OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 98009
Application S 140/96

Participants:

JOHN PAUL MURPHY
Applicant

QUEENSLAND TREASURY
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - communications between the respondent and its legal advisers concerning a previous FOI access application by the applicant, subsequent external review by the Information Commissioner, and subsequent judicial review proceedings - whether communications made in furtherance of an illegal or improper purpose so as to preclude the communications from attracting legal professional privilege - whether bills of costs for legal services provided to the respondent attract legal professional privilege - application of s.43(1) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.27(4), s.28(1), s.32, s.33(1), s.34, s.40(c), s.42(1)(c), s.43(1), s.44(1), s.52(4), s.52(6), s.73(3), s.79(1), s.81
Administrative Decisions (Judicial Review) Act 1977 Cth
Freedom of Information Act 1982 Cth s.22, s.42(1)
Freedom of Information Act 1992 WA
Judicial Review Act 1991 Qld s.20(2)(e), s.23(c), s.23(d), s.23(e)

Allen, Allen & Hemsley v Deputy Commissioner of Taxation (1988) 81 ALR 617
Attorney-General (NT) v Kearney (1985) 158 CLR 500
Attorney-General (NT) v Maurice (1986) 161 CLR 475
Baker v Campbell (1983) 153 CLR 52
Butler v Board of Trade [1970] 3 All ER 593
Commissioner, Australian Federal Police v Propend Finance Pty Ltd (1997) 71 ALJR 327; 141 ALR 545
Durrisdeer Pty Ltd v Nordale Management Pty Ltd [1998] 2 Qd R 138
Grant v Downs (1976) 135 CLR 674

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Hewitt and Queensland Law Society Inc, Re (Information Commissioner Qld, Decision No. 98005, 24 June 1998, unreported)
Johnson and State Government Insurance Commissioner, Re (Information Commissioner WA, D02896, 17 May 1996, unreported)
Lake Cumbeline Pty Ltd v Effem Foods Pty Ltd (1994) 126 ALR 58
Murphy and Queensland Treasury & Others, Re (1995) 2 QAR 744
Packer v Deputy Commissioner of Taxation [1985] 1 Qd R 275
Potter and Brisbane City Council, Re (1994) 2 QAR 37
R v Bell: ex parte Lees (1980) 146 CLR 141
R v Cox and Railton (1884) 14 QBD 153
Ricegrowers Co-operative Mills Ltd v Bannerman and Trade Practices Commission (1981) 38 ALR 535
Skopalj and Transport Accident Commission, Re (1989) 4 VAR 16
Smith and Administrative Services Department, Re (1993) 1 QAR 22
State of Queensland v Albietz [1996] 1 Qd R 215
Sullivan and Department of Industry, Science and Technology, Re (Commonwealth Administrative Appeals Tribunal, Mr P Bayne (Senior Member), No. A95/197, 6 June 1997, unreported)
Trade Practices Commission v Sterling (1979) 36 FLR 244
Waterford v Commonwealth of Australia (1987) 163 CLR 54
Woodyatt and Minister for Corrective Services, Re (1995) 2 QAR 383
Z and Australian Taxation Office, Re (1984) 6 ALD 673

DECISION

1. I decide to vary the decision under review (which is identified in paragraph 4 of my accompanying reasons for decision) by finding that the matter in issue which is identified in paragraph 26 of my accompanying reasons for decision is not exempt matter under the *Freedom of Information Act 1992* Qld.

2. I affirm those parts of the decision under review which found that the balance of the matter in issue (which is identified in sub-paragraphs 5(b), (c), (d) and (e) of my accompanying reasons for decision) is exempt matter under s.43(1) of the *Freedom of Information Act 1992* Qld.

Date of decision: 24 July 1998

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INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse him access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to documents recording communications between the respondent and its legal advisers relating to the processing of FOI access applications made by the applicant to the respondent, and relating to the conduct of the respondent's case in an external review under Part 5 of the FOI Act, and in subsequent judicial review proceedings. The respondent contends that the documents in issue would be privileged from production in a legal proceeding on the ground of legal professional privilege, and are therefore exempt under s.43(1) of the FOI Act. The applicant contends that the communications were made in furtherance of an illegal or improper purpose, and so would not be protected from disclosure on the ground of legal professional privilege. The applicant also questions whether some documents, relating to legal fees for services provided to the respondent, qualify for legal professional privilege.

2. On 24 June 1993, Mr Murphy made an FOI access application for documents held by the respondent relating to the land tax affairs of his Family Trust. (I will refer to that application as the 1993 access application.) He obtained access to all matter falling within the terms of the 1993 access application, subject to the deletion of the names of a number of officers of the respondent. Mr Murphy sought internal review of the decision to refuse him access to those names, but was again refused access. Both of those decisions were subsequently revoked, and a fresh decision was made by the Under Treasurer, who also decided to refuse access to the names of the officers. (The detail of those decisions is more fully explained in *Re Murphy and Queensland Treasury & Others* (1995) 2 QAR 744, at p.749, paragraphs 3-7. See also paragraph 44 below.) Mr Murphy then applied to me for external review of the Under Treasurer's decision. My review resulted in a decision that Mr Murphy was

entitled to access to the names of the officers (see *Re Murphy* cited above). My decision was challenged, unsuccessfully, by the respondent in the Supreme Court of Queensland (see *State of Queensland v Albietz* [1996] 1 Qd R 215). Mr Murphy thereafter obtained access to the names of the officers.

3. By letter dated 18 March 1996, Mr Murphy applied to the respondent for access, under the FOI Act, to numerous documents, including documents relating to the 1993 access application and the ensuing proceedings. By letter dated 15 May 1996, Ms F Smith, on behalf of the respondent, decided that Mr Murphy should be granted access to a large number of documents falling within the terms of his access application. However, she decided that some documents or parts of documents were exempt matter under s.43(1) (the legal professional privilege exemption), and that parts of other documents were exempt matter under s.44(1) (the personal affairs exemption) of the FOI Act.

4. By letter dated 19 June 1996, Mr Murphy made an application for internal review of Ms Smith's decision (see s.52 of the FOI Act), which application was confined to Ms Smith's decision to invoke the s.43(1) exemption for certain documents and parts of documents. Mr Murphy argued that legal professional privilege did not apply, because the relevant communications were made in furtherance of an illegal or improper purpose. The internal review was conducted on behalf of the respondent by Mr G G Poole who, by letter dated 1 July 1996, affirmed Ms Smith's initial decision. Mr Murphy then challenged the adequacy of the reasons for decision given by Mr Poole, and was provided with further reasons for decision dated 31 July 1996. By letter dated 31 August 1996, Mr Murphy applied to me for review, under Part 5 of the FOI Act, of Mr Poole's decision.

External review process

5. The documents in issue were obtained and examined. They comprise:

   (a) correspondence attaching legal accounts (parts of documents H8, H9 and I7);
   (b) correspondence between the respondent and the Crown Solicitor, seeking or giving legal advice or prepared for the purpose of legal proceedings (documents A6, A7, A20, F7-F9, F30, F32, H1-H3, H5-H7, H12, H21, H22, H24, H26-H28, I57, K83, O1-O3, O8, P11, P13, P17 and P49, and part of document P34);
   (c) records of communications between officers of the respondent and the Crown Solicitor, appearing in file notes or internal memoranda (documents A5, A6, F30, H23, H25 and I58(a), and parts of documents A64, I69, K85, K88, K91, K96, K99, K104 and O9);
   (d) written legal advice given by an in-house legal adviser employed by the respondent (documents H10, H11 and H20); and
   (e) an opinion of counsel (document I58).

6. In the course of this review and other related external reviews, Mr Murphy has provided me with a number of written submissions. He has also provided me with an undated and unsigned copy of an affidavit by himself, the original of which he has informed me was sworn and filed in the course of Supreme Court proceedings he initiated against the Department of Justice. I have no reason to doubt that, and I have accepted the copy affidavit on that basis.

7. By letter dated 27 February 1997, I wrote to the respondent questioning whether a small number of the documents in issue qualified for exemption under s.43(1). The respondent, by letter dated 3 April 1997, agreed to withdraw its objection to disclosure of some of that matter, but maintained its claim for exemption in respect of the correspondence attaching legal accounts, and made a brief submission in that regard.

8. With my letter to the respondent dated 27 February 1997, I also forwarded copies of a number of Mr Murphy's submissions (dated, or received by me on, 23 April, 19 June, 9 July and 16 September 1996) and the affidavit furnished by Mr Murphy, and raised a number of issues concerning the application of the 'improper purpose exception' to legal professional privilege. I invited the respondent to lodge written submissions and/or evidence in support of its case that the matter in issue is exempt matter under s.43(1) of the FOI Act. The Under Treasurer responded by letter dated 3 April 1997, in which he stated:

> *... There is really nothing new in the material which has not been raised by Mr Murphy previously in various forums. However, I think it is important to focus on the review which is presently in issue.*
>
> *Full consideration of the nominated documents had been given by Mr Poole on the internal review and the decision of 1 July 1996 was duly made.*
> *Mr Murphy by letter dated 4 July 1996 then sought a Statement of Reasons in relation to that decision and a Statement of Reasons dated 31 July 1996 was provided to him. A copy of this statement of reasons has previously been provided to you.*
>
> *I reiterate what was set out in the Statement of Reasons. There is no improper or illegal purpose which would defeat the applicability of the doctrine of legal professional privilege in relation to the subject documents.*
> *The officers concerned carried out their duties appropriately and honestly.*
>
> *Mr Murphy has made various claims. It is a matter for Mr Murphy to prove these claims in the Court.*

I provided Mr Murphy with a copy of the Under Treasurer's letter, and Mr Murphy made a brief reply dated 14 April 1997.

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

9. 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.*

10. The s.43(1) exemption turns on the application of those principles of Australian common law which determine whether a document, or matter in a document, is subject to legal professional privilege. The grounds on which a document can attract legal professional privilege are fairly well settled in Australian common law. In brief terms, legal professional privilege attaches to confidential communications between lawyer and client for the sole purpose of seeking or giving legal advice or professional legal assistance, and to confidential communications made for the sole purpose of use, or obtaining material for use, in pending or anticipated legal proceedings

(see *Re Smith and Administrative Services Department* (1993) 1 QAR 22 at pp.51-52 (paragraph 82), which sets out a summary of the principles established by the High Court authorities of *Grant v Downs* (1976) 135 CLR 674, *Baker v Campbell* (1983) 153 CLR 52, *Attorney-General (NT) v Kearney* (1985) 158 CLR 500, *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, and *Waterford v Commonwealth of Australia* (1987) 163 CLR 54). There are qualifications and exceptions to that broad statement of principle, 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* (Information Commissioner Qld, Decision No. 98005, 24 June 1998, unreported) 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) 71 ALJR 327).

Correspondence attaching legal accounts

11. Documents H8 and H9 each comprise a covering letter dated 14 February 1996, a notional invoice for services from the Crown Solicitor, and a standard form questionnaire entitled "Review of Notional Bill". Document I7 comprises a covering letter dated 8 March 1996, a notional invoice from the Crown Solicitor and a memorandum of fees from Counsel. (The documents date from a period when the Crown Solicitor was trialling a system for charging government agencies for legal services.) I can see no basis on which the respondent can sustain a claim for exemption of the standard form questionnaire under s.43(1) of the FOI Act. It clearly relates to matters of administration, and was not communicated for the purpose of seeking or giving legal advice or professional legal assistance, or for use in legal proceedings. I find that it is not exempt matter under s.43(1) of the FOI Act.

12. In his letter dated 3 April 1997, the Under Treasurer (responding to a preliminary view I had conveyed in my letter dated 27 February 1997) stated:

> *... You have indicated that as those accounts do not disclose any detail of legal advice sought or given, it appears that they do not qualify for exemption under s.43(1).*
>
> *However, with respect, s.43(1) provides that matter will be exempt if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.*
>
> *Legal professional privilege attaches to accounts from a lawyer to the client. It is an inherent part of obtaining legal advice that the client receives an account. Those accounts usually contain details of the amount of work done as this is reflected in the quantum of the account.*
>
> *Accounts are not required to be produced in proceedings by a person who has received advice except in circumstances where a person seeks to recover their costs from another party.*
>
> *In circumstances where an award of costs has been made to a party and taxation is required, it is up to that party to voluntarily provide their costs for the taxation. There is no compulsion on them to provide the account if they do not want to recover their costs.*

13. In *Packer v Deputy Commissioner of Taxation* [1985] 1 Qd R 275, the members of a Full Court of the Supreme Court of Queensland made some incidental remarks about legal professional privilege and solicitors' accounts. The documents in issue in that case were trust account ledgers, but in the course of considering the position of such documents, members of the Court referred to older authorities concerning privilege attaching to solicitors' bills of account. Andrews SPJ said (at pp.281-282):

> *We were referred to a number of decisions touching upon bills of costs, for example. Speaking generally I would accede to a contention that if disclosure of material under consideration could be said to expose material by way of communication whether documentary or otherwise between solicitor and client for the relevant purposes discussed herein legal professional privilege should exclude it from a requirement of disclosure. ...*
>
> *... In my view there is nothing in particular to set aside a bill of costs as forming some special category of record of privileged information. Even bills of costs may on careful scrutiny in particular cases be shown not to contain privileged information. Consideration of individual cases demonstrates that bills of costs frequently contain a history of matters in respect of which solicitors have been consulted by clients which discloses the nature of advice sought or given.*
>
> *In* "Daily Express" (1908) Ltd v Mountain *(1916) 32 TLR 592, for example Swinfen Eady LJ at p.593 expressed the view that a bill of costs came within the rule as to privilege; that it contained the history of the transactions to which it related and was valuable because it recorded the events in chronological order. It had been common ground between the parties there that this was so. In* Chant v Brown *9 Hare 791; 68 ER 735 Turner VC made it plain that a bill of costs was privileged as a history of matters dealt with by the solicitor. I would hold the material under consideration here to be quite different from a detailed bill of costs. In any event I am of the opinion that if a bill of costs does not contain such details it is not* per se *protected by legal professional privilege.*

14. On the other hand, both McPherson J (at pp.286-287) and Shepherdson J (at pp.295-296), referred with apparent approval to those older, predominantly English, cases which suggest that a solicitor's bill of costs in detailed form would *prima facie* attract the cloak of legal professional privilege, on the basis that a bill of costs will ordinarily disclose instructions given by a client to a solicitor, and refer to work done and disbursements made by the solicitor in a professional capacity.

15. In *Allen, Allen & Hemsley v Deputy Commissioner of Taxation* (1988) 81 ALR 617, another case dealing with a claim of legal professional privilege in respect of solicitors' trust account ledgers, Pincus J (then of the Federal Court of Australia) was implicitly critical of that approach (his specific reference was to the judgment of Shepherdson J at p.295), saying (at p.626):

> *One approach to the problem of defining the scope of privilege is to proceed from the assumption that, except in so far as the High Court has expressly rejected older statements as to the scope of the privilege, such statements continue to be authoritative:* cf. Packer v DCT (Qld) *[1985] 1 Qd R 275 at*

> *295, where that technique is used. I incline, on the other hand, to the course of assuming that the High Court's recent analyses of the topic must constitute the main source of the relevant principles.*

16. All of the cases concerning legal professional privilege and solicitors' bills of costs that were referred to by McPherson J and Shepherdson J predated the High Court's insistence (commencing from *Grant v Downs* in 1976) that relevant communications must satisfy the 'sole purpose' test to attract legal professional privilege. *Packer v DCT* itself predated the High Court decision in *Waterford's* case, which dealt with the application of the 'sole purpose' test to documents containing legal advice and other "extraneous matter", and the circumstances in which such "extraneous matter" may be severed (and disclosed) from a document which, considered as a whole, attracts legal professional privilege. (The treatment of those issues in *Waterford's* case was analysed in detail in my decision in *Re Hewitt* at paragraphs 97-129.)

17. *Waterford's* case involved a decision on the application of a statutory provision (s.42(1) of the *Freedom of Information Act 1982* Cth - the legal professional privilege exemption) very similar in its terms, and its intended operation, to s.43(1) of the Queensland FOI Act. Mason and Wilson JJ (who, with Brennan J, formed a majority in dismissing Mr Waterford's appeal) said (at p.66):

> *The appellant's submission fails to appreciate that the sole purpose test is a test that looks to the reason why the document was brought into existence. If its sole purpose was to seek or to give legal advice in relation to a matter, then the fact that it contains extraneous matter will not deny to it the protection of the privilege. The presence of matter other than legal advice may raise a question as to the purpose for which it was brought into existence but that is simply a question of fact to be determined by the Tribunal and its decision on such a question is final. It may also be appropriate in a particular case for the Tribunal to require those parts of the document which do not bear the necessary relation to legal advice to be disclosed. The doctrine of legal professional privilege allows room for questions of fact and degree such as these to fall for decision. Moreover the* [*Freedom of Information Act 1982* Cth] *contemplates that where an exempt document contains material which, standing alone, would not render the document exempt, the agency or Minister should, if it is reasonably practicable to do so, delete the privileged material and grant access to the remainder: s.22.*
>
> [I note that s.32 of the Queensland FOI Act is similar, in purpose and effect, to s.22 of the *Freedom of Information Act 1982* Cth.]

18. In the High Court's recent consideration of aspects of legal professional privilege in *Propend Finance*, Kirby J said (at p.375): "... it is now settled that the privilege, at common law, extends only to communications brought into existence for the *sole* purpose of submission to legal advisers for advice or for use in legal proceedings. ..." (my underlining). Dawson J also used language indicating a similar confinement of the scope of the privilege in his comment (at p.335) that: "... the preferred view is that a communication constituted by a document will only be protected by privilege if the document is brought into existence for the sole purpose of seeking or giving legal advice or for use in legal proceedings." Brennan CJ made comments to the same effect at p.330 (the relevant passage is quoted in *Re Hewitt* at paragraph 112).

19. I have difficulty in accepting that solicitors' bills of costs are brought into existence for the sole purpose of providing legal advice or professional legal assistance, or for the sole purpose of use in pending or anticipated legal proceedings. They are ordinarily brought into existence for the purpose of rendering an account for legal services performed. Although a solicitor's bill of costs may (and in the case of a detailed bill of costs inevitably will) refer to communications between solicitor and client, or with third parties, (e.g., instructions received, and advice or professional legal assistance given, by the solicitor) which are *prima facie* privileged communications, those references are included as a record of instructions received and services performed, for the purpose of rendering an account for payment.

20. A strict application of the 'sole purpose' test as stated in paragraphs 17 and 18 above would, in my view, ordinarily have the result that a solicitor's bill of costs does not attract legal professional privilege because it would not ordinarily have been brought into existence solely for a privileged purpose. However, any segments of a solicitor's bill of costs which comprise a record of prior privileged communications would, in my view, attract legal professional privilege (*cf.* Lockhart J's category (d) of material to which legal professional privilege extends, as stated in *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at p.246: "Notes, memoranda, minutes or other documents made by the client, or officers of the client, or the legal adviser of the client, of communications which are themselves privileged, or containing a record of those communications, ..."). I consider that the common law principles of legal professional privilege must permit severance from a solicitor's bill of costs (and continued protection from compulsory disclosure) of those segments of the bill which record prior privileged communications. That seems to me to be necessary to preserve the efficacy of the doctrine of legal professional privilege (*cf. Re Hewitt* at paragraphs 119-120, and the cases there discussed), given the frequent necessity to include in a solicitor's bill of costs records of prior privileged communications, albeit not for the sole purpose which attracted legal professional privilege to those prior communications. In my view, the rationale for legal professional privilege requires that protection from compulsory disclosure be extended only to any record, contained in a solicitor's bill of costs, of a communication which itself satisfies the requirements to attract legal professional privilege. The balance of a solicitor's bill of costs would not ordinarily, in my opinion, attract legal professional privilege under the prevailing High Court authorities.

21. The views I have expressed are similar, in essence, to the views expressed in *Packer v DCT* by Andrews SPJ (see paragraph 13 above), whose views were accepted and applied, in an FOI context, in the two Tribunal decisions referred to in paragraphs 22 and 23 below. My views also accord with the approach adopted by Tamberlin J of the Federal Court of Australia in *Lake Cumbeline Pty Ltd v Effem Foods Pty Ltd* (1994) 126 ALR 58 at p.68:

> *Disclosure of the memoranda of fees and other documents does not in any way disclose the nature or contents of the advice or communications between the applicants and their legal advisers. The memoranda of fees simply set out the dates and refer to the action taken in respect of which a charge is made. The memoranda of fees were brought into existence, on their face, not solely for the purpose of obtaining legal advice or for use in legal proceedings but for the purpose of recording and raising charges in respect of work which had been already completed. It is evident that the documents were made or brought into existence for a purpose different from, or beyond, the obtaining of legal advice or use in legal proceedings.*
>
> ...

> *In the present case, I have perused the memoranda of costs which have been provided by the applicants and I do not consider that they disclose the* nature *or* content *of privileged material. ... The memoranda and the other documents are simply recording, in outline form, the work which has been undertaken by the solicitors and in respect of which the charges are raised and do not disclose the content of the communications, advices, briefs or conferences.*

22. In *Re Skopalj and Transport Accident Commission* (1989) 4 VAR 16, Deputy President Galvin of the Victorian Administrative Appeals Tribunal analysed a number of documents on the basis of the comments of Andrews SPJ in *Packer v DCT*. Deputy President Galvin found that a bill of costs disclosing no particulars of the matter, save for the names of the parties, and an accompanying letter simply enclosing an account, would not be protected by legal professional privilege (see pp.28 and 29).

23. The Western Australian Information Commissioner considered the status of solicitors' bills of costs in *Re Johnson and State Government Insurance Commissioner* (Information Commissioner WA, D02896, 17 May 1996, unreported). After an analysis of the decided cases on the point, including *Packer v DCT*, *Lake Cumbeline* and *Re Skopalj*, the Western Australian Information Commissioner determined that the amount alone of the solicitors' bill did not indicate the nature of instructions given by the client, nor could it in any way reveal the advice or assistance given by legal advisers. The Information Commissioner determined that, subject to deletion of certain matter, the bills of costs in issue were not exempt matter under the exemption provision of the *Freedom of Information Act 1992* WA which corresponds to s.43(1) of the Queensland FOI Act.

24. Even if, contrary to my views, the principles applied in the older cases referred to with apparent approval by McPherson J and Shepherdson J in *Packer v DCT* (see paragraph 14 above) remain applicable in Australian law, I consider that the result I have described in the last two sentences of paragraph 20 above would ordinarily be arrived at by the application of the provisions of the FOI Act to a solicitor's bill of costs. That result would, in my view, be required by the application, in conjunction with s.32 of the FOI Act, of the principle stated in the final sentence of the passage from *Waterford's* case quoted at paragraph 17 above. Thus, in my view, even if it be correct that privilege usually attaches to solicitors' bills of costs, because they record or refer to privileged communications, an authorised decision-maker under the FOI Act should, where it is practicable to do so, grant access to any matter in a bill of costs which, standing alone, would not be privileged from production in a legal proceeding on the ground of legal professional privilege.

25. Turning to the covering letter, the notional invoices, and the memorandum of counsel's fees which are in issue in this review, the only matter in any of those documents which could be said to record anything regarding the legal services provided is the heading to each document. The letters dated 14 February 1996 describe, in general terms, the type of work carried out, e.g., "discussions between Crown Law officers and the Office of State Revenue" and "all necessary perusal of material". Descriptions of that kind convey nothing about the nature or content of privileged communications, and they do not, in my opinion, constitute information of a kind that attracts the protection of legal professional privilege. The headings themselves give only the broadest idea of the subject of the legal advice and services provided, and do not give any detail of particular advice provided. (It must already be obvious to Mr Murphy, given the nature of his FOI access application dated 18 March 1996 and the fact that the respondent has identified the documents now under consideration as

falling within its terms, that the legal advices obtained by the respondent related in some way to his FOI access applications, or to the review proceedings arising from the 1993 access application.) I have significant reservations as to whether those headings attract legal professional privilege but, in any event, Mr Murphy has indicated that he does not seek access to them. The headings, therefore, are not in issue in this external review. It is practicable to give Mr Murphy access to the documents with the headings deleted.

26. I find that documents H8, H9 and I7 (subject to deletion of the headings to the covering letters, notional invoices and memorandum of counsel's fees) are not exempt matter under s.43(1) of the FOI Act.

Remaining matter in issue, and the application of the 'improper purpose exception'

27. I have described the other documents in issue in sub-paragraphs 5(b), (c), (d) and (e) above. Those documents fall into categories which are well recognised as being subject to legal professional privilege.

28. In *Re Potter and Brisbane City Council* (1994) 2 QAR 37 at pp.45-47 (paragraphs 19-27), I discussed the application of legal professional privilege to communications to or from in-house legal advisers. In summary, the authorities establish that legal professional privilege may apply with respect to employee legal advisers of a government Department or statutory authority, provided there is a professional relationship of solicitor (or barrister) and client, which secures to the advice an independent character notwithstanding the employment. Important indicia are whether the legal adviser has been admitted to practice as a barrister or solicitor, and remains subject to the duty to observe professional standards and the liability to professional discipline. Possession of a current practising certificate is not necessary for establishing the requisite degree of independence, but will carry some weight in assisting to establish the requisite degree of independence.

29. I have previously indicated that the Crown Solicitor is in a position to give independent legal advice which attracts legal professional privilege (see *Re Smith and Administrative Services Department*, at p.54, paragraphs 88-90). I also consider that the author of the documents listed in sub-paragraph 5(d) was in a position to provide independent legal advice of a kind which would attract legal professional privilege.

30. Having examined each document containing or comprising matter in issue, it is my view that, subject to consideration of the 'improper purpose exception', the matter listed in sub-paragraphs 5(b), (c), (d) and (e) above, was created solely for a purpose which attracts legal professional privilege, and hence would qualify for exemption under s.43(1) of the FOI Act.

Principles with respect to the 'improper purpose exception'

31. Detailed analyses of the 'improper purpose exception' to legal professional privilege can be found in the judgments of the High Court of Australia in *Attorney-General (NT) v Kearney* and in *Propend Finance*. In the latter case, McHugh J said (at p.358): "Communications in furtherance of a fraud or crime are not protected by legal professional privilege because the privilege never attaches to them in the first place. While such communications are often described as 'exceptions' to legal professional privilege, they are not exceptions at all. Their illegal object prevents them becoming the subject of privilege." However, for the sake of convenience, when I have needed to refer to the relevant principles in a short-hand way, I have described them, in these reasons for decision, as the 'improper purpose exception'.

32. In *Propend Finance*, Gaudron J said (at p.352):

> *Communications made in furtherance of future wrongdoing fall outside legal professional privilege, although there is no particularly precise statement as to the nature of the wrongdoing that produces that result. (As to the different formulations of the nature of the wrongdoing which 'displaces' legal professional privilege, see* Attorney-General (NT) v Kearney *(1985) 158 CLR 500 at pp.528-529 per Dawson J and the cases there cited.) However, legal professional privilege clearly extends to the situation in which a person seeks advice with respect to past misdeeds.*

33. The passage from Dawson J's judgment in *Kearney*, to which Gaudron J referred, is the following (at pp.528-529):

> *It is true that different expressions are to be found in the cases to explain what is meant by crime or fraud in the present context: "any unlawful or wicked act" (*Annesley v Anglesea *(1743) 17 St. Tr. 1139 at p.1229); "a criminal or unlawful proceeding", "fraudulent contrivance, or ... any illegal proceeding", "an improper or an illegal act", "illegality or fraud or trickery" (*Bullivant v Attorney-General (Vict) *[1901] AC 196 at pp.201, 203, 205, 206), "crime or civil fraud", "wrong-doing", "illegal object" (*Varawa v Howard Smith & Co Ltd *(1910) 10 CLR at pp.386, 387, 390); "any illegal or improper purpose", "to frustrate the processes of law", "taint of illegality" (*Reg v Bell; Ex parte Lees *(1980) 146 CLR at pp.145, 156, 162), "crime or fraud or civil offence" (*Baker v Campbell *(1983) 153 CLR 52 at p.86).*
> (See also per Gibbs CJ in *Kearney* at pp.511-515.)

34. Having regard to the nature of the case put forward by Mr Murphy, perhaps the most apposite statement for present purposes is that made by Gibbs CJ in *Kearney* at p.515:

> *It would be contrary to the public interest which* [legal professional] *privilege is designed to secure - the better administration of justice - to allow it to be used to protect communications made to further a deliberate abuse of statutory power and by that abuse to prevent others from exercising their rights under the law.*

35. Gibbs CJ also stated the evidentiary requirements for a finding that legal professional privilege had been displaced in such circumstances (at p.516):

> *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 (Vict) *and in* O'Rourke v Darbishire. *As Viscount Finlay said in the latter case, "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."
> [footnotes omitted]

36. Similarly, in *Propend Finance*, Brennan CJ said (at p.334):

> *In determining whether a claim of legal professional privilege can be upheld, it is open to the party resisting the claim to show reasonable grounds for believing that the communication effected by the document for which legal professional privilege is claimed was made for some illegal or improper purpose, that is, some purpose that is contrary to the public interest. I state the criterion as "reasonable grounds for believing" because (a) the test is objective and (b) it is not necessary to prove the ulterior purpose but there has to be something "to give colour to the charge", a "prima facie case" that the communication is made for an ulterior purpose.*
> [footnotes omitted]

37. Discussing the evidence necessary to displace legal professional privilege, Gaudron J said in *Propend Finance* (at p.353):

> *... 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. Thus, for example, it was said by Lord Wrenbury in* O'Rourke v Darbishire, *a case involving an allegation of fraud, that there must be material which shows "good ground for saying that prima facie a state of things exists which, if not displaced at the trial, will support a charge of fraud". Similarly in* Buttes Gas and Oil, *Lord Denning MR said that it was necessary for there to be "strong evidence".*
>
> *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.*
> [footnotes omitted]

38. I consider that the following principles can be drawn from the decided cases:

- 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.

- 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.
- 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 Railton* (1884) 14 QBD 153 at p.165; *R v Bell: ex parte Lees* (1980) 146 CLR 141 at p.145); however, such knowledge or intention on the part of the client, or the client's agent, is a necessary element (see paragraphs 39-40 and 42 below).

Knowledge of wrongdoing necessary

39. In *Kearney* (at p.515), Gibbs CJ said that there must be a "deliberate abuse of statutory power". This point was considered at some length by Wilson J in *Kearney* (at pp.524-525):

> *The principle may be expressed by saying that, generally speaking, the public interest in the protection of alleged confidential professional communications will not be outweighed by the public interest in ensuring that all relevant evidence is admissible save when the professional relation is abused in a manner involving dishonesty that goes to the heart of the relationship. The presence of such dishonesty is enough to cause the privilege to "take flight", to use the words of Cardozo J in* Clark v United States, *because it precludes a true professional relationship from arising: see the remarks of Stephen J in* Cox and Railton. *A passage from the judgment of Isaacs J in* Varawa v Howard Smith & Co Ltd *is in point. His Honour said:*
>
> > "The words 'for the perfect administration of justice' are all important, because, as was pointed out by Turner VC in *Russell v Jackson*, the privilege which protects any confidential disclosure between solicitor and client is not intended simply to protect that confidence, but it rests upon the necessity of carrying it out.
> > Otherwise justice could not be administered, as the Courts would not have the proper opportunity and means of administering the law between the litigants. That being the foundation of the rule, says the learned Vice-Chancellor, the Court must, of course, have regard to the foundation on which it rests, and not extend it to cases which do not fall within the mischief which it is designed to protect."
>
> *I turn now to consider whether the conclusion I have expressed with respect to the privilege of the citizen is entirely apposite in the case of a claim of privilege by a government in respect of legal advice sought in connexion with the making of regulations. Woodward and Neaves JJ, in the passage I have cited, express the view that any exercise of the regulation-making power for an ulterior purpose would displace the privilege. With all respect, I think that is too wide. Where legal advice is sought with reference to the making of regulations for a purpose which is believed to be consistent with the scope and objects of the enabling legislation, in my opinion the privilege should*

> *attach to those communications notwithstanding that it is alleged that the regulations are beyond power and notwithstanding that some secondary motive unrelated to the statutory power is also present. The purpose which the privilege is designed to serve is in no way denied when legal advice is taken in those circumstances. In my view, the implications for the privilege would be serious if an allegation of* ultra vires*, based on a genuine but mistaken view of the scope of the power, were sufficient to expose a government to discovery of confidential professional communications. It must be remembered that whatever rule is found to apply to government law making will find a close parallel in the case of the exercise of a local government's power to make by laws. Conversely, if the advice is sought in the deliberate pursuit of a purpose which is known to be beyond power, then in those circumstances the public interest cannot concede to a government any right to withhold relevant material from scrutiny in the courts. The distinction between a deliberate and a mistaken misuse of power is to my mind of crucial significance.*
>
> *Counsel for the appellant argues against the drawing of such a distinction on the ground that there is a single category by reference to which regulations will be held invalid because made for an ulterior purpose. The test is an objective one. That may be so when testing regulations for validity but the question is a different one when the issue is whether legal professional privilege may be claimed in respect of certain communications. The test goes to the professional quality of the relationship. That quality depends on the good faith, the integrity that the client brings to the consultation, not upon the correctness or otherwise of the advice that may be given.*
> [footnotes omitted]

40. In this case, Mr Murphy has made allegations which, if established, would mean that certain decisions made by the respondent in dealing with Mr Murphy's 1993 access application were made contrary to law, in the sense that grounds would have existed for overturning those decisions in proceedings brought under the *Judicial Review Act 1991* Qld. The *Judicial Review Act* lists numerous errors of law into which a decision-maker might fall, and which (subject to the exercise of the court's discretion to grant, or decline to grant, a remedy to an aggrieved applicant) might result in the overturning of an administrative decision. For example, a decision-maker may take into account irrelevant considerations or may make an error in interpreting the law. I do not consider that *prima facie* evidence that a communication was made in furtherance of the purpose of making an administrative decision, which decision can be shown to have been based on a flawed understanding of the legal requirements attending the making of that administrative decision, will necessarily lead to the establishment of the 'improper purpose exception' to legal professional privilege. A mere mistake as to legal requirements will usually be insufficient. Consistently with the observations by Wilson J in the second last paragraph of the above-quoted passage, in order to displace legal professional privilege, there would ordinarily need to be *prima facie* evidence that the impugned communications were made in furtherance of a purpose of making (and, in the context of this case, defending) an administrative decision known to be contrary to the law.

41. Legal professional privilege plays a very significant part in the proper functioning of the legal system. In *Re Hewitt* at paragraph 68, I quoted passages from *Waterford's* case (per Mason and Wilson JJ at p.62 and p.64; per Deane J at p.82) which acknowledged that the public interest rationale for the principles of legal professional privilege extends to benefiting the

public interest through encouraging public officials to consult professional legal advisers, with the same protection for confidential communications between legal adviser and client as is afforded to the ordinary citizen In *Kearney*, Gibbs CJ made a similar point (at p.511):

> *The reasons justifying the privilege apply when a public authority preparing regulations which will have the force of law seeks legal advice from its legal advisers. It is in the interest of the public as well as that of the authority that the latter should make full and candid disclosure to its advisers so that it may obtain sound legal advice.*

42. In my view, 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.

43. By virtue of s.81 of the FOI Act, the onus is on the Department to satisfy me that the requirements for exemption under s.43(1) have been met. This extends to showing that the documents in issue are not excluded from eligibility for legal professional privilege under the 'improper purpose exception'. Mr Murphy's evidence and submissions were directed to showing a *prima facie* case that the documents in issue did not attract legal professional privilege because they were brought into existence in furtherance of an illegal or improper purpose. An agency in the position of the respondent should carefully consider its position before deciding (as the respondent did in this case) not to provide evidence to establish its case for exemption on the ground of legal professional privilege, in the face of an attempt by an applicant to show grounds for the application of the 'improper purpose exception'.
Nevertheless, if I am to find that the 'improper purpose exception' applies in respect of the matter in issue, I must be satisfied that I have before me *prima facie* evidence that the matter in issue was communicated in preparation for, or furtherance of, an illegal or improper purpose.

Submissions and evidence of the applicant

44. In her original decision on Mr Murphy's 1993 access application, Ms Natalie Barber of the Department decided that the names of a number of officers of the Department were exempt matter under s.44(1) of the FOI Act. An internal review was undertaken by Mr M Sarquis, who, in his written decision dated 20 September 1993, affirmed Ms Barber's decision that the names of officers were exempt matter under s.44(1), and also determined that they were exempt matter under s.42(1)(c) of the FOI Act. The decisions of Ms Barber and Mr Sarquis were subsequently revoked, and a decision was made by Mr H Smerdon, the then Under Treasurer (and the principal officer of the respondent agency in terms of s.33 of the FOI Act), that the names were exempt matter under s.40(c) and s.44(1) of the FOI Act. On external review, I set aside Mr Smerdon's decision, finding that the names of the officers concerned were not exempt matter under the FOI Act. The respondent's challenge to my decision under the *Judicial Review Act* was dismissed.

45. Mr Murphy set out his allegations relating to his claim of improper purpose at paragraph 2 of his submission received by me on 16 September 1996, as follows:

> *(a) The Queensland Treasury's duly authorised delegate (Michael Sarquis) decided on or before 13 September 1993 that the Applicant was entitled without exemption to certain documents.*

(b) The Queensland Treasury determined that it did not want to allow the Applicant to exercise his right to have access to the documents as required by the FOI Act and wished to delay access as long as possible, if it could not finally prevent his gaining access.

(c) The Queensland Treasury decided not to comply with the legal obligations binding it consequent upon Sarquis' decision.

(d) The Queensland Treasury, by means of fraud, unlawful directions and abuse of power on the part of its employees concealed its delegate's true decision, knowing that the Applicant would continue to attempt to exercise his right of access to the documents in issue.

(e) The Queensland Treasury, knowing full well that the Applicant had an unrestricted right of access, thereby committed itself to carrying out the unlawful purpose of obstructing the Applicant's subsequent attempts to exercise his right of access.

(f) To assist in that unlawful purpose, the Queensland Treasury sought and obtained legal advice and assistance from the Crown Law Office and counsel in:-

(i) composing a fraudulent letter to the Applicant from Sarquis;

(ii) formulating the reasons for decision of Henry Smerdon, its Principal Officer;

(iii) opposing the Applicant before the Information Commissioner; and

(iv) conducting an Application for Review to the Supreme Court (Application 696 of 1995).

(g) In formulating its case before the Supreme Court, the Queensland Treasury acted unlawfully in that it sought to pervert the operation of section 98 of the FOI Act and thereby abuse the process of the Supreme Court. To assist it in that purpose, the Queensland Treasury sought and obtained legal advice and assistance from the Crown Law Office and counsel.

Mr Murphy added that he did not allege that Crown Law officers, or counsel, were aware of the "*true purpose and unlawful conduct of Queensland Treasury*".

46. Mr Murphy alleged that prior to making his written decision, Mr Sarquis had made up his mind to disclose the names of officers appearing on the documents to which Mr Murphy had requested access. Mr Murphy alleged that Mr Sarquis was subsequently instructed to find that the names were exempt matter. In support of this allegation, Mr Murphy referred to a number of documents, including a memorandum dated 13 September 1993 to the Under Treasurer from Ms J Macdonnell, who was then the Director of the Office of State Revenue, and which stated:

A freedom of information application was lodged by Mr John Murphy on behalf of Milglade Pty Ltd on 24 June 1993 seeking access to a land tax file.
It could be inferred from the wording of the application that one of the purposes of the request was to access the names of Office of State Revenue staff who had dealt with the company's file.

Mr Murphy, on behalf of his company, has had ongoing dealings with the office and was investigated in relation to a land tax principal place of residence concession, which was subsequently disallowed. He has been aggressive and abusive in his conversations with staff and has threatened to place various staff members on a "list" for reprisal action. I have personally spoken to Mr Murphy on one occasion and was threatened with having my name put on the list when I did not agree to negate the land tax assessment.

On this basis and in reliance on exemptions available in the FOI Act, exemption of material disclosing officers' names was recommended to the FOI Co-ordinator. Access to the file was granted on this basis. Mr Murphy has now lodged a request for internal review of the decision to exempt this material and I am advised it is the internal reviewer's intention to reverse the original exemption decision. I am concerned at the preparedness to reverse this decision as it may effectively establish a precedent, making it difficult to support any future recommendation for exemption of officers' names. While such exemption is not generally sought by the Office of State Revenue, certain instances are considered to warrant a more cautious approach, particularly where there is an indication of officers being targeted for undesirable attention.

A similar issue was considered by the Administrative Appeals Tribunal in respect of the Commonwealth FOI Act in Re Z and Australian Taxation Office *(1984) 2 AAR 190. In that case it was held the names of ATO staff were exempt from disclosure under section 40(1)(c) or (d) of the Commonwealth FOI Act, because there was a strong possibility that the revelation of the names of officers who had dealt, even in a routine way, with the taxpayers' affairs would undermine public confidence in the strict confidentiality which surrounds the ATO's operations. The AAT considered this confidentiality was respected by both the public and the agency's officers and it, therefore, was not in the public interest to breach that confidence.*
Section 40(1)(c) of the Commonwealth FOI Act corresponds with section 40(1)(c) of the Queensland FOI Act. There is no section directly comparable with section 40(1)(d) in the Queensland Act.

While the matter is untested in relation to the Queensland FOI Act, a similar approach should be adopted - particularly where there is evidence that the taxpayer would seek to intimidate the officers concerned. It is, therefore, my strong view the original exemption decision should be confirmed on internal review and the matter be determined by the Information Commissioner should the applicant pursue the matter to external review (- it is expected he will). Any decision prior to such external review would, in my opinion, be premature.

Your thoughts on the matter would be appreciated.

47. Appearing on the memorandum are two handwritten notes. The first appears to be a response from the Under Treasurer to Ms Macdonnell, which states:

> *If Mr Murphy's behaviour has been as you say it has, then I agree we should take all reasonable steps to protect the names of staff involved.*
>
> *This should be conveyed to the Internal reviewer.*
>
> *It would then be a matter for the Information Commissioner to determine, if necessary.*

48. The second handwritten note appears to have been made by Ms M Haley, a staff member of the respondent, and states: "*Advised Mike Sarquis 16/9/93. He requested background info in writing re applicant and reason for exemption."* It appears that a memorandum dated 17 September 1993 was then sent to Mr Sarquis by Ms Macdonnell, outlining her concerns about disclosure of the names and pointing out the possible relevance of s.40(c). Ms Macdonnell concluded by saying:

> *While the matter is untested in relation to the Queensland FOI Act, a similar approach* [to the approach in Re Z] *should be adopted - particularly where there is evidence that the taxpayer would seek to intimidate the officers concerned. It is my strong view the matter should be considered by the Information Commissioner if the applicant pursues the matter to external review as this will provide guidance in future similar cases. Any decision prior to such external review would, in my opinion, be premature.*

49. At paragraphs 83-88 of his affidavit, Mr Murphy deposed to a conversation he had with Ms Haley as follows:

> *83. I discovered Haley's part in the matter early in 1996, and I contacted her by phone on 4 April 1996.*
>
> *84. I put to her that she knew that Sarquis had decided that the material was not exempt but that she had nevertheless relayed what she knew to be an unlawful direction from her superior.*
>
> *85. Without hesitation, Haley admitted to me that she knew the nature of the communication. She admitted readily that she knew that Sarquis had decided I was to have unrestricted access.*
>
> *86. She readily admitted that she knew the instruction she relayed was intended to cause Sarquis to notify me that he had reached a decision to exempt the documents when, in fact, he had not.*
>
> *87. She justified herself by saying that she was entitled to so instruct Sarquis because she was following an order from her superior officer (Macdonnell).*
>
> *88. I was unable to persuade her that she was obliged not to obey an instruction which was unlawful to her knowledge.*

50. Mr Murphy also deposed to the fact that he had had a discussion with Mr Sarquis, and that Mr Sarquis had failed to deny that he had previously decided that the names of the staff were not exempt, or that he had acted under direction. Mr Murphy contended that this lack of a denial supported a finding of those facts.

51. Mr Murphy contended that once Mr Sarquis had made up his mind that the matter in issue was not exempt matter, then Mr Murphy became entitled to have access to the matter unless Mr Sarquis changed his mind. Mr Murphy says Mr Sarquis at no stage changed his mind but was rather directed to make a finding contrary to his original conclusion. Mr Murphy contended that from the time Mr Sarquis made up his mind that the matter in issue was not exempt matter, Mr Murphy was entitled to the names of the officers, and from that time there was a conscious intention on the part of officers of the respondent to deny him access to matter which he had a right to obtain.

52. At paragraph 26 of his submission received on 16 September 1996, Mr Murphy listed some 19 circumstances which he contended lend support to his allegation of a continuing intention on the part of staff of the respondent to deny him access to what was lawfully his. The listed circumstances were:

> *(a) the general behaviour of Treasury employees -*
>
> > *(i) they have refused to recognise the purport of the judgment of the Supreme Court in Application 696 of 1995 and remove the offending material from their files;*
> >
> > *(ii) they have repeatedly refused to confirm the untruth of the assault allegations by the simple expedient of phoning the Director of Legal Services of the B.C.C. (Ms. Robyn Chapman). Ms. Chapman conducted an internal investigation in 1995 and subsequently admitted to the Applicant and his solicitor that the allegations were a "malicious and vindictive fabrication by Council employees." The Applicant has informed a number of OSR employees of her admission;*
> >
> > *(iii) the quite obviously contrived "reasons" advanced by Siddle (the OSR decision maker) to suppress documents under section 41 - those very documents which evidence the unlawful directions given to Sarquis and which ought to have been produced to the Applicant under two previous requests under the FOI Act (MPL56 and MPL58), tendered to the Information Commissioner in application MPL46, and disclosed to the Supreme Court under RSC Order 35 in Application 696 of 1995.*
>
> *(b) the fact that certain Treasury employees had personal motives to cause the documents to be suppressed -*
>
> > *(i) certain of the material is defamatory of the Applicant - the Information Commissioner has the Applicant's affidavit and exhibits in application MPL46 which demonstrate this. Whether or not the Applicant might ultimately succeed in a suit against*

them and to what extent, it was obviously in the employees' interests that he not have the names of the persons responsible for the creation and dissemination of that material (see also sub-paragraph (1), below);

(ii) some of the documents now in the Applicant's possession (including those mentioned in this application) demonstrate prima facie that Treasury employees committed criminal offences;

(c) the extremely deficient nature of the purported "Reasons for Decision" given by Kevin Martin (the Department of Justice internal reviewer). Mr. Martin failed to give adequate reasons at his first attempt. He failed again when prompted by the Applicant. In our submission, he again failed to comply with the law and the order of the Supreme Court on his third attempt.

It is open to the Information Commissioner to take cognisance of the fact that Mr. Martin is a very experienced lawyer who should be taken to know his duty and the law on this subject.

It is further open to the Information Commissioner to recognise, it is submitted, that Mr. Martin's refusal to do his duty (despite prompting by the Applicant, and by the Court) is consistent with a course of conduct which is designed to obstruct and frustrate the Applicant at every turn;

(d) the otherwise inexplicable omission by Sarquis to mention in his affidavit before the Information Commissioner that he had formed the opinion that section 42(1)(c) did not apply to the Applicant when he well knew that section 42(1)(c) was being claimed as a ground for exemption. Indeed, his statutory declaration was, it is submitted, misleading in this important sense and deliberately so;

(e) Barber's otherwise inexplicable failure to depose to her personal knowledge of the Applicant and her judgment (which she recorded in writing) that the Applicant was not a dangerous person;

(f) the failure of the Treasury to disclose certain very relevant documents (inimical to its case before the Information Commissioner) to the Commissioner and the Supreme Court in Application 696 of 1995;

(g) the obvious intention of the Treasury to release the documents only if its employees had no objection.

Sarquis made his decision on 13 September 1993 at the latest as is evidenced by Macdonnell's letters (documents 294 and 296 in the bundle "JPM-11"). [There is no document 296 in my copy of exhibit "JPM-11" but document 268 is a memorandum from Ms Macdonnell.] *Therefore, it is submitted, Sarquis was* functus officio *possibly as early as that date and certainly on 20 September 1993 when he notified the Applicant (falsely, it is submitted) of his alleged decision.*

Nevertheless, Treasury employees were making enquiries on 20 September 1993 and 14 October 1993 plainly directed to determining the desires of certain OSR employees. The Applicant reminds the Information Commissioner that Sarquis did not allegedly "revoke" his decision formally until 4 October 1993 at the earliest - even if that was a valid revocation, which, we submit, it was not, since the decision he allegedly revoked (that the documents were exempt) was never made, in fact or in law.

In this regard, the Information Commissioner might have regard to document 186 and consider that that document, coupled with the enquiries mentioned in the last sub-paragraph are further evidence that the alleged revocation was fraudulent and for an ulterior purpose;

(h) the coincidence of the simultaneous destruction of the computer copy, the OSR copy and the Minister's copy of each of two faxes which were directed towards preventing the Applicant complaining to Members of Parliament (probably in contempt of the Parliament), and which must, it is submitted, both have been in a similar vein - i.e. defamatory of the Applicant;

(i) document 186 addressed to a person named "Mark" - alleged by the Applicant to be Mark Viglan, a Treasury solicitor. In our submission, this is plainly both a recognition at the time by Sarquis that no proper grounds existed for the section 42(1)(c) exemption he claimed and a plan to keep the Applicant at bay until some evidence could be gathered;

(j) the dishonest and fraudulent behaviour of Sarquis and Barber prior to and at the meeting on 15 October 1993 where they contrived to deceive the Applicant by purporting to revoke their decisions on the grounds that, having met the Applicant, they realised in effect that they had made a mistake;

(k) Sarquis' enquiries of the wishes of the OSR employees on the very day (20 September 1993) he wrote his letter conveying his alleged decision to the Applicant - four days after he was apprised of the Under-Treasurer's comments agreeing with Macdonnell's wish that the Applicant not have the documents;

(l) the comment by the Under-Treasurer on 21 September 1993 that the alleged exemption decision was "wise" in the circumstances of the Applicant's threat to sue Sarquis - as was his legal right. The Applicant submits that this comment confirms the true purpose of the Treasury - to protect its employees from civil suit.

There was no suggestion in that document that Smerdon thought the decision "wise" because he regarded the Applicant as dangerous - consistently with Smerdon's failure to raise section 42(1)(c) when he made his decision. On the contrary, the decision was seen as "wise"

because the Applicant had asserted that he was willing to sue Sarquis and therefore could be assumed to be willing to sue other employees whose names he was unable to obtain because of Sarquis' "wise" decision;

(m) the fact that Sarquis told the Applicant that section 42(1)(c) would not be used again; that Barber recorded her opinion that the Applicant was not dangerous; that Smerdon did not raise section 42(1)(c); that the Treasury did raise the section on external review - these are all consistent with Macdonnell's express wish that the Applicant not have access unless it was granted by the Information Commissioner;

(n) the behaviour of the Crown Law solicitor, Lisa Fleming, who, given the very serious nature of the allegations, had a plain professional duty to take reasonable steps to check the accuracy of what she had been told by the two B.C.C. employees (Quin and Corrie) before she swore the statutory declaration she tendered to the Commissioner;

(o) the "manure incident", in our submission, is consistent with the vindictive and high-handed behaviour of the Treasury's employees from the beginning of this matter in 1991;

(p) the plain threat to the Information Commissioner by the employees' trade union - the State Public Services Federation (Queensland) - in its submission in the external review of request MPL46;

(q) that the Treasury's use of the natural person Bradley as its "Applicant" in Application 696 of 1995 to circumvent section 98 of the FOI Act was, it is submitted, an abuse of the process of the Supreme Court;

(r) further, it is submitted, the circumstances of that application, particularly the attempt to circumvent section 98 of the FOI Act, point to an ulterior motive on the part of the Treasury.

In our submission, that motive could have been none other than to frighten the Applicant away from defending his rights by the threat of an adverse costs order in the Treasury's own application - a situation which the Parliament had deliberately intended to avoid when it enacted section 98;

(s) Macdonnell's letter to the SPSF(Q) rejecting the very argument she instructed her agency's solicitors to put to the Information Commissioner and the Supreme Court against the Applicant.

Mr Sarquis' decision

53. Much of Mr Murphy's evidence is aimed at establishing that Mr Sarquis had already made a decision prior to formulating his written reasons for decision, but changed it at the direction of a superior officer or officers.

54. In her memorandum dated 13 September 1993, Ms Macdonnell stated, "*I am advised it is the internal reviewer's intention to reverse the original exemption provision*." However, the written decision of Mr Sarquis was dated 20 September 1993 and differed markedly from that "intention". Mr Murphy argued that a distinction can be drawn between the formulation of a decision and committing the decision and reasons for decision to writing.

55. A useful discussion of what constitutes a decision, made in the exercise of a statutory decision-making power, can be found in the judgment of Northrop J in *Ricegrowers Co-operative Mills Ltd v Bannerman and Trade Practices Commission* (1981) 38 ALR 535, at pp.542-544 (see also *Re Sullivan and Department of Industry, Science and Technology* (Commonwealth Administrative Appeals Tribunal, Mr P Bayne (Senior Member), No. A95/197, 6 June 1997, unreported), at paragraphs 84-89). In considering what constitutes a "decision" under the *Administrative Decisions (Judicial Review) Act 1977* Cth, Northrop J stated (at p.544):

> … *The mere thought processes taking place in the mind of the person when considering whether or how to exercise a power or to perform a duty of an administrative character under an enactment do not, in my opinion, constitute a decision. In addition to thought processes, there must be some overt act by which the conclusions reached as a result of those thought processes are manifested. The manifestation may take many different forms.*
> *It may take the form of a verbal or written communication of the conclusion to the person affected. It may take the form of no action being taken when otherwise a definite action would have been taken.*

56. Also relevant are the observations of Ambrose J in *Durrisdeer Pty Ltd v Nordale Management Pty Ltd* [1998] 2 Qd R 138, at pp.144-145. At p.144, Ambrose J stated:

> *Indeed there is strong authority in my view for the proposition that until at least some notification of a decision is given to an interested party or until some formal public record is effected, no final decision can be said to have been made. Until the decision maker notifies an applicant of the decision made upon his application either personally or by a form of public notification, he has a* locus poenitentiae *to alter or vary that decision.*

57. I do not consider that the evidence before me can be described as *prima facie* evidence that Mr Sarquis had reached a final decision in relation to Mr Murphy's internal review application prior to the time at which Mr Sarquis signed and posted his notice of decision addressed to Mr Murphy, dated 20 September 1993. In the process of developing a final decision, a decision-maker will often develop views on particular aspects of the case. Some of those views will be more strongly held than others. A decision-maker generally should take care in expressing such views to other persons (e.g., by cautioning that they represent the official's present thinking, rather than a final decision), but the expression of such views will often be a valuable tool in drawing out responses which may shed further light on the issues, and may well lead to a change of view on the part of the decision-maker.

58. Section 34 of the FOI Act sets out the requirements for a notice of decision given in response to an FOI access application, or an application for internal review (see s.52(4) of the FOI Act). Leaving aside those provisions which deem an agency to have made a negative decision when statutory response times have been exceeded (see s.27(4), s.52(6), and s.79(1) of the FOI Act), I have difficulty conceiving of a case in which it might be proper to find that

a decision refusing access had been made on behalf of an agency under the FOI Act, prior to the decision-maker despatching a signed notice of decision in response to a relevant application under the FOI Act. On the evidence before me, I consider that the decision of Mr Sarquis in response to Mr Murphy's internal review application was expressed in his letter to Mr Murphy dated 20 September 1993, and that any earlier comments made by Mr Sarquis to officers of the respondent did not constitute a decision in response to Mr Murphy's relevant application for internal review under s.52 the FOI Act.

59. There was therefore no earlier decision to grant access, which agency officers acted in disregard of, to defeat Mr Murphy's rights. But there are still allegations made by Mr Murphy which call into question the propriety of Mr Sarquis' decision, as recorded in the letter dated 20 September 1993.

60. The *Judicial Review Act* contains three grounds for challenge to a decision which reflect the allegations of impropriety made by Mr Murphy. Under s.20(2)(e) of the *Judicial Review Act*, a decision may be challenged on the basis that the making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made. Section 23 of the *Judicial Review Act* lists instances of improper exercise of power, including, the exercise of a personal discretionary power at the direction or behest of another person (s.23(e)), the exercise of a power for a purpose other than a purpose for which the power is conferred (s.23(c)), and the exercise of a discretionary power in bad faith (s.23(d)).

61. Under s.28(1) of the FOI Act, an agency has a discretionary power to refuse access to exempt matter. An authorised decision-maker at agency level who, in responding to a valid FOI access application, proposes to exercise the power conferred by s.28(1) of the FOI Act, is ordinarily faced with two decisions:

    (a) whether particular matter satisfies the test for exemption under at least one of the exemption provisions in the FOI Act; and
    (b) whether he or she should exercise the discretion conferred by s.28(1) of the FOI Act (which is the only source of power to refuse access to exempt matter) so as to refuse access to the matter in question.

62. Strict logic would suggest that decision (a) should always come first. If the matter in issue does not qualify for exemption, the applicant for access has a legally enforceable right to be given access under the FOI Act (see *Re Woodyatt and Minister for Corrective Services* (1995) 2 QAR 383 at p.403, paragraph 48) and no occasion arises for the exercise of the discretion conferred by s.28(1). However, in practical terms, it is not strictly necessary that decision (a) should be the first one considered by an authorised decision-maker under the FOI Act. For example, it may well be that a decision-maker need not give detailed consideration to whether the matter in issue technically qualifies for exemption, if he or she decides (assuming the matter in issue to be exempt) that the matter should be disclosed in any event, on the basis that no essential private or public interests would be prejudiced by disclosure. Considerations relevant to the proper exercise of the discretion conferred by s.28(1) may well be more extensive than the material facts and considerations which afford a basis for exemption. In many cases, the gathering of information and consideration of issues involved in both decisions will probably proceed simultaneously (although a decision-maker should always be careful to clearly distinguish between the material facts and relevant considerations which affect each decision).

63. Ms Macdonnell's memorandum dated 13 September 1993 raised with the Under Treasurer concerns about staff problems which might arise if the names of officers were released in the particular case. She also raised the possible application of an exemption provision relating to staff management (s.40(c) of the FOI Act) and referred to a decision of the Commonwealth Administrative Appeals Tribunal on a similar issue (*Re Z and Australian Taxation Office* (1984) 6 ALD 673) which, at face value, tended to support the application of the s.40(c) exemption. She sought the Under Treasurer's thoughts on the matter.

64. It may be that the Under Treasurer's response to Ms Macdonnell's memorandum (see paragraph 47 above) was taken as a direction by Ms Haley and communicated as such to Mr Sarquis (although, in my view, it was not framed in the terms of a direction). However, the evidence I have of Mr Sarquis' actions does not suggest that he immediately followed any direction which may have been passed on by Ms Haley. Ms Haley's note records that his response was to ask for background information in writing and seek reasons for exemption. He then received Ms Macdonnell's memorandum dated 17 September 1993, which raised the possible application of s.40(c). But, in his written decision, he determined that the names of the officers were exempt under s.42(1)(c) and s.44(1) of the FOI Act. If he was directed to find matter exempt under s.40(c), he failed to act in accordance with such a direction.

65. Mr Sarquis was dealing with Mr Murphy's internal review application "on behalf of the [respondent] agency" (see s.33(1) of the FOI Act). I consider that Mr Smerdon and Ms McDonnell were entitled to make known to Mr Sarquis their views that officers' names qualified for exemption under the FOI Act. There would have been no impropriety in Mr Sarquis taking their views into account, and being persuaded to make a decision which accorded with their views, provided his decision was not made at the direction or behest of Mr Smerdon or Ms McDonnell. I am not satisfied that the material before me raises a *prima facie* case that Mr Sarquis made his decision at the direction or behest of another.

66. I have also referred to the contention that Mr Sarquis' decision was made in bad faith or for an ulterior purpose. In this case, the evidence of internal departmental communications displays information which would be relevant to whether the names of the officers were exempt matter, and information which would be relevant to the exercise of the s.28(1) discretion. The evidence itself goes to what representations were made to Mr Sarquis, rather than directly to the matters Mr Sarquis considered in making his decision. I do not consider that the material before me can be characterised as *prima facie* evidence that Mr Sarquis' decision was made in bad faith or for an ulterior purpose. As explained at paragraph 40 above, simply falling into an error of law or procedure is not sufficient grounds for the application of the 'improper purpose exception'. I consider that what must be shown is *prima facie* evidence of a course of action adopted with knowledge of wrongdoing. I could not make such a finding based on the material before me.

67. Finally, I note that even if I were mistaken, and the actions of officers of the respondent overall constituted an improper purpose capable of displacing legal professional privilege, the fact of the matter is that none of the documents in issue was created for the purpose of Mr Sarquis making his internal review decision. In fact, none of them was prepared prior to Mr Sarquis' decision being revoked. Therefore, none of the communications in issue could be said to have been made in preparation for, or in furtherance of, any improper purpose with respect to the making of Mr Sarquis' decision.

Subsequent events

68. Mr Murphy also complained about the subsequent revocation of Mr Sarquis' and Ms Barber's decisions. However, in a letter dated 22 September 1993 to the respondent, Mr Murphy actually suggested that "*to save time and trouble for all concerned, and to facilitate my access to the documents, that the whole process be restarted and done according to law*". That course was adopted by the respondent.

69. After the revocation of Mr Sarquis' and Ms Barber's decisions, a new decision in respect of the 1993 access application was made by Mr Smerdon, in his capacity as principal officer of the respondent agency. The respondent explained that the principal officer made the decision so as to permit Mr Murphy to proceed directly to external review by the Information Commissioner (see s.73(3) of the FOI Act). Before making his decision, Mr Smerdon obtained legal advice (which is in issue in this external review). After considering the legal advice, Mr Smerdon decided that the names of the officers were exempt matter under s.40(c) and s.44(1) of the FOI Act. While it is true that Mr Smerdon's decision was overturned on external review, I am not satisfied that the material before me raises a *prima facie* case that Mr Smerdon sought legal advice, and made his decision, knowing that a decision to exempt the officers' names would be contrary to law. In light of the result arrived at on similar issues in cases heard by the Commonwealth Administrative Appeals Tribunal (the cases are analysed in *Re Murphy* at pp.781-787; paragraphs 109-134), I do not think it could be seriously maintained that there were no grounds to support an honest belief on the part of Mr Smerdon (or other officers of the respondent) that the names of officers were exempt matter under the FOI Act.

70. Turning to the proceedings for review, under Part 5 of the FOI Act, of Mr Smerdon's decision, the case on behalf of the respondent was conducted by the Crown Solicitor. The Crown Solicitor lodged written submissions (supported by sworn evidence), contending that the names of the officers were exempt matter under s.40(c), s.42(1)(c) and s.44(1) of the FOI Act. I do not consider that there is before me *prima facie* evidence that relevant officers of the respondent (or of the Crown Solicitor's office) had formed a concluded view that those exemption provisions did not apply to the matter in issue, but that nevertheless the respondent would continue to refuse access to the officers' names. While I ultimately found that the names were not exempt matter, I do not consider that there was any impropriety in the respondent, through its legal representatives, seeking to argue a case for exemption. The law relating to freedom of information in Queensland was, at the time of my decision, still in its developmental stages. I consider it reasonable that agencies should, from time to time, consider it necessary to raise issues for consideration by the Information Commissioner, where the law is not clear. (In saying this, I consider that it is incumbent on agencies, when making decisions to pursue objections to disclosure of matter in issue in an FOI access application, to consider carefully the commitment of their own resources, the resources of the Information Commissioner, and perhaps ultimately the Supreme Court. It would be unfortunate if public resources were to be wasted on objections to disclosure of matter which is most unlikely to be found to be exempt matter.)

71. My comments in the preceding two paragraphs apply equally to the conduct of the Supreme Court proceedings. Further, I should note that there is no *prima facie* evidence before me to suggest that any of the matter in issue was communicated in furtherance of an abuse of the processes of the Supreme Court in terms of paragraph (g) of Mr Murphy's submission set out at paragraph 45 above.

72. Mr Smerdon's decision, the participation of the respondent in my external review, and the subsequent Supreme Court challenge, were all undertaken with the input of legal advisers. The documents in issue record that legal advice. I have examined that advice in the course of this external review. I have also considered the evidence and submissions of Mr Murphy, including the list of circumstances set out at paragraph 52 above. Mr Murphy is clearly very dissatisfied with the conduct of the respondent in its dealings with him. He has asserted that his evidence and submissions constitute *prima facie* evidence of an improper purpose which underlay and tainted all communications with the respondent's legal advisers.

73. Whatever the merit of the conduct of the respondent's officers with respect to Mr Murphy in particular instances, I do not agree with Mr Murphy on that point. I am not satisfied that there is *prima facie* evidence before me that any of the matter in issue was created in preparation for, or furtherance of, an illegal or improper purpose so as to displace the legal professional privilege which (as I have explained at paragraphs 27 and 30 above) otherwise attaches to the matter in issue.

74. I therefore find that the matter in issue listed in sub-paragraphs 5(b), (c), (d) and (e) above, is exempt matter under s.43(1) of the FOI Act.

Conclusion

75. I vary the decision under review (being the decision made on behalf of the respondent on 1 July 1996 by Mr G Poole) by finding that documents H8, H9 and I7 (subject to deletion of the headings to the covering letters, notional invoices and memorandum of counsel's fees, which headings are not in issue) are not exempt matter under s.43(1) of the FOI Act.

76. I affirm those parts of the decision under review which found that the balance of the matter in issue (described in sub-paragraphs 5(b), (c), (d) and (e) above) is exempt matter under s.43(1) of the FOI Act.

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F N ALBIETZ
INFORMATION COMMISSIONER