

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Application 83/04

Participants:

CHARLIE CACCIOLA
Applicant

QUEENSLAND OMBUDSMAN
Respondent

DECISION AND REASONS FOR DECISION

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REASONS FOR DECISION**1. Background**

1.1 The applicant seeks review of a decision of the Office of the Queensland Ombudsman (the Ombudsman's Office) to refuse him access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to documents concerning a complaint which the applicant made to the Ombudsman's Office. The complaint involved the applicant's son and the Department of Education and the Arts (as it is now known; the Department).

1.2 By letter dated 7 October 2003, the applicant applied to the Ombudsman's Office for access, under the FOI Act, to documents in the following terms:

I request under the FOI Act copies of all documents that you received or sent (including E-mails) relating to my complaint to your office since 10 April 2000 with the exception of the documents referred to in the schedule to your letter 23/9/2003 and those documents which were forwarded to your office by me or on my behalf.

1.3 By letter dated 24 December 2003, Mr Greg Woodbury of the Ombudsman's Office advised the applicant that he had identified 58 documents which were responsive to the terms of the applicant's FOI access application. Mr Woodbury decided to grant the applicant full access to 30 documents, but to refuse him access, either in whole or in part, to the remainder of the documents under s.43(1) (folios 6, 7, 10, 21, 25-39 and 41) or s.44(1) (folios 45-49 and 54-56) of the FOI Act.

1.4 By letter dated 1 January 2004, the applicant applied for internal review of Mr Woodbury's decision, and also contended that there existed, in the Ombudsman's possession or control, additional documents which the Office had failed to identify. Mr Craig Allen of the Ombudsman's Office conducted the internal review. By letter dated 10 February 2004, Mr Allen advised the applicant that he had decided to affirm Mr Woodbury's decision that the relevant documents were exempt from disclosure under s.43(1) or s.44(1) of the FOI Act. In response to the applicant's contention that the Ombudsman's Office had failed to identify all responsive documents, an additional 7 documents were identified and disclosed in full to the applicant.

1.5 By letter dated 14 February 2004, the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Mr Allen's decision in terms of the exemptions claimed, and of the "sufficiency of search" by the Ombudsman's Office for documents which fell within the terms of his FOI access application.

2. Steps taken in the external review process

2.1 Copies of the documents in issue were obtained and examined.

2.2 Initially, the focus of this external review was in determining the scope of the applicant's FOI access application. This was confirmed with both participants by letter dated 21 April 2004 from Assistant Commissioner (AC) Moss. Clarification of the scope of the applicant's FOI access application was necessary, as a narrow or broad interpretation would affect the extent of the inquiries to be pursued regarding the "sufficiency of search" issue. However,

as the sufficiency of search issue has been finalised, it is not necessary for the purposes of my decision to set out the steps taken or the results obtained in any detail. I will summarise them briefly below.

- 2.3 Following inquiries with the Ombudsman's Office some additional documents were identified and, on 20 August 2004, I authorised the release of those documents to the applicant. The applicant still contended, however, that the Ombudsman's Office had in its possession, or under its control, further documents which it had not yet identified. I subsequently agreed to make direct inquiries with the Ombudsman, the Deputy Ombudsman, and another staff member of that office, the results of which were conveyed to the applicant by letters dated 24 September 2004 and 14 October 2004. As a result of my office's inquiries, I advised the applicant that it was my preliminary view that there were no reasonable grounds for believing that additional documents existed in the possession, or under the control, of the Ombudsman's Office. I also expressed the preliminary view that the searches and inquiries conducted in an effort to locate any further responsive documents had been reasonable in the circumstances of the case. In the event the applicant did not agree with my preliminary view, I invited him to make a written submission specifying the searches and inquiries which he contended the Ombudsman's Office should reasonably be required to undertake. I advised the applicant that if I did not receive any submissions from him, I would proceed on the basis that he accepted my preliminary view. No further submissions have been made by the applicant in respect to this issue, and I have not considered it further.
- 2.4 As the documents containing the matter in issue in this review were provided to the Ombudsman's Office by the Department, I consulted with the Department in accordance with s.74(1) of the FOI Act, and invited it to be a participant in the review. At the same time, I asked the Department to consider whether it objected to the disclosure of the segments of matter in issue in folios 7, 45-49 and 54-56, on the basis that those folios were either provided to the Department by solicitors who, at the relevant time, represented the applicant's son in a grievance lodged with the Department (there being no suggestion that the applicant was acting other than on behalf of his son), or duplicated in another folio to which the applicant had been granted full access. By email received on 14 July 2004, Ms Stephannie Kalas of the Department advised my office that the Department withdrew its objection in relation to that matter. The Ombudsman's Office subsequently withdrew its objection and, by letter dated 28 July 2004, I authorised the release of those segments of matter. Those documents are no longer in issue in this review.
- 2.5 As regards the remaining documents (folios 6, 10, 21, 25-39 and 41), by letter dated 14 May 2004, AC Moss expressed to the applicant her preliminary view that the matter in issue in those documents qualified for exemption under s.43(1) of the FOI Act. The applicant did not accept that preliminary view and, by letter dated 30 May 2004, provided submissions in support of his case for disclosure.
- 2.6 By letter dated 17 June 2004, I wrote to the applicant confirming what I understood to be the basis of his objection to the preliminary view expressed by AC Moss. Having regard to his submissions, I extended the time for the applicant to lodge evidence in support of his case for disclosure of the matter in issue. Nothing further has been received from the applicant in that regard.

2.7 In making my decision, I have taken into account the following:

- the matter in issue;
- the applicant's FOI access application dated 7 October 2003, application for internal review dated 1 January 2004, and application for external review dated 14 February 2004;
- the initial and internal review decisions of the Ombudsman's Office, dated 14 November 2003 and 10 February 2004, respectively;
- the applicant's letters dated 30 May 2004 and 1 September 2004; and
- the letter from the Ombudsman's Office dated 9 March 2004.

3. **Matter in issue**

3.1 The matter remaining in issue can be categorised as follows:

- Category 1 - correspondence between Crown Law and the Department (folios 25-39 and 41)
- Category 2 - discussion or summary of professional legal advice provided to the Department by its solicitors, Crown Law (parts of folios 6, 10 21).

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

(a) **General Principles**

4.1 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.

4.2 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.

4.3 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.

4.4 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).

- 4.5 Legal professional privilege will apply to communications between officers of the Crown Solicitor's Office and their clients, or with third parties, which satisfy the tests summarised above: see *Re Smith and Administrative Services Department* (1993) 1 QAR 22 at p.54 (paragraphs 88-90).

(b) Application of s.43(1) to the matter in issue

- **Category 1**

- 4.6 Based upon my examination of the contents of the category 1 documents, I am satisfied that they comprise confidential communications between lawyer (Crown Law) and client (the Department), which were made for the dominant purpose of obtaining or giving legal advice or professional legal assistance, or for the dominant purpose of use, or obtaining material for use, in pending or anticipated legal proceedings. I am therefore satisfied that the category 1 documents would be privileged from production in a legal proceeding, and are exempt from disclosure under s.43(1) of the FOI Act.

- **Category 2**

- 4.7 Based upon my examination of the contents of the category 2 documents, I am satisfied that the matter in issue in those documents either discusses, or summarises, professional legal advice provided to the Department by its solicitors, which advice would, of itself, attract legal professional privilege. I am therefore satisfied that the matter in issue in the category 2 documents attracts legal professional privilege and is exempt from disclosure under s.43(1) of the FOI Act.

(c) The applicant's submissions

- 4.8 The applicant has argued that any legal professional privilege that might have existed in the matter in issue was waived by the Department when it produced the folios to the Ombudsman's Office, or by giving the applicant access to the matter in issue as part of a previous FOI access application lodged with the Department.
- 4.9 In her letter to the applicant dated 14 May 2004, AC Moss considered whether, by providing the documents to the Ombudsman's Office, the Department had waived any privilege attaching to the matter in issue. It was AC Moss' view that as the matter in issue was provided in confidence, and for the limited purpose of assisting the Ombudsman's Office in its assessment of the applicant's complaint, the Department had not waived the privilege attaching to those folios.
- 4.10 In his letter dated 30 May 2004, the applicant stated:

- *... in a 1999 FOI application the agency gave me 2 versions of the documents. One version with numerous blackouts and the other without any blackouts. As I indicated the documents I received from the agency FOI sweep are stored by the agency would have records. The agency has a history of luring my documents so it can update and 'fix' its own records. I believe that as recent as 2003 part of these documents were given to EQ and his local member, by my son. I believe one version of documents given to me included blacked out advice from Crown Law that the agency could withstand any judicial review and the other version could be clearly read.*

- *Other documents regarding natural justice were provided by Crown Law to my son via his solicitors.*
- *I disagree that the documents were released by the agency in confidence for the limited purpose of assisting the Ombudsman in his assessment and therefore all information should be made available to me. The Ombudsman did not notify me within a reasonably practicable time as he is obliged to of his reason not to investigate. In fact all along I was lead to believe that an investigation was being conducted hence my providing additional information during the 2 year 10 month process. The Ombudsman's response in 2003 referred to assessment but a further letter from Ombudsman's office April 2003 clearly refers to S57 in the Ombudsman's office is only required to advise complainants of the outcome of investigations (not assessment) in the way the Ombudsman considers appropriate.*

I state that the agency has waived privilege by making documents available under FOI and can't hide behind the fact that it can't find records. It is reasonable that the agency finds the records. As your office knows the agency has been caught out before with documents 'reappearing' after 12 months – refer to my 2001 report to Ombudsman.

4.11 By letter dated 17 June 2004, I wrote to the applicant confirming what I understood to be the basis of his objection:

I understand that objection is based on the premise that the [Department] has waived the privilege attaching to the matter in issue by:

- (a) providing copies of the matter in issue to the [Ombudsman's Office];*
and
- (b) giving you access to the matter in issue following an application you made, under Part 3 of the FOI Act, to the Department in 1999.*

4.12 In that letter, I invited the applicant to provide evidence in support of his statements that he (or his son) had previously been given access to the matter in issue. Despite that request, the applicant did not put any material before me, or refer me to any material, which suggests or indicates that he (or his son) had previously been given access to the matter in issue.

(d) Waiver

4.13 The Information Commissioner discussed the circumstances in which legal professional privilege will be waived in *Re Hewitt* and *Re Noosa Shire Council and Department of Communication and Information, Local Government and Planning* (2000) 5 QAR 428. 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 express or intentional waiver, the Information Commissioner 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.

- 4.14 In this case, the Ombudsman's Office assessed a complaint the applicant made to it concerning the Department. I am satisfied that the matter in issue which was sent to the Ombudsman's Office by the Department was provided in confidence, and for the limited purpose of assisting the Ombudsman's Office in its assessment of that complaint. Based on the material before me, there is nothing to suggest that the Ombudsman's Office disclosed the matter in issue to any person, or made any other use of that matter contrary to the use for which it was provided. Nor is there any material before me to suggest that the Department previously disclosed the matter in issue to the applicant, or his son.

(e) Conclusion

- 4.15 I find that the matter in issue satisfies the test for legal professional privilege set out at paragraph 4.2 above, and the privilege attaching to the matter in issue has not been waived by, or on behalf of the Department.

DECISION

- 5.1 I affirm the decision under review (being the decision dated 10 February 2004 made by Mr Allen on behalf of the Ombudsman's Office) by finding that the matter in issue, as identified at paragraph 3.1 above, is exempt from disclosure to the applicant under s.43(1) of the FOI Act.
- 5.2 I have made this decision as a delegate of the Information Commissioner's powers, under s.90 of the FOI Act.

.....
 SUSAN BARKER
ASSISTANT INFORMATION COMMISSIONER

Date: 20 December 2004