OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2007103 Decision Ref: D0152007

Participants:

Deacons
Complainant

- and -

Heritage Council of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - internal memorandum and attachments - clause 6(1) - deliberative processes - meaning of 'deliberative processes' - clause 7(1) - legal professional privilege - independence of salaried legal officer - confidential communications - 'dominant purpose test' - whether dominant purpose - whether copy of privileged document privileged.

Freedom of Information Act 1992: sections 3(3), 43(2), 102(1); Schedule 1, clauses 6(1), 6(3), 7(1)
Heritage of Western Australia Act 1990: sections. 5 and 7
Freedom of Information Act 1982 (Cth): section 36(1)
Legal Practice Act 2003: section 36

Re Read and Public Service Commission [1994] WAICmr 1
Re West Australian Newspapers Ltd and Western Power [2006] WAICmr 10
Re Waterford and Department of the Treasury *(No.2)* (1984) 5 ALD 588
Ministry for Planning v Collins (1996) 93 LGERA 69
Esso Australia Resources Ltd v The Commissioner of Taxation (1999) 168 ALR 123
Commissioner of Australian Federal Police and Another v Propend Finance Pty Ltd and Others [1997] 188 CLR 501
Trade Practices Commission v Sterling [1979] 36 FLR 244
Grant v Downs (1976) 135 CLR 674
Waterford v The Commonwealth of Australia (1987) 163 CLR 54
Re Manning and University of Western Australia [2005] WAICmr 9
Australian Competition and Consumer Commission v Safeway Stores Pty Ltd (1998) 81 FCR 526
Mitsubishi Electric Australia Pty Ltd v Victorian Work Cover Authority (2002) 4 VR 332
Waugh v British Railways Board [1980] AC 521

Brambles Holdings Ltd v Trade Practices Commission (No.3) (1981) 58 FLR 452
Komacha v Orange City Council (unreported Supreme Court of New South Wales, 30 August 1979)

Cross on Evidence

DECISION

The decision of the agency to refuse access to the disputed document is set aside. I find that that part of the disputed document that consists of the e-mail dated 12 October 2006 from the Legal Officer is exempt under clause 7(1) of Schedule 1 to the *Freedom of Information Act 1992* but that the remainder of the disputed document is not exempt.

D A WOOKEY
A/INFORMATION COMMISSIONER

17 August 2007

REASONS FOR DECISION

BACKGROUND

1. On 30 November 2006, the complainant applied under the FOI Act to the agency for access to certain documents in relation to a house in Adelaide Terrace, Perth ('the Property').

2. The agency is established under section 5 of the *Heritage of Western Australia Act 1990* ('the Heritage Act'). Section 4(3) of the Heritage Act provides that the agency's objects are, with due regard to the rights of property ownership:

   - to identify, conserve and where appropriate enhance those places within Western Australia which are of significance to its cultural heritage;
   - in relation to any area, to facilitate development that is in harmony with the cultural heritage values of that area; and
   - to promote public awareness as to the cultural heritage generally.

3. Section 7 of the Heritage Act sets out the agency's functions, which include the following:

   "(a) to advise the Minister ... as to matters relating to or associated with places that have or may have cultural significance or possess special interest related to or associated with the cultural heritage in the State ...;

   (b) to advise the Minister in relation to the Register, and to maintain the Register and records of place in accordance with this Act;

   (c) to advise the Minister, and with the consent of the Minister other persons, and to negotiate for its own purposes or on behalf of the Minister or those persons, in relation to Heritage Agreements or proposed Heritage Agreements".

4. The agency advises me that it began its assessment of two neighbouring houses in Adelaide Terrace, Perth, for possible entry onto the State Register of Heritage Places ('the Register') in 2005. The owner of the Property, one of the houses concerned, objected to the proposed registration and hired several expert consultants to assist in representing his position to the agency. The complainant is acting on behalf of the owner of the Property, in this case.

5. The agency's heritage assessment consultants compiled a report on the Property, which concluded that it was of high significance to the cultural heritage of Western Australia. The heritage experts engaged by the owner of the Property also compiled a report, which concluded that the Property was of little or no significance to the State's cultural heritage.

6. Following the receipt of the access application, the agency identified 566 folios as coming within the scope of the application and, on 12 January 2007, gave the complainant access in full to 560 folios but refused access to six folios on the ground that they are exempt under clause 6 of Schedule 1 to the FOI Act.

7. On 29 January 2007, the complainant requested an internal review of that decision. In the event, the agency did not provide the complainant with a notice of decision on internal review and, pursuant to section 43(2) of the FOI Act, was taken to have confirmed its original decision. Consequently, on 24 March 2007, the complainant applied to me for external review of the agency's deemed decision to refuse access to the six folios.

The disputed document

8. The agency described the disputed document in the document schedule attached to its notice of decision given to the complainant, as follows:

   "*Internal Memorandum from Christine Lewis to Ian Baxter - 20 October 2006 with attachments: 3 page e-mail exchange between Stephen Carrick and Daniel* [Iacopetta] - *12 October 2006 and draft letter to* [a third party]*.*"

   I understand that Ms Lewis's position at the agency is Manager, Assessment and Registration; Mr Carrick is Manager, Conservation and Assessment; and Mr Baxter is the Director of the agency.

9. The disputed document consists of a one-page internal memorandum, dated 20 October 2006, to which is attached:

   - a two-page draft letter - also dated 20 October 2006 - to the third party; and
   - a series of four e-mails (printed on 3 pages) - all dated 12 October 2006 - between officers of the agency, including the agency's Legal Officer, Mr Iacopetta.

10. On 8 June 2007, the agency provided me with a detailed submission that, amongst other things, sets out the following explanation of how the disputed document came into being:

    - The Heritage Act does not explicitly provide for a procedure by which the agency makes a determination as to whether or not a place is of significance to the cultural heritage of the State. However, the Heritage Act requires the agency to have regard to submissions made by the owner of the property in question and by members of the public. In practice, the agency makes its recommendation based on an assessment prepared by its staff of expert consultants, taking into account submissions made by the owner and members of the public.

    - On 10 October 2006, the agency's officers, including its Legal Officer, met with one of the owner's consultants ('the third party') to consider a compromise proposal in relation to the conflicting reports prepared by

the heritage experts retained by the agency and the owner of the Property respectively.

- The following day, the third party sent an e-mail to the agency's Manager, Assessment and Registration, putting forward a proposal to the agency concerning the heritage assessment of the Property.

- On 12 October 2006, the Manager, Assessment and Registration, sent an e-mail - attaching the third party's e-mail of 11 October 2006 - to three officers of the agency: the Director; the Manager, Conservation and Assessment; and the agency's Legal Officer. The two latter officers then e-mailed responses within that group.

- The three printed pages of e-mails sent between the officers on 12 October 2006, together with a two-page draft letter dated 20 October 2006 to the third party from the Manager, Conservation and Assessment, were sent with a covering memorandum to the agency's Director on 20 October 2006.

REVIEW BY A/INFORMATION COMMISSIONER

11. Following my receipt of this complaint, the agency produced the original of the disputed document to me, together with the agency's FOI file maintained in respect of the access application. My Legal Officer made further inquiries with the agency concerning the basis of its claim for exemption under clause 6. The agency provided that information and claimed, in addition, that the disputed document is exempt, in the alternative, under clause 7 of Schedule 1 to the FOI Act. My Legal Officer asked the agency to provide further information and material to support that alternative claim.

12. On 2 May 2007, the complainant provided a signed authorisation from a third party to disclose to the complainant the draft letter addressed to that person in the event that I found that that particular part of the disputed document was not exempt as claimed by the agency.

13. Since the matter could not be conciliated, I provided the parties with my preliminary view of this complaint by letter dated 29 May 2007. On the information before me at that time, it was my preliminary view that the disputed document was not exempt under clause 6(1) or 7(1) of Schedule 1 to the FOI Act. The agency did not accept my preliminary view and made further written submissions and provided further information to me in support of its claims for exemption. The agency also gave me additional details concerning the background to this matter.

CLAUSE 6(1) – DELIBERATIVE PROCESSES

14. The agency claims that the disputed document is exempt under clause 6(1) of Schedule 1 to the FOI Act. Clause 6 provides:

"*(1) Matter is exempt matter if its disclosure –*

(a) would reveal –

(i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or

(ii) any consultation or deliberation that has taken place,

in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency; and

(b) would, on balance, be contrary to the public interest.

Limits on exemptions

(2) Matter that appears in an internal manual of an agency is not exempt matter under subclause (1).

(3) Matter that is merely factual or statistical is not exempt matter under subclause (1).

(4) Matter is not exempt matter under subclause (1) if at least 10 years have passed since the matter came into existence".

15. To establish that the disputed document is exempt under clause 6(1), the agency must satisfy the requirements of both paragraphs (a) and (b) of that provision. Only when paragraph (a) of the exemption is satisfied is it necessary to consider paragraph (b) and whether disclosure of the disputed information would, on balance, be contrary to the public interest. If the requirements of both paragraphs (a) and (b) are satisfied, the disputed document will be exempt, subject to the limits on exemption contained in clause 6(2) – (4).

16. In the case of this exemption, section 102(1) of the FOI Act provides that the onus is on the agency to establish that its decision was justified and that includes establishing that disclosure would, on balance, be contrary to the public interest. The complainant is not required to demonstrate that disclosure of deliberative process matter would be in the public interest but is entitled to access unless the agency can establish that disclosure of the particular information would be contrary to the public interest.

17. The purpose of the exemption in clause 6 and the meaning of the phrase "deliberative processes" have been considered in a number of decisions - see, for example, *Re Read and Public Service Commission* [1994] WAICmr 1 and,

most recently, *Re West Australian Newspapers Ltd and Western Power* [2006] WAICmr 10.

18. I agree with the view expressed by the Commonwealth Administrative Appeals Tribunal ('the AAT') in *Re Waterford and Department of the Treasury (No.2)* (1984) 5 ALD 588 on the meaning of the term "deliberative processes" in relation to section 36(1) of the Commonwealth *Freedom of Information Act 1982*, which is equivalent to clause 6(1) of Schedule 1 to the FOI Act. In *Re Waterford,* the AAT said, at paragraphs 58-60:

> "*58. As a matter of ordinary English the expression 'deliberative processes' appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. "Deliberation" means "The action of deliberating; careful consideration with a view to a decision": see the Shorter Oxford English Dictionary. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. Deliberations on policy matters undoubtedly come within this broad description. Only to the extent that a document may disclose matter in the nature of or relating to deliberative processes does s.36(1)(a) come into play.*
>
> *59. It by no means follows, therefore, that every document on a departmental file will fall into this category … Furthermore, however imprecise the dividing line may first appear to be in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of an agency …*
>
> *60. It is documents containing opinion, advice, recommendations etc relating to the internal processes of deliberation that are potentially shielded from disclosure … Out of that broad class of documents, exemption under s.36 only attaches to those documents the disclosure of which is 'contrary to the public interest' …".*

See also the comments of Templeman J in *Ministry for Planning v Collins* (1996) 93 LGERA 69 at 72.

The agency's submissions

19. In April 2007, in response to my Legal Officer's request for information to support this claim for exemption, the agency submitted that, if disclosed, the disputed document would reveal opinions, advice and recommendations obtained, prepared and recorded in the course of the agency's deliberative process. The agency advised that the relevant deliberative process is its

consideration of a possible entry onto the Register, which I understand to refer to the possible entry of the Property onto the Register.

20. The agency submitted that there is no public interest in the disclosure of the disputed document which has not been adequately addressed by the final version of the letter sent to the third party. In addition, the agency submitted that communication and discussion amongst its officers needs to be open and uninhibited and that those officers' communications would not have been recorded if they had known that their discussion would be disclosed.

21. On 8 June 2007, the agency made, in brief, the following additional submissions:

    (a) In *Re Waterford* and in *Collins*' case, the definitions of "deliberative processes" could reasonably include or exclude the documents at issue here.

    (b) The proposal concerning the heritage assessment of the Property, which was put forward on 11 October 2006 by the third party, was completely unprecedented and, in consequence, the agency does not agree that the documents relating to it are documents which can be categorised as routine, procedural or administrative in nature.

    (c) The disputed document can clearly be characterised as being deliberations on policy matters since it is concerned with the appropriateness of the proposal by the third party in light of the agency's established policy with respect to public submissions and consists of reflection "*upon the wisdom and expediency of a proposal* ..." being the third party's suggestion. The course of action chosen could have far-reaching implications for the future policy of the agency regarding public submissions among other things. The agency queries whether clause 6(1) can ever apply if it were not intended to apply to such documents.

    (d) In *Collins*' case, the former Information Commissioner ('the former Commissioner') determined that documents including property valuation reports, handwritten memoranda from agency officers and a property manager's report were exempt under clause 6(1). In this case, analogous documents, such as the agency's heritage assessment reports and internal memoranda relating to the assessment of the Property, were disclosed by the agency to the complainant, even though the agency could, by analogy to *Collins*, have claimed exemption under clause 6(1) for those documents.

    (e) The present case can be distinguished from the facts of *Re Read and Public Service Commission* [1994] WAICmr 1, which concerned handwritten notes of investigative interviews. In *Re Read*, the former Commissioner characterised the information contained in the disputed documents as 'facts' or 'data'. Information of that kind is subject to the limit on exemption in clause 6(3) and is not, therefore, exempt. However, the disputed document in this case cannot be characterised as facts or data.

(f) This case can also be distinguished from *Re West Australian Newspapers Ltd and Western Power* [2006] WAICmr 10, in which the disputed document was an accountant's report into a scheme under which the senior managers of a government agency were able to personally profit from the sale of their government vehicles. In that case, it was determined that the public interest would be served by the disclosure of the disputed document. However, the document at issue in this complaint is nothing like that in *Re West Australian Newspapers Ltd* as there is no possible misuse of public monies. Instead, the disputed document "*consists of opinion, conjecture and advice in an effort to determine the best course of action with respect to a deliberative process of the agency*" and the public interest does not weigh in favour of its disclosure.

22. I understand the agency to submit that, on balance, the public interests in favour of non-disclosure outweigh those favouring disclosure in this case.

Clause 6(1)(a) – nature of the information

23. The first step is to establish whether, if disclosed, the information in the disputed document would reveal any opinion, advice or recommendation that has been obtained, prepared or recorded, or any consultation or deliberation that has taken place, in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency.

24. Having examined the disputed document, I accept the agency's submission that it contains opinions, advice and recommendations. However, I do not accept that those opinions, advice and recommendations were obtained, prepared or recorded in the course of the agency's deliberative processes within the meaning of that term as explained in *Re Waterford.*

25. The agency submits that the disputed document can be characterised as deliberations upon policy matters because it relates to the agency's consideration of the third party's proposal and how that might impact on its established policy with respect to public submissions. The agency relies on paragraph 58 of *Re Waterford,* where the AAT said "*Deliberations on policy matters undoubtedly come within this broad description"*. I understand the agency to say that this is also a 'deliberative process'.

26. However, in my opinion, that reference should be taken in the context of the three paragraphs cited from *Re Waterford*, which make it clear that the relevant processes of deliberation are those involved in the functions of an agency and that documents dealing with deliberative processes must be distinguished "*from documents dealing with the purely procedural or administrative processes involved in the functions of an agency ...*".

27. Although the agency says that it has a policy concerning submissions from members of the public, it has not provided me with a copy of that policy and, in any event, it is not clear to me that this matter relates to submissions from the public where, as here, the submissions were made on behalf of the owner of the Property. Moreover, it seems to me that any policy that the agency may have in

connection with how to present information to the full Council of the agency is an administrative or procedural policy that is distinct from the processes of reflection upon the agency's functions as set out in section 7 of the Heritage Act. The fact that the third party's proposal may have been unprecedented or might have far-reaching implications does not, in my opinion, alter that characterisation.

28. Further, the documents do not appear to me to contain any discussion on the broader implications or impact on policy of the proposal. They appear to me to relate merely to whether or not to accept the proposal and how to progress the particular matter at hand.

29. In *Re Read,* the former Commissioner considered the meaning of the word 'policy' in the context of clause 6(1) and said, at paragraph 24:

> *"However, the word "policy" is susceptible to a variety of meanings. In* Re Fewster and Department of Prime Minister and Cabinet *(1986) 11 ALN N266, (at para 14) the Deputy President of the Tribunal accepted the submission that a "policy" is something that "provides a guide for handling of particular cases or problems as they arise in the future. A policy may relate both to what should be done, and how it should be done." Although I am inclined to think that the "how" of a policy decision is more correctly described as "procedures", the deliberative processes at the very least, includes policy decisions. In* Re VXF and Human Rights and Equal Opportunity Commission*, at paragraph 31, the Tribunal made this distinction and said:*
>
> *"I therefore accept that s.36(1) comprehends, in the deliberative processes both deliberations for decision making and deliberations for policy making. It does not however cover documents dealing with the purely procedural or administrative functions of an agency. I consider that the use of a social worker to help the applicant obtain medical or financial assistance or to clarify her rights to leave or pay from Australia Post are not part of the deliberative processes involved in the functions of the Commission. They are functions of an administrative nature incidental to but not part of the deliberative processes involved in the functions of the agency."*

30. Similarly, I consider that any discussion as to how information should be presented to the full Council of the agency is not part of the deliberative processes involved in the functions of the agency but is - whether policy matters or not - a function of an administrative nature incidental to but not part of the deliberative processes involved in any of the functions set out in section 7 of the Heritage Act. The proposal and discussion relate purely to procedure. The disputed document does not, for example, contain or reveal any of the agency's deliberation on the question of whether or not the Property should be entered onto the Register, which is clearly a deliberative process of the agency. In my view, the administrative process discussed in the disputed document is not part of the "deliberative processes" of the agency that clause 6 is designed to protect.

31. Accordingly, I do no accept the agency's submission that the definitions of "deliberative processes" referred to in the cases cited here could reasonably include or exclude the disputed document.

32. With regard to the agency's submission in (d) in paragraph 22 above, I agree with the agency that it was open to it to claim exemption for the various documents that it did disclose to the complainant. However, section 3(3) of the FOI Act gives the agency the discretion to give access to documents containing exempt matter if - among other things - that can properly be done and, in this case, it seems that the agency chose to exercise that discretion.

33. I accept the agency's submission that the information in the disputed document is not subject to the limit on exemption in clause 6(3) and can be distinguished from *Re Read,* in which the former Commissioner characterised the documents in dispute in that case as having been created to record facts which would either substantiate or refute certain allegations. I also accept the agency's submission that the facts of the present case can be distinguished from those of *Re West Australian Newspapers Ltd.* However, that does not affect my view that the agency has not, in this case, satisfied the requirements of clause 6(1)(a) in relation to the disputed document. In light of that, I need not consider the agency's public interest arguments and whether or not the requirements of paragraph (b) of clause 6(1) have been satisfied. Accordingly, I find that the disputed document is not exempt under clause 6(1).

CLAUSE 7(1) – LEGAL PROFESSIONAL PRIVILEGE

34. The agency claims that the disputed document is exempt, in the alternative, under clause 7 of Schedule 1 to the FOI Act. Clause 7(1) provides as follows:

> "*Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege*".

35. Legal professional privilege protects from disclosure confidential communications between clients and their legal advisers if made or brought into existence for the dominant purpose of giving or seeking legal advice or for use in existing or anticipated legal proceedings: *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 168 ALR 123 at 132.

36. The privilege is concerned with confidential communications and seeks to promote communication with a legal adviser, not to protect the content of a particular document. In *Commissioner of Australian Federal Police and Another v Propend Finance Pty Ltd and Others* [1997] 188 CLR 501, Toohey J observed, at p.525:

> *"… privilege does not attach to a piece of paper. It attaches to a communication, written or oral, and it is the communication that is at issue. While it is natural to speak of legal professional privilege in terms of documents, it is the nature of the communication within the document that determines whether or not the privilege attaches."*

37. Although the rule is most commonly applied to communications between clients and their legal advisers, it also extends to various other classes of communications: see, for example, the categories listed by Lockhart J in *Trade Practices Commission v Sterling* [1979] 36 FLR 244 at pp.245-246.

The agency's submission

38. The agency submits that the disputed document contains communications to and from Mr Iacopetta, who was employed by the agency as its Legal Officer for the purpose of, among other things, providing legal advice on matters relating to the Heritage Act.

39. On 8 June 2007, following the receipt of my letter of 29 May 2007 to the parties, the agency provided me with additional information and submissions which I have set out, in brief, as follows:

- At the relevant time the Legal Officer was admitted to practice in Western Australia, as shown by the list of "Certificated Practitioners" on the website of the Legal Practice Board of Western Australia, which shows that he was admitted on 18 July 2006. In a letter to the agency of 6 June 2007, Mr Iacopetta says that his employment as Legal Officer to the agency was as a certificated practitioner pursuant to s.36 of the *Legal Practice Act 2003* and, accordingly, he was not required to, and did not hold, a practice certificate as at 12 October 2006.

- In his letter to the agency, the Legal Officer says that he understood that he was providing legal advice in the context of the disputed document and he has set out the nature of that advice to me.

- The agency has provided me with a letter dated 6 June 2007 from Mr Carrick, Manager, Conservation and Assessment, who says that he made it clear to the Legal Officer that he expected his opinion to be frank and independent on all matters put to him and that that can be seen from the disputed document. The Legal Officer also confirms that he had a high level of independence in respect of his giving legal advice to the agency.

- The shared communication in the form of e-mails was explicitly seeking legal advice and is therefore exempt.

- The agency has provided me with a letter dated 6 June 2007 from Ms Lewis, Manager, Assessment and Registration, who says that:

  (i) the agency has an endorsed procedure whereby "*officers were not to respond to correspondence from lawyers without legal advice on the response*" and that it has always been her practice when dealing with lawyers to seek the assistance of a lawyer; and

(ii) in her 12 October 2006 e-mail, she was seeking guidance and input from three officers: the Manager, Conservation and Assessment, the Director and the Legal Officer.

- In relation to the question of dominant purpose, the agency says that *Grant v Downs* (1976) 135 CLR 674 can be distinguished from the facts of this case because the incident reports there were compiled for a number of different purposes. In the present case, the e-mail sent by the Manager, Conservation and Assessment, was created for consideration by only three people for the purpose of eliciting opinions – including legal advice – on the appropriate response to an unprecedented request which raised questions of policy and precedent. It is clear from the "cc" notation on the e-mail that it was intended that the Legal Officer's advice be available to all the recipients of the e-mail – the key decision-makers – and to say that the dominant purpose was not the seeking of legal advice "*is to celebrate form over substance*."

- The test for legal professional privilege should be considered in light of the underlying purpose of the privilege. In this case, the 6-page document was submitted by an officer of the agency to the agency's in-house solicitor for "*legal advice*" and was not created for a multitude of purposes.

- The disputed document was submitted by an officer of the agency to the agency's in-house solicitor, Mr Iacopetta, for advice. The document was clearly not a routine investigative report created for a multitude of purposes and unknown readers. The e-mail exchange between Ms Lewis, Mr Iacopetta, Mr Carrick and Mr Baxter is clearly intended to obtain legal advice from a properly licensed solicitor and to share it among the agency's key decision-makers in a timely and expedient fashion. Mr Iacopetta clearly offers legal advice on the potential legal consequences of various possible responses to the proposal.

Consideration

40. In *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54, the High Court held that government agencies may claim legal professional privilege in respect of confidential communications between salaried legal officers employed by an office such as the State Solicitor's Office and officers of the agency, if:

    - the communications are made for the purpose of giving or receiving legal advice or for use in existing or anticipated legal proceedings;
    - there is a professional relationship; and
    - the legal advice is independent in character.

41. *Waterford's* case did not deal directly with the question of salaried officers who are employed as in-house legal advisers by government agencies. However,

Brennan J in *Waterford,* at p.72, suggested that there was a distinction between legal advisers employed in a government law office, such as the State Solicitor's Office, and salaried legal advisers employed by government departments or statutory authorities. Since the decision in *Waterford*, courts and tribunals have accepted that legal professional privilege may apply to communications to or from salaried legal advisers employed by such bodies: see the cases referred to in my decision in *Re Manning and University of Western Australia* [2005] WAICmr 9 at paragraph 24.

Does the necessary degree of independence exist, in this case?

42. In *Re Manning* at paragraphs 25-28*,* I accepted and followed the guidelines suggested by the Queensland Information Commissioner for establishing the necessary degree of independence that will secure to legal advice given by salaried legal advisers to their government employers. Those guidelines are as follows:

- privilege extends to legal advice given by salaried legal advisers provided that, in giving that advice, they are acting in their capacity as legal advisers; and

- the legal advice will be privileged if the legal adviser who gives it:

    - has been admitted to practice as a barrister or solicitor;
    - is listed on a roll of current practitioners;
    - holds a current practising certificate or works under the supervision of such a person; and
    - remains subject to the duty to observe professional standards and the liability to professional discipline.

43. I have considered the information concerning Mr Iacopetta provided to me by the agency and I have examined the information concerning Mr Iacopetta's "Position Description Statement", which provides as follows:

"***4. NATURE AND SCOPE OF WORK PERFORMED***

This position is responsible for providing legal advice on matters relating to the Heritage of Western Australia Act 1990 *(the Act) generally and prepares relevant correspondence on behalf of the organisation. Further to this, the position assists with the preparation of Heritage Agreements, declaration of Conservation Orders, provision of development advice and advice generally on the implementation of the Heritage Act.*

The Legal Officer is responsible for assisting the Manager, Conservation and Assessment in the successful management of the outcomes of the Heritage Council's requirements on the development of registered places and associated projects. The position also assists in responding to customer enquiries and is responsible for effectively liaising and maintaining successful working relationships with

> *management and staff internal and external to the Heritage Council of WA.*
>
> *The position undertakes research and investigation with respect to compliance with statutory referral advice and prepares draft heritage agreements and liaises with affected owners and other stakeholders."*

44. In light of the information provided, I am satisfied that the Legal Officer was admitted to practice at the relevant time and, as a legal practitioner employed by the agency in a salaried capacity, was acting in his official capacity as a legal practitioner so employed and was deemed by s.36 of the *Legal Practice Act 2003* to be a certified practitioner. I am also satisfied that his advice had the character of independent legal advice.

Is the disputed document a 'confidential communication'?

45. I accept that the folios comprising the disputed document can be categorised as 'confidential communications' between the agency and its legal adviser on the basis that they were all provided to Mr Iacopetta; known to only a small number of officers of the agency, acting on behalf of the agency; and are not in the public domain. The communications were, therefore, confidential to the "client" and legal adviser only.

Was the disputed document created for the dominant purpose of giving 'legal' advice?

46. The question of whether the memorandum was created for the 'dominant' purpose of seeking or giving legal advice is a question of fact, which may be disclosed by the content of that document: see *Grant v Downs* at 689 and *Waterford* at 58. That question is to be determined objectively and the intention of the document's maker is not conclusive of purpose: see *Australian Competition and Consumer Commission v Safeway Stores Pty Ltd* (1998) 81 FCR 526 at 545 and *Propend Finance.*

47. In *Mitsubishi Electric Australia Pty Ltd v Victorian Work Cover Authority* (2002) 4 VR 332 at [10], the Victorian Court of Appeal held that a 'dominant' purpose is that which is the ruling, prevailing or most influential purpose. It is more than the primary or substantial purpose; it must be clearly paramount: see *Cross on Evidence* [25240].

48. The 'test' for legal professional privilege makes it clear that a document may be created for a number of purposes. For example, in *Waugh v British Railways Board* [1980] AC 521, a report was made into a railway crash both for the purpose of obtaining legal advice and to consider matters of operational safety. In that case, the House of Lords held that both purposes were of equal weight and, since neither was the dominant purpose behind the report's creation, the claim for legal professional privilege was not made out.

49. The relevant purpose is the purpose for bringing into existence the document containing the confidential communication. In this case, the disputed document

is the memorandum of 20 October 2006 from the Manager, Assessment and Registration, to the Director, via the Legal Officer and the Manager, Conservation and Assessment, with the attached e-mails and the draft response to the third party.

50. In my view, the content of the memorandum does not support the agency's claim that the dominant purpose for the creation of that document was the seeking of legal advice.

51. The agency's claim that the memorandum was created for the dominant purpose of obtaining legal advice from the Legal Officer appears to be based on advice from the Manager, Assessment and Registration, that the agency's procedures required a legal officer to peruse outgoing correspondence to a lawyer (although it is not clear that the draft letter was addressed to a person acting in the capacity of a lawyer) and also the fact that the memorandum was "through" the Legal Officer.

52. In my opinion, on its face, the memorandum was created for a number of purposes:

- to make certain recommendations to the Director;
- to allow the Director to comment on those recommendations and the draft letter;
- to allow the Manager, Conservation and Assessment, to comment on the recommendations and the draft letter;
- to allow the Legal Officer to comment on the recommendations and the draft letter; and
- (if I accept that the memorandum was provided to the Legal Officer for the unstated purpose of his providing legal advice), to seek legal advice from the Legal Officer on the recommendations and the draft letter.

53. Even if I accept that the memorandum was given to the Legal Officer to obtain his legal advice, it does not appear to me that the paramount purpose for creating the memorandum was to seek legal advice.

54. On its face, the e-mail correspondence was also created for a number of purposes – none of which appears to predominate. It appears that it was created for the purpose of obtaining input from several sources, and perspectives, the Legal Officer being only one of them. In her letter of 6 June 2007, the Manager, Conservation and Assessment, appears to agree with that view.

55. Although it is not entirely clear, it seems that the e-mail from the Manager, Assessment and Registration, was directed to the Manager, Conservation and Assessment, and also copied to the Legal Officer, as well as to others. If that is correct, then on the face of that e-mail, I do not consider that it could be interpreted as being primarily a request for legal advice from the Legal Officer by the Manager, Assessment and Registration.

56. The only evidence that the latter was seeking legal advice from the Legal Officer in her e-mail to the Manager, Conservation and Assessment, is the fact

that the e-mail was also copied or sent to the Legal Officer. The e-mail contains no request for legal advice or other indication that it was sought. Contrary to the agency's submissions, none of the agency's communications with the Legal Officer 'explicitly' sought legal advice.

57. However, having considered the content of the Legal Officer's e-mail response and his advice – which was given to me by the agency – that he understood that he was giving legal advice in that response, I accept that – even if the agency did not expressly seek legal advice – the Legal Officer gave the agency some legal advice in his e-mail, to the extent that he alerted the other officers to various matters.

58. I also accept that the Legal Officer created his e-mail for the dominant purpose of giving the agency legal advice and that that advice is a 'confidential communication' which is privileged.

59. However, I am not satisfied that the other e-mails were created for the dominant purpose of obtaining or giving legal advice. In the case of those e-mails, draft letter and memorandum, it seems to me, that - if it could be said that the agency was seeking legal advice from the Legal Officer - then that was only one of a number of purposes. In this case, with the exception of the Legal Officer's e-mail – which I consider gives legal advice – it does not seem to me that the prevailing purpose of the memorandum or its attachments was the obtaining or giving of legal advice.

60. Also, it appears that the e-mail attachments to the memorandum were copied or brought into being for the purpose of being added to the memorandum; that is, they were created, in this case, for a non-privileged purpose, since it is my preliminary view that the memorandum was not made for the dominant purpose of seeking legal advice. In such cases, the courts have found that the privilege attaching to a document will be accorded to copies made of it, provided confidentiality is maintained; see *Brambles Holdings Ltd v Trade Practices Commission (No.3)* (1981) 58 FLR 452 at [28] and [31], citing Rath J in *Komacha v Orange City Council* (unreported Supreme Court of New South Wales, 30 August 1979).

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.. Consequently, I find that the Legal Officer's e-mail dated 12 October 2006 is exempt under clause 7(1) but that the memorandum and the remaining attachments to it are not exempt under that provision.

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