

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

L 9 of 1993
(Decision No. 94018)

Participants:

T C J POTTER
Applicant

- and -

BRISBANE CITY COUNCIL
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents in issue comprising legal advice given to the respondent by its own employee legal advisers - whether documents in issue subject to legal professional privilege - whether employee legal advisers had the requisite degree of independence in giving professional advice - whether advice given in furtherance of an abuse of statutory power - whether documents exempt under s.43(1) of the *Freedom of Information Act 1992 Qld*.

Freedom of Information Act 1992 Qld s.14, s.28(1), s.43(1), s.44(1), s.52, s.52(3)(b)

Judicial Review Act 1991 Qld

Solicitors Admission Rules 1968 Qld

Alfred Crompton Amusement Machines Ltd v Customs and Excise Commission (No. 2) [1972] 2 QB 102

Attorney-General for the Northern Territory v Kearney (1985) 158 CLR 500; 59 ALJR 749; 61 ALR 55

Clarkson and Attorney-General's Department, Re (1990) 4 VAR 197

Citibank Ltd, Re [1989] 1 Qd R 516; sub nom *Deputy Commissioner of Taxation v Citibank Ltd* 93 FLR 469; 19 ATR 1847; 88 ATC 4, 941

Famous Artists International Pty Ltd v Australian Broadcasting Corporation (1992) 7 BR 395
Geary and Australian Wool Corporation, Re (Commonwealth AAT, No. V86/575, 16 October 1987, unreported)

Norman and Mulgrave Shire Council, Re (Information Commissioner Qld, Decision No. 94013, 28 June 1994, unreported)

Page and Metropolitan Transit Authority, Re (1988) 2 VAR 243

Proudfoot and Human Rights and Equal Opportunity Commission, Re (1992) 16 AAR 411

Smith and Administrative Services Department, Re (1993) (Information Commissioner Qld, Decision No. 93003, 30 June 1993, now reported at (1993) 1 QAR 22)

Trotman and Occupational Health and Safety Authority, Re (Victorian AAT, No. 92/16882, 26 November 1992, unreported)

Ventura Motors and Metropolitan Transit Authority, Re (1988) 2 VAR 277 (Vic AAT)

Wagen and Community Services Victoria, Re (Victorian AAT, No. 91/26202, 21 November 1991, unreported)

Waterford v Commonwealth of Australia (1987) 163 CLR 54

DECISION

The documents in issue are exempt documents under s.43(1) of the *Freedom of Information Act 1992 Qld*, and accordingly the decision under review (being the decision made on behalf of the respondent by Mr R N Metcalfe on 23 June 1993) is affirmed.

Date of Decision: 19 August 1994

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F N ALBIETZ
INFORMATION COMMISSIONER

Participants:

T C J POTTER
Applicant

- and -

BRISBANE CITY COUNCIL
Respondent

REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision refusing him access to six documents which are claimed by the respondent to be exempt under s.43(1) of the *Freedom of Information Act 1992 Qld* (referred to in these reasons for decision as the FOI Act).
2. By letter dated 19 May 1993, Mr Potter made application to the Brisbane City Council (the Council) under the FOI Act for access to documents relating to a number of matters. The relevant requests, for the purposes of this external review, were for access to:
 1. *All information held by Council and Alderman G Quirk dealing with the decision to introduce the above scheme (one-way traffic scheme - Blackwattle Street, Macgregor) and the subsequent refusal to remove it.*
 2. *All information held by Council supporting its position that the Judicial Review Act 1991 does not apply to the decision to leave the scheme in place.*
3. In a letter dated 23 June 1993, Mr R N Metcalfe advised Mr Potter of his decision on the FOI access application. Mr Metcalfe was Director, General Manager's Branch, and Town Clerk of the Council, and was therefore the principal officer of the Council for the purposes of the FOI Act. Mr Metcalfe decided that Mr Potter could have access to some documents but refused access to the six documents in issue on the basis that they were exempt under s.43(1) of the FOI Act (the legal professional privilege exemption).
4. After inspecting the documents to which access had been granted, Mr Potter indicated, by a letter to the Council dated 30 June 1993, that he did not consider that he had been given access to all relevant documents. In that letter, Mr Potter also requested that Mr Metcalfe reconsider his decision in relation to the documents for which access had been refused. It should be noted that it was not open to Mr Potter to apply for internal review of the decision under s.52 of the FOI Act as the initial decision was made by the principal officer of the Council (see s.52(3)(b) of the FOI Act).
5. Mr Metcalfe responded by a letter of 28 July 1993 advising the applicant that further documents had been found and that the Council was prepared to grant access to a number of these documents but claiming exemption for parts of documents under s.44(1) of the FOI Act (the

personal affairs exemption). Mr Metcalfe declined to reconsider his decision in relation to the documents for which exemption under s.43(1) of the FOI Act was claimed, but did amplify the reasons for his original decision.

6. By a letter dated 16 August 1993, Mr Potter made application to the Information Commissioner for review of Mr Metcalfe's decision, in accordance with Part 5 of the FOI Act. Mr Potter's application sought review only in respect of the decision to refuse access to documents under s.43(1) of the FOI Act.

The External Review Process

7. Copies of the six documents in issue have been obtained and examined. Each of the documents is a memorandum to the Manager, Corporate Services Division, Brisbane City Council. They bear various dates between August and December 1992. Each memorandum was signed by, or on behalf of, the City Solicitor or the Acting City Solicitor, and each comprises legal advice in relation to continuing requests by the applicant and his solicitors for a statement of reasons which the applicant claimed was required to be given to him by the Council under the *Judicial Review Act 1991 Qld.*
8. On the basis of my examination of the documents, I wrote to the Council on 17 September 1993 stating my preliminary view that each of the documents on its face appeared to satisfy the primary test for attracting legal professional privilege, in that each had been created for the sole purpose of giving legal advice to the Council. However, I also raised the secondary issue as to whether:

the City Solicitor, the Acting City Solicitor and the City Solicitor's Branch (as it then was) had the quality of "independence" discussed in the High Court's decision in Waterford v the Commonwealth of Australia (1986-7) 136 CLR 54 so as to enable a claim of legal professional privilege to be maintained in respect of legal advice obtained by the Manager of the Corporate Services Division from the City Solicitor and the Acting City Solicitor.

- 9.. I invited the Council to provide me with a written submission addressing relevant facts, circumstances and legal arguments which bear on this issue.
10. The Council responded by letter dated 6 October 1993 and on the basis of the information conveyed in that submission, the preliminary assessment was made that the documents in issue were exempt under s.43(1) of the FOI Act. That preliminary view was communicated to the applicant by letter dated 14 January 1994, together with an explanation of the basis on which the view had been formed. The applicant was invited, if he wished to continue to contest the exemption claims made under s.43(1) of the FOI Act, to lodge a written submission in support of his case. The applicant replied by letter dated 19 January 1994 indicating that he thought it was important to establish without doubt that the City Solicitor had the necessary degree of independence to sustain a claim for legal professional privilege. The applicant also raised the possibility that there had been a deliberate abuse of statutory power by the Council and suggested that this would be sufficient to deprive the Council of any claim for legal professional privilege which it might otherwise have in respect of the documents in issue.
11. In order to obtain a more complete understanding of the workings of the City Solicitor's Branch of the Council, evidence was obtained in the form of a statutory declaration executed on 17 May 1994 by Mr P E P O'Brien. Mr O'Brien held the office of City Solicitor for the Council from 1970 until 1992. The applicant was given the opportunity to comment upon Mr O'Brien's evidence and did so by letter dated 28 May 1994.

Applicant's Submissions

12. In his letter of 19 January 1994, Mr Potter set out his reasons for pursuing the matter and his submissions in relation to whether the documents in issue are exempt under s.43(1) of the FOI Act. I set out below relevant extracts from that letter:

My reason for pursuing this matter is that there is a deep resentment among Shirland Street residents about the way Council implemented the one way scheme in Blackwattle Street and the loss of amenity and safety which has resulted in our street.

My freedom of information request has proved that there is no technical justification for the scheme and that, in fact, Council's own officers have recommended against it. The attached letter summarises the frustration felt in Shirland Street about what appears to be a deliberate abuse of statutory power.

I believe that Council should protect the rights and interests of all its ratepayers and should work for, rather than against them.

Council has declined to provide a Statement of Reasons as required under the Judicial Review Act on the grounds that the Act does not apply in this case. To prove otherwise would involve initiating a Supreme Court action with the possibility of having costs awarded against us.

13. In his letter of 28 May 1994, the applicant reiterated a number of the points raised in his earlier letter and stated further as follows:

As I see it, there are two issues to be resolved:

1. *Whether or not the City Solicitor had at the material time the quality of "independence" so as to enable claims of legal professional privilege to be maintained in respect of legal advice obtained from the City Solicitor.*
2. *Whether or not the Council is responsible for a deliberate abuse of statutory power which has prevented others from exercising their rights under the law.*

...

Council did not follow its own policy on Residential Street Management or the advice of its own traffic experts. My freedom of information request has not uncovered any technical or other reasons for implementing the scheme apart from the fact that it was ordered by Alderman G. Quirk after consulting with selected residents of Blackwattle Street. The residents of Shirland Street were denied their rights to protect their own interests before the scheme was implemented without notice.

Council has also refused to provide a Statement of Reasons as required under the Judicial Review Act. To challenge the Council on this matter would require initiating a Supreme Court action and risk having costs awarded against us. By implementing the scheme in the way that it did, Council has deliberately denied us our rights. In addition, failure to provide a Statement of Reasons covers up the real reasons for implementing the scheme and constitutes a deliberate abuse of statutory power.

Page 33 of [Re Smith and Administrative Services Department (1993) (Information Commissioner Qld, Decision No. 93003, 30 June 1993, now reported at (1993) 1 QAR 22)] which was forwarded to me with your letter dated 14 January 1994 states in paragraph 93 that the privilege's protection should not be afforded to communications made to further a deliberate abuse of statutory power, thereby preventing others from exercising their rights under the law.

As a result of my Freedom of Information request, I have found no technical or other reasons for implementing the scheme. It appears that Alderman G. Quirk was convinced by selected residents in Blackwattle Street to implement the scheme and it was done in such a manner that the residents in Shirland Street were denied their rights.

To deny access to the documents in question, closes off any question of challenging Council's decision and effectively condones an unfair process which has already been criticised by the Ombudsman.

Respondent's Submissions and Evidence

14. As I had communicated my preliminary view that I was satisfied that the documents in issue had been created for the sole purpose of giving legal advice to the Council, the bulk of the respondent's submission related to the question of the independence of the advice which had been given. The Council asserted that the requisite degree of independence did exist, pointing to the requirement that staff of the City Solicitor's Branch be admitted and hold a current practising certificate, and also to the status of the City Solicitor under the *Solicitors Admission Rules 1968*.
15. As noted above, evidence was also obtained from Mr O'Brien who was the City Solicitor from 1970 until he resigned in or about October 1992. Mr O'Brien gave evidence that the City Solicitor's Branch was a sub-unit of the Corporate Services Division of the Council. The City Solicitor's Branch was established by resolution of the Council and made responsible for the following business, procedures and functions:
 - (i) *acting as legal adviser to the Council;*
 - (ii) *preparation of legal instruments and contracts on behalf of the Council;*
 - (iii) *the drafting of ordinances and such other legislation as instructed by the Deputy Town Clerk and Manager;*
 - (iv) *the conduct of litigation on behalf of the Council;*
 - (v) *the conduct of legal processes for the enforcement of Council ordinances, and any other acts, rules, regulations or statutory instruments which the Council had the power or duty to enforce;*
 - (vi) *the recording and safe custody of all titles and documents evidencing ownership by the Council of real and personal property and of such contracts for sale or purchase of goods and services as are entrusted to the City Solicitor for that purpose;*
 - (vii) *the maintenance of the Council's legal library; and*
 - (viii) *the preparation and publication of the material required by s.55 of the City of Brisbane Act 1924-1986 Qld.*
16. Mr O'Brien gave further evidence in relation to the operation of the City Solicitor's Branch during his term of office, as follows:

7. *As City Solicitor, I was in charge of the City Solicitor's Branch within the Corporate Services Division (and previously the General Administration Division). In my capacity as City Solicitor, I was answerable in relation only to administrative matters to the Manager of the Corporate Services Division (and previously the Manager of the General Administration Division). The types of matters in respect of which I was answerable to the Manager of the Corporate Services Division (and previously the Manager of the General Administration Division) included staffing, budgeting and policy matters.*
8. *At the time the documents in issue were created in 1992, the City Solicitor's Branch was divided into three sections. Mr Don Wright, Senior Solicitor/Common Law, was the head of the Common Law Section of the City Solicitor's Branch. Mr Terry Griffith, Senior Solicitor/Conveyancing, was in charge of the Conveyancing Section of the City Solicitor's Branch. Mr Neil Boge, Solicitor/Draftsman, was in charge of the section relating to the drafting of acts, ordinances and resolutions. In total, approximately 14 professional staff were employed in the three sections of the City Solicitor's Branch. The professional staff employed within the Branch were all required to be admitted to practice in Queensland as solicitors or barristers. I treated Mr Wright, Mr Griffith and Mr Boge, as heads of their respective sections, as being wholly responsible for the work undertaken by those sections, their responsibility was analogous to that of partners in a private solicitor's firm.*
9. *Instructions were received by the City Solicitor's Branch from a number of individuals within the BCC who wished to obtain legal advice or assistance from the Branch. I had in place a procedure by which all instructions came through myself as City Solicitor. I tried to ensure that instructions received by the Branch would originate from a manager or director level of the various units of administration of the BCC but often instructions were received from officers in less senior positions. I would receive the instructions and determine which section, and particular professional staff member within that section, should have the carriage of the matter which was the subject of the instructions. The matter would then be assigned to that professional staff member and he or she would have complete carriage of the matter. Generally matters which were assigned to the Common Law Section concerned town planning issues, prosecutions, rates recovery and general advice matters. All real property matters were assigned to the Conveyancing Section and that section also undertook advice work in relation to issues relevant to conveyancing. The Drafting Section of the Branch received all instructions relating to the drafting of ordinances, resolutions and legislation and also undertook general advice work as allocated by myself.*
10. *In many circumstances, the legal advice provided by the professional staff within the Branch was done on an oral basis. This was especially the case in relation to legal advice which I provided to the Town Clerk and the Mayor. Written legal advice provided to the various units of administration of the BCC was undertaken in a memorandum format. Those memoranda of advice went out under my name as City Solicitor and were also initialled by the relevant professional staff member who had the carriage of the particular matter.*

11. *I was not (and my professional staff through me were not) answerable to anyone within the BCC in relation to the contents of the legal advice provided in response to instructions received by the Branch. There were instances when the conclusions reached in the advice rendered by myself and my professional staff was not appreciated by the person from whom instructions were received but there was never an instance where I received pressure to give advice contrary to that which I had previously given because the person from whom instructions were received was dissatisfied with the conclusions reached in the advice.*
12. *There were instances when one of my young professional staff members may have given legal advice which the person who provided the instructions regarding that advice would refer to myself, as City Solicitor, with a request to review the conclusions reached by my professional staff. I would, in those circumstances, either review the advice of the staff member myself or ask one of my senior solicitors to review the advice. In most instances I would, after reviewing the advice, go back to the person from whom instructions had been received and confirm the advice previously rendered. However, in some instances where the conclusions reached by the professional staff member were incorrect, I would amend the advice so it correctly represented the law as applied to the facts and circumstances in issue. However, in each instance, the advice rendered by the Branch to the persons from whom instructions were received would be based on an analysis of the facts in issue and law relevant to those issues which were the subject of the instructions and would not be formulated to provide the conclusion which may have been desired by the person giving instructions relating to the advice.*
13. *At all times, in my capacity as City Solicitor, I was acutely aware of the need to maintain the independence of the City Solicitor's Branch in respect of the legal advice provided by the branch to the BCC and the other work carried out by the Branch as legal adviser to the BCC. I was, during my time as City Solicitor, familiar with the decision of the English Court of Appeal in Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioner [No. 2] [1972] 2 QB 102. In particular, the following comments of Lord Denning MR in his judgment of that case were always in the back of my mind:*
- "Being a servant or agent too, he may be under more pressure from his client. So he must be careful to resist it. He must be as independent in the doing of right as any other legal adviser"*
14. *I believe that during my period as City Solicitor, the functioning of the City Solicitor's Branch was such that the relationship between myself as City Solicitor (together with the professional staff of the Branch) and the persons from whom instructions were received within the BCC was professional relationship which secured to the advice an independent character notwithstanding the employment, as was discussed in the reasons of Mason and Wilson JJ in the decision of the High Court of Australia in Waterford v the Commonwealth of Australia (1986-1987) 163 CLR 54, at p.62.*

Applicable Law

17. Section 43 of the FOI Act provides as follows:

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

(2) Matter is not exempt under subsection (1) merely because it appears in an agency's policy document.

18. In my reasons for decision in *Re Smith and Administrative Services Department* (Information Commissioner Qld, Decision No. 93003, 30 June 1993, now reported at (1993) 1 QAR 22), I discussed at length (paragraphs 78-98) the requirements for exemption under s.43 of the FOI Act. At paragraph 82 of my decision I referred to the useful summary of principles set out in the decision of Mr K Howie, Member of the Victorian Administrative Appeals Tribunal, in *Re Clarkson and Attorney-General's Department* (1990) 4 VAR 197, at p.199. Of particular relevance in this case is the fourth principle stated by Mr Howie, which I set out below:

Legal professional privilege attaches to confidential professional communications between salaried legal officers and government agencies. It must be a professional relationship which secures to the advice an independent character. The reason for the privilege is the public interest in those in government who bear the responsibility of making decisions having free and ready confidential access to their legal advisers. Whether or not the relationship exists is a question of fact.

19. In my decision in *Re Smith* I considered (in the context of advice from the Queensland Crown Solicitor's Office to a government department, see paragraphs 88-90) the position of advice from salaried or "in-house" legal officers. The leading case is *Waterford v Commonwealth of Australia* (1987) 163 CLR 54. In that case, Mason and Wilson JJ canvassed relevant authorities from other jurisdictions on this issue, including the English Court of Appeal decision in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioner (No. 2)* [1972] 2 QB 102. Their Honours concluded (at p.62):

In our opinion, given the safeguards to which reference is made in the various citations, there is no reason to place legal officers in government employment outside the bounds of legal professional privilege. The proper functioning of the legal system is facilitated by freedom of consultation between the client and the legal adviser. ...

To our minds it is clearly in the public interest that those in government who bear the responsibility of making decisions should have a free and ready confidential access to their legal advisers. Whether in any particular case the relationship is such as to give rise to the privilege will be a question of fact. It must be a professional relationship which secures to the advice an independent character notwithstanding the employment.

20. However, in his decision in *Waterford*, Brennan J (at p.72) stated:

I am ... unable to accept the notion that salaried lawyers are generally to be assimilated to the position of the independent legal profession for the purpose of determining the availability of legal professional privilege.

21. His Honour was concerned that the employment relationship creates conflict between the independence necessary for a legal adviser and the loyalties, duties and interests of an employee (p.71). However, His Honour went on to state that the position of lawyers employed in the offices of Crown Solicitors, the Australian Government Solicitor and Departments of the respective Attorneys-General were sufficiently independent to attract legal professional privilege (pp.72-73).
22. Brennan J's suggested distinction between those employed in a traditional legal advice department and salaried legal advisers in other departments or statutory authorities, was not supported by other judges of the High Court in *Waterford*. Mason and Wilson JJ (at p.62), Deane J (at p.81-2) and Dawson J (at p.95-97) focus on the nature of advice given and the quality of the relationship between adviser and client. This accords with the views expressed in *Attorney-General for the Northern Territory v Kearney* (1985) 158 CLR 500 by Gibbs CJ (at p.510) and Dawson J (at p.530-1). There is nothing in these decisions which precludes the possibility of legal professional privilege applying to advice given by a legal adviser employed by a department or statutory authority, other than a traditional legal advice department of the kind referred to by Brennan J in *Waterford*.
23. Since the decision in *Waterford*, courts and tribunals have on numerous occasions accepted that legal professional privilege may apply to communications to or from employee legal advisers (provided of course that all other requirements for the application of legal professional privilege are satisfied), and I also accept that proposition. The following cases involved legal advisers employed by statutory authorities: *Famous Artists International Pty Ltd v Australian Broadcasting Corporation* (1992) 7 BR 395 (Federal Court); *Re Geary and Australian Wool Corporation* (Commonwealth AAT, No. V86/575, 16 October 1987, unreported); *Re Page and Metropolitan Transit Authority* (1988) 2 VAR 243 (Vic AAT); *Re Ventura Motors and Metropolitan Transit Authority* (1988) 2 VAR 277 (Vic AAT); and *Re Trotman and Occupational Health and Safety Authority* (Victorian AAT, No. 92/16882, 26 November 1992, unreported). The case of *Re Wagen and Community Services Victoria* (Victorian AAT, No. 91/26202, 21 November 1991, unreported) involved a legal adviser employed by a Victorian government department. For a case involving a legal adviser employed by a corporation, see *Re Citibank Ltd* [1989] 1 Qd R 516; sub nom *Deputy Commissioner of Taxation v Citibank Limited* (1988) 93 FLR 469; 88 ATC 4,941.
24. Despite the number of cases that have considered the point, discussion of the requirements for establishing the necessary degree of independence (that, in the words of Mason and Wilson JJ in *Waterford*, will secure to the advice an independent character notwithstanding the employment) has been limited. In *Kearney*, Gibbs CJ (at p.510) indicated that privilege would extend to legal advice given by employees provided that, in giving the advice, they are acting in their capacity as legal advisers. His Honour went on to say that advice would only be privileged if the lawyer who gives it has been admitted to practice and (His Honour inclined to think) remains subject to the duty to observe professional standards and the liability to professional discipline.
25. In *Waterford*, Deane J, while not deciding the point, suggested that the privilege would be restricted to persons who "*in addition to any academic or other practical qualifications were listed on a role of current practitioners, held a current practising certificate, or worked under the supervision of such a person*" (pp.81-82). Dawson J (at p.96-97) referred to the requirement that the legal adviser be qualified to practise law and be subject to the duties to observe professional standards and the liability to professional discipline. In *Waterford*, Brennan J (at p.70) suggested that admission to practice as a barrister or solicitor is a necessary condition for attracting legal professional privilege. (This suggestion was made in the context of raising a separate requirement, namely, that the legal adviser must be competent, as well as independent. His Honour indicated that there was much to be said for the view that admission to practice is the sufficient and necessary condition for attracting the privilege so far as the requirement of competence is concerned).

26. The requirements were further discussed by the Commonwealth Administrative Appeals Tribunal in *Re Proudfoot and Human Rights and Equal Opportunity Commission* (1992) 16 AAR 411, where the importance of the legal adviser holding a current practising certificate was emphasised (at pp.414-415). This was not, however, a requirement mentioned by the majority judges in *Waterford*. It would not, therefore, appear to be a necessary requirement for establishing the requisite degree of independence; although, where present, it will doubtless be of some weight in assisting to establish the requisite degree of independence.

Application of s.43(1) to the Documents in Issue

27. Having examined the documents in issue, I am satisfied that they were all created for the sole purpose of giving legal advice to the Council. I am further satisfied that they were created in the course of a professional relationship which secured to the advice an independent character notwithstanding the employment of the legal advisers by the Council. The advice was given by professional staff acting in their capacity as legal advisers. The legal advisers in question were all admitted as solicitors or barristers in the State of Queensland. All held practising certificates. Mr O'Brien has given evidence that, although in relation to administrative matters the City Solicitor's Branch was under the control of a division of the Council, in relation to the provision of legal advice the City Solicitor and his professional staff were not answerable to anyone within the Council in respect of the content of legal advice given. I am satisfied that the City Solicitor and the professional staff of the City Solicitor's office were appropriately qualified legal practitioners, who conducted their practice with the requisite degree of independence from their employing organisation, such that legal advice given in the course of conducting their practice was capable of attracting legal professional privilege.
28. In addition to the question of the independence of the legal advice provided, the applicant has suggested that privilege could not attach to the particular communications in issue because the Council was responsible for a deliberate abuse of statutory power. I discussed the exception to legal professional privilege based on crime, fraud or abuse of statutory power at paragraphs 91-95 of my decision in *Re Smith*. At paragraph 94, I quoted the words of Gibbs CJ in *Kearney* (at p.516) in which His Honour set out the initial hurdle which must be overcome by a person who asserts that the exception operates in a particular case. I reproduce that passage below:

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 for Victoria ([1901] AC) at pp 201, 203, 205, and in O'Rourke v Darbishire [1920] AC 581 at 604, 613-4, 622-3, 63-3. As Viscount Finlay said in the latter case [at p 604] "there must be something to give colour to the charge". His Lordship continued:

"The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact. ... The court will exercise its discretion, not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications".

29. In my view, the applicant's allegations of abuse of statutory power are not sufficient to deny the protection of legal professional privilege to the documents in issue. There is nothing in those documents which establishes, or even suggests, that they constitute or include communications

made to further an abuse of statutory power.

30. I therefore find that the six documents in issue are exempt under s.43(1) of the FOI Act.
31. In his letter of 19 January 1994, the applicant asked that I consider a number of options before completely denying access, should I ultimately decide in favour of the Council. Those options were:
- (1) Council waive legal professional privilege;
 - (2) full release without prejudice on condition that the documents cannot be used in any future legal action;
 - (3) partial release with exempt sections to the documents omitted;
 - (4) release of a report summarising the contents of the documents;
 - (5) view documents with no copies being made available.
32. In my role as Information Commissioner, I have no jurisdiction to consider the release of documents which I have found to be exempt, or to instruct the Council to grant access to any part of those documents, or to waive legal professional privilege. I note that the Council has a discretion to grant access to the documents, or parts of the documents, both within the terms of the FOI Act (see the discretion given by s.28(1) as explained at paragraphs 13-16 of my reasons for decision in *Re Norman and Mulgrave Shire Council* (Information Commissioner Qld, Decision No. 94013, 28 June 1994, unreported)) and outside the terms of the FOI Act (see s.14 of the FOI Act). Whether it chooses to adopt one of the courses suggested by Mr Potter is a matter for the Council.

Conclusion

33. For the reasons given earlier, I am satisfied that the documents in issue are exempt under s.43(1) of the FOI Act, and I affirm the decision of Mr R N Metcalfe, dated 23 June 1993, in relation to the documents in issue.

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 F N ALBIETZ
INFORMATION COMMISSIONER