



## **Decision and Reasons for Decision**

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**Application Number:** 210216

**Applicant:** Mareeba Shire Council

**Respondent:** Department of Local Government, Planning, Sport and Recreation

**Third Party:** Thiess Services Pty Ltd & FGF Developments No. 1 Pty Ltd

**Decision Date:** 28 September 2007

**Catchwords:** **FREEDOM OF INFORMATION - section 43 of *Freedom of Information Act 1992 (Qld)* (FOI Act) - matter affecting legal proceedings - legal professional privilege - whether disclosure for limited purpose constitutes waiver**

### **Contents**

Background .....	2
Steps taken in the external review process .....	2
Document remaining in issue in this review .....	4
Findings .....	4
Section 43(1) of the FOI Act .....	4
Waiver of legal professional privilege .....	5
Decision .....	8

## Reasons for Decision

### Background

1. On 15 December 2006, the Department of Local Government, Planning, Sport and Recreation (Department) received a freedom of information (FOI) application from Thiess Services Pty Ltd and FGF Developments No.1 Pty Ltd (Thiess Services) for access to:
  - documents relating to Council's Temporary Local Planning Instrument (TLPI) 01/06 titled "Waste Management Facilities"
  - a copy of the TLPI.
2. By letter dated 15 January 2007, the Department consulted with Mareeba Shire Council (Council) pursuant to section 51 of the *Freedom of Information Act 1992* (Qld) (FOI Act) in relation to two documents (Document 1 and Document 2). The purpose of this consultation was to obtain the views of the Council as to whether or not the documents comprised exempt matter under the FOI Act.
3. By letter dated 1 February 2007, the Council provided the Department with its consultation response under section 51 of the FOI Act. In that letter, the Council contended that both Document 1 and Document 2 qualified for exemption under sections 38, 41, 43 and 46 of the FOI Act and provided specific submissions in relation to the application of sections 41 and 46 of the FOI Act to those documents.
4. By letter dated 26 February 2007, Ms Bronwyn Nosse, Principal Legal Officer, Legal and Administrative Review Services, advised the Council of her decision in respect of Document 1 and Document 2. Ms Nosse decided that neither document qualified for exemption under sections 38, 41, 43 or 46 of the FOI Act. Thiess Services was advised of Ms Nosse's decision by letter dated 5 March 2007.
5. By letter dated 15 March 2007, the Council sought internal review of Ms Nosse's decision. Thiess Services did not seek internal review of Ms Nosse's decision.
6. By letter dated 16 April 2007, Ms Clare Smith, Director, Legal and Administrative Services, advised the Council of her internal review decision to affirm Ms Nosse's decision.
7. By letter dated 3 May 2007, the Council applied to this Office for external review of Ms Smith's decision.

### Steps taken in the external review process

8. Copies of the documents in issue were obtained from the Department and examined by this Office.
9. On 23 May 2007, I wrote to Thiess Services, via its legal representatives, to advise it of this external review and to invite it to become a participant. By letter dated 29 May 2007, Thiess Services applied to this Office to participate in this external review.
10. By letter dated 7 June 2007, the Department advised this Office that Thiess Services had commenced proceedings in the Planning and Environment Court against the Department and Mareeba Shire Council.

11. On 11 July 2007, the Council informed this Office that Thiess Services had made a second FOI application, directly to the Council, seeking access to various documents, including Document 1 and Document 2 (second FOI application). In its initial decision on the second FOI application, the Council decided to grant Thiess Services full access to Document 1 but to refuse access to Document 2 on the basis of section 43(1) of the FOI Act.
12. On 8 August 2007, I asked Thiess Services to confirm whether it wished to pursue access to Document 2 in light of the full release of Document 1 by the Council. On 17 August 2007, Thiess confirmed that it still wished to pursue access to Document 2.
13. On 22 August 2007, I asked the Department to provide this Office with copies of certain documents which had been partially released to Thiess Services pursuant to Ms Nosse's decision (Document 13 and Document 14), but which had not been the subject of consultation with the Council under section 51 of the FOI Act. The Department provided copies of Document 13 and Document 14 to this Office on 22 August 2007.
14. By letter dated 29 August 2007, I advised the Department, Thiess Services and the Council of my preliminary view that:
  - Document 2 qualified for exemption under section 43(1) of the FOI Act
  - legal professional privilege attaching to Document 2 was not waived when Mr Mick Borzi, Mayor of the Council, sent a copy to Mr Michael Kinnane, Director General of the Department.
15. By letter dated 11 September 2007, Thiess Services advised that it did not wish to contest my preliminary view, but expressed disagreement with that view.
16. Following receipt of Thiess Services' letter dated 11 September 2007, this Office contacted Thiess Services' legal representatives to confirm their client's position. On 12 September 2007, Thiess Services' legal representatives confirmed that their client did not wish to proceed with the external review but maintained its disagreement with my preliminary view because it did not wish to prejudice its position in related court proceedings concerning Document 2.
17. On 12 September 2007, this Office contacted the Department to advise that Thiess Services did not wish to contest my preliminary view. In that conversation, the Department:
  - advised that it intended to contest my preliminary view
  - requested an extension of time within which to provide submissions in response to my preliminary view.
18. On 12 September 2007, I consented to the Department's request for an extension of time and requested its submissions be lodged in this Office by 26 September 2007.
19. By letter dated 27 September 2007, the Department provided its submissions in response to my preliminary view.
20. On 27 September 2007, Ms Nosse advised this Office that Thiess Services is seeking a declaration, in the relevant Planning and Environment Court proceedings, that the Minister's exercise of power in approving the TLPI was invalid.

21. In making my decision in this review, I have taken into account the following:
- Thiess Services' initial FOI application dated 15 December 2006
  - section 51 consultation letter from the Department to the Council dated 15 January 2007
  - section 51 consultation response from the Council to the Department dated 1 February 2007
  - initial decision of Ms Nosse to the Council dated 26 February 2007
  - initial decision of Ms Nosse to Thiess Services dated 5 March 2007
  - the Council's application for internal review dated 15 March 2007
  - internal review decision of Ms Smith dated 16 April 2007
  - the Council's application for external review dated 3 May 2007
  - Document 1, Document 2, Document 13 and Document 14
  - written correspondence exchanged between this Office and Department, the Council and Thiess Services during the course of this review
  - file notes of telephone conversations held between staff members of this Office and the Department, the Council and Thiess Services during the course of this review
  - the Department's submissions dated 27 September 2007
  - relevant sections of the FOI Act and applicable case law.

#### **Document remaining in issue in this review**

22. In light of the full release of Document 1 to Thiess Services by the Council pursuant to its initial decision in the second FOI application, the only document remaining in issue in this review is Document 2, a seven page letter from Lyons QC to Marino Moller Lawyers dated 19 October 2006.

#### **Findings**

23. I find that Document 2, in its entirety, qualifies for exemption under section 43(1) of the FOI Act as the legal professional privilege attaching to it was not waived when Mr Mick Borzi, Mayor of the Council, sent a copy to Mr Michael Kinnane, Director General of the Department.
24. My reasoning is set out below.

#### **Section 43(1) of the FOI Act**

25. This section provides:

##### **43 Matter affecting legal proceedings**

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

26. It is well settled that legal professional privilege attaches to confidential communications between a lawyer and client (including communications through their respective servants or agents) made for the dominant purpose of seeking or giving legal advice or professional legal assistance or use, or obtaining material for use, in legal proceedings that have commenced, or were reasonably anticipated, at the time of the relevant communication *Esso Australia Resources Ltd v Commission of Taxation* (1999) 74 ALJR 339 (*Esso*).

### **Application of section 43(1) of the FOI Act**

27. The Department acknowledges that Document 2 constitutes a legally privileged communication between a legal advisor, Lyons QC, and client, the Council. However, in her internal review decision, Ms Smith found that the privilege in Document 2 was waived when Mr Borzi emailed Document 2 to the Director-General for the purpose of obtaining the Minister's approval for the TLPI.

#### **Waiver of legal professional privilege**

28. The leading authority on waiver of legal professional privilege is *Mann v Carnell* (1999) 201 CLR 1. The principal question before the High Court in that case was whether disclosure of legal advices by a government Minister to an independent member of the Legislative Assembly resulted in waiver of legal professional privilege which attached to the advices prior to their disclosure. The majority found that privilege in the legal advices had not been waived and that they remained protected from disclosure by legal professional privilege.
29. In *Mann v Carnell*, Gleeson CJ, Gaudron, Gummow and Callinan JJ stated (at 29) as follows:

*Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law". ... What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some over-riding principle of fairness operating at large.*

30. With respect to implied waiver which results from disclosure of legal advice to a third party, the majority in *Mann v Carnell* reasoned (at 33-34) as follows:

*It does less than justice to the respondent's position to describe what occurred in the present case as disclosure to a third party. The privilege was that of the body politic, the Australian Capital Territory. The head of the Territory's Executive, the Chief Minister ... gave the member, confidentially, access to legal advice that had been given to the Territory, and on the basis of which it had acted. Although 'disclosure to a third party' may be a convenient rubric under which to discuss many problems of this nature, it represents, at the least, an over-simplification of the circumstances of the present case.*

...

*Disclosure by a client of confidential legal advice received by the client, which may be for the purpose of explaining or justifying the client's actions, or for some other purpose, will waive privilege if such disclosure is inconsistent with the confidentiality which the privilege serves to protect.*

31. In *Goldberg v Ng* (1994) 33 NSWLR 639 (at 651-653), Kirby P (as his Honour then was) examined a series of United Kingdom decisions concerning disclosure of privileged communications to a third party for a particular limited purpose (*British Coal v Dennis Rye*; *Goldman v Hesper* [1998] 1 WLR 1238; *Downey v Murray* [1988] NI 600), and found as follows:

*...it is possible for the holder of legal professional privilege to disclose relevant privileged material to a third party for a limited and specific purpose in a specific context, and that limited waiver of the privilege will not prevent the holder of the privilege from maintaining that privilege as against the opposing litigant. It is also clear that the absence of an*

*express reservation of confidentiality and/or privilege is not fatal to the operation of limited waiver.*

32. In *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* [1999] FCA 1061 (4 August 1999), Sackville J (at paragraph 42), in considering the approach taken by the High Court in *Goldberg v Ng* (1995) 185 CLR 83 (on appeal from the New South Wales Court of Appeal), reasoned as follows:

*It seems to follow from Goldberg v Ng that disclosure of a privileged communication for a limited purpose, if subject to a confidentiality requirement, may well not amount to an express or intentional waiver of legal professional privilege. In short, as Toohey J said (at 109), such a limited, confidential disclosure may be an exception to express general waiver.*

33. These cases recognise that disclosure of a privileged communication for a limited purpose in a specific context, may not amount to waiver of legal professional privilege. Further, as Kirby P acknowledged in *Goldberg v Ng*, the absence of an express reservation of confidentiality when disclosing a privileged communication is not necessarily fatal to the maintenance of privilege.

#### ***Did the Council waive privilege in Document 2?***

34. As set out in *Mann v Carnell*, in determining implied waiver of legal professional privilege, the question is whether disclosure is inconsistent with the confidentiality which the privilege serves to protect. The answer will depend upon the circumstances of each particular case (see *Secretary to the Department of Justice v Osland* [2007] VSCA 96 at paragraph 42 per Maxwell P).
35. *Carnell* demonstrates that the inconsistency test contemplates that a privilege holder may disclose the content of legal advice to a third party for a particular purpose, without being held to have waived privilege (see also *Osland* at paragraph 51 per Maxwell P). Accordingly, in determining inconsistency, I consider the following to be relevant considerations:
- whether disclosure was made on a confidential basis
  - the purpose for which the privilege holder made the disclosure.

I will now consider these two elements as they apply to the disclosure of Document 2.

#### ***Confidentiality***

36. Document 2 was provided to the Director-General by Mr Borzi under cover of an email dated 19 October 2006 (Document 14). In that email, Mr Borzi stated that *'The attached [advice] is for the Minister and yourself'*.
37. In its submissions dated 27 September 2007, the Department submitted as follows:
- ...the legal advice was provided to the Department and the Minister for consideration without placing limitations on the use of the legal advice or providing the advice on a confidential basis. There is no evidence to suggest otherwise.*
38. In its letter dated 1 February 2007, provided to the Department pursuant to section 51 of the FOI Act, the Council submitted as follows (albeit in support of an exemption claim under section 46 of the FOI Act which has since been abandoned):

*It is important to the function of Government that Local Governments should be able to communicate on a confidential basis about matters of public interest with Ministers without fear that their correspondence would be made susceptible to a freedom of information application. It might be thought that Local Government would lose confidence in their capacity to communicate confidentially with the relevant Minister if every communication were likely to end up in the public domain.*

39. I acknowledge that Mr Borzi made no express reservation as to confidentiality or to the privileged nature of Document 2 in his email to the Director-General. However, I consider that Mr Borzi in sending Document 2 for the attention of the two most senior officers of the Department, intended his communication to be confidential and for the specific and limited use of the Minister and Director-General only. The submissions of the Council dated 1 February 2007 set out in paragraph 38 of this decision support this view.
40. Based on the evidence before me in this review, I am satisfied that:
- Mr Borzi provided Document 2 to the Director-General on a confidential basis
  - disclosure of Document 2 to the Director-General was not inconsistent with the maintenance of confidentiality in the legal advice
  - the absence of an express reservation of confidentiality in Document 14 was not fatal to maintenance of legal professional privilege in Document 2 (see paragraph 31 of this decision).

#### *Purpose*

41. The purpose of providing Document 2 to the Director-General and the Minister was to seek the Minister's approval of the TLPI. The *Integrated Planning Act 1997* (Qld), Schedule 2, Part 1, section 2, provides that the Minister's approval is required before a local government can adopt a TLPI. That provision requires a local government to provide the Minister with a copy of the proposed TLPI and a statement of reasons supporting its adoption.
42. In its submissions dated 27 September 2007, the Department submitted as follows:

*The Council provided the Department with the legal advice that it had received, for the sole purpose of supporting their request to the Minister to approve the temporary local planning instrument (TLPI). The relevant legislation does not require that the Minister see a copy of the legal advice when considering whether to approve a TLPI.*

*In providing this advice to the Minister the Council was putting itself in a better position to gain the Minister's approval. It would be unfair for Council to seek to gain an advantage by disclosing the legal advice to the Minister for the purpose that the Minister would take this legal advice into account in deciding whether to approve the TLPI, and not be prepared to disclose this advice to a person who is affected by that decision and that may challenge that decision by instituting legal proceedings.*

43. The 'legal proceedings' to which the Department has referred in its submissions are Planning and Environment Court proceedings commenced by Thiess Services. The Department has informed this Office that Thiess Services is seeking a declaration from the Planning and Environment Court that the Minister's exercise of power in approving the TLPI was invalid. The Department and the Council are parties to those proceedings.
44. I acknowledge that the argument raised by the Department with respect to a party seeking to gain an advantage in litigation by way of limited disclosure can be relevant

to the question of waiver in certain circumstances. However, this is not a case where the disclosure was made to enable the person entitled to privilege to gain an advantage over the opposing party to litigation. Significantly, at the time that Document 2 was provided to the Director-General and the Minister, the Planning and Environment Court proceedings had not commenced. Moreover, the purpose of the communication was to seek the Minister's approval of the TLPI, not to gain a forensic advantage in any related court proceedings.

45. Based on the information before me in this review, I am satisfied that:
- the disclosure of Document 2 was for the limited and specific purpose of obtaining the Minister's approval to adopt the TLPI
  - Document 2 was not provided to the Director-General for him to deal with as he saw fit, but rather, for the specific purpose of obtaining the Minister's approval of the TLPI
  - this was not a case of a party to litigation '*...deploying a partial disclosure for forensic advantage, while seeking unfairly to deny the other party an opportunity to see the full text of the privileged communication*' (see Maxwell P in *Osland* at 67).
46. The circumstances surrounding disclosure of Document 2 to the Director-General by Mr Borzi share similarities with those in *Mann v Carnell*. To describe Mr Borzi's provision of Document 2 to the Director-General as disclosure to a third party or a 'stranger' would, I consider, over-simplify the circumstances and ignore the government setting in and the purpose for which disclosure occurred (see paragraphs 33 and 148 of *Mann v Carnell*).
47. Based on my analysis of Document 2, the relevant case law and circumstances surrounding the disclosure, I am satisfied that:
- legal professional privilege in Document 2 was not waived by the Council when it provided this document to the Director-General
  - Document 2 qualifies for exemption under section 43(1) of the FOI Act, in its entirety
  - Thiess Services is not entitled to access any part of Document 2 under the FOI Act.

## Decision

48. I set aside the decision under review (being the decision made by Ms Smith of behalf of the Department on 16 April 2007). In substitution for it, I find that Document 2, in its entirety, qualifies for exemption from disclosure under section 43(1) of the FOI Act.
49. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

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**F Henry**  
**Assistant Commissioner**

**Date: 28 September 2007**