct" (emphasis added).*

48. In my view, *Goldberg* provides little guidance in this instance. The decision in *Mann* marked a change in the Court's approach to determining whether LPP has been impliedly waived. In *Mann* the Court emphasised that inconsistency, rather than fairness,<sup>46</sup> as was applied in *Goldberg*, is now the appropriate test.<sup>47</sup> Fairness is now merely one factor which may be relevant in determining whether LPP has been impliedly waived. The correctness of this approach was affirmed in *Osland*. In any event, I am satisfied that the circumstances in *Goldberg* are distinguishable from those in the present matter.
49. The unfairness arising from the particular circumstances of that matter, does not arise here. In *Goldberg* the appellant was required to answer a professional misconduct complaint and chose to do so using privileged material, thus depriving the respondents of the outcome sought, an opportunity to respond to matters that determined the issue and an understanding of the reasons for the decision. In this matter, the context in which the privileged information was provided was the anticipated litigation. The Legal Advice was provided for purposes relating to that litigation, as discussed at paragraph 35 above. The Attorney- General did not involve herself in the litigation and so, no detriment flowed to the applicant. Had she done so, I do not consider that any such course of action would have to be explained with reference to the Legal Advice, but rather, to her obligations and responsibilities under the relevant legislation.
50. Looking at the circumstances in which the Legal Advice was communicated, I am satisfied that, as noted above,<sup>48</sup> both the First and Second letters were clearly intended to be confidential as between the Attorney-General and the Society and the Legal Advice has not been disclosed by the Attorney-General or the Society. In my view, the facts of the present matter do not reveal an inconsistency on the part of the Society with the confidence that the LPP doctrine serves to protect. I am satisfied that disclosure of the Legal Advice to the Attorney-General was for a specific, limited purpose and was not inconsistent with the confidentiality of the Legal Advice. Accordingly, I am satisfied that this limited disclosure does not prevent the Society from maintaining that privilege as against the applicant.

---

<sup>43</sup> (1994) 33 NSWLR 639 at 677.

<sup>44</sup> At 677.

<sup>45</sup> At 102.

<sup>46</sup> *Attorney General (NT) v Maurice and Others* (1986) 161 CLR 475 at 487 as per Mason and Brennan JJ: *'Implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege.'*

<sup>47</sup> *Mann* at paragraph 28-29

<sup>48</sup> At paragraph 25.

## **DECISION**

51. I affirm the decision under review.
52. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

---

**Jenny Mead**  
**Right to Information Commissioner**

**Date: 13 May 2011**

## APPENDIX

### Significant procedural steps

Date <sup>49</sup>	Event
20 October 2009	The applicant applied to the Department for access under the RTI Act to all the information held by the Department relating to itself, its relationship with the Society, its legal status and action by the Society against it in the Queensland Supreme Court.
11 December 2009	The Department refused access to the 385 pages responding to the access application on the basis that they comprised exempt information under section 48 of the RTI Act.
22 December 2009	The applicant applied to the Department for internal review of the decision.
22 January 2010	On internal review, the Department decided: <ul style="list-style-type: none"> <li>to not consider duplicate documents in its decision, thereby reducing the number of pages in issue to 96; and</li> <li>to refuse access to the information in issue under section 48 of the RTI Act.</li> </ul>
11 February 2010	The applicant applied to OIC for external review.
19 February 2010	OIC informed the Department and the applicant that the external review application had been accepted for review.
23 February 2010	The Department provided OIC with a copy of the 96 pages the subject of its internal review decision.
6 October 2010	OIC conveyed its preliminary view to the applicant that the Department was entitled to refuse access to the information in issue under section 47(3)(a) and section 48 of the RTI Act on the basis that the information in issue was subject to LPP and there had been no waiver of privilege.
19 October 2010	The applicant informed OIC that it did not accept the preliminary view expressed in OIC's 6 October 2010 letter and provided submissions in support of its case.
9 December 2010	OIC consulted the Society regarding its purpose in creating the information in issue.
28 February 2011	The Society provided its submission regarding creation of the information in issue.

<sup>49</sup> Of correspondence or relevant communication unless otherwise stated.