

Price & Nominal Defendant

(S 97/97, 24 November 1999, Information Commissioner Albietz)

(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)

1.- 4. These paragraphs deleted.

REASONS FOR DECISION

Background

5. The applicant seeks review of a decision by the Nominal Defendant to refuse him access to certain documents held by it and by its former solicitors. Some of the documents in issue relate to the legal proceedings between the applicant and the Nominal Defendant that were described in paragraph 3 of my reasons for decision in *Re Price and Nominal Defendant* (Information Commissioner Qld, Decision No. 99003, 30 June 1999, unreported) but were documents that came into existence after the lodgment by the applicant of the FOI access application dealt with in my earlier decision (and to which I will refer as the "previous access application"). Other documents sought by the applicant relate to the processing of the previous access application, and the external review application in respect of it (no. S 2/95).
6. By letter dated 1 April 1997, the applicant applied to Queensland Treasury for access to the following:
 1. *"all documents of the agency created in relation to my Freedom of Information applications and related to the application";*
 2. *"all documents of the agency related to myself. To include all Ministerial contact including the last Government and their advisers";*
 3. *"an answer to my earlier request of the Agency to furnish the work details and names of persons listed on documents of the agency and their rank";*
 4. *"a breakdown of the Solicitors, Counsel and loss assessors used by the Nominal Defendant since 1988"; and*
 5. *"a breakdown list of cases that went to loss assessors e.g. when there were no police reports available".*
7. On 2 April 1997, parts 1, 3, 4 and 5 of that access application were transferred to the Nominal Defendant pursuant to s.26 of the FOI Act. On 12 May 1997, Ms L Anderson, the Insurance Commissioner, made a determination in respect of those parts. Ms Anderson decided to grant access to some documents falling within the terms of part 1 of the application, but refused access to nine documents, and to part of one document, on the basis that they comprised exempt matter under s.43(1) of the FOI Act. She also refused access to part of another document on the basis that it was outside the scope of the access application.
8. In relation to parts 3, 4 and 5 of the access application, Ms Anderson refused access to information on the basis that it would require the Nominal Defendant to create new written

documents, and that it was unable to do so using equipment currently available to it. Ms Anderson also relied on s.28(2) of the FOI Act as a further reason for refusing to deal with those parts of the access application.

9. As no internal review was available from the decision of Ms Anderson as principal officer (see s.52(3) of the FOI Act), the applicant applied to me, by letter dated 16 June 1997, for review, under Part 5 of the FOI Act, of Ms Anderson's decision.

External review process

10. The documents containing the matter in issue were obtained and examined.
11. During this review, the Nominal Defendant agreed to accept my preliminary view as to which of the documents of its former solicitors and its loss assessors, that were created after 17 October 1994 (the date of lodgment of the applicant's previous FOI access application dealt with in external review no. S 2/95), fell within the terms of the access application dated 1 April 1997, and were "documents of the agency". The Nominal Defendant has disclosed to the applicant a number of documents from its own file, the solicitors' file, and the loss assessors' file that were initially in issue. There are no further documents on the loss assessors' file in issue in this external review.
12. A conference was held with Mr L Meteyard of the Nominal Defendant to seek information about parts 3, 4 and 5 of the access application. In relation to part 3, it was agreed that the Nominal Defendant would provide to the applicant copies of that part of its Annual Reports which set out relevant staff members. In a letter to this Office dated 19 February 1999, the Nominal Defendant advised that it had done so but that for 1993/94, the Nominal Defendant's Annual Report formed part of Queensland Treasury's Annual Report with no separate listing of Nominal Defendant staff. This was because the Nominal Defendant did not exist as a statutory corporation in its own right until 1 September 1994. My staff confirmed that, in dealing with that part of the access application not transferred to the Nominal Defendant pursuant to s.26 of the FOI Act, Queensland Treasury provided the applicant with a list of relevant staff, which covered the 1993/94 period, and included the Queensland Treasury FOI decision-makers involved in dealing with the previous access application. As part 3 of the access application dated 1 April 1997 has been satisfactorily dealt with, and the applicant has not taken specific issue with it, I will not consider part 3 further in this review.
13. In relation to parts 4 and 5 of the access application dated 1 April 1997, Mr Meteyard expressed a concern that to provide the information sought would involve considerable time and effort in obtaining information to create a new document. However, in an attempt to answer part 4 of the access application, the letter dated 19 February 1999 provided a list of firms of solicitors that had acted for the Nominal Defendant since 1988.
14. That letter also attached a list of counsel and loss assessors who were, at the time of the letter, regarded as preferred suppliers (which, Mr Meteyard informed a member of my staff, was obtained through his having undertaken a "provider query" of the Nominal Defendant's computer database). The letter outlined the difficulties involved in locating information about counsel and loss assessors who had provided services to the Nominal Defendant prior to late 1994 and in compiling any of the information that the applicant sought in relation to part 5 of his access application. A further meeting with Mr Meteyard to discuss part 5 of the access application revealed that some of the information requested by the applicant could, with some effort described later in these reasons, be obtained from the database.

Price & Nominal Defendant

15. I gave the applicant a copy of the Nominal Defendant's letter dated 19 February 1999 and informed him of my preliminary view:
- as to which of the documents remaining in issue were "documents of the agency", and my further view that those which were "documents of the agency" all qualified for exemption under s.43(1) of the FOI Act;
 - that the Nominal Defendant was entitled, under s.28(2) of the FOI Act, to refuse to deal with parts 4 and 5 of his access application dated 1 April 1997, except to the limited extent discussed at paragraph 24 below.
16. The applicant responded by contesting my preliminary views and requesting a conference with participants to clarify matters. I replied to the applicant by letter stating that I did not regard a conference as a productive exercise as the matters raised could be readily and easily dealt with by the applicant in writing. I extended the time within which the applicant could provide submissions and/or evidence. In a further letter to the applicant (responding to subsequent correspondence from him relating to this and his numerous other external review applications), I reiterated the issues I had invited him to address.
17. The applicant responded that he had already provided me with affidavit evidence and submissions of improper conduct and fraud by agencies, including the Nominal Defendant and its solicitors. Indeed, in the course of external review no. S 2/95, the applicant provided a lengthy submission dated 28 August 1995 and also presented to this Office an extremely large bundle of documents which included affidavits that he had filed in the High Court during legal proceedings in which he was involved before it. The applicant has not, however, responded to the matters raised concerning parts 4 and 5 of his access application, despite being given ample opportunity to do so.
18. In making my decision, I have taken into account the abovementioned submissions of the applicant dated 28 August 1995, and further submissions and documents provided by the applicant on 26 March 1999.

Creation of documents from a computer database

19. Parts 4 and 5 of the access application dated 1 April 1997 are framed as requests for access to information rather than access to documents already in existence in the possession or control of the Nominal Defendant. Essentially, the Nominal Defendant would be required to create new documents in order to provide the relevant information. In paragraphs 6-9 of *Re Pearce and Queensland Rural Adjustment Authority and Others* (Information Commissioner Qld, Decision 99008, 4 November 1999, unreported), I said:

6. *The ordinary and natural meaning of the words used by the legislature in s.21 and s.25 of the FOI Act makes clear that the right of access conferred by the FOI Act is not a right of access to information per se, but a right of access to information contained in the form of documents which exist in the possession or control of a particular agency or Minister, at the time that a valid access application under s.25 of the FOI Act is lodged with that agency or Minister. The natural corollary to this is that an agency or Minister is not obliged by the terms of the FOI Act to create a new document in order to provide information requested by an access applicant - an agency or Minister is only obliged to locate existing documents in its possession or control, which fall within the terms of a valid access application under s.25 of the FOI Act (and to make the*

decisions, in respect of any documents thus located, that are required under the provisions of the FOI Act).

7. *There is only one exception to that general statement of principle to be found in the FOI Act. It is the one provided for in s.30(1)(e) of the FOI Act, which is, in turn, subject to a significant qualification. Section 30(1)(e) of the FOI Act provides:*

30.(1) Access to a document may be given to a person in one or more of the following forms—

...

(e) if—

- (i) the application relates to information that is not contained in a written document held by the agency; and
- (ii) the agency could create a written document containing the information using equipment that is usually available to it for retrieving or collating stored information;

providing a written document so created.

8. *Section 30(1)(e)(i) and s.30(1)(e)(ii) set out the two pre-conditions which, if satisfied, will oblige an agency, at the request of an access applicant, to create a document in order to provide information specified in an FOI access application. Firstly, s.30(1)(e) only applies when the access application relates to information that is not contained in a written document held by the agency. The most obvious example of this is the storage of information in a computer database.*
9. *Secondly, s.30(1)(e)(ii) requires an examination, in the particular circumstances of a given case, of a factual issue as to whether the relevant agency could create a written document, containing the information requested in the FOI access application, using equipment that is usually available to it for retrieving or collating stored information. The term "usually available" imposes a significant qualification on the entitlement of an FOI access applicant to seek specific information from a computer database or other repository of stored information. It means, in effect, that it must be possible to retrieve or collate the information requested by an FOI access applicant using equipment (including computer programs or software) already in place, or otherwise usually available, to undertake the performance of the agency's functions. In other words, s.30(1)(e) imposes no requirement on an agency to obtain additional equipment or re-program existing equipment, or (for example) write a specific program to enable a database to be interrogated, in order to respond to an FOI access application.*

20. Mr Meteyard has explained that the list of counsel and loss assessors was compiled through interrogating the Nominal Defendant's database. However, the limitation on the information

that can be obtained is that the database was created only after the Nominal Defendant was established as a separate corporation (September 1994) and there were some slight teething problems until integrity in the information stored on the database was achieved after a few months of operation. The applicant's request for a list of counsel and loss assessors has been satisfied (with as much accuracy as the database can provide) back to approximately late 1994. The data did not exist before that period, and to obtain the information sought by the applicant, from 1989 to late 1994, would require manual searches of individual files held by the Nominal Defendant.

21. In relation to part 5 of the access application, Mr Meteyard explained that the type of query that would be required to generate a "breakdown of cases that went to loss assessors, eg. when there were no police reports available" is more complex and an external information technology consultant would have to be retained to perform the relevant query. A consultant has been contacted and has informed Mr Meteyard that she estimates that her charges for that task would be between \$100-\$300, depending upon the difficulty of the query and the time taken. Thus, some of the information sought by the applicant does exist, albeit stored on a computer database, but is again subject to the limitation that the information was only entered into the databases after September 1994. Prior to that time, a manual search of the Nominal Defendant's files would need to be undertaken.
22. Section 7(1) of the *Freedom of Information Regulation 1992* Qld (the FOI Regulation) provides that an applicant must pay a charge for access to a document that does not concern the applicant's personal affairs. Section 29(3) of the FOI Act provides that any charge that is, by regulation, required to be paid by an applicant before access to a document is given is to be calculated in accordance with a number of principles, one of which is that a charge may be made for the reasonable cost incurred by an agency in providing a written document under s.30(1)(e) of the FOI Act. These provisions set out the basis for making a charge for the reasonable costs incurred by an agency in creating, from computer records, a document which does not concern the applicant's personal affairs.
23. The applicant was informed of the possible costs involved in obtaining the information and asked to advise whether he wished to pursue access to it. He has not responded to that question. I am satisfied that the Nominal Defendant is entitled to charge for the reasonable costs incurred by it in obtaining the services of an information technology consultant to undertake the relevant database inquiry to respond to part 5 of the access application dated 1 April 1997. The information sought by the applicant does not concern the applicant's personal affairs. There is nothing before me to suggest that a charge of \$300 to carry out this task would be unreasonable.
24. The applicant is therefore entitled to access to a document that could be created by interrogating the Nominal Defendant's database to provide such information retained on the database as falls within part 5 of the applicant's FOI access application dated 1 April 1997, provided the applicant is prepared to pay the reasonable costs of access. Under s.29(7) of the FOI Act and s.11 of the FOI Regulation, the Nominal Defendant may require the Defendant to pay a 20% deposit before it undertakes the work in question.

Application of s.28(2) of the FOI Act

25. Section 28(2) provides:

28(2) If—

- (a) *an application is expressed to relate to all documents, or to all documents of a specified class, that contain information of a specified kind or relate to a specified subject matter; and*
- (b) *it appears to the agency or Minister dealing with the application that the work involved in dealing with the application would, if carried out—*
 - (i) *substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions; or*
 - (ii) *interfere substantially and unreasonably with the performance by the Minister of the Minister functions;*

having regard only to the number and volume of the documents and to any difficulty that would exist in identifying, locating or collating the documents within the filing system of the agency or the office of the Minister;

the agency or Minister may refuse to deal with the application.

26. The Nominal Defendant outlined, in its letter dated 19 February 1999, the type of manual searches and difficulties involved to deal completely with part 4 (which would be necessary to provide the information sought back to 1989), and with any of part 5 of the access application, if the applicant did not agree to pay the reasonable costs of the database inquiry.
27. Parts 4 and 5 of the access application are far-reaching, and part 5 is not defined by any timeframe. The Nominal Defendant has indicated that to carefully search through the thousands of files opened since 1989 to ascertain the names of loss assessors and counsel, and claim files where loss assessors were appointed, would be extremely time consuming. In situations where files are stored off-site, there would be significant retrieval costs involved.
28. The applicant has been provided with a copy of the Nominal Defendant's letter dated 19 February 1999, which contained a list of all firms of solicitors that have acted for the Nominal Defendant since 1988. The Nominal Defendant advised that if part 4 of the applicant's access application dated 1 April 1997 had to be construed to mean each *individual* solicitor from those firms who had provided legal assistance to the Nominal Defendant, there would be considerable difficulty in identifying from its own files the names of those individual solicitors, and a strong likelihood that the firms of solicitors would no longer have files dating back to January 1989 to be able to ascertain that information.
29. I am satisfied that the Nominal Defendant has carefully addressed the difficulties it would have, with its small number of staff, in identifying, locating and collating all of the requested documents and has demonstrated that to do so would significantly interfere with its operations for a considerable period of time.
30. The Nominal Defendant's function is to manage compulsory third party claims associated with unidentified and uninsured vehicles, and it is funded by a levy on third party insurance premiums paid by vehicle owners. I am satisfied that the Nominal Defendant would experience a substantial and unreasonable diversion of its resources (funded by the public) in performing that function, if it were to take the steps required to process parts 4 and 5 of the access application (other than those addressed in paragraph 24 above), having regard only to

the number and volume of the documents requested, and to the difficulties that would exist in identifying, locating or collating the documents within the filing system of the Nominal Defendant.

31. I find that, pursuant to s.28(2) of the FOI Act, the Nominal Defendant is entitled to refuse to deal with parts 4 and 5 of the access application dated 1 April 1997, beyond the steps discussed in paragraph 24 above concerning interrogation of its computer database for the period from late 1994.

Documents of the agency

32. For a document to be subject to access under s.21 and s.25 of the FOI Act, it must be a "document of the agency", i.e., of the agency which is dealing with the FOI access application. Section 7 of the FOI Act relevantly provides:

In this Act—

...

"document of an agency" or "document of the agency" means a document in the possession or under the control of an agency, or the agency concerned, whether created or received in the agency, and includes—

(a) *a document to which the agency is entitled to access; and*

(b) *a document in the possession or under the control of an officer of the agency in the officer's official capacity.*

33. The ruling test imposed by the definition of "document of an agency" is comprised in the words "in the possession or under the control of an agency". The remaining words of the definition illustrate, rather than extend, the ruling test. In *Re Holt and Education Queensland* (1998) 4 QAR 310, I decided that the word "possession" in the above definition is properly to be construed as meaning physical possession rather than legal possession. A document in the physical possession of an agency (or of an officer of an agency in the officer's official capacity), whether created or received in the agency, is a "document of the agency" for the purposes of the FOI Act. A document not in the physical possession of an agency will nevertheless be a "document of the agency" for the purposes of the FOI Act, if it is under the control of the agency (or under the control of an officer of the agency in the officer's official capacity).
34. Included in the concept of documents which are under the control of an agency are documents to which the agency is entitled to access. This concept is apt to cover a document in respect of which an agency has legal ownership, and hence a right to obtain possession, even though the document is not in the physical possession of the agency. The words "under the control" convey the concept of a present legal entitlement to control the use or physical possession of a document, as exists in the case of documents held on behalf of a principal by the principal's agent, or documents held by a bailee on behalf of the owner of the documents.
35. In the context of the obligations placed on an agency, by the FOI Act, in respect of "documents of the agency" (including the manner in which an agency is obliged to deal with a document of the agency in response to an application under the FOI Act), I consider that, for a document to be one which is under the control of an agency (or one in respect of which an agency is entitled to access), the agency must have a present legal entitlement to take

Price & Nominal Defendant

physical possession of the document (at least for so long as necessary to discharge all of the agency's obligations under the FOI Act in respect of the document).

36. The Schedule attached to these reasons for decision sets out those documents appearing on the file of the solicitors to the Nominal Defendant which remain in issue. In *Re Price and Nominal Defendant* at paragraphs 21-28, I said that, in the context of a solicitor and client relationship, a determination as to those documents in respect of which a client has a legal entitlement to ownership is based on the contract of retainer between the solicitor and client. At paragraph 22, I said that the judgment of the New South Wales Court of Appeal in *Wentworth v De Montfort* (1988) 15 NSWLR 348 set out the relevant principles for determining what documents on a solicitor's file are documents in respect of which the client has a legal right to possession. At paragraphs 29-52, I applied the principles in that case to the various categories of documents in issue on the solicitors' file. My findings are directly applicable here and I will discuss the categories that are relevant below. In the attached schedule, I have indicated in the "Decision" column those documents which are not "documents of the agency" by the letters "NDA".

Correspondence between the Nominal Defendant and its solicitors

37. At paragraphs 32-34 of *Re Price and Nominal Defendant*, I found that original letters and facsimile transmissions to the solicitors from the Nominal Defendant and file copies of letters from the solicitors to the Nominal Defendant were not "documents of the agency" for the purposes of the FOI Act. For the same reasons, I find that documents on the solicitors' file which comprise correspondence between the Nominal Defendant and its solicitors are not "documents of the agency" (i.e., the Nominal Defendant) for the purposes of the FOI Act.

Records of telephone attendances on the Nominal Defendant

38. At paragraph 35 of *Re Price and Nominal Defendant*, I found that those documents were not "documents of the agency" for the purposes of the FOI Act. I find that, in this external review, records of telephone attendances on the Nominal Defendant are not "documents of the agency" for the purposes of the FOI Act.

Internal records and memoranda of the solicitors as to work done or work to be done

39. The solicitors' file contains diary notes of intra-office communications and records of facsimile transmissions. At paragraph 46 of *Re Price and Nominal Defendant*, I concluded that those documents were created by the solicitors for their own benefit and were not owned by the client. For the reasons given at paragraphs 47-48 of *Re Price and Nominal Defendant*, I find that excerpts of rules with annotations, drafts and file copies of court documents, and notes made about the taxation by the solicitors on the solicitors file, belong to the solicitors and not the client. None of the documents on the solicitors' file falling into this category are documents of the Nominal Defendant for the purposes of the FOI Act.
40. However, the printout of the Department of Lands search (S521), was made for the benefit of the Nominal Defendant in relation to issuing court proceedings against the applicant in relation to its costs. Thus, I find that S521 is a "document of the agency" for the purposes of the FOI Act.

Correspondence with, and records of, telephone attendances on third parties

41. At paragraph 36 of *Re Price and Nominal Defendant*, I said that whether any particular document in this category belongs to the client or to the solicitor depends upon a number of

Price & Nominal Defendant

factors and, in particular, whether the predominant purpose of the communication was for the benefit of the solicitor or the client. I consider that correspondence with, and records of telephone attendances on, the solicitors' service agents, were undertaken for the purpose of the Nominal Defendant issuing court proceedings against the applicant in relation to its costs. Thus, those communications were predominantly for the benefit of the Nominal Defendant. I therefore find that the documents on the solicitors' file representing such communications are "documents of the agency" for the purposes of the FOI Act.

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

Nominal Defendant's file

42. The documents remaining in issue on the Nominal Defendant's file that are claimed to be exempt under s.43(1) of the FOI Act are documents 19, 25, 29, 32, 42, and parts of documents 7 and 8. 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.

43. 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).
44. 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 and Legal Ombudsman* (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) 71 ALJR 327).
45. Many of my comments in *Re Price and Nominal Defendant* at paragraphs 59-68 are equally applicable to the documents in issue in this matter.
46. Documents 19, 25, 29, 32 and part of document 7 comprise correspondence between the Nominal Defendant and its solicitors. Similarly to my findings in paragraphs 64-68 of *Re Price and Nominal Defendant*, I consider that each of those documents was brought into existence for the sole purpose of seeking or giving professional legal advice or assistance in relation to the Nominal Defendant's participation in the external review process in application for review no. S 2/95. I find that those documents attract legal professional privilege, and so qualify for exemption under s.43(1) of the FOI Act.

Price & Nominal Defendant

47. Document 42 is a draft letter to the Crown Solicitor prepared by the Nominal Defendant's solicitors. Material created by a 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 that advice: see also *Re Norman and Mulgrave Shire Council* (1994) 1 QAR 574 p.581. I find that document 42 attracts legal professional privilege and qualifies for exemption under s.43(1) of the FOI Act.
48. The matter claimed to be exempt in document 8 is the same matter as that which was in issue in a related application for external review no. S 101/97, which has now been finalised. It is page 5 of a statement of Mr Daniel Morgan prepared by the Nominal Defendant's loss assessors during the time when legal proceedings were on foot between the Nominal Defendant and the applicant. The remainder of document 8 (to which the applicant has obtained access) is an internal memorandum within the Nominal Defendant's office concerning submissions that it proposed to make during the previous external review process concerning no. S 2/95. I have been informed by Queensland Treasury and by the Nominal Defendant that the page of Daniel Morgan's statement was inadvertently caught up in the memorandum during the processing of the applicant's access application.
49. In my reasons for decision in *Re Price and Nominal Defendant*, I found that the statements taken by the loss assessors for use in legal proceedings between the Nominal Defendant and the applicant (the page in issue in document 8 forming part of one such statement) attracted legal professional privilege. Any copies of such statements, or copies of parts of such statements, also attract legal professional privilege and qualify for exemption under s.43(1). I find that the part of document 8 comprising a copy of page 5 of Mr Morgan's statement to the loss assessors is exempt matter under s.43(1) of the FOI Act.

Solicitors' file

50. I have found that only the correspondence with, and records of telephone attendances on, the service agents, plus the Department of Lands search printout, are documents of the Nominal Defendant for the purposes of the FOI Act (see paragraphs 40 and 41 above).

Communications with service agents

51. In *Trade Practices Commission v Sterling* (1979) 36 FLR 244 (at pp.245-266), Lockhart J said that legal professional privilege extends to:

(a) Any communication between a party and his professional legal adviser if it is confidential and made to or by the professional adviser in his professional capacity and with a view to obtaining or giving legal advice or assistance; notwithstanding that the communication is made through agents of the party and the solicitor or the agent of either of them.

52. I consider that correspondence, and file notes of conversations, between the solicitors and their service agents, constitute or record communications made for the sole purpose of instituting costs proceedings between the Nominal Defendant and the applicant. I find that they attract legal professional privilege and qualify for exemption under s.43(1) of the FOI Act.

Printout of Department of Lands search

Price & Nominal Defendant

53. In *Trade Practices Commission v Sterling*, Lockhart J said that legal professional privilege also extends to:

(d) 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, or relate to information sought by the client's legal adviser to enable him to advise the client or to conduct litigation on his behalf. ...

54. The solicitors obtained the Department of Lands search for the sole purpose of providing advice to the Nominal Defendant concerning anticipated legal proceedings, and hence it attracts legal professional privilege. Therefore, the printout qualifies for exemption under s.43(1) of the FOI Act.

Improper purpose exception

55. As with his previous application for review no. S 2/95, the applicant has alleged that there has been *a tort, fraud and/or improper conduct* by the Nominal Defendant, and, therefore, the documents on the Nominal Defendant's file and on the solicitors' file cannot qualify for legal professional privilege.

56. I considered the 'improper purpose exception' at some length in *Re Murphy and Queensland Treasury (No. 2)* (Information Commissioner Qld, Decision No. 98009, 24 July 1998, unreported), at paragraphs 31-42. At paragraphs 35, 36 and 37, I considered the judgments in *Kearney* and *Propend Finance* concerning the evidentiary onus on a person contesting the existence of legal professional privilege to demonstrate a *prima facie* case that the relevant communications were made in furtherance of an illegal or improper purpose. At paragraph 38, I drew the following principles from those 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.

57. I note also that, in the recent Federal Court of Australia decision of *Freeman v Health Insurance Commission and Ors* (1998) 157 ALR 333, Finkelstein J said (at p.342):

Notwithstanding the submissions made by the applicant, I do not believe that the exception should be extended so that the privilege is lost if there is an inadvertent abuse of statutory power. Legal professional privilege is an important right and the public interest does not require it to be lost except by conduct which is morally reprehensible. ... if the exception was now to be

Price & Nominal Defendant

extended to cover inadvertent conduct it might endanger the basis of the privilege.

There was a successful appeal against aspects of Finkelstein J's judgment (see *Health Insurance Commission and Anor v Freeman* (1998) 158 ALR 26), but no issue was taken with the above statement of principle.

58. The documents remaining in issue are very similar in nature to those considered by me in *Re Price and Nominal Defendant*. The applicant has sought to rely on the submissions he has previously placed before me regarding the 'improper purpose exception'. In particular, there is before me a lengthy submission and a large bundle of documents, including affidavits filed by him in the High Court of Australia, in order to show *prima facie* evidence that the documents in issue were brought into existence in preparation for, or furtherance of, an illegal or improper purpose. As I stated in *Re Price and Nominal Defendant* at paragraph 81, those submissions are repetitious and attempt to weave a net of conspiracy between many public officials, members of the legal profession, the police and the courts against the applicant (for further explanation, see my discussion in paragraphs 82-83 of that decision). Those submissions are based merely on the applicant's assertion, unsupported by any credible, independent, corroborative evidence.
59. What must be shown to invoke the 'improper purpose exception' to legal professional privilege is *prima facie* evidence of a course of action by the Nominal Defendant or its agents adopted with knowledge of wrongdoing. Nothing in any of the material provided to this office by the applicant, or in the documents in issue in this case (or other cases presently before me involving the applicant), amounts to *prima facie* evidence that the documents in issue in this case were brought into existence in preparation for, or furtherance of, an illegal or improper purpose.

Application of s.44(1) of the FOI Act

60. Section 44(1) of the FOI Act provides:

44.(1) Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.

61. The Nominal Defendant claims that part of document 1 on the Nominal Defendant's file does not fall within the terms of the access application, as it relates to details of banking transactions concerning persons other than the applicant. Indeed, that part of the document representing other persons' transactions has nothing to do with the applicant or his dealings with the Nominal Defendant and, therefore, appears to fall outside the scope of the applicant's access application. In any event, that information comprises information concerning the personal affairs of persons other than the applicant. The applicant has not provided me with any submissions on this point and I am unable to discern any public interest considerations of any substance that would favour disclosure of that information to the applicant. I find that matter to be exempt under s.44(1) of the FOI Act.

DECISION

62. Given that further documents have been located in the course of the review, I vary the decision under review (being the decision dated 12 May 1997 made on behalf of the Nominal Defendant by Ms L Anderson) by finding that:

Price & Nominal Defendant

- the applicant is entitled to have a document created, in accordance with s.30(1)(e) of the FOI Act, listing the information referred to at paragraph 24 above for the period since late 1994, subject to payment of all reasonable charges (including a deposit);
- the agency is otherwise entitled to refuse to deal further with parts 4 and 5 of the access application dated 1 April 1997, pursuant to s.28(2) of the FOI Act;
- the documents listed "NDA" in the attached Schedule are not "documents of the agency" as defined in s.7 of the FOI Act, and hence are not subject to the application of the FOI Act;
- the documents and parts of documents identified at paragraphs 40, 41 and 42 above are exempt matter under s.43(1) of the FOI Act; and
- the matter identified at paragraph 61 above is exempt matter under s.44(1) of the FOI Act.