OFFICE OF THE INFORMATION COMMISSIONER (QLD)	**)** **)**	L 21 of 1993 (Decision No. 94013)

Participants:

R J & D E NORMAN
Applicants

- and -

MULGRAVE SHIRE COUNCIL
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents claimed to be exempt under s.43(1) of the *Freedom of Information Act 1992 Qld* - common law principles pertaining to legal professional privilege - whether legal professional privilege attaches to draft pleading and draft affidavits prepared for anticipated litigation - whether privilege attaching to documents created in contemplation of litigation continues notwithstanding the conclusion of that litigation.

FREEDOM OF INFORMATION - interpretation of s.28(1) of the *Freedom of Information Act 1992 Qld.*

Acts Interpretation Act 1954 Qld s.32CA
Freedom of Information Act 1992 Qld s.21, s.28(1), s.43(1), s.52, s.72, s.83(3), s.88(2)
Freedom of Information Act 1982 Cth s.42(1)

Baker v Campbell (1983) 153 CLR 52
Calcraft v Guest [1898] 1 QB 759
Dalleagles Pty Ltd v Australian Securities Commission (1991) 4 WAR 325, (1991) 6 ACSR 498
Director of Investigation and Research and Shell Canada Ltd, Re (1975) 55 DLR (3d) 713
Giannarelli and Ors v Wraith & Ors (1991) 98 ALR 1
Hobbs v Hobbs and Cousens [1959] 3 All ER 827
Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd [1985] 3 NSWLR 44
Packer v DCT (Qld) (1985) 55 ALR 242
Smith and Administrative Services Department, Re (Information Commissioner Qld, Decision No. 93003, 30 June 1993, unreported)
Southern Equities Corporation Ltd v West Australian Government Holdings Ltd (Sup Ct of WA, Full Court, No. 1347 of 1990, 16 June 1993, unreported)
Trade Practices Commission v Sterling (1979) 36 FLR 244
Waterford v Department of the Treasury (1985) 5 FCR 76
Webb v Commissioner of Taxation (1993) 93 ATC 4,679

DECISION

The documents in issue are exempt documents under s.43(1) of the *Freedom of Information Act 1992 Qld*, and accordingly the decision under review is affirmed.

Date of Decision: 28 June 1994

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicants seek review of the respondent's decision refusing them access to 17 pages of material which is claimed by the respondent to be exempt matter under s.43(1) of the *Freedom of Information Act 1992 Qld* (referred to in these reasons for decision as the FOI Act or the Queensland FOI Act).

2. On 3 August 1993, Mr & Mrs Norman made application to the Mulgrave Shire Council (the Council) under the FOI Act for access to:

> *... any files or records your Council possesses concerning any complaints made to your Council about the operations of our helicopter from our property situated at* [the applicants' address in] *Trinity Beach.*

3. By letter dated 17 September 1993, Mr Bryan A Ottone, FOI Decision-Maker for the Council, advised Mr & Mrs Norman of his decision on their FOI access application. Specifically, Mr Ottone advised that, of the 44 pages held by the Council which fell within the terms of the FOI access request, he had decided to grant full access to 27 pages (being pages numbered 18-44 inclusive). Access to the remaining pages (numbered 1-17 inclusive) was refused under s.43(1) of the FOI Act *"for the reasons of legal professional privilege on the grounds that documents were brought into existence in contemplation of anticipated litigation."*

4. On 12 October 1993, Mr Norman wrote (on behalf of himself and his wife) to the Shire Clerk of the Council, exercising the right conferred by s.52 of the FOI Act to seek an 'internal review' of Mr Ottone's decision by a more senior officer of the Council. In his 12 October 1993 letter, Mr Norman indicated that the basis for requesting a review of Mr Ottone's decision was that *"the information which has been withheld was stated to be 'in contemplation of anticipated litigation'. This litigation has now taken place and the appeal period has elapsed. There is, I believe, no further reason to keep this information from ourselves".*

5. The internal review of Mr Ottone's 17 September 1993 decision was undertaken by Mr N Mills, Shire Clerk and FOI Principal Officer/Review Officer for the Council. By letter dated 25 October 1993, Mr Mills wrote to Mr Norman affirming Mr Ottone's initial decision to refuse access to pages 1-17 on the basis that they were exempt documents under s.43(1) of the FOI Act. Mr Mills said in that letter:

Notwithstanding as mentioned by you that litigation has taken place, these documents are subject to legal professional privilege and are therefore exempt documents.

6. On 13 November 1993, Mr Norman made application to the Information Commissioner for review of Mr Mills' decision, in accordance with Part 5 of the FOI Act. I have assumed that Mr Norman made application on behalf of both himself and his wife.

The External Review Process

7. Copies of the documents in issue were obtained and examined. On the basis of that examination, I wrote to Mr Norman on 16 December 1993, setting out my preliminary view that the documents in issue did fall within the scope of the s.43(1) exemption, and setting out reasons in support of that preliminary view. In that letter, I asked that Mr Norman advise whether the applicants accepted or contested my preliminary view, and I extended to Mr Norman the opportunity to provide me with a written submission addressing the issues discussed in my letter to him.

8. No response was received from Mr Norman to that letter, nor to a follow-up letter dated 25 January 1994 which was forwarded to Mr Norman by facsimile transmission and by post on that date.

9. The provisions of the FOI Act concerning the conduct of an external review, as contained in Part 5, Division 4 of the FOI Act, include the following:

> ***72.(1)*** *On a review under this Part -*
>
> *(a) the procedure to be followed is, subject to this Act, within the discretion of the Commissioner; and*
>
> *(b) proceedings are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Commissioner permits; and*
>
> *(c) the Commissioner is not bound by the rules of evidence and may inform himself or herself on any matter in any way the Commissioner considers appropriate.*
>
> ***(2)*** *The Commissioner may, during a review, give directions as to the procedure to be followed on the review.*

and

> ***83.*** *...*
>
> ***(3)*** *In conducting a review, the Commissioner must -*
>
> *(a) adopt procedures that are fair, having regard to the obligations of the Commissioner under this Act; and*

> *(b) ensure that each participant has an opportunity to present the participant's views to the Commissioner;*
>
> *but subject to paragraph (a), it is not necessary for a participant to be given an opportunity to appear before the Commissioner.*

10. I am satisfied that although no submission has been received from Mr Norman in connection with the issues raised on this external review, he has been provided with a fair opportunity to present the applicants' views to me (even though he has not taken advantage of that opportunity), and that the requirements of s.83(3) of the FOI Act have been met in the circumstances of this case.

The Applicable Law

11. Section 21 of the FOI Act confers a legally enforceable right of access to documents of an agency, and "agency" is defined in the FOI Act to include local authorities such as the Mulgrave Shire Council. However, the general right of access conferred by s.21 is expressed to be "subject to this Act", and a number of limitations on the general right of access are to be found in the FOI Act itself, chief of which is s.28(1) of the FOI Act which provides as follows:

> ***28.(1)*** *An agency or Minister may refuse access to exempt matter or an exempt document.*

12. The categories of exempt matter, to which an agency or Minister has the discretion to refuse access, are set out in sections 36 to 50 (inclusive) of the FOI Act. Among them is s.43(1) which 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.*

13. The use of the word "may" in s.28(1) of the FOI Act means that the power to refuse access to exempt matter or an exempt document may be exercised or not exercised at the discretion of the relevant agency or Minister (see s.32CA of the *Acts Interpretation Act 1954 Qld*), i.e. an agency or Minister may choose to allow access to documents, even though they may technically be exempt documents under one or more of the exemptions set out in sections 36 to 50 of the FOI Act.

14. I note by way of example the policy which the Commonwealth government has adopted in this regard, as recently restated to Commonwealth FOI administrators in FOI Memorandum No. 19, issued by the Commonwealth Attorney-General's Department on 17 December 1993. Paragraph 2.6 of FOI Memorandum No. 19 says:

> *2.6 In June 1985 the Government issued directions (see FOI Memo No. 77, para.6) that agencies should not refuse access to non-contentious material only because there are technical grounds of exemption available under the Act. Proper compliance with the spirit of the FOI Act requires that an agency first determine whether release of a document would have harmful consequences before considering whether a claim for exemption might be made out. For example, the fact that an exemption may be claimed under section 42 (legal professional privilege) should only lead to a claim for exemption where disclosure will cause real harm (see Appendix 2). ...*

15. Appendix 2 to FOI Memorandum No. 19 is a copy of a minute dated 2 March 1986 from the Secretary of the Commonwealth Attorney-General's Department to FOI Managers, which relevantly states:

> ...
>
> *2. Section 42 of the FOI Act provides that documents are exempt from disclosure if they would be privileged from production on the ground of legal professional privilege. Section 14 provides that nothing in the Act is intended to prevent or discourage agencies from giving access to exempt documents where they can properly do so. Federal Cabinet decided in June 1985 that agencies should not claim exemption for documents which have no particular sensitivity.*
>
> *3. A claim for legal professional privilege is one that must be made by the client. An agency should not be advised to claim the exemption simply because it is available. Where a client agency wishes to assert a claim of legal professional privilege in respect of a document which has no apparent sensitivity, the attention of the client agency should be drawn to the Cabinet decision mentioned above. The client should be advised that legal professional privilege should be waived unless some real harm would result from release of the documents.*

16. This approach is clearly in accordance with the general objects of FOI legislation and I commend it for consideration by agencies subject to the Queensland FOI Act.

17. When reviewing a decision under Part 5 of the FOI Act, however, the Information Commissioner is specifically deprived of the discretionary power possessed by Ministers or agencies to permit access to exempt matter. Section 88(2) of the FOI Act provides:

> ***88.*** *...*
>
> ***(2)*** *If it is established that a document is an exempt document, the Commissioner does not have power to direct that access to the document is to be granted.*

18. Accordingly, the question for my determination in this case is whether the documents for which the Council has claimed exemption under s.43(1) of the FOI Act properly fall within the scope of that exemption. If my determination is that the documents in issue do fall within the scope of the s.43(1) exemption, then as indicated above, I do not have the power to order the release of those documents to the applicants.

Legal Professional Privilege

19. The test to be applied in determining whether or not the exemption contained in s.43(1) of the FOI Act is made out in a particular case was discussed in my decision in *Re Smith and Administrative Services Department* (Information Commissioner Qld, Decision No. 93003, 30 June 1993, unreported). In particular, at paragraph 82 of *Re Smith*, I said:

> *The nature and scope of legal professional privilege at common law has been the subject of consideration by the High Court of Australia in a number of recent cases. A concise summary of the general principles which can be extracted from those High Court judgments is contained in the decision of Mr K Howie, Member of the Victorian Administrative Appeals Tribunal, in* Re Clarkson and Attorney-General's Department, *(1990) 4 VAR 197, at p. 199:*

"The nature of legal professional privilege has been closely examined by the High Court in a number of decisions, in particular *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.

From these decisions, the following principles emerge:

(1) To determine whether a document attracts legal professional privilege consideration must be given to the circumstances of its creation. It is necessary to look at the reason why it was brought into existence. The purpose why it was brought into existence is a question of fact.

(2) To attract legal professional privilege the document must be brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings. Submission to legal advisers for advice means professional legal advice. It includes the seeking or giving of advice. Use in legal proceedings includes anticipated or pending litigation.

(3) The reason for legal professional privilege is that it promotes the public interest. It assists and enhances the administration of justice by facilitating the representation of clients by legal advisers. There are eloquent statements of the importance of this public interest in each of the cases referred to above.

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

(5) If a document contains material that does not fulfil the required test, that does not necessarily deny the document the protection of the privilege. What matters is the purpose for which the document was brought into existence. If it was for the required purpose, it is not to the point that the document may contain advice which relates to matters of policy as well as law. However, an analysis of the document may assist in determining its moving purpose.

(6) A client may waive legal professional privilege: see in particular the *Maurice* case.

(7) Some vigilance is necessary to ensure that legal professional privilege is not successfully invoked to protect from production documents that do not properly fall within its ambit. Otherwise the important public purposes it is intended to serve will be undermined.

> (8) Legal professional privilege does not attach to documents brought into existence for the purpose of guiding or helping in the commission of a crime or fraud, or for the furtherance of an illegal purpose, including an abuse of statutory power, or for the purpose of frustrating the process of the law itself: see the *Kearney* case."

20. I note that the High Court cases referred to in this passage, while being authoritative as to those aspects of legal professional privilege which were in issue on the facts of each case, did not purport to exhaustively state all aspects of legal professional privilege which have been accepted by Australian courts; see, for example, *Trade Practices Commission v Sterling* (1979) 36 FLR 244, *Packer v DCT (Qld)* (1985) 55 ALR 242, *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* [1985] 3 NSWLR 44, *Dalleagles Pty Ltd v Australian Securities Commission* (1991) 6 ACSR 498, *Southern Equities Corporation Ltd v West Australian Government Holdings Ltd* (Sup Ct of WA, Full Court (Malcolm CJ, Seaman and White JJ), No. 1347 of 1990, 16 June 1993, unreported. Note: an appeal from this decision was argued in the High Court in October 1993 and the High Court's decision is reserved).

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

21. As indicated previously, the basis of Mr Norman's assertion that s.43(1) is not applicable to the documents in issue is that while the Council contended that the documents in issue had been created in anticipation of litigation, the litigation has now taken place, and the appeal period has elapsed. In Mr Norman's view, there is therefore no further reason for the Council to refuse to grant access to the documents in issue.

22. The documents in issue in the present review comprise the following:

(a) a two-page letter dated 20 March 1991 from McDonnells, Solicitors, to the Shire Clerk, Mulgrave Shire Council, providing legal advice and reporting on action taken by the solicitors in response to instructions from the Shire Clerk concerning anticipated litigation; and

(b) three attachments to that letter, comprising a draft pleading and two draft affidavits prepared by McDonnells, Solicitors, for use by the Council in anticipated litigation against Mr Norman in connection with use of a helicopter at the applicants' Trinity Beach property.

23. Based on my examination of the documents in issue, I am satisfied that they fall squarely within the scope of the common law principles of legal professional privilege referred to in point (2) of the passage quoted at paragraph 19 above. In respect of the draft pleading referred to in (b), I note that it falls within the principles discussed by Anderson J of the Supreme Court of Western Australia in *Dalleagles Pty Ltd v Australian Securities Commission & Ors* (1991) 4 WAR 325 at p.331-4:

> [In Attorney-General (NT) v Maurice (1986) 161 CLR 475] *Dawson J expressly referred to the privilege attaching to draft documents. He said at 496:*
>
> > Before it emerges in its final form, successive drafts of a claim book may be privileged but this is not because of any privilege attaching to the final product. Draft pleadings in an action may be privileged, but I have never heard it suggested that a statement of claim or a defence or a reply is privileged so that the privilege is waived when it is filed or delivered to the other side. The reason why the draft may be privileged before the document is completed was early explained in

> *Walsham v Stainton* [1863] 2 H & M 1 at 4, 'upon the basis that, although after a pleading has been filed it becomes publici juris, the drafts might disclose the precise character of confidential communications with the solicitor, by showing the alterations made from time to time.'
>
> In the same way, a letter to the other side in litigation which is drafted in a solicitor's office may be privileged before it is sent because it may reveal confidential communications between the solicitor and his client. Once it is sent, however, it ceases to be confidential and there is no privilege in it, not because privilege in the document is waived, but because no privilege attaches to it.
>
> When the claim book in this case reached final form or, at all events, when it was put to the use for which it was intended, it was not a confidential communication and not a privileged document. Legal professional privilege exists to secure confidentiality in communications between a legal adviser and his client but it can have no application in relation to a document, the purpose of which is to communicate information to others.
>
> ...

Mostyn v West Mostyn Coal and Iron Co Ltd *(1876) 34 LT 531 is long standing authority for the rule that summaries of agreements and draft agreements prepared by legal advisers with hand written observations and cancellations on them are prima facie privileged, as well as instructions given to draw an agreement.*

I have already adverted to the recognition by Dawson J in A-G (NT) v Maurice *of the privileged status of draft pleadings and draft correspondence. See also the apparent acceptance of that rule by Gibbs CJ in the same case at 480 where he also refers to the privileged status of "instruction".*

...

What is protected, of course, is that which is communicated between solicitor and client. It is the communication that is privileged. But this is not to say that material that is not literally a communication or manifestly the record of a communication is never protected. There are many instances of protection being extended to such material. The examples of the draft letter that never leaves the solicitor's office, the draft agreement and the draft statements of claim have already been referred to. The reason why such material is protected is often stated to be that disclosure of it will, or will tend to, reveal the privileged communication. A-G (NT) v Maurice *per Dawson J at 496. Thus a note made by a solicitor of a conference with his client will be privileged in so far as it is a record of the communication from the client (that communication being privileged) but also in so far as it might contain notes of the solicitor's own thoughts in regard to the matters communicated to him. Protection is afforded in the latter case on the ground that disclosure of that material might tend to reveal what had been communicated to the solicitor. There is much in the cases to support the view that this is the true basis upon which draft agreements, draft letters, draft pleadings and the like have long been accepted as privileged; that it is not so much because they are themselves "advice" or "communication" but because they will, if disclosed, reveal, or tend to reveal, the content of privileged communications. Material created by the solicitor in fulfilment*

> *of his engagement "is the result of the solicitor's mind working upon and acting as professional adviser with reference to" material communicated to him confidentially in his professional capacity (*Kennedy v Lyell *[1883] 23 Ch D 387 at 407) and, as such, will by its very nature tend to reveal the content of the communication in response to which it had been prepared.*
>
> *Of course there are limits and these have often been stated. The material must have been created solely for the purpose of fulfilling the engagement. The material must be confidential. No protection can extend to agreements in their final form intended to constitute the actual transaction between the parties or to records made for the purpose of evidencing an actual transaction, or to letters sent or to forms lodged at public offices or to pleadings filed in courts. This is because legal professional privilege exists to secure confidentiality and such material is no longer confidential.*

24. The draft affidavits referred to in point (b) of paragraph 22, are subject to legal professional privilege in accordance with the principles discussed by Malcolm CJ, giving judgment as a member of a Full Court of the Supreme Court of Western Australia, in the *Southern Equities* case (cited in paragraph 20 above):

> *Evidence obtained for the purposes of litigation, whether in the form of an unsigned proof of evidence, a signed proof of evidence, or a sworn affidavit, is privileged from disclosure or inspection:* Anderson v Bank of British Colombia *(1876) 2 Ch D 644 at 658 per Mellish LJ;* Kennedy v Lyell *(1883) 23 Ch D 387 per Cotton LJ at 404;* North Australian Territory Company v Goldsborough Mort and Co *(1893) 2 Ch 381 at 387 per Maud Esher MR; In* Re HW Strachan *(1895) 1 Ch 439 at 445 per Lindley LJ; and* Handley v Baddock *(1987) WAR 98 per Seaman J at 100.*
>
> *In my opinion, although Stephen, Mason and Murphy JJ said in their joint judgment in* Grant v Downs *(1976) 135 CLR 674 at 685 that legal professional privilege "should be confined within strict limits", nothing was said in that case which would limit the operation of the privilege which applies to evidence obtained and documents brought into existence for the sole purpose of litigation. There is likewise nothing to limit the privilege in any relevant way in any of the subsequent cases which were cited to us, including* O'Reilly v Commissioners of the State Bank of Victoria *(1983) 153 CLR 1;* Baker v Campbell *(1983) 153 CLR 52;* Dingle v Commonwealth Development Bank of Australia *(1989) 23 FCR 63;* Attorney General for the Northern Territory v Maurice *(1986) 161 CLR 475; and* Dalleagles Pty Ltd v Australian Securities Commission *(1991) 4 WAR 325. In* Attorney General for the Northern Territory v Maurice, *above at 490 Deane J said that it was "a substantive general principle of the common law" that, subject to defined qualifications and exceptions, a person is entitled to preserve the confidentiality of materials brought into existence "for the sole purpose of preparing for existing or contemplated judicial or quasi judicial proceedings".*

25. I am satisfied from the face of the documents themselves, and the circumstances of their creation, that there can be no suggestion that the 'furtherance of crime or fraud, or abuse of statutory power' exceptions to legal professional privilege, as described above in paragraph 19, apply to these documents. Nor is there any indication that the client (the Council) has taken any step which could be characterised as constituting a waiver of the privilege that it is entitled to assert in the documents.

Whether privilege attaching to documents created in contemplation of litigation continues notwithstanding the conclusion of that litigation

26. Being satisfied that the documents in issue attract legal professional privilege at common law, the question which remains for my determination is whether Mr Norman is correct in asserting that there is a temporal limit to the privilege; i.e. that the privilege which attaches to documents created

in contemplation of anticipated litigation ceases to apply once that litigation has been finalised and any applicable appeal period has expired. There is clear authority against the proposition which Mr Norman has raised, and I consider that the proposition must be rejected, having regard to the authorities discussed below.

27. Although the issue did not directly arise in *Baker v Campbell* (cited in paragraph 20 above), two judges of the High Court of Australia referred to it incidentally in their analyses of the rationale for legal professional privilege. In his reasons for decision, Wilson J (153 CLR at p.96) expressed his specific agreement with the following statement of Thurlow J, of the Federal Court of Appeal (Canada) in the case of *Re Director of Investigation and Research and Shell Canada Ltd* (1975) 55 DLR (3d) 713 at p.723:

> *... Secondly, it appears to me that the confidential character of such communications* [i.e. communications between solicitor and client], *whether oral or in writing, comes into existence at the time when the communications are made. As the right to protection for the confidence, commonly referred to as legal professional privilege, is not dependent on their* [sic] *being litigation in progress or even in contemplation at the time the communications take place, it seems to me that the right to have the communications protected must also arise at that time and be capable of being asserted on any later occasion when the confidence may be in jeopardy at the hands of anyone purporting to exercise the authority of the law*.

Deane J said (153 CLR at p.114):

> *... it has been generally accepted that the explanation of the privilege is to be found in an underlying principle of the common law that, subject to the above-mentioned qualifications, a person should be entitled to seek and obtain legal advice in the conduct of his affairs and legal assistance in and for the purposes of the conduct of actual or anticipated litigation without the apprehension of being thereby prejudiced: see* Wigmore, *s 2291. The fact that the privilege is not restricted to the particular legal proceedings for the purposes of which the relevant communication may have been made or, for that matter, to proceedings in which the party entitled to the privilege is a party plainly indicates that the underlying principle is concerned with the general preservation of confidentiality.* (my emphasis)

28. In addition, the issue of whether there are temporal limits to legal professional privilege has been directly addressed in a number of cases. A proposition similar to that raised by Mr Norman was argued before Cooper J of the Federal Court of Australia in *Webb v Commissioner of Taxation* (1993) 93 ATC 4,679. Mr Webb had applied for judicial review of the respondent's decision refusing to grant him remission of additional income tax owing for late payment. In response to an interlocutory application by Mr Webb to inspect the documents contained in his taxation debt file, the Court had ordered that inspection be given subject to the respondent's right to withhold documents in respect of which legal professional privilege was claimed.

29. The respondent claimed legal professional privilege for documents relating to earlier debt recovery proceedings it had brought against Mr Webb, which had been concluded by a deed of settlement, and for further documents pertaining to anticipated litigation for the purpose of enforcing Mr Webb's obligations under the deed of settlement, and related matters. In support of his application to inspect the documents for which privilege had been claimed, Mr Webb argued, *inter alia*, that legal professional privilege no longer attached to the documents relating to the earlier recovery proceedings, as those proceedings had been settled.

30. Cooper J rejected Mr Webb's argument, stating (at p.4,684):

> *In my opinion the documents which came into existence solely for the purpose of the litigation in the Supreme Court and for the purpose of anticipated litigation to enforce performance of the deed of compromise and further to recover the tax assessed together with additional tax for late payment for the 1989 financial year, satisfy the tests laid down in* Grant v Downs *at 682-683;* National Employers' Mutual General Insurance Association Ltd v Waind & Anor *(1979) 141 CLR 648 and* Waterford v The Commonwealth *to support a claim to immunity for disclosure on the basis of legal professional privilege.*
>
> *That privilege comes into existence at the time the documents come into existence. The privilege is not limited to that litigation but exists generally and in respect of later litigation whether or not it is associated with the earlier litigation.*

31. Cooper J cited two other cases as authority for the proposition that legal professional privilege continues despite the termination of the litigation in connection with which the privileged documents had been brought into existence. The first was an 1898 decision of the English Court of Appeal, *Calcraft v Guest* [1898] 1 QB 759. In that case, which involved a dispute over property rights (specifically fishing rights), the defendant sought production of documents which had been created in the course of legal proceedings held more than one hundred years previously (in 1787) involving the same issues and the predecessors in title of the parties to the 1898 litigation. In support of his claim for production, the defendant argued that any privilege which had attached to the documents in connection with the 1787 proceedings had expired with the conclusion of those prior proceedings. The plaintiff asserted that privilege continued, notwithstanding the passage of some 110 years since the earlier litigation. The Court rejected the defendant's argument, finding that privilege continued to attach to the documents in issue. At pages 761-2 of his judgment, Lindley MR stated:

> *I take it that, as a general rule, one may say once privileged always privileged. I do not mean to say that privilege cannot be waived, but that the mere fact that documents used in a previous litigation are held and have not been destroyed does not amount to a waiver of the privilege.*

32. The second case cited by Cooper J in *Webb's case* was the decision of a Full Court of the Federal Court of Australia in *Waterford v Department of the Treasury* (1985) 5 FCR 76. *Waterford's case* arose out of an application which Mr Waterford had lodged under the *Freedom of Information Act 1982 Cth* (the Commonwealth FOI Act) for access to certain documents held by the Department of Treasury. Access to the requested documents was denied by the Department, and Mr Waterford applied to the Commonwealth Administrative Appeals Tribunal for a review of the Department's decision. Prior to the determination of that review application, Mr Waterford lodged a fresh FOI access application with the Department in which he sought access to, *inter alia*, any documents which had been created within the Department in the course of its determination of his initial FOI access application.

33. The Department refused to grant Mr Waterford access to some of the documents sought in the second FOI access application. One of the grounds relied upon by the Department was that the documents in question would be privileged from production in legal proceedings on the ground of legal professional privilege, and therefore were exempt documents under s.42(1) of the Commonwealth FOI Act (which corresponds to s.43(1) of the Queensland FOI Act). Following an unsuccessful application to the Commonwealth AAT for a review of the Department's decision, Mr Waterford lodged an appeal with the Federal Court of Australia.

34. At page 82 of the decision, a Full Court of the Federal Court (comprised of Fisher, Gallop and Neaves JJ) set out the basis of the assertion made by the appellant, and the Court's rejection of that argument, as follows:

> *It was also submitted that ... the proceedings ... had concluded and the time for appeal ... had expired without an appeal being instituted. In those circumstances it was asserted that, even if the documents had previously been the subject of legal professional privilege, that privilege ceased with the termination of the proceedings. It was said that this limitation applied only to a government or a governmental agency and had no application where the claim of privilege was made by a citizen.*
>
> *No authority was cited in support of this submission. We think it is plainly incorrect.*

35. A similar argument to that advanced by Mr Norman in the present case was also made in the English case of *Hobbs v Hobbs and Cousens* [1959] 3 All ER 827, a decision of Melford Stevenson J in the Probate, Divorce and Admiralty Division. Following divorce proceedings, in which the co-respondent was ordered to pay the costs of the successful party (the husband), the co-respondent sought to challenge certain items listed in the husband's bill of costs. The co-respondent applied for access to the brief and its contents, which had been delivered to the husband's counsel. The husband opposed the application on the grounds that the brief was privileged.

36. In his decision, Melford Stevenson J stressed the importance of privilege, and held that the co-respondent was not entitled to inspect the document. Further, he went on to say (at p.829) that the brief was a privileged document which remained privileged notwithstanding that the litigation was concluded:

> *The co-respondent has also made the point that this litigation is now concluded, the decree has been made absolute, and he therefore suggests that no harm will be done now by permitting him to see this document. There is, however, an abundance of authority in support of the proposition that once legal professional privilege attaches to a document, of which a brief to counsel such as this is only one example, that privilege attaches for all time and in all circumstances. There are a number of cases which demonstrate that, in particular the judgment of Sir Alexander Cockburn, CJ in* Bullock v Corry [(1878) 3 QB 376] *and also the judgment of Sir William Brett, MR in* Pearce v Foster [(1885) 15 QB 114].

37. Finally, I note that the penultimate sentence of this passage was quoted with implicit approval by McHugh J of the High Court of Australia in *Giannarelli and Ors v Wraith & Ors* (1991) 98 ALR 1 at p.7.

Conclusion

38. Where it is clear from the nature and purpose of a document, and the circumstances attending its creation, that the document is subject to legal professional privilege, the privilege endures (notwithstanding for instance, the conclusion of the litigation for the purpose of which the privileged document was created) unless the privilege is waived by the client entitled to assert the privilege, or any of the recognised exceptions to the privilege apply.

39. Consistently with the objects of the FOI Act, there may be sound reasons why a government agency, in appropriate circumstances, should choose not to exercise its discretion under s.28(1) of the FOI Act to claim exemption under s.43(1) for a document that is technically subject to legal professional privilege (see paragraphs 13-16 above). For instance, the fact that relevant litigation has concluded may mean that the documents are no longer sensitive and the agency no longer has any interest in maintaining the confidentiality of the privileged documents.

40. However, as explained at paragraphs 17-18 above, where an agency exercises its discretion to claim exemption under s.43(1) of the Queensland FOI Act, my only task in a formal determination of a review under Part 5 of the Queensland FOI Act, is to determine whether the documents in issue do in fact satisfy the legal test for exemption under s.43(1).

41. For the reasons given earlier, I am satisfied that the documents in issue became subject to legal professional privilege at the time of their creation, and that legal professional privilege continues to apply to those documents. I am satisfied that the documents in issue are exempt under s.43(1) of the FOI Act, and I affirm the decision under review.

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F N ALBIETZ
INFORMATION COMMISSIONER