OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Application 2006/F0164

Participants:

Alexandria Holdings Pty Ltd
Applicant

Department of Local Government, Planning, Sport and Recreation
Respondent

DECISION AND REASONS FOR DECISION

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REASONS FOR DECISION

Background

1. The applicant, Alexandria Holdings Pty Ltd ACN 079 552 828, seeks review of the decision of the Department of Local Government, Planning, Sport and Recreation (the Department) to refuse it access under the *Freedom of Information Act 1992* (Qld) (the FOI Act) to legal advice provided to the Department by Crown Law, regarding the call in and subsequent refusal by the Minister for the Environment, Local Government, Planning and Women (the Minister) of a particular development application.

2. The applicant is the registered proprietor of land which adjoins Queen St, Ann St and Clark Lane in Brisbane's central business district. On 27 August 2002 Emerald Developments (Aust) Pty Ltd (Emerald Developments) made application under the *Integrated Planning Act 1997* (IPA) for a development permit for material change of use ("for Centre Activities (Multi-Unit Dwelling, Child Care Centre, Shop, Office, Restaurant") and building work on land adjoining a "Heritage Place", to the Brisbane City Council. Emerald Developments is an operating company which shares the same sole director as the applicant. The applicant is the owner of the land in respect of which the development application was made. The application proposed the building of a 77 storey commercial and residential complex which, had it gone ahead, would have been Brisbane's tallest building.

3. The IPA allows the Minister to call in and decide development applications if the development involves a State interest. By letter dated 20 July 2004 the Minister exercised the power to call in the development application regarding the applicant's land and by letter dated 6 October 2004 refused the application. The documents in issue in this review are advices provided to the Department which relate to the exercise of the Minister's power to call-in and decide the development application.

4. By letter dated 27 September 2005, the applicant applied for, among other things, documents which were listed in a letter from the Department to the applicant's solicitors dated 1 December 2004 including 'Crown Law advice.'

5. By letter dated 30 November 2005, Ms Simpson, Acting Manager of Legal and Administrative Review Services of the Department advised the applicant that thirteen documents relevant to its request had been located and her decision was to fully release twelve documents and refuse access to one document pursuant to section 43(1) of the FOI Act.

6. The document to which access was refused was described by the department as 'Various advices from Crown Law' and in fact contained two letters of advice obtained from Crown Law, dated 9 July 2004 and 26 November 2004. The letter dated 26 November 2004 included a number of annexures.

7. The applicant sought internal review of Ms Simpson's decision by letter dated 6 February 2006. The internal review was conducted by Ms Hoekstra, General Manager, Corporate and Executive Services of the Department's Office for Women. By letter dated 17 February 2006 Ms Hoekstra advised the applicant that she had decided to partly affirm Ms Simpson's decision. Ms Hoekstra decided that the letters of advice dated 9 July 2004 and 26 November 2004 were exempt from disclosure under section 43(1) of the FOI Act but that any privilege attaching to the annexures to the letter dated 26 November 2004 had been waived and therefore the annexures were not exempt from disclosure.

8. By letter dated 31 March 2006 the applicant applied, through its then solicitors, Suthers Taylor Lawyers, to the Information Commissioner for review, under Part 5 of the FOI Act, for review of Ms Hoekstra's decision.

Steps taken in the external review process

9. Copies of the documents in issue were obtained and examined.

10. Submissions on the application of section 43(1) of the FOI Act were received from the applicant together with their letter of application for external review dated 31 March 2006.

11. The Department provided submissions on the application of section 43(1) of the FOI Act by letter dated 7 April 2006.

12. By letter dated 30 May 2006, Assistant Information Commissioner (AC) White informed the applicant of her preliminary view that the documents in issue qualified for exemption under section 43(1) of the FOI Act.

13. By facsimile dated 9 June 2006 the applicant advised that it wished to contest AC White's preliminary view and by facsimile dated 21 June 2006 requested an extension of time in which to lodge further submissions. That request was granted and by e-mail dated 5 July 2006 the applicant provided further submissions in support of its case for disclosure and noted its continued reliance upon its submissions of 31 March 2006.

14. In making my decision I have taken into account the following material:

- the documents in issue;
- the applicant's FOI access application dated 27 September 2005;
- the applicant's application for internal review dated 6 February 2006;
- the applicant's application for external review dated 31 March 2006, together with its submissions concerning the application of section 43(1) of the FOI Act;
- the Department's letter dated 7 April 2006;
- AC White's letter to the applicant dated 30 May 2006; and
- the applicant's further submissions dated 5 July 2006.

Matter in issue

15. The matter in issue in this review comprises two documents as follows:

- Crown Law advice dated 9 July 2004;
- Crown Law advice dated 26 November 2004.

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

16. Section 43(1) of the FOI Act 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.*

Requirements for exemption

17. Following the judgment of the High Court of Australia in *Esso Australia Resources Ltd v Commission of Taxation* (1999) 74 ALJR 339, the basic legal test for whether a communication attracts legal professional privilege under Australian common law can be summarised as follows:

> 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 had commenced, or were reasonably anticipated, at the time of the relevant communication.

19. There are qualifications and exceptions to this statement of the basic test, 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* (1998) 4 QAR 328 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) 188 CLR 501).

Application to the matter in issue

Confidential communication between lawyer and client

20. Legal professional privilege may apply with respect to employee legal advisors 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 (see *Waterford v Commonwealth* (1987) 163 CLR 54; *Murphy v Queensland Treasury* (1998) 4 QAR 446).

21. Based upon my examination of the matter in issue, identified at paragraph 15 above, I am satisfied that it comprises communications between lawyer and client. Each of the advices were prepared for the Department by principal lawyers of the Crown Solicitor and I am satisfied that the requisite independent professional relationship exists.

22. The applicant has argued, in its application for external review that the documents in issue were intended to form part of a judicially reviewable decision-making process in which an affected party may be able to obtain copies of documents and consequently, they are not confidential communications.

23. I do not consider that the mere possibility that the documents in issue may be disclosed in the course of judicial review proceedings is sufficient to support a conclusion that the communications were otherwise than confidential. In this context, I note that section 5.9.5 of IPA provides that the *Judicial Review Act 1991* does not apply to the making of a decision under IPA (although section 5.9.5(2) of IPA provides that an application for a statement of reasons may be made) and consequently the Minister's decision to call in the development application is not judicially reviewable.

24. Nor do I consider that the mere possibility that the documents in issue may be disclosed in the course of proceedings before the Supreme Court for declaratory relief is sufficient to support a conclusion that the communications were otherwise than confidential, as was proposed by the applicant in its submissions dated 5 July 2006.

25. Under IPA, if the Minister makes a decision to call in a development application, the Minister must prepare a report about the decision. Section 3.6.9(2) outlines various matters that must be included in the report. Under that provision, the report must include the reasons for decision, but there is no requirement for the report to include the content of documents such as legal advice which may have been relied on in making the decision. The Department argues that there is no requirement under IPA to disclose the advices and advises that it does not disclose documents referred to in decision notices except as required under section 3.6.9(2) of IPA and that documents listed as having been referred to in a decision notice are often considered confidential.

26. I am satisfied that the communications were confidential communications between lawyer and client as required by section 43(1) of the FOI Act.

Dominant purpose of seeking or giving legal advice

27. In its submission dated 5 July 2006 the applicant asserts that 'litigation privilege' did not apply to the documents in issue as they did not come into existence for use in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication. The Department, however, does not rely on this second limb of the basic test for legal professional privilege and I do not consider that the litigation privilege applies in this instance. It is not necessary to show, in order for a claim under section 43(1) of the FOI Act to succeed, that the documents in issue were brought into existence for use in legal proceedings. As set out in paragraph 17 above, the basic test for legal professional privilege is whether the documents in issue comprise confidential communications between a lawyer and client 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. It is sufficient to show that one or other of the requirements are present.

28. In its submission dated 31 March 2006 the applicant also submitted that the documents in issue are not subject to legal professional privilege as the dominant purpose of the advices was to provide factual or administrative advice to assist the Minister in the exercise of her power to call in and decide the development application.

29. It has been clear since the High Court's decision in *Waterford v Commonwealth* (1987) 163 CLR 54 that legal advice given to assist a client in making an administrative decision can qualify for legal professional privilege. In *Queensland Law Society Inc v Albeitz & Anor* (1998) 4 QAR 387 at paragraph 8 Williams J commented on the High Court's decision as follows:

> *'It is of some significance to note that the Court in* Waterford *specifically rejected an argument addressed to it my Counsel for the appellant to the effect that legal professional privilege did not extend to a communication which "relates … to … the manner in which a person should exercise a power of of an administrative nature conferred upon him by law…". (See especially judgment of Mason and Wilson JJ at 62-3).'*

30. In the present case the advices were obtained by the Department in order to advise the Minister with respect to her power to call in and decide development applications under IPA. Having considered the advices, it is clear that although the advice provided is in respect of an administrative decision making power, the nature of the advice is legal. I am satisfied that the documents in issue were communicated for the dominant purpose of giving legal advice about the proper exercise of the Minister's statutory powers under IPA to call in and decide development applications.

Waiver

31. In addition to satisfying the basic test for legal professional privilege, in order to qualify for exemption under section 43(1) of the FOI Act, the privilege must not have been waived. Legal professional privilege may be waived either:

    (a) intentionally, by the client or the client's agent disclosing a privileged communication to people outside the privileged relationship (eg. disclosure of a legal opinion with a view to influencing commercial negotiations to the advantage of the client); or
    (b) by implication of law, in circumstances where there is conduct, by or on behalf of, the client which is inconsistent with the maintenance of the privilege, whether the client intended that result or not.

32. The applicant argues that the Department has waived any privilege by listing the advices as documents on which the Minister relied in making her decisions to call in and subsequently refuse the development application. The applicant states in its submissions dated 5 July 2006 that *'On any test privilege in the documents has long since been waived'.*

33. The applicant has been provided with a number of documents surrounding the Minister's decisions to call in and refuse the development application including: the decision to call in the application; the statement of reasons for the decision to call in the application; and the statement of reasons for the Minister's decision to refuse the application. The documents in issue contain advice about the Minister's powers under IPA, as well as advice regarding what steps must be taken in order to comply with the corresponding legal requirements under IPA. I am satisfied that the substance of advices has not been disclosed in the documents to which the applicant has had access.

34. I am aware that, in the course of an application to the Supreme Court for declaratory relief against the decision of the Minister, the applicant has made application directly to Crown Law for a copy of the documents in issue. There is no evidence before me, nor has the applicant provided any, to suggest that the content of the advices has been disclosed as a result.

35. In *Re Hewitt* (at pp.338-351; paragraphs 20-61), Information Commissioner Albietz examined the concept of implied (or imputed) waiver in the context of s.43(1) of the FOI Act, and analysed relevant authorities at some length, concluding (at p.351, paragraph 61):

> *… Therefore, I have reached the view that Australian law with respect to legal professional privilege allows for the application of principles of imputed waiver of privilege in the context of an extra-curial dispute, by reference to some act or omission of the privilege holder which, though falling short of intentional waiver, is inconsistent with maintenance of the privilege, and by reference to what ordinary notions of fairness require having regard to all relevant circumstances attending the extra-curial dispute.*

36. Information Commissioner Albietz's decision in *Re Hewitt* on implied waiver of privilege was upheld by the Supreme Court of Queensland in judicial review proceedings: see *Queensland Law Society v Albietz and Hewitt* (1998) 4 QAR 387, [2000] 1 Qd R 621. Since then, the High Court of Australia has published its decision in *Mann v Carnell* (1999) 74 ALJR 378. The comments of the majority judges in *Mann v Carnell* on implied waiver of privilege (set out below from pp.384-385) allow that fairness is still a relevant consideration, but do not give it emphasis as the determinative consideration bearing on implied waiver of privilege:

> *[28] … Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege. …*
>
> *[29] 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". This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. Thus, in* Benecke v National Australia Bank*, the client was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to a barrister in related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister's version of those instructions. She did not subjectively intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication. 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.*
>
> *…*
>
> *[34] … 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. Depending upon the circumstances of the case, considerations of fairness may be relevant to a determination of whether there is such inconsistency. The reasoning of the majority in* Goldberg *illustrates this.*

37. The application of these principles is illustrated in Information Commissioner Albietz's reasons for decision in *Re Noosa Shire Council and Department of Communication and Information, Local Government and Planning* (2000) 5 QAR 428.

38. I do not consider that the conduct of the Minister is inconsistent with the maintenance of the privilege attaching to the documents in issue. A reference to legal advice as having been considered in the context of a comprehensive statement of reasons is not usually sufficient to show that an imputed waiver of the privilege in the legal advice has occurred.

39. In *Ampolex Limited v Perpetual Trustee Company (Canberra) Limited (Ampolex No.3)* (1996) 137 ALR 28 Kirby J said at p.34:

> *The disclosure suggested, to reasonable inference, that the legal advice supported Ampolex's stated position. … I agree that a mere reference to the existence of legal advice would not amount to a waiver of its contents.*

40. In *Bennett v Chief executive officer, Australian Customs Service* (2004) the full Federal Court found that legal professional privilege had been waived in respect of legal advice provided by the Australian Government Solicitor, however, Tamberlin J said at paragraph 6:

> *… It may perhaps have been different if it had been simply asserted that the client has taken legal advice and that the position which was adopted having considered the advice, is that certain action will be taken or not taken. In those circumstances, the substance of the advice is not disclosed but merely the fact that there was some advice and that it was considered.*

41. Information Commissioner Albeitz made the following observations in *Re Hewitt* at paragraph 64:

> *64. ... Although it may seem a fine distinction in practical terms, the difference between stating "I have received legal advice and I deny liability", and stating "I have received legal advice that I am not liable to compensate you", is nevertheless a real and material one, in that the former involves no conduct inconsistent with maintaining privilege in the legal advice, but the latter does. At least in extra-curial contexts, I tend to agree with the contention put by the QLS that a mere reference to the existence of legal advice, or a statement that a person or company was adopting a certain course of action (eg, denying liability to compensate a claimant for damages) based on legal advice, should not ordinarily, of itself, involve an imputed waiver of privilege in the content of the legal advice.*

42. I accept that in circumstances where, in the course of making an administrative decision, legal opinion is relied on and adopted as the reasons for that decision and the opinion was not disclosed, it would be unfair or misleading to allow a claim for privilege. However, the Minister's reasons merely disclose the fact that she had regard to the advices in making the decisions to call in and refuse the development application. The Minister has not 'adopted'

the substance of the legal advice as the reasons for her decision in the absence of any other explanation, as was the case in *Queensland Law Society Inc v Albeitz and Anor.*

43. In that case Williams J discussed at paragraph 15, *'the unfairness to the second respondent of the applicant relying on the advice to justify its decision without disclosing the advice.'* The Minister provided statements of reasons, as required under IPA, to justify her decisions. Not having access to the advices which are the documents in issue has not deprived the applicant of any opportunity to assess whether or not the power of the Minister to call in and refuse the development application was properly exercised. The Minister's exercise of the power to refuse the application has now been the subject of de Jersey CJ's decision in *Emerald Developments (AUST) P/L v Minister for Environment, Local Government, Planning and Women* [2006] QSC 073. The Minister was found to have taken into account irrelevant considerations, and the decision to refuse the application was unlawful and of no effect.

44. I am satisfied that the conduct of the Minister, in referring to the legal advices in her statements of reasons, is not inconsistent with maintaining the privilege in those advices and there has been no imputed waiver of privilege.

Conclusion

45. The documents in issue comprise confidential communications between lawyer and client that were made for the dominant purpose of obtaining legal advice or professional legal assistance. The privilege in those communications has not been waived and the documents in issue are exempt from disclosure under section 43(1) of the FOI Act.

DECISION

46. I affirm the decision under review (being the decision made on 17 February 2006 on behalf of the Department by Ms Hoekstra) that the matter in issue, identified at paragraph 15 above, is exempt from disclosure under section 43(1) of the FOI Act.

47. I have made this decision as a delegate of the Information Commissioner's powers under section 90 of the FOI Act.

……..
V. Corby
Assistant Information Commissioner

Date: 22 August 2006