

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: F2010195
Decision Ref: D0312011**

Participants:

Ian Bruce Duggan
Complainant

- and -

Department of Agriculture and Food
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents in relation to a prosecution – clause 7(1) – legal professional privilege – whether documents *prima facie* privileged – illegal or improper purpose – what is required in a consideration of clause 7(1) – whether the decision in *Bowden* is relevant to illegal or improper purpose – whether illegal or improper purpose established.

Freedom of Information Act 1992: section 110; Schedule 1, clause 7(1)

Plant Diseases Act 1914

The Criminal Code Act Compilation Act 1913 (the Criminal Code): sections 130(2), 135 and 173

Public Sector Management Act 1994

Esso Australia Resources Ltd v The Commissioner of Taxation (1999) 201 CLR 49

Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543

Pratt Holdings Pty Ltd v Commissioner of Taxation (2004) 136 FCR 357

Attorney-General (NT) v Maurice (1986) 161 CLR 475

Commissioner of Australian Federal Police and Another v Propend Finance Pty Ltd and Others (1997) 188 CLR 501

Attorney-General (NT) v Kearney (1985) 158 CLR 500

Waterford v The Commonwealth of Australia (1987) 163 CLR 54.

Re Page and Metropolitan Transit Authority (1988) 2 VAR 243

Alcoota Aboriginal Corporation and Anor v Central Land Council and Ors [2001] NTSC 30

Noye v Robbins; Noye v Crimmins [2007] WASC 98

Temwood Holdings Pty Ltd v Western Australian Planning Commission & Anor [2003] WASCA 112
Department of Housing and Works v Bowden [2005] WASC 123
Mann v Carnell (1999) 201 CLR 1
Re Ross and Department of the Premier and Cabinet [2008] WAICmr 7
Re Boddington Resources Pty Ltd, Trovex Pty Ltd and Moutier Pty Ltd and Department of Industry and Resources [2008] WAICmr 4
Re Glasson and the Department of Premier and Cabinet [2009] WAICmr 11
Re Carnegie Richmond Hallett Fieldhouse v the Deputy Commissioner of Taxation of the Commonwealth of Australia Re Perron Investments Pty Limited, Century Finance Pty Limited and Prestige Motors Pty Limited v Deputy Commissioner of Taxation, Perth [1989] FCA 397
Carbotech-Australia Pty Ltd v Yates [2008] NSWSC 1151
Doran Constructions Pty Limited (in Liquidation) [2002] NSWSC 215
A3 v Australian Crime Commission (No. 2) [2006] FCA 929
Hogan v Australian Crime Commission (No 4) [2008] FCA 1971
Re Murphy and Queensland Treasury (1998) 4 QAR 446

DECISION

The agency's decision is confirmed. I find that the disputed documents are exempt under clause 7(1) of Schedule 1 to the FOI Act.

Sven Bluemmel
INFORMATION COMMISSIONER

13 September 2011

REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Agriculture and Food ('the agency') to refuse Mr Ian Bruce Duggan ('the complainant') access to documents under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. The complainant formerly owned a plantation in Carnarvon, which he leased to share farmers. In January 2008, the agency issued the complainant with a requisition notice pursuant to the *Plant Diseases Act 1914* ('the PD Act') requiring him and the lessees to take certain measures and action in relation to his plantation. In February 2008, the agency commenced an investigation regarding an alleged non-compliance with the notice. Subsequently, in January 2010, the agency commenced prosecution action against the complainant in the Magistrates Court of Western Australia. That action was withdrawn in May 2010.
3. On 11 March 2010, the complainant applied to the agency under the FOI Act for access to correspondence between the agency and the State Solicitors Office ('the SSO') and between the agency and a certain third party, concerning his alleged breach of the PD Act. The agency contacted the complainant on 11 and 15 March 2010 to clarify the scope of his request.
4. On 7 April 2010, the SSO disclosed a number of documents to the complainant outside the FOI Act under the disclosure obligations imposed as part of the prosecution proceedings.
5. By notice of decision dated 20 April 2010 the agency identified 248 folios within the scope of the complainant's access application. The agency gave the complainant access to edited copies of 19 folios; refused access to six folios on the ground they were exempt under clause 3(1) (personal information); and refused access to 223 folios, claiming they were exempt under clause 7(1) (legal professional privilege) of Schedule 1 to the FOI Act.
6. The complainant sought internal review of the agency's decision on the 223 folios claimed exempt under clause 7(1). On 6 May 2010 the agency confirmed its decision to refuse the complainant access to those 223 folios.
7. Thereafter, on 11 June 2010, the complainant applied to me for external review of the agency's decision. On 13 June 2010, the complainant provided me with further material and claimed that the requested documents did not attract privilege as they were made in furtherance of an illegal or improper purpose.

REVIEW BY THE INFORMATION COMMISSIONER

8. Following receipt of the complainant's application for external review, the agency produced to me the originals of the disputed documents together with

the agency's FOI file maintained in respect of the complainant's access application.

9. At the outset of this complaint there were 223 folios or 42 documents in dispute between the parties. Following discussions with one of my officers, the complainant reduced the scope of his complaint to ten documents and the agency subsequently gave the complainant access in full to seven of those documents. Consequently, only three documents remain in dispute.
10. On 20 April 2011, after considering the information then before me, I wrote to the parties setting out my preliminary view of the complaint. My preliminary view was that the disputed documents were exempt under clause 7(1) of Schedule 1 to the FOI Act, as the agency claimed.
11. I invited the complainant to withdraw his complaint or alternatively to provide me with relevant written submissions. The complainant made further submissions to me on 28 April 2011 and provided additional material on 23 June 2011, 24 July 2011 and 24 August 2011.

THE DISPUTED DOCUMENTS

12. The three documents remaining in dispute were described by the agency in the schedule of documents attached to its notice of decision as folios 26-146, 147-156 and 214. For the sake of convenience, I refer to them as Documents 1-3:
 - Document 1 (folios 26-146) is a "*Confidential Report. Compliance Reference NWJ2757. Prosecution report for State Solicitor's Office – 121 pages*" dated 26 May 2008 prepared by the agency;
 - Document 2 (folios 147-156) is a "*Copy of letter from SSO to [the agency] received at meeting with SSO regarding prosecution – 10 pages*" dated 24 February 2009; and
 - Document 3 (folio 214) is a letter dated 19 June 2009 from the agency to the SSO.

CLAUSE 7 – LEGAL PROFESSIONAL PRIVILEGE

13. The agency claims that the disputed documents are exempt under clause 7(1) of Schedule 1 to the FOI Act. Clause 7(1) provides:

“(1) Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.”

14. 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) 201 CLR 49 at [35]; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*

(2002) 213 CLR 543. The former is often referred to as ‘advice’ privilege and the latter ‘litigation’ privilege: see *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357 at [8]-[9].

15. Litigation privilege protects material created at the instigation of a party or the party’s legal advisers for the dominant purpose of conducting anticipated or existing litigation. An explanation of the rule, as set out in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490, is explained in J D Heydon, ‘*Cross on Evidence*’ (7th Australian edition) at [25225] as follows:

“The rule also protects documents which are not communications provided they are brought into existence for the dominant purpose of preparing for, or for use in, existing or contemplated judicial or quasi-judicial proceedings...”

The complainant’s submissions

16. The complainant’s detailed submissions are set out in his application for external review received on 11 June 2010 and in his correspondence to my office received on 13 June 2010, 2 December 2010, 14 January 2011, 25 February 2011, 3 March 2011, 5, 6 and 28 April 2011, 23 June 2011, 24 July 2011 and 24 August 2011.
17. In brief, the complainant submits that the disputed documents are not exempt under clause 7(1) of Schedule 1 to the FOI Act because legal professional privilege never attached to the disputed documents, as they are communications made in the course of an unlawful or improper purpose: *Propend and Attorney-General (NT) v Kearney* (1985) 158 CLR 500. The purpose in the present case consists of the agency:
- i. prosecuting him with insufficient evidence and without just cause for the purpose of mitigating any criticism of the agency. The agency’s motive in taking that action was to cover up negligence by the agency over its handling of a certain plant disease in the Carnarvon region and the ‘Small Hive Beetle’ outbreak in Kununurra some months earlier. The agency’s action against him amounts to a malicious prosecution and an abuse of process: see *Noye v Robbins*; *Noye v Crimmins* [2007] WASC 98;
 - ii. using prosecution action for an illegal or improper purpose to punish him for raising certain queries with the agency (concerning which the agency could be criticised) and for bringing those matters to the attention of his local Member of Parliament (‘MP’), who then asked questions pertaining to the agency in Parliament;
 - iii. breaking the law in presenting select facts to the SSO, including inaccurate statements and withholding relevant evidence in breach of s.130(2) and s.135 of the *Criminal Code* (‘conspiring to pervert justice’) in order to facilitate a prosecution against him;

- iv. facilitating the collusion of most of the prosecution witnesses;
- v. concealing documents in breach of s.110 of the FOI Act;
- vi. breaching s.173 of the *Criminal Code* ('refusal by public officer to perform duty') when a certain officer failed to respond to the complainant's request for further information regarding the investigation of him and thereby denying him procedural fairness; and
- vii. misfeasance in public office by those preparing the "*prosecution brief*". I understand the complainant's references to "*prosecution brief*" and "*brief for prosecution*" in his submissions to be references to Document 1.

Consideration

18. I have examined the information before me including the disputed documents. The agency advises me that Document 1 is a confidential report prepared by the agency for the dominant purpose of being put before its legal advisers, the SSO, for legal advice and preparing for anticipated litigation. I understand from the agency and the information before me that the agency provided Document 1 to the SSO and, following an examination of that matter, the SSO provided the agency with its advice by letter (Document 2). Document 3 is the agency's letter to the SSO in response to its receipt of Document 2.
19. The first question for my determination is whether a solicitor/client relationship exists between the agency and the SSO. The High Court of Australia has held that legal professional privilege attaches to confidential communications between government agencies and salaried legal officers in government employment in respect of legal advice, where the advice given is within the professional relationship between the legal officer and the client and the advice is independent in character: *Kearney and Waterford v The Commonwealth of Australia* (1987) 163 CLR 54.
20. 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 statutory authorities: see, for example, *Re Page and Metropolitan Transit Authority* (1988) 2 VAR 243 and *Alcoota Aboriginal Corporation and Anor v Central Land Council and Ors* [2001] NTSC 30. On the information before me, I am satisfied that a solicitor/client relationship capable of attracting legal professional privilege exists between the SSO and the agency.
21. The next question for my determination is whether the disputed documents are privileged. Based on my examination of Documents 1-3, the agency's advice and other material before me, I am satisfied that Document 1 is a confidential communication that was created for the dominant purpose of the agency's seeking legal advice from its legal adviser, the SSO. In my view, Document 1 would *prima facie* be privileged from production in legal proceedings.
22. Document 2 is a letter from the SSO to the agency. On its face, I am satisfied

that it is a confidential communication between the agency's legal adviser and the agency made for the dominant purpose of giving legal advice to the agency. I consider Document 2 would *prima facie* be privileged from production in legal proceedings.

23. Document 3 is a letter from the agency to the SSO. On its face, I am satisfied that it is a confidential communication between the agency and its legal adviser made by the agency for the dominant purpose of preparing for contemplated judicial proceedings. Accordingly, I consider that Document 3 would *prima facie* be privileged from production in legal proceedings.
24. Consequently, I am satisfied that all of the disputed documents would *prima facie* be privileged from production in legal proceedings on the ground of legal professional privilege and, thus, exempt under clause 7(1) of Schedule 1 to the FOI Act.

Scope of the Information Commissioner's consideration under clause 7(1)

25. As noted, the complainant submits that the disputed documents are not privileged because they were made in the course or furtherance of an unlawful or improper purpose. The complainant has provided substantial material in support of that claim.
26. I note that the principle of illegal or improper purpose is not, strictly speaking, an 'exception' to the rule governing the application of legal professional privilege. In *Propend, McHugh J* at 556 said: "*While such communications are often described as "exceptions" to legal professional privilege, they are not exceptions at all. Their illegal object prevents them becoming the subject of the privilege*".
27. In *Temwood Holdings Pty Ltd v Western Australian Planning Commission & Anor* [2003] WASCA 112, Wheeler J considered an appeal from a decision of the former Information Commissioner who found that certain documents were exempt under clause 7(1). The respondents in that matter raised the question of waiver. Her Honour said, at [4]:

"... the wording of [clause 7(1)] is concerned with whether matter would be privileged from production in any legal proceedings on the ground of legal professional privilege, notwithstanding that there may be no legal proceedings in existence. There is therefore a question of a somewhat hypothetical or abstract nature for the Information Commissioner to determine. Where an issue of privilege arises in the context of legal proceedings, issues of fairness arising from the whole of the context of the proceedings, will be relevant to the question of whether waiver should be imputed as a matter of law. Against that background, the respondents suggested that it appeared that the only question for the Information Commissioner was 'Is this the sort of document that ordinarily would be privileged from production by reason of legal professional privilege?'"

28. In that case, Wheeler J did not consider it necessary to deal with that question

since, on detailed examination of the evidence, she held that there was no waiver of privilege in that case.

29. In *Department of Housing and Works v Bowden* [2005] WASC 123, the Supreme Court dealt with an appeal by the Department of Housing and Works ('the Department') against the former A/Information Commissioner's decision that the Department had impliedly waived its right to claim privilege for certain documents in that case. The Supreme Court set aside the decision of the former A/Commissioner and found the relevant documents exempt under clause 7(1).

30. Relevantly, McKechnie J said in *Bowden*:

"16. In general, it is only necessary for a decision-maker, including the Commissioner, to decide whether, on its face, or after information has been received, if necessary, a document is prima facie privileged from production in legal proceedings.

17. Whether privilege has been waived may involve subtle questions of law: see, for example, Mann v Carnell (1999) 201 CLR 1; [1999] HCA 66. It may, but need not, necessarily, involve consideration of subjective intention of an agency and whether a particular officer stands in the shoes of the agency in disclosing material intentionally. It may involve questions of inconsistency of conduct. These matters are often difficult to resolve.

18. Parliament could not have intended that these questions should be resolved at every level of an FOI request by persons untrained in the law and in a vacuum without the matrix of extant legal proceedings to resolve the question of waiver.

19. A finding that a document is prima facie the subject of legal professional privilege is a finding that the matter would be privileged from production in legal proceedings on that ground. It may be that in specific legal proceedings, following inquiry, a court might hold that the privilege had been waived. Such a finding of waiver does not derogate from the proposition that legal professional privilege once attached to a document and attached at the time of the FOI request.

...

25. In my opinion, Parliament did not intend that decision-makers under the FOI should be required to go through the factual permutations that may operate to resolve questions of waiver of privilege, especially when the exercise is hypothetical because there are no legal proceedings. If it appears, prima facie, that a matter would be privileged from production in legal proceedings on the ground of legal professional privilege then it is exempt matter.

...

28. *I therefore hold that the Commissioner was wrong in proceeding to determine the question of waiver. Once she had concluded that the documents were prima facie privileged in legal proceedings, then it followed that the three documents were exempt matter and access was not permitted.”*
31. McKechnie J concluded at [46]:
- “... *I hold that once a document is determined, prima facie, to be the subject of legal professional privilege, questions of waiver do not arise under the FOI Act.”*
32. Although the decision in *Bowden* only dealt with the question of waiver of privilege, and did not consider whether in dealing with clause 7(1) the Commissioner is required to consider the issue of improper purpose, McKechnie J at paragraphs [25], [28] and [46] makes it clear that when a document is claimed to be exempt under clause 7(1), it is only necessary for the Commissioner to decide whether the document is *prima facie* privileged – that is, whether, on its face, it would be privileged from production in legal proceedings.
33. The decision in *Bowden* is directly relevant to the application of clause 7(1) and, as a decision of the Supreme Court of Western Australia, is binding: see *Re Ross and Department of the Premier and Cabinet* [2008] WAICmr 7; *Re Boddington Resources Pty Ltd, Trovex Pty Ltd and Moutier Pty Ltd and Department of Industry and Resources* [2008] WAICmr 4; and *Re Glasson and the Department of Premier and Cabinet* [2009] WAICmr 11.
34. As I understand *Bowden*, if I find that the disputed documents are *prima facie* the subject of legal professional privilege, then those documents are exempt under clause 7(1).
35. The dictionary meaning of ‘*prima facie*’ is “*at first appearance; at first view; before investigation*”: see Macquarie Dictionary, 5th edition, 2009. McKechnie J said at paragraph [14] of *Bowden* that “[t]he test at common law for legal professional privilege in relation to documents is whether a communication was made or a document was prepared for the dominant purpose of a lawyer providing legal advice or legal services...”. Applying that test and the dictionary definition of ‘*prima facie*’, it follows that a document will be ‘*prima facie*’ privileged if at first view or before investigation by the Information Commissioner or an agency’s decision-maker it appears to be a communication made or a document prepared for the dominant purpose of a lawyer providing legal advice or legal services.
36. In *Re Carnegie Richmond Hallett Fieldhouse v the Deputy Commissioner of Taxation of the Commonwealth of Australia Re Perron Investments Pty Limited, Century Finance Pty Limited and Prestige Motors Pty Limited v Deputy Commissioner of Taxation, Perth* [1989] FCA 397 (which were four appeals heard together by consent), the Federal Court said, at [55]:

“When one speaks of a document being *prima facie* the subject of legal professional privilege all that is meant is that the document is one that records in some way or another legal advice”.

37. In *Carbotech-Australia Pty Ltd v Yates* [2008] NSWSC 1151, Brereton J considered the question of whether a document is *prima facie* the subject of legal professional privilege as a separate issue to the question of whether the documents were disentitled to privilege by way of fraud or criminality. Among other things, the plaintiffs contended that the documents were ‘disentitled’ to privilege by reason of an alleged improper purpose and, in addition, that in respect of some of the documents any claim for privilege had been waived. In considering the matter, Brereton J of the NSW Supreme Court said at [5]:

“There are therefore essentially three questions: the first is whether a claim for client legal privilege *prima facie* has been established; the second is whether the documents are disentitled to privilege by the fraud or criminality exception; and the third is whether privilege has been waived.”

38. Similar approaches can be found in *Doran Constructions Pty Limited (in Liquidation)* [2002] NSWSC 215 per Campbell J at [127]-[128] and *A3 v Australian Crime Commission (No. 2)* [2006] FCA 929 per Emmett J at [5]. See also *Hogan v Australian Crime Commission (No 4)* [2008] FCA 1971 at [3].
39. In effect, the approach taken is to establish first whether the document is *prima facie* privileged and only then consider whether the illegal or improper purpose ‘exception’ applies. In my opinion, the above authorities provide that a document will be *prima facie* the subject of legal professional privilege if it appears that it has been brought into existence for the dominant purpose of giving or receiving legal advice or for use in existing or anticipated litigation. Determining whether a document is *prima facie* privileged does not include a consideration of whether the communication was made for an improper purpose.
40. Applying the same approach as adopted in *Bowden*, once I decide, as I have in this case, that the disputed documents are, *prima facie*, the subject of legal professional privilege, then that is all that is required to establish the exemption under clause 7(1). In my view, where *prima facie* legal professional privilege apparently attaches to documents held by an agency, *Bowden’s* case has the effect of constraining my role to that of deciding whether, on its face or after information has been received, documents are *prima facie* privileged from production in legal proceedings.
41. However, even if my application of the approach taken in *Bowden* to this case is incorrect, I would still find that, on the information before me, the disputed documents were not prepared in furtherance of any illegal or improper activity or purpose, as set out below.

Illegal or improper purpose

42. The principles for the displacement of legal professional privilege due to an illegal or improper purpose can be found in the judgments of the High Court in *Kearney* and *Propend*. In *Propend*, Gaudron J at 545 referred to Dawson J's judgment in *Kearney* at 528-529, for different formulations of the nature of the wrongdoing which 'displaces' legal professional privilege. These include "a criminal or unlawful act", "an improper or an illegal act", "illegality or fraud or trickery", "crime or civil fraud" and "wrongdoing" – see also *AWB v Cole (No 5)* [2006] FCA 1234 at [210]-[212]. Communications made for an illegal purpose, such as an abuse of statutory power, are also not covered by the privilege: see Gibbs CJ in *Kearney* at 515.
43. An analysis of the principles drawn from these two cases is usefully set out by the Queensland Information Commissioner in *Re Murphy and Queensland Treasury* (1998) 4 QAR 446, as follows:
- 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. It is not necessary to prove an improper purpose on the balance of probabilities, but there must be evidence to raise sufficient doubt as to a claim of privilege. A mere assertion or allegation of fraud or impropriety is insufficient.
 - There is an 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.
 - 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. 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; however, such knowledge or intention on the part of the client, or the client's agent, is a necessary element.
 - *Prima facie* evidence that a communication was made in furtherance of the purpose of making an administrative decision, which decision can be shown to have been based on a flawed understanding of the legal requirements attending the making of that administrative decision, will not necessarily lead to the establishment of the 'improper purpose exception'

to legal professional privilege. A mere mistake as to legal requirements will usually be insufficient.

44. I agree with the above analysis and consider that the principles referred to in *Re Murphy* are correct.
45. Since the complainant alleges that legal professional privilege does not apply to the communications in the disputed documents by reason of an alleged illegal or improper purpose, he has the onus of establishing reasonable grounds for believing that the disputed documents were made in preparation for, or furtherance of, the alleged illegal or improper purposes. Although the standard of proof is not required to the level of proof on the balance of probabilities that the communications were made in the commission of a fraud or other improper purpose, there must be “*something to give colour to the charge*”: Brennan CJ in *Propend* at 514.
46. In his submissions, the complainant has principally relied on documents which he has obtained through FOI applications made to the agency. The complainant contends that those documents demonstrate that the agency deliberately commenced prosecution proceedings in order to mitigate criticism of its handling of certain matters and to punish him and that they support his contention that Documents 1-3 were prepared in furtherance of an illegal or improper purpose.
47. I have considered the complainant’s submissions in (i) to (vii), as set out in paragraph 17 above. I have also examined all of the relevant documents referred to by the complainant, which he submits substantiate his claim.
48. I note that 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 *Re Murphy* at [38]. In other words, it is not enough to find *prima facie* evidence of an illegal or improper purpose. There must be *prima facie* evidence that the particular communications – that is, Documents 1-3 – were made in preparation for, or furtherance of, an illegal or improper purpose, fraud or illegality.
49. In relation to submission (i), the complainant has cited the case of *Noye*. In that case, a police officer was prosecuted but the prosecution was subsequently dropped. The police officer then sued the Inspector who brought the charges for malicious prosecution, injurious falsehood and collateral abuse of process. In relation to abuse of process, the Court, at paragraphs 269-272, recognised that that tort would be made out if it was shown that the Inspector had initiated a prosecution in which he had no belief, so as to make a scapegoat out of the police officer and, thereby avoid or to reduce criticism or embarrassment of the Police Force over its handling of the Argyle diamond affair and allegations of police corruption.
50. In the present case, I acknowledge that some of the documents relied on by the complainant in support of submission (i) may suggest that there were certain administrative deficiencies and delays in the agency’s handling of a plant

disease outbreak in the Carnarvon region and that the agency was reluctant to release information that could leave it open to criticism. However, I do not accept that this, of itself, amounts to reasonable grounds for believing the agency commenced proceedings against the complainant in an attempt to mitigate criticism of those deficiencies. In my view, the documents the complainant relies on can be construed as showing that the agency was taking a considered approach and discussing various options with regard to the appropriate action to be taken in the matter. I understand that since the withdrawal of the prosecution, the agency has been made aware of issues where its administrative functions and subsequent actions may have been procedurally inadequate and the complainant has been informed of the steps that have been implemented to address this.

51. There is nothing provided to me by the complainant or on the material before me to suggest that there was a malicious prosecution or an abuse of process as an attempt to divert attention from the agency's shortcomings. Instead, there are documents before me that evidence the agency's belief that there was a *prima facie* case to justify a prosecution.
52. The complainant submits in (ii) that the documents to which he refers show that the agency provided false and misleading answers to Parliament and revised its response to the complainant. He submits that these actions support his claim that the agency was trying to cover-up its negligence and also punish him for informing his local MP about issues concerning the agency and raising certain queries with the agency.
53. In my view, the documents on which the complainant relies – which include draft and final answers to parliamentary questions and internal emails within the agency – merely show a process of drafting and refining undertaken by the agency in providing answers to the complainant and to Parliament. I am unable to comment on the accuracy or otherwise of the answers to Parliament from the information before me. Regardless, I do not consider that those documents are *prima facie* evidence to suggest that the agency embarked on a deliberate course of action to punish the complainant by way of prosecution for raising issues concerning the agency with both the agency and his MP, let alone that Documents 1-3 were made in preparation for, or furtherance of, an illegal or improper purpose.
54. In relation to submission (iii), the complainant submits that the agency deliberately presented selective facts and inaccurate witness statements to the SSO and withheld relevant evidence. He submits that this could not be considered as mere negligence, in view of the agency's experience in preparing matters for prosecution. The complainant contends that the agency was reckless and the prosecution was a conspiracy to bring false accusations against him to cover-up its previous negligence in handling the plant disease outbreak and investigation into the matter.
55. The complainant submits that witness statements have been structured to support a prosecution against him by omitting relevant evidence and containing incorrect information. An example is the complainant's submission that a

particular memorandum prepared by an officer of the agency was deliberately withheld from the SSO, because it would have destroyed the prosecution case against him. The complainant submits that the memorandum recorded instructions given to him by that officer and was evidence to show he did not breach a requisition notice issued to him by the agency. However, from my examination of that memorandum, it is ambiguous as to whether any instructions were given by that officer to the complainant. Moreover, I observe that the memorandum was made well before the requisition notice was issued by the agency to the complainant. The requisition issued by the agency consisted of the steps to be taken by the complainant in relation to his plantation. In my opinion, it follows that any 'instructions' given prior to that requisition would not have been relevant to the complainant's alleged non-compliance with the requisition, which was the subject of the prosecution action commenced against him and that may provide an alternative explanation as to why it was withheld.

56. Having considered the relevant material, I accept that there are some inconsistencies and anomalies relating to dates of certain events that occurred and also to things said or observed. In my view, there are reasonable alternative explanations as to why those inconsistencies occurred, which include poor record-keeping and administrative training and simple error. I consider that there is no *prima facie* evidence before me to establish reasonable grounds for believing that such omissions, inconsistencies or anomalies were made for, or in furtherance of, any illegal or improper purpose.
57. With regard to the complainant's submissions in (iv), I acknowledge that some of the witness statements contain similar accounts and certain identical inaccuracies. For example:
- nine witness statements, which were disclosed to the complainant by the SSO while his prosecution was on foot, contain the same incorrect address for the complainant's plantation;
 - two witness statements made by officers of the agency – who attended at the complainant's plantation together on a number of occasions – contain some identical paragraphs; and
 - two witness statements include dates which the complainant contends are incorrect and included for the purpose of supporting certain statements made by officers.
58. In my view, it is not uncommon for some coordination to occur in the preparation of witness statements and other documents being prepared for a prosecution, which may include a process of checking facts – such as an address – re-drafting and refinement. I understand from the information before me that one officer of the agency was coordinating the preparation of all of the statements. In my opinion, most people could not be expected to draft a witness statement that conforms to the relevant requirements without some assistance. I do not consider that the coordination which occurred is susceptible only to the interpretation that the complainant has placed on it. There are other documents before me that show clear instructions for witnesses to check the truth of their

statements and to amend anything that they disagreed with prior to signing. There is no *prima facie* evidence before me to establish reasonable grounds for believing that those instructions were not followed or that the agency facilitated the collusion of witnesses for an improper or illegal purpose.

59. In my opinion, the documents which the complainant submits show improper collusion only establish that there were some inaccuracies and some coordination in the preparation of the statements. In my view, that does not amount to reasonable grounds for believing that the agency facilitated the collusion of witnesses or that the disputed documents were made in furtherance or preparation of an illegal or improper purpose.
60. In (v), the complainant submits that the agency concealed documents, in breach of s.110 of the FOI Act. However, there is nothing in the material before me to suggest that any officer of the agency was involved in concealing a document or was knowingly involved in such an act for the purpose (sole or otherwise) of preventing the agency from giving access under the FOI Act.
61. With respect to submission (vi), I do not consider that the failure of an officer to respond to the complainant's email request for information (about, among other things, the names of witnesses and specific details as to dates, times etc that the alleged offences occurred) – in the event that there was such a failure – amounts to an offence under s.173 of the *Criminal Code*. The complainant submits that such a failure to respond was a breach of the agency's relevant code of conduct; the State Ombudsman's Guidelines relating to procedural fairness; and Administrative Instructions under the *Public Sector Management Act 1994* sufficient to make it an offence under s.173 of the *Criminal Code*. I note that provision is headed "*Refusal of public officer to perform duty*", a breach of which is punishable by 2 years' imprisonment.
62. The complainant's assertions in this regard are supported only by documents that indicate that a request was made for information and that the agency had recorded his request as received. The complainant has provided me with no *prima facie* evidence to establish reasonable grounds for believing that any illegal or improper purpose was intended by the alleged failure to answer his email of 28 February 2008, or that the disputed documents were made in preparation for, or furtherance of, an illegal or improper purpose.
63. In submission (vii), the complainant submits that there is evidence to demonstrate misfeasance in public office by those preparing the "*prosecution brief*". In *Noye*, the principles of the tort of misfeasance are set out. In order to establish misfeasance in public office, it must be demonstrated that the office-holder acted in bad faith in pursuit of an improper or collateral purpose, or maliciously, and with the intention to harm; and with actual knowledge that the conduct was beyond power and likely to harm. Based on the material before me, there is no evidence to establish that any officer of the agency or the SSO acted beyond power or maliciously and with the intent to harm the complainant or that there are reasonable grounds for believing that to be the case. In my view, the complainant has not made out the tort of misfeasance in public office. While I note that some of the documents indicate that certain officers had

inadequate training to perform their duties, I do not consider that equates to acting beyond power with intent to harm, where that officer is clearly authorised and given the power to perform those duties.

64. Having examined all the relevant material which the complainant provided to me together with the disputed documents, I do not consider there to be *prima facie* evidence that Documents 1-3 were made in preparation for, or furtherance of some illegal or improper purpose as described by the complainant. In my view, there is nothing to support a *prima facie* case that these documents were prepared for any purpose other than advising the agency in relation to a potential prosecution of the complainant. Consequently, I am not persuaded that the 'exception' from the privilege for documents prepared in furtherance of an illegal or improper purpose applies in this case.

CONCLUSION

65. For the reasons given above, as I am satisfied that the disputed documents would be privileged from production in legal proceedings on the ground of legal professional privilege, I find that the disputed documents are exempt from disclosure under clause 7(1) of Schedule 1 to the FOI Act and confirm the agency's decision.
