



Decision and Reasons for Decision

Application Number: 210870

Applicant: J Grant

Respondent: Moreton Bay Regional Council

Decision Date: 21 July 2010

Catchwords: **FREEDOM OF INFORMATION – Section 43(1) of the *Freedom of Information Act 1992* (Qld) – legal professional privilege - confidential communications between an agency and its solicitor – confidential communications between a solicitor and third parties - application of the ‘improper purpose exception’**

Contents

REASONS FOR DECISION.....	2
Summary	2
Background.....	2
Decision under review	3
Steps taken in the external review process	3
Matter in issue	5
Findings	5
Section 43(1) of the FOI Act.....	5
Legal professional privilege.....	6
The improper purpose exception to legal professional privilege.....	9
DECISION	15

REASONS FOR DECISION

Summary

1. For the reasons set out below, I am satisfied that the matter in issue is exempt from disclosure under section 43(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**).

Background

2. As a result of local government amalgamations that occurred on 15 March 2008, the former Pine Rivers Shire Council (**PRSC**) was subsumed within the Moreton Bay Regional Council (**MBRC**).
3. By MBRC FOI request form dated 13 November 2008, the applicant sought access to 'a second valuation of ex-Mayor Chapman's resumption at Dohles Rocks Road, Murrumba Downs'.
4. In a letter of the same date addressed to the Mayor of MBRC and attached to the applicant's FOI request form, the applicant also sought three documents mentioned in a letter from the Shire Solicitor for PRSC to Urbis JHD Valuations Pty Ltd (**Urbis**) dated 31 May 2004:

Please provide me with a copy of the review of the J Wood & Associates P/L valuation and a letter dated 27th September 2002 from J Wood & Associates (as per item 1 of Mr Forbes' letter).

Please provide me with a copy of the full valuation in respect of the resumed land (again as requested by Mr Forbes).

... [P]lease provide me with a copy of the letter dated 6 May 2004 from Trilby Misso & Associates, solicitors for the owners (Chapmans).

5. Together, the applicant's requests in his FOI request form and the accompanying letter comprise the **FOI application**.
6. By letter dated 7 January 2009, MBRC issued a decision (**Original Decision**) in which it advised that it had:
 - identified 144 folios responsive to the FOI application
 - decided:
 - to release one folio—that is, the letter from Trilby Misso Solicitors to PRSC dated 6 May 2004 and
 - that the 'report' was exempt from disclosure under section 43(1) of the FOI Act.
7. By letter dated 2 February 2009, the applicant sought internal review of the Original Decision.
8. By letter dated 22 May 2009, the MBRC purported to issue an internal review decision. However, as the 'decision' was made outside the time limit specified in the FOI Act¹, MBRC is deemed to have affirmed its decision dated 7 January 2009 (**Deemed Decision**).

¹ See section 52(6) of the FOI Act.

9. By email dated 16 June 2009, the applicant sought an external review stating that *'[t]he basis of our request is that sufficient evidence of iniquity exists in this matter to overcome any protection under legal privilege or Commercial in Confidence'*.

Decision under review

10. The decision under review is the Deemed Decision.

Steps taken in the external review process

11. By letter dated 30 June 2009, the applicant made submissions to which he attached supporting documentation.
12. By letter dated 1 July 2009, this Office requested that MBRC provide submissions in support of its view that the matter in issue is exempt under section 43(1) of the FOI Act.
13. By letter dated 21 July 2009, MBRC provided submissions to this Office setting out why it considered that the Urbis valuation was exempt.
14. By letter dated 2 July 2009, the applicant made further submissions to which he attached supporting documentation.
15. By telephone conversation on 5 August 2009, a staff member of this Office requested that MBRC provide clarification regarding the 143 folios that its Original Decision indicated had been identified as responsive to the FOI application.
16. By letter dated 19 August 2009, MBRC advised that the 143 folios comprised:

Document	No. of folios	No. of copies on file	Total no.
a. Compensation valuation report by Urbis dated July 2004	30	3	90
b. Letter of proposal from Urbis to PRSC dated 8 June 2004	8	3	24
c. Email and revised letter of proposal from Urbis to PRSC dated 10 June 2004	9	3	27
d. Letter and account from Urbis to PRSC dated 4 August 2004	2	1	2
Total folios			143

17. By letter dated 10 September 2009, the applicant made further submissions to which he attached supporting documentation.
18. By telephone conversation on 29 October 2009, a staff member of this Office requested that MBRC provide additional information and supporting documentation regarding the PRSC Shire Solicitor's request to Urbis that it prepare a valuation.
19. By letter dated 12 November 2009, MBRC referred this Office to:
- the letter from the Shire Solicitor for PRSC to Urbis dated 31 May 2004²
 - a letter of proposal from Urbis to PRSC dated 8 June 2004³ and
 - a letter from MBRC to Urbis dated 10 June 2004 accepting the proposal.

² Which was referred to by the applicant in framing his FOI application.

³ That is, document b. in the preceding paragraph.

20. By telephone conversation between a staff member of this Office and MBRC on 14 April 2010, MBRC agreed to release to the applicant a document specified by the applicant in the letter of 13 November 2008 accompanying his FOI request form—that is, a letter dated 24 September 2002⁴ from J Wood & Associates to PRSC.
21. Also in that telephone conversation, this Office requested that MBRC provide additional information and supporting documentation regarding the PRSC Shire Solicitor's use of the Urbis valuation.
22. In response and by letter dated 15 June 2010, MBRC provided a copy of a letter dated 8 April 2008 from the PRSC Shire Solicitor to Bennett & Philp Solicitors (**Bennett & Philp**). This letter requested that Bennett & Philp act on PRSC's behalf regarding a recent offer of settlement made by the solicitors of ex-PRSC Mayor Chapman and her husband (**the Chapmans**). The offer had been made in relation to a compensation claim made by the Chapmans regarding PRSC's resumption of a portion of land owned by them. A copy of the Urbis valuation was enclosed with this letter.
23. By letter dated 26 May 2010, this Office advised the applicant of its preliminary view that the Urbis valuation was exempt from disclosure under section 43(1) of the FOI Act, as legal professional privilege attached to it and the illegal or improper purpose exception was not made out.
24. By letter dated 16 June 2010, the applicant responded to the preliminary view with submissions to which he attached supporting documentation.
25. By email dated 22 June 2010, this Office requested that MBRC advise whether, when acting on PRSC's behalf, Bennett & Philp had provided a copy of the Urbis valuation to the Chapman's solicitors⁵.
26. By email dated 29 June 2010, MBRC advised this Office that Bennet & Philp Solicitors had not provided a copy of the Urbis valuation to the Chapman's solicitors.
27. By email dated 1 July 2010, this Office asked MBRC to confirm that documents b., c. and d. identified in paragraph 16 above had not been released to the applicant⁶ and, if not, to consider whether it was willing to provide copies of same to him.
28. By email dated 5 July 2010, MBRC advised this Office that it had no objection to providing copies of documents b., c. and d. to the applicant.
29. In a telephone conversation between a staff member of this Office and MBRC on 6 July 2010, MBRC's agreement to provide copies of the letter dated 24 September 2002⁷ from J Wood & Associates to PRSC⁸ and documents b., c. and d. was confirmed.

⁴ In its purported internal review decision, MBRC noted that:

- while the applicant had specified the date of 27 September 2002 in relation to this letter, it was actually dated 24 September 2002 and
- the applicant already possessed a copy of this letter, as he had attached it to another FOI application.

⁵ And if so, to provide a copy of Bennett & Philp's correspondence under which the valuation was provided (as the correspondence could indicate the terms on which the valuation was provided).

⁶ As this appeared possible, given their similarity in nature to the letter from PRSC to Urbis dated 31 May 2004 that was referred to by the applicant in framing his FOI application.

⁷ In its purported internal review decision, MBRC noted that:

- while the applicant had specified the date of 27 September 2002 in relation to this letter, it was actually dated 24 September 2002 and
- the applicant already possessed a copy of this letter, as he had attached it to another FOI application.

⁸ As previously agreed on 14 April 2010.

30. In reaching this decision, I have taken into account:

- the applicant's FOI application
- MBRC's Original Decision dated 7 January 2009
- the application for internal review dated 2 February 2009
- the application for external review dated 16 June 2009
- MBRC's purported internal review decision dated 22 May 2009⁹, submissions dated 21 July 2009 and supporting documentation provided on 19 August 2009, 12 November 2009, 17 June 2010 and 29 June 2010
- the applicant's submissions to this Office dated 30 June 2009, 2 July 2009, 10 September 2009 and 16 June 2010 and supporting documentation attached to those submissions
- the matter in issue
- relevant case law and previous decisions of this Office
- relevant provisions of the FOI Act.

31. During the course of this external review, the applicant and/or MBRC have provided this Office with copies of the following correspondence, which I have also taken into account to the extent that it is relevant to this external review:

- the applicant's letters to MBRC dated 3 February 2009, 3 March 2009, 24 April 2009, 25 April 2009 and 6 August 2009 and supporting documentation attached to those letters
- the applicant's letter to Queensland Newspapers dated 14 August 2009 and supporting documentation attached to that letter.

Matter in issue

32. The matter remaining in issue in this review is document a. identified in paragraph 16 above—a compensation valuation report by Urbis dated July 2004 comprising 30 folios (**Urbis Valuation**).

Findings

Section 43(1) of the FOI Act

33. This section provides:

43 Matter affecting legal proceedings

- (1) *Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.*

34. The effect of section 43(1) of the FOI Act is that information which attracts legal professional privilege will be exempt from disclosure under the FOI Act.

⁹ Taken by this Office to comprise submissions.

Legal professional privilege

35. The general principles of legal professional privilege were summarised by the High Court of Australia in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*¹⁰ 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.

36. The 'dominant purpose' test for legal professional privilege was adopted by the High Court of Australia in *Esso Australia Resources Ltd v Commission of Taxation*¹¹ in preference to the 'sole purpose' test which was formulated in *Grant v Downs*¹².
37. The legal professional privilege exemption in the FOI Act reflects the requirements for establishing legal professional privilege at common law. In other words, the legal professional privilege exemption protects communications passing between a lawyer and a client where¹³:

- (a) *the communication is made in the course of a professional relationship of lawyer and client; and*
- (b) *the communication is confidential; and*
- (c) *the communication is:*
 - (i) *from the client to the lawyer for the dominant purpose of seeking legal advice; or*
 - (ii) *from the lawyer to the client for the dominant purpose of providing legal advice; or*
 - (iii) *from a third party at the client's request for the dominant purpose of use in assisting the lawyer to provide legal advice*¹⁴; *or*
 - (iv) *from the lawyer or the client, or a third party at the request of the lawyer or the client, for the dominant purpose of use in or in relation to existing or anticipated legal proceedings.*

Paragraphs (c)(i)-(iii) above describe the 'advice limb' of legal professional privilege, while paragraph (c)(iv) describes the 'litigation limb'.

38. Legal professional privilege for the purpose of section 43(1) of the FOI Act is established when these common law requirements are met.
39. Qualifications and exceptions to legal professional privilege may, in particular circumstances, affect the question of whether information attracts or remains subject to legal professional privilege at common law, and therefore also in relation to section 43(1) of the FOI Act.
40. One such qualification or exception, known as the 'illegal or improper purpose exception' or simply the 'improper purpose exception', is considered in the context of this review.

¹⁰ (2002) 213 CLR 543 at [9].

¹¹ (1999) 201 CLR 49.

¹² (1976) 135 CLR 674.

¹³ Emiliios Kyrrou, 'Under Attack: Legal professional Privilege' (2007) 81(3) LIJ 32 at 34.

¹⁴ *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357.

Application of legal professional privilege to the Urbis valuation

(a) Communication made in the course of a lawyer-client relationship

41. The High Court of Australia has stated that:

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 [he/she] may relinquish that entitlement¹⁵.

42. The High Court has confirmed that legal professional privilege can apply to communications between government agencies and their salaried legal officers provided there is a *'professional relationship which secures to the advice an independent character notwithstanding the employment'*¹⁶.

43. The Information Commissioner has previously stated that advice from in-house legal advisers¹⁷ may attract legal professional privilege if a professional relationship of solicitor (or barrister) and client exists between relevant parties. It is this professional relationship which gives the advice its independent character which is necessary to attract LPP¹⁸.

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

- the Shire Solicitor for PRSC engaged Urbis to prepare the Urbis Valuation for the purpose of settling the Chapmans' compensation claim, and received the valuation from Urbis
- the PRSC Shire Solicitor did so in his capacity as lawyer for PRSC as his client
- the PRSC Shire Solicitor engaged Bennett & Philp to act on PRSC's behalf to settle the Chapmans' compensation claim
- Bennett & Philp received a copy of the Urbis Valuation in its capacity as lawyers acting for PRSC
- the PRSC Shire Solicitor was, at the relevant time, in a position to provide professional legal advice of an independent character, and capable of attracting legal professional privilege, to PRSC
- similarly, Bennett & Philp were, at the relevant time, in a position to provide professional legal advice of an independent character, and capable of attracting legal professional privilege, to PRSC
- the communication comprised by the Urbis Valuation occurred in the context of firstly, the lawyer-client relationship between PRSC and its Shire Solicitor and secondly, the lawyer-client relationship between PRSC and Bennett & Philp.

(b) Confidential communication

45. The High Court has stated that the object of legal professional privilege is:

... to preserve the confidentiality of confidential statements and other materials which have been made or brought into existence for the [dominant] purpose of [the client] seeking or being furnished with legal advice by a practicing lawyer or for the [dominant] purpose of preparing for existing or contemplated judicial or quasi-judicial proceedings.¹⁹

¹⁵ *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1 at [28].

¹⁶ *Waterford v Commonwealth* (1986) 163 CLR 54 at 61.

¹⁷ Including legal advisers within a government department or statutory authority.

¹⁸ *Potter and Brisbane City Council* (1994) 2 QAR 37.

¹⁹ *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at page 490.

46. Accordingly, it has been noted that:

*It seems ... to be an essential element in a claim for legal professional privilege that the material, disclosure of which is sought to be precluded is, so far as the person from whom disclosure is sought is concerned, confidential.*²⁰

47. On the information available to me, I am satisfied that the Urbis Valuation:

- was confidential when it was communicated by Urbis to PRSC
- remained confidential when it was communicated by PRSC to Bennett & Philp
- remains confidential as Bennett & Philp did not provide a copy of it to the Chapmans solicitors during negotiations regarding the compensation claim.

48. Accordingly, I am satisfied that the communications comprised by the Urbis Valuation were confidential at the time of communication, and remain confidential.

(c) Communication regarding legal advice or legal proceedings

49. The 'advice limb' of legal professional privilege requires that the communication be:

- from the client to the lawyer for the dominant purpose of seeking legal advice
- from the lawyer to the client for the dominant purpose of providing legal advice or
- from a third party at the client's request for the dominant purpose of use in assisting the lawyer to provide legal advice.

50. Legal advice involves more than just advising the client about the law—it also includes advice as to '*what may prudently and sensibly be done in the relevant legal context*'²¹. It does not include advice that is predominantly for administrative, financial, personal, commercial or public relations purposes.

51. The dominant purpose is '*the ruling, prevailing, paramount or most influential purpose*'²². This test brings within the scope of LPP documents brought into existence for the purpose of legal advice, even if another ancillary use was contemplated at that time²³. It must be determined objectively, having regard to the evidence, the nature of the document and the parties' submissions²⁴.

52. After carefully examining the communications which comprise the information in issue, I am satisfied that the Urbis Valuation:

- was brought into existence by Urbis and communicated to the PRSC Shire Solicitor for the dominant purpose of assisting the Shire Solicitor to provide legal advice to PRSC
- was subsequently communicated by the PRSC Shire Solicitor to Bennett & Philp for the dominant purpose of PRSC seeking legal advice from Bennett & Philp, and Bennett & Philp providing such advice to PRSC.

²⁰ *Ritz Hotel Ltd v Charles of the Ritz Ltd* (No 22) (1988) 14 NSWLR 132 at page 133.

²¹ *AWB v Cole* (No. 1) (2005) 152 FCR 382 at 410 and *DSE (Holdings) v Intertan Inc.* (2003) 135 FCR 151 at [45].

²² *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.

²³ *Esso Australia Resources Ltd v Commission of Taxation* (1999) 201 CLR 49 at [58].

²⁴ *Grant v Downs* (1976) 135 CLR 674 at 692.

Conclusion

53. Based on my careful review of the Urbis Valuation itself, and documents related to its commissioning and communication from Urbis to PRSC, and from PRSC to Bennett & Philp, I find that that the Urbis Valuation comprises communications:
- (a) occurring in the course of lawyer-client relationships
 - (b) that were and remain confidential and
 - (c) made for the dominant purpose of PRSC receiving legal advice, firstly from PRSC's Shire Solicitor and then from Bennett & Philp.
54. On this basis, I am satisfied that the Urbis Valuation:
- satisfies the common law requirements for legal professional privilege and therefore attracts such privilege
 - qualifies for exemption from disclosure under section 43(1) of the FOI Act.

The improper purpose exception to legal professional privilege

55. As the applicant's submissions raise issues of impropriety and/or illegality, it is necessary to consider the qualification or exception to legal professional privilege known as the improper purpose exception.
56. This exception provides that communications that otherwise satisfy the common law requirements for legal professional privilege do not attract or remain subject to²⁵ such privilege if they are made in preparation for, or furtherance of, an illegal or improper purpose—that is, a crime, fraud, illegal purpose, or deliberate abuse of statutory power.
57. The improper purpose exception is considered in the Information Commissioner decision of *Murphy and Treasury Department*²⁶ (***Murphy***), which observes:

*... in order to establish the 'improper purpose exception', it will be necessary for me to find prima facie evidence that the client, or an agent of the client, had embarked on a deliberate course of action knowing that the proposed actions were contrary to law, and had made the relevant communications in furtherance of that illegal or improper purpose.*²⁷

58. On reviewing case law regarding the improper purpose exception, the following five issues emerge as considerations relevant to determining whether the exception is established.

(i) *Prima facie* evidence is required that the actual communication was in furtherance of wrongdoing

59. To displace legal professional privilege, there must be *prima facie* evidence (sufficient to afford reasonable grounds for believing) that the relevant communication was made in preparation for, or furtherance of, some illegal or improper purpose.
60. *Murphy*²⁸ noted the following observations of members of the High Court regarding the evidentiary onus required to displace legal professional privilege:

²⁵ Case law variously holds either that the exception prevents legal professional privilege from attaching to communications in the first place, or that privilege does attach but the exception then applies.

²⁶ (1998) 4 QAR 446 at [31]-[42].

²⁷ Ibid at [42].

²⁸ Ibid at [35]-[37].

*Gibbs CJ ... stated the evidentiary requirements for a finding that legal professional privilege had been displaced in such circumstances...*²⁹:

The privilege is of course not displaced by making a mere charge of crime or fraud or, as in the present case, a charge that powers have been exercised for an ulterior purpose. This was made clear in *Bullivant v Attorney-General (Vic)* and in *O'Rourke v Darbishire*. As Viscount Finlay said in the latter case, "there must be something to give colour to the charge".

...

*Discussing the evidence necessary to displace legal professional privilege, Gaudron J said...*³⁰:

... there must be evidence to raise a sufficient doubt as to a claim of privilege, to cast a further evidentiary onus on the person making the claim to show that, in truth, the privilege attaches.

Inevitably, what will be sufficient to cast a further evidentiary burden on a person claiming legal professional privilege will vary according to the facts of each case. However, the presumption of innocence is not lightly displaced. ...

Bearing in mind the purpose served by legal professional privilege and the importance of the presumption of innocence, a further evidentiary burden is, in my view, cast upon a person claiming legal professional privilege only if there is evidence which, if accepted, raises a prima facie case of illegal or other purpose falling outside the privilege. Evidence of that nature need not be led by the person resisting the claim of privilege. It might emerge, for example, from documents for which the claim is made.

[Murphy footnotes omitted]

(ii) The knowledge of wrongdoing must be the client's, or an agent of the client's

61. On this point, *Murphy*³¹ observed:

Knowledge, on the part of the legal adviser, that a particular communication was made in preparation for, or furtherance of, an illegal or improper purpose is not a necessary element (see R v Cox and Railton³²; R v Bell: ex parte Lees³³); however, such knowledge or intention on the part of the client, or the client's agent, is a necessary element.

(iii) There must be a deliberate course of action – mere inadvertence will not ground the exemption

62. The exception does not apply to inadvertent actions—in the Federal Court decision of *Freeman v Health Insurance Commission and Ors*³⁴, Finkelstein J stated:

Notwithstanding the submissions made by the applicant, I do not believe that the exception should be extended so that the privilege is lost if there is an inadvertent abuse of statutory power. Legal professional privilege is an important right and the public interest does not require it to be lost except by conduct which is morally reprehensible.

²⁹ *Of Attorney-General (NT) v Kearney* (1985) 158 CLR 500.

³⁰ *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1996) 188 CLR 501 at 546.

³¹ Above n 26 at [38].

³² (1884) 14 QBD 153 at 165.

³³ (1980) 146 CLR 141 at 145.

³⁴ (1998) 157 ALR 333 at 342. Note—there was a successful appeal against parts of Finkelstein J's judgment (see *Health Insurance Commission and Anor v Freeman* (1998) 158 ALR 26), but no issue was taken with the above statement of principle.

... if the exception was now to be extended to cover inadvertent conduct it might endanger the basis of the privilege.

(iv) The exception applies in respect of a wide range of "improper" conduct

63. In *Attorney-General (NT) v Kearney*³⁵, Gibbs CJ held that:

... the exception is not confined to cases of crime and fraud, even in the wide sense in which "fraud" has been used in this context, unless the meaning of that word is extended to include anything that might be described as a fraud on justice.

64. In *Southern Equities Corporation (In Liq) v Arthur Anderson & Co.*³⁶ (***Southern Equities***), Doyle CJ stated that:

... the claim of privilege will fail only if there is material raising an arguable case that the relevant communications were made for the purpose of furthering or assisting a crime or fraud, and that fraud in this context embraces a range of legal wrongs that have deception, deliberate abuse of or misuse of legal powers, or deliberate breach of a legal duty at their heart. It is not enough, I consider, that one could simply say that a transaction constituted sharp practice, or fell below the normal standard of commercial probity. It is not enough, I consider, that one would regard a transaction on which advice was sought as artificial, or as deliberately structured to take advantage of the law on a topic. In light of the authorities, one cannot be more precise than that.

65. The exception is not limited to crime or fraud: it extends to civil or equitable fraud, fraudulent breach of trust, improper or illegal act or civil offence, and deliberate abuse of statutory power³⁷.

(v) The relevant communications must be made in furtherance of the illegal or improper purpose

66. In *Murphy*³⁸, it was noted that:

*Only communications made in preparation for, or furtherance of, the illegal or improper purpose are denied protection, not those that are merely relevant to it (see *Butler v Board of Trade* [1970] 3 All ER 593 at pp.596-597). In other words, it is not sufficient to find prima facie evidence of an illegal or improper purpose. One must find prima facie evidence that the particular communication was made in preparation for, or furtherance of, an illegal or improper purpose.*

67. The statement of Hodgson CJ in *Watson v McLernon*³⁹ provides some guidance regarding the meaning of "furtherance":

The next question is, what would amount to furtherance of such a [dishonest] purpose? I accept that a purpose of merely concealing previous dishonest conduct, and avoiding adverse consequences, such as penalties or claims for damages, which could flow therefrom, would not amount to furtherance of the improper purpose. The policy of the law is to encourage people to get legal advice so that they can be aware of their rights in relation to such matters. However, if the person seeking advice proposes to continue the dishonest conduct, ... and proposes to use legal advice to assist in this purpose, then in my opinion that would be sufficient to amount to a furtherance of the improper purpose.

³⁵ Above n 29 at 514.

³⁶ (1997) 70 SASR 166 at 174.

³⁷ Above n 29 at 528-529; *Freeman v Health Insurance Commission* (1997) 78 FCR 91 at 94; *Crescent Farm v Stirling Offices* (1972) Ch 553 at 565.

³⁸ Above n 26 at [38]. See also *Southern Equities* above n 36.

³⁹ [2000] NSWSC 306 at [116].

The applicant's submissions regarding improper purpose

68. The applicant's submissions and correspondence are dedicated to showing that ex-Mayor Chapman and others acted improperly in relation to the resumption of a portion of the Chapmans' land, and that the Chapmans acted improperly in relation to other issues involving their land. The applicant contends that the information and evidence provided by him establishes that impropriety has occurred, and therefore the improper purpose exception prevents legal professional privilege from attaching to the Urbis Valuation.
69. A brief outline of matters alleged by the applicant regarding the resumption of a portion of the Chapmans' land is as follows:
- A 1972 rezoning approval and subsequent planning and building permit conditions required the Chapmans to carry out specified roadworks as owners of the relevant property.
 - The roadworks were not carried out.
 - Part of the relevant land was resumed to allow the road to be widened.
 - The Chapmans benefited from the enhancement to their land afforded by the roadworks undertaken by PRSC as follows:
 - The total cost of the roadworks was \$1.2million and the enhancement to the Chapmans' property was, according to the applicant's estimates, between \$400,000 and \$600,000.
 - The roadworks were *'absolutely necessary to provide operational and safe access to [ex-Mayor Chapman's] business which, at that time, was being unlawfully carried out on the premises ... on that basis alone, no compensation was payable'*.
 - Generally, it was PRSC's common practice to require the 'dedication' of land of the type that it resumed from the Chapmans free of cost, on the basis of 'negotiations'. It would have been a reasonable and relevant condition for PRSC to impose on the Chapmans to dedicate or give over the resumed land as a condition of development approval, rather than to pay any amount of compensation. However, PRSC did not ask the Chapmans to dedicate the land.
 - The *Acquisition of Land Act 1967* (Qld) required any compensation for loss arising from the resumption to be off-set by any enhancement to the remaining property. However, PRSC did not calculate, nor did it set-off, any enhancement of the Chapmans' interest in the land adjoining the land resumed for roadworks against the amount of compensation payable.
 - There was no reduction to the value of development potential of the adjoining land (after the resumption) which could justify compensation. In this regard, by letter dated 16 September 2002, TRACT Consulting (engaged by PRSC) advised that no compensation was payable as development potentials were the same before and after resumption.
 - Notwithstanding these circumstances, an initial sum of compensation was paid to the Chapmans in December 2002.

- Further, a minute of a general meeting of PRSC on 16 May 2005 reveals that the 1972 obligation to undertake roadworks was removed by a motion carried on the basis of matters including recognition that, while some roadworks had not been completed, Council had approved a material change of use application which rendered the former planning and building conditions redundant. The motion also noted that some land had been already resumed for road widening purposes.
70. Further, the applicant alleges the following matters (which are not directly related to PRSC's resumption of a portion of the Chapmans land):
- Bank guarantees provided to PRSC by the Chapmans (many years prior to the Urbis Valuation) regarding the roadworks that the Chapmans were required to carry out were inadequate when first provided, and also on renewal.
 - Ex-Mayor Chapman had a material personal interest in the upgrading of the roads adjoining the Chapmans' property, but failed to declare this and, as a result, was in breach of the *Local Government Act 1993* (Qld).
71. On the basis of these matters, the applicant contends that the following general conclusions should be drawn and give rise to the improper purpose exception:
- Compensation should not have been paid to the Chapmans.
 - Ex-Mayor Chapman acted to the detriment of ratepayers, so as to ensure that she and her husband would:
 - benefit from roadworks that enhanced the value of their land and
 - also receive compensation for the resumption of a portion of that land.
72. Finally, in relation to PRSC's commissioning of the Urbis Valuation, the applicant contends that, unless PRSC advised Urbis of the matters set out in paragraphs 69 and 70 above, the improper purpose exception is established as Urbis was "deceived".

Analysis

73. The applicant's submissions and correspondence contend that impropriety has occurred, both in relation to circumstances surrounding the Urbis Valuation and more broadly, and therefore the improper purpose exception should prevent legal professional privilege from attaching to the Urbis Valuation.
74. The jurisdiction of this Office is limited to applying the FOI Act, in particular, to assessing whether particular information qualifies for exemption from disclosure under the FOI Act. Accordingly, the issue for determination is whether there is *prima facie* evidence that the Urbis Valuation was made in preparation for, or furtherance of, some illegal or improper purpose.
75. In considering this point, I have carefully considered the following documents:
- the letter of instruction from the Shire Solicitor for PRSC to Urbis dated 31 May 2004 by which the Urbis valuation was commissioned⁴⁰
 - a letter of proposal from Urbis to PRSC dated 8 June 2004 and a revised proposal dated 10 June 2004⁴¹

⁴⁰ Which was referred to by the applicant in framing his FOI application.

- the Urbis Valuation
 - a letter dated 8 April 2008 from the Shire Solicitor of PRSC to Bennett & Philp which requested that Bennett & Philp act on PRSC's behalf regarding a recent offer of settlement made by the Chapmans' solicitors.
76. I have also carefully considered the matters alleged by the applicant regarding the resumption of a portion of the Chapmans' land and broader issues. In doing so, I have been mindful of the general timeline of events related to the Chapmans' land and the resumption of a portion of it by PRSC.
77. In relation to the matters alleged and conclusions drawn by the applicant set out at paragraphs 69 to 71 above, I note and acknowledge the applicant's concerns regarding the broader circumstances—that is, the propriety of PRSC's practices regarding the resumption of a portion of the Chapmans' land, and the Chapmans' actions regarding that land. I also acknowledge the applicant's view that the Urbis report may be relevant to these broader circumstances. However, I am mindful of the point noted in *Murphy*, *'it is not sufficient to find prima facie evidence of an illegal or improper purpose. One must find prima facie evidence that the particular communication was made in preparation for, or furtherance of, an illegal or improper purpose'*. Accordingly, whether or not the broader circumstances (as alleged by the applicant) amount to impropriety, the issue for consideration is whether there is *prima facie* evidence that the Urbis Valuation was made in preparation for, or furtherance of, some illegal or improper purpose.
78. In relation to the applicant's contention⁴² that, unless PRSC advised Urbis of the matters set out in paragraph 69 and 70 above, the improper purpose exception is established because Urbis was "deceived", I find that:
- Urbis was aware that the land in question was owned by the Chapmans.
 - I am unable to make any findings regarding the extent of the roadworks which were necessary to satisfy the relevant obligation and/or provide safe access to the Chapmans' property.
 - I am unable to make any findings in respect of the applicant's allegation that *'business ... was being unlawfully carried out on the premises ... on that basis alone, no compensation was payable'*.
 - There is no evidence before me that Urbis and its employees are other than competent professionals aware of issues which might impact upon the adequacy of their professional advice, including provisions of the *Acquisition of Land Act 1967* (Qld).
 - In respect of whether PRSC could have or should have imposed a 'dedication of land condition' on the relevant development approval, or take steps other than those taken, I am unable to make any finding other than these are ultimately matters for PRSC, notwithstanding what its usual practice may have been.
79. As noted in *Murphy* and *Southern Equities*, it is only communications made in preparation for, or furtherance of, an illegal or improper purpose that are denied the protection of legal professional privilege. Further, as noted in *Southern Equities*, evidence of a transaction

⁴¹ That is, documents b. and c. in paragraph 16. above. Note—MBRC has agreed to provide copies of these documents to the applicant—see paragraphs 28 and 29 above.

⁴² Outlined at paragraph 72. above.

viewed objectively as 'artificial', constituting 'sharp practice' or 'falling below the standard of normal commercial probity' is unlikely to establish the improper purpose exception.

80. While I am unable to reveal the content of exempt matter⁴³, I note that, on its face, the Urbis Valuation reads as a summary of fact and professional opinion provided by an entity operating at arms length to PRSC.
81. Further, on careful examination of the correspondence noted at paragraph 75 above, I am satisfied that it provides no support for the proposition that the Urbis Valuation was communicated in preparation for, or furtherance of, an illegal or improper purpose.
82. In conclusion, based on all of the information available to me, I am unable to identify any *prima facie* evidence that the communication in issue—that is, the Urbis Valuation—was created in preparation for, or furtherance of, an illegal or improper purpose.
83. Accordingly, I am satisfied that:
 - the Urbis Valuation comprises a communication:
 - from Urbis to the PRSC Shire Solicitor to enable the provision of legal advice to PRSC
 - from the PRSC Shire Solicitor to Bennett & Philp to enable the provision of legal advice to PRSC
 - there is no evidence before me to establish that the Urbis Valuation was obtained or communicated for, or in furtherance of, an illegal or proper purpose
 - the illegal or improper purpose exception does not operate to prevent legal professional privilege from attaching to the Urbis Valuation in the circumstances.

DECISION

84. For the reasons set out above, I affirm the Deemed Decision with respect to the matter remaining in issue and find that the Urbis Valuation is exempt from disclosure under section 43(1) of the FOI Act.
85. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

F Henry
Assistant Commissioner

Date: 21 July 2010

⁴³ See section 87 of the FOI Act.