OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2011273 Decision Ref: D0362012

Participants:

'V'
Complainant

- and -

Legal Profession Complaints Committee
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to an inquiry – clause 7 – legal professional privilege – whether documents prima facie privileged – illegal or improper purpose – waiver – whether solicitor-client relationship exists between agency and its legal advisers – clause 3(1) – personal information – personal information about third parties – personal information about the complainant – clause 3(4) – prescribed details – services performed under contract – clause 3(6) – the public interest – information known by the complainant – whether the access application was for personal or non-personal information – section 26 – documents that cannot be found or do not exist – sufficiency of searches.

Administrative Decisions (Judicial Review) Act 1977 (Cth)
Freedom of Information Act 1992: sections 3(3), 23(1), 24, 26, 30(f), 40(2), 40(3), 74, 76(1), 76(4), 102(1) and 102(3); Schedule 1, clauses 3(1), 3(4), 3(6) and 7(1)
Freedom of Information Regulations 1993: regulations 2, 4 and 9
Legal Profession Act 2008 (WA)
Legal Profession Act 1987 (NSW) (repealed)
Legal Profession Act 2004 (NSW)

A3 v Australian Crime Commission (No. 2) [2006] FCA 929
Alcoota Aboriginal Corporation and Anor v Central Land Council and Ors [2001] NTSC 30.
Attorney General (NT) v Kearney (1985) 158 CLR 500
Avon Downs Pty Ltd v Commissioner of Taxation (Cth) (1949) 78 CLR 353
Bailey v Commissioner of Taxation (Cth) (1977) 136 CLR 214
Baker v Campbell (1983) 153 CLR 52
Balabel v Air India [1988] Ch 317
Bennett v CEO Australian Customs Service [2009] 210 ALR 220

Carbotech-Australia Pty Ltd v Yates [2008] NSWSC 1151
Clements Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police (2001) FCA 1858
Commissioner Australian Federal Police v Propend Finance Pty Ltd [1996-1997] 188 CLR 501
Commissioner of Taxation v Pratt Holdings Pty Ltd [2003] FCA 1641
Commissioner of Taxation (Cth) v Rio Tinto Limited [2006] FCAFC 86
Department of Housing and Works v Bowden [2005] WASC 123
Dimos v Hanos and Egan (2001) VSC 173
Doran Constructions Pty Ltd (in liquidation) [2002] NSWSC 215
DPP v Smith [1991] 1 VR 63
Esso Australia Resources Ltd v The Commissioner of Taxation (1999) 201 CLR 49
Glengallan Investments Pty Ltd & Ors v Anderson & Ors [2001] QCA 115
Grant v Downs [1976]135 CLR 674
Harris v Australian Broadcasting Corporation (1983) 50 ALR 551
Health Department of Western Australia v Australian Medical Association Ltd [1999] WASCA 269
Hogan v Australian Crime Commission (No. 4) [2008] FCA 1971
Keesing v Adams [2010] NSWSC 336
Lake Cumberline Pty Ltd v Effem Foods Pty Ltd (1994) 126 ALR 58
Mann v Carnell (1999) 201 CLR 1
Mayor and Corporation of Bristol v Cox [1884] 26 Ch D 678
Moore v Row [1629] 1 Rep Ch 38
Police Force of Western Australia v Kelly and Smith (1996) 17 WAR 9
R v Bell, ex parte Lees (1980) 146 CLR 141
Re Boddington Pty Ltd, Trovex Pty Ltd and Moutier Pty Ltd and Department of Industry and Resources [2008] WAICmr 4
Re Carnegie Richmond Hallett Fieldhouse v The Deputy Commissioner of Taxation of the Commonwealth of Australia re Perron Investments Pty Ltd, Century Finance Pty Ltd and Prestige Motors Pty Ltd v Deputy Commissioner of Taxation, Perth [1989] FCA 397
Re Coastal Waters Alliance of Western Australia and Department of Environmental Protection and Another [1995] WAICmr 37
Re Duggan and Department of Agriculture and Food [2011] WAICmr 31
Re Glasson and the Department of Premier and Cabinet [2009] WAICmr 11
Re Leighton and Shire of Kalamunda [2008] WAICmr 52
Re Linda Elsie Manning and University of Western Australia [2005] WAICmr 9
Re Lyall and Insurance Commission of Western Australia [2004] WAICmr 15
Re Mossenson and Others and Kimberley Development Commission [2006] WAICmr 3
Re Murphy and Queensland Treasury (1998) 4 QAR 446
Re Neville; Ex Parte Pike [1896] 17 NSW (B&P) 24
Re Page and Metropolitan Transit Authority (1988) 2 VAR 243
Re Ross and Department of Premier and Cabinet [2008] WAICmr 7
Re Simonsen and Edith Cowan University [1994] WAICmr 10
Re Waterford and Department of the Treasury (No. 2)(1984) 5 ALD 588
Re Western Australian Newspapers Pty Ltd and Western Power Corporation [2005] WAICmr 10
Rich v Harrington [2007] FCA 1987
Rondel v Worsley [1969] 1 AC 191

Southall v Hill [2010] VCC 123
The Daniels Corporation Pty Ltd v ACCC (2002) 213 CLR 543
The Queen (Brooke and Another) v Parole Board and Others [2007] EWHC 2036 (Admin)
Trade Practices Commission v Sterling (1979) 36 FLR 244
Waterford v The Commonwealth of Australia (1987) 163 CLR 54

Heydon J D, Cross on Evidence, **7th Australian Edition**
Macquarie Dictionary *[online version at www.macquarieonline.com.au, accessed on 18 December 2012]*
Shorter Oxford English Dictionary, *5th Edition, 2002*

DECISION

The agency's decision is varied. I find that:

- The decision of the agency to refuse access to documents under section 26 of the *Freedom of Information Act 1992* ('the FOI Act') is justified. The agency has taken all reasonable steps to find the requested documents but they cannot be found or do not exist;

- Documents 36, 36.1, 43, 46, 46.1, 46.2, 46.3, 47, 48, 50, 50.1, 50.2, 50.3, 51, 51.1, 53, 59, 60, 62, 64, 64.1, 64.2, 64.3, 65, 70, 70.1, 71, 71.1, 75, 75.1, 92, 92.1 and 100 are exempt under clause 7(1) of Schedule 1 to the FOI Act;

- Documents 40, 52, 58, 67, 67.1, 68, 69, 70.2, 72, 73, 80 and 80.1 are not exempt under clause 7(1);

- the information deleted from Documents 40, 58, 67, 67.1, 68, 69, 70.2, 72, 73, 80 and 80.1 is exempt under clause 3(1) of Schedule 1 to the FOI Act; and

- Document 89.1 is exempt under clause 3(1) of Schedule 1 to the FOI Act.

Sven Bluemmel
INFORMATION COMMISSIONER

21 December 2012

REASONS FOR DECISION

1. This complaint arises from a decision made by the Legal Profession Complaints Committee ('the agency') to refuse 'V' ('the complainant') access to certain documents under the *Freedom of Information Act 1992* ('the FOI Act'). Given the nature of the background to this matter, I have decided not to identify the complainant by name in order to protect their privacy.

BACKGROUND

2. The agency is established as a committee of a regulatory authority, the Legal Practice Board, under s.555 of the *Legal Profession Act 2008* ('the LP Act'). The agency's functions include supervision of the conduct of legal practitioners and the power to inquire into complaints about practitioners.

3. In 2004 a matter concerning the complainant was referred to the agency. However, in 2006, following an investigation, the agency resolved to take no action on that matter, following legal advice obtained from out-of-state Counsel that a charge of unprofessional or unsatisfactory conduct could not be established.

4. On 1 June 2011, the complainant applied to the agency under the FOI Act for access to documents relating to the allegations made against the complainant and the investigation conducted by the agency into those allegations. Specifically, the complainant sought access to:

> *"1. (a) the complaint file containing correspondence, memoranda and the like;*
> *(b) documents related to the meetings of the Complaints Committee, such as agendas, minutes, memoranda and the like; and*
> *(c) any other file created,*
>
> *Dealing in any way with the enquiry into my conduct which commenced in October 2004…*
>
> *2. This application is for each and every page of the files from and including the time when 'the chairman received information' 'from a person' to and including any consideration of* [a third party's letter] *to the Complaints Committee and, without limited the width of the description in the preceding paragraph, includes the instructions given to the out-of-State Counsel and his or her Opinion or Memorandum of Advice.*
>
> *3. I enclose my cheque for $30 in case it is properly payable. My own view is that 'the application is one for personal information about the applicant only' and that no fee is payable, in which case the cheque should be returned to me…"*

5. By letter dated 12 June 2011, the agency's FOI Coordinator responded to the complainant's access application and provided the following advice:

> *"... As you have sought access to documents directly relating to the* [agency's] *investigation into your conduct, I have returned your cheque for $30.00 on the basis that your request appears to be limited to personal information only. However, if it transpires that your request includes non-personal information, the application fee may be payable..."*

6. On 7 July 2011, the agency notified the complainant of its decision, which was to give access in full or in edited form to 139 documents (listed in Part 1 of the agency's document schedule) ('the Part 1 Documents') but to refuse access to 56 documents (listed in Part 2 of the schedule) ('the Part 2 Documents'), under clauses 3(1), 6(1) and 7(1) of Schedule 1 to the FOI Act.

7. On 2 August 2011 the complainant applied to the agency for internal review of its decision *"...of 7 July 2011 refusing to grant access to the documents set out in Part 2 of your determination..."*. The complainant engaged in further correspondence with the agency making comments in relation to the process of its conduct in investigating the complaint against the complainant. In addition, in an email dated 10 August 2011, the complainant stated that they were *"...surprised that you have seen fit to make the deletions in the documents forwarded. The names of the [third parties] are, of course, very well known to me, and the names of [third parties] who passed on phone messages do not appear to necessitate deletion. These deletion actions are contrary to the legislative intent of the FOI legislation...."* In a notice of decision dated 12 August 2011, the agency confirmed its initial decision in relation to the Part 2 documents.

8. By email dated 23 September 2011, the complainant applied to me for external review of the agency's decision of 12 August 2011. The complainant stated that: *"I hereby make a complaint under section 65 and 66 of the* Freedom of Information Act 1992 *(WA) against the decision …dated 12 August 2011 …Without derogating from the generality of the foregoing, I contend that the documents claimed to be subject to legal professional privilege (client legal privilege) are not protected by that privilege and, in addition, I contend that the matter claimed to be exempt under Schedule 1 Clause 3 of the Act (as per section 24 of the Act) is not exempt. Other information was not recorded in documents, but should have been, and should have been provided to me."*

REVIEW BY INFORMATION COMMISSIONER

9. After receiving this complaint, I required the agency to produce to me its FOI file maintained in relation to the complainant's access application and the file or files containing the originals of the documents in dispute in this matter.

10. By letter dated 13 October 2011, my A/Senior Investigations Officer wrote to the complainant seeking confirmation of the ambit of the complaint to me. The complainant responded to my officer, in an email dated 20 October 2011, confirming that *"...my claim did not refer to documents being 'inaccurate' but*

to the insufficiency or incompleteness of the information provided, ie, information should have been recorded and provided to me, but was not."

11. In order to further clarify the scope of the complaint to me, in an email dated 24 October 2011, my officer wrote to the complainant confirming their understanding that the complainant sought external review of the agency's decision to refuse access to documents under s.26 of the FOI Act. My officer provided the complainant with information regarding my role on external review in relation to a decision made by an agency to in effect refuse access to documents under s.26 of the FOI Act. The complainant was invited to reconsider this aspect of their complaint to me.

12. In a letter dated 27 October 2011, the complainant responded making detailed submissions in relation to the conduct of the investigation held by the agency into the complaint lodged with it against the complainant; the agency's claim for exemption under clause 7(1); the agency's decision to refuse access to documents under s.26 of the FOI Act; the agency's decision to refuse access to certain information under clause 3(1). In that submission the complainant also commented on each individual document the subject of both parts 1 and 2 of the agency's decision. However, as only the Part 2 Documents are the documents the subject of this complaint, I have not considered the complainant's submission in relation to the Part 1 documents.

13. In a further submission to me dated 14 November 2011, the complainant repeated their concerns regarding the manner of the agency's investigation into the complaints made against the complainant. The complainant also made further submissions in relation to the agency's claim for exemption under clause 7(1); and confirmed that access is sought to a copy of the Court transcript *"...which was actually worked on by the* [agency]*..."*

14. On 8 May 2012, I provided the parties with a letter setting out my preliminary view of this complaint. In brief, my preliminary view was that:

    - the scope of the access application was limited to personal information about the complainant;
    - the scope of this complaint was limited to the Part 2 documents;
    - the agency's claim that certain documents were exempt under clause 7(1) is established;
    - certain documents claimed to be exempt under clause 7(1), were not exempt under that provision;
    - certain documents claimed to be exempt under clause 6(1) were not exempt under that provision – however certain of those documents were exempt under clause 7(1);
    - Document 89.1 was not exempt under clause 3(1); and

- pursuant to s.26 of the FOI Act, the agency had taken all reasonable steps to find documents within the scope of the access application but that further documents cannot be found or do not exist.

15. Both parties to this matter requested and were granted extensions of time to 5 June 2012 to respond to my preliminary view. The agency accepted my preliminary view and gave the complainant access to those documents that, in my preliminary view, were not exempt, deleting personal information, pursuant to clause 3(1). In an email dated 3 June 2012, the complainant did not accept any part of my preliminary view and provided me with detailed submissions on all points they considered to be still at issue.

16. Under cover of a letter dated 8 June 2012, the agency released copies of Documents 14.1, 30.1, 31, 39.1, 42.2, 42.4, 94.1 and 95.1 in full to the complainant. Therefore, Documents 14.1, 30.1, 31, 39.1, 42.2, 42.4, 94.1 and 95 are no longer in dispute in this matter and I will not consider those documents further. In addition, by letter dated 12 July 2012, the agency confirmed to my office that it had released edited copies of Documents 40, 52, 58, 67, 67.1, 68, 69, 70.2, 72, 73, 80 and 80.1, deleting certain information under clause 3(1) of Schedule 1 to the FOI Act. However, the complainant remained dissatisfied with the access provided to those documents.

17. Therefore, on 7 August 2012, I advised the parties, in writing, of my supplementary preliminary view concerning Documents 40, 52, 58, 67, 67.1, 68, 69, 70.2, 72, 73, 80 and 80.1 which the agency had released in edited form to the complainant as a result of my preliminary view of 8 May 2012. The agency claimed that the information deleted from those documents is exempt under clause 3(1) of Schedule 1 to the FOI Act. It was my supplementary preliminary view that, with the exception of a small amount of information in Documents 40, 58, 72 and 80, the deleted information was exempt under clause 3(1), as the agency claimed. In response, the agency gave the complainant access to the small amount of information that I considered was not exempt under clause 3(1).

18. However, the complainant did not accept my supplementary preliminary view of 7 August 2012 and in an email dated 15 August 2012 made further submissions to me on that matter.

THE COMPLAINANT'S SUBMISSIONS

19. In response to my preliminary view of 8 May 2012, the complainant made two separate detailed submissions. Given the complex nature of the dispute and the fact that the complainant made several comprehensive and detailed submissions, I have taken the step of reproducing many of those submissions, in some cases verbatim. I have done this to ensure that I have not inadvertently overlooked or misconstrued any element of the complainant's case, which may happen if such detailed submissions are paraphrased for reasons of brevity.

20. In an email dated 3 June 2012 the complainant submitted as follows:

"INTRODUCTION

1. Thank you for the time and effort you have put into consideration of my earlier submissions.

2. I thank you very much for forming the preliminary view that 23 documents in dispute are not exempt.

3. Hopefully, the LPCC will accept that preliminary view on those 23 documents, and if not, that you will not be persuaded by any further submissions made by the LPCC.

4. My further submissions on the matters where you have formed the preliminary view that the documents are exempt are set out hereunder.

B. DOCUMENTS UNDER REVIEW – SCOPE OF COMPLAINT

5. You claim that my request for review is restricted to the documents in Part 2 of the Schedule to the LPCC letter of 7 July 2011. That is incorrect.

6. In my request of 2 August 2011, I sought an internal review of [the agency's] *decision set out in* [the agency's] *determination of 7 July 2011. That determination referred to both Part 1 and Part 2 documents. I then correctly went on to say that determination refused to grant access to the documents set out in Part 2 of the determination, which it did.*

7. You are correct in saying that the LPCC notified me of its decision to give access to some documents and to refuse access to others. The way that the LPCC described the situation in their letter of 12 June 2011 was misleading. The information about the Part 1 documents was inadequate. The extent of the editing was not fully made known in the letter of 12 June 2011. The impression created by the notification that access was being granted was a positive one, rather than a negative one. Further, the LPCC did not at that time provide me with the documents in Part 1. I had expected that they would automatically be received in a larger envelope in the mail; nothing in the letter of 12 June 2011 indicated otherwise. I only received those documents in Part 1 after I expressly asked the LPCC to provide them to me. The notification that I had been granted access to the Part 1 documents on its face conveyed the meaning that the documents in Part 1 were being made the subject of access.

8. The position should be the same as under the contra proferentem *rule, ie. any ambiguity should be interpreted against the party who prepared the document (the LPCC, which prepared the notification of 7 July 2011).*

9. Having been advised by letter of 7 July 2011 (which I did not receive until I returned from overseas on 26 July 2011, which I had informed the LPCC by letter on 1 June 2011 that would be the case) that the documents in

Part 1 would be provided to me, I expected that they would automatically be received from the LPCC. At the time of seeking the internal review (only a week after my return from overseas), I asked for the Part 1 documents to be provided to me.

10. *Those documents were not provided to me until sent on 8 August 2011. The covering letter states: "Several documents have been edited to remove the names and or signatures of third parties because this information was exempt under Schedule 1 Clause 3 of the Act (as per Section 24 of the Act)." That information, and the Part 1 documents themselves, should have been provided to me by the LPCC in the letter of 7 July 2011.*

11. *On the day of receipt of the documents on 9 August 2011, I raised objection, by email at 1.22 am on 10 August 2011, to the deletions having been made from the Part 1 documents. By two days later (12 August 2011) the [agency's Principal Legal Officer] had completed their Notice of Decision on the internal review.*

12. *On the next available opportunity, ie. my complaint to you of 23 September 2011 seeking an external review, I expressly referred to the Part 1 deletions, the details of which had only belatedly been made known to me by the LPCC.*

13. *The information conveyed to me by the LPCC in its letter of 12 June 2011 was misleading in another respect. At the top of page 13 of that letter, the following was stated: "I advise you that" "you have a right to seek an internal review of my decision refusing to grant access to the document [sic] set out in Part 2 of the determination." That letter failed to advise me of a right to seek an internal review of the deletions made to the documents set out in Part 1 of the determination. Without prejudice to my above submissions on this scope point, the LPCC should also not be permitted to use to my disadvantage that failure to advise me about my right to seek an internal review of the deletions to the documents in Part 1.*

15. *The LPCC is required to assist me in gaining access to the documents I seek (see sections 3(3) and 4(b) of the Act and the Minister's Second Reading Speech). The LPCC should not be able to gain an advantage by the way it has conducted itself in the matter of not providing at that time (on 7 July 2011) the edited Part 1 documents or disclosing the extent of its deletions when it split the documents into Parts 1 and 2, advising that access had been given to the Part 1 documents, and failing to notify me of my right to an internal review in relation to the Part 1 documents.*

C. *PERSONAL OR NON-PERSONAL INFORMATION*

16. *Clearly, I am, and have been at all stages, seeking whatever information and documents relate to the enquiry into my conduct in 2004-2006. All that information or those documents relate to the personal matter which*

was the enquiry. For example, my access application does not relate to an enquiry into any other legal practitioner's conduct or to any documents unrelated to the enquiry into my conduct. Anything relevant to the enquiry into me, even if it mentions other persons such as my former clients … is nevertheless still personal to me.

17. *As I held that view, I expressed my belief that an application fee was not properly payable. To me, everything relating to me in the enquiry was personal. However, ironically, to prevent any possible dispute over the matter and to cover all bases, I forwarded the application fee of $30. This request for access by me is not about $30. $30 is neither here nor there to me or to the LPCC. It was obvious what I was seeking (ie. everything relevant to the enquiry) and the LPCC is/was required to do what it can to assist me to get access to those documents (sections 3(3) and 4(c) of the Act and the Minister's Second Reading Speech). It was I who paid the application fee, but it was the LPCC which refunded it to me. It does the LPCC no credit to now say that the fee was properly payable, and it does your Office no credit to uphold that argument by them. Having seen the scope of my application, if the LPCC considered that some of the information sought was "non-personal" (which it foresaw in its letter of 12 June 2011) the LPCC should have kept the application fee instead of returning it to me – and then using its return to me as supporting an argument that I did not pay the application fee!*

18. *An applicant is in the difficult position of having to request access to documents which she or he has not seen, and cannot know that the LPCC or the Information Commissioner will take the view that some of the documents related to an enquiry into the conduct of the applicant will be regarded as technically "non-personal."*

19. *The description I used in my FOI request of 1 June 2011 of the documents I was seeking adopted the wording used by the LPCC itself in paragraph 5 in its 16-paragraph document titled "Freedom of Information Act 1992 ("FOI Act") – Information Statement – Legal Profession Complaints Committee" (required under Part 5 of the FOI Act) as to the kinds of documents which it usually held. Once again, if by using the LPCC's own descriptions of its kinds of documents I have not correctly described the documents I was requesting, the* contra proferentem *rule should apply and any ambiguity should be decided against the LPCC and in my favour.*

20. *The LPCC letter of 12 June 2011 said that my request only "appears" to be limited to personal information only. Most importantly, it went on to say: "However, if it transpires that your request includes non-personal information, the application fee may be payable. "According to your preliminary advice, it now does "transpire" that you take the view that my request includes non-personal information. I therefore on 30 May 2012 have repaid the $30 application fee to the LPCC, for which I have a receipt. It is, and always was, incorrect that I did not pay the application fee. As should be obvious and apparent to any reasonable person, my request was always for information which you now call non-personal but*

which, because it relates to the enquiry into my conduct, I consider is personal.

D. SECTION 26 - DOCUMENTS THAT CANNOT BE FOUND OR DO NOT EXIST

21. You have correctly understood that I am seeking, among other things, the name of the person who told the Chairman of the LPCC about my […] *and the name of the out-of-State Senior Counsel who provided legal advice to the LPCC. As these were clearly my objectives in making my request, I therefore cannot see how the LPCC or your Office could, on any view, take the approach that my application was not seeking that information.*

22. If the approach by you and the LPCC is correct, which is definitely not conceded, does this mean that to get that information, I have to make a fresh application, ask for "non-personal" information and documents, and pay another $30? Surely, with the requirement upon the LPCC to assist me (sections 3(3) and 4(c) of the Act and the Minister's Second Reading Speech) and your function under section 63(2) of the Act to assist, the access request should be dealt with pursuant to the present application. This, of course, raises the question as to why, when the LPCC has a discretion to release exempt documents and information (section 23 (1) of the Act), it has decided not to do so. What is the LPCC covering up and afraid to reveal?

23. Under section 76(1)(b) of the FOI Act – "In dealing with a complaint the Commissioner has, in addition to any other power, power to decide any matter in relation to the access application... that could, under this Act, have been decided by the "agency".

24. This confers upon you all the decision powers of the LPCC in relation to the access application. I request you to use this power expressly granted to you under section 76(1)(b) of the Act to exercise your discretionary powers in my favour where the LPCC has exercised those discretions against me.

25. I also ask you to adopt this power under section 76(1)(b) to arrive at interpretations in my favour where the LPCC has interpreted matters against me, eg the matter of the application fee paid by me on 1 June 2011, the internal review and the external review (this complaint) to deal also with the editing of material in the Part 1 documents in the Schedule attached to the letter dated 12 June 2011, and the matter of my application for access including documents which it transpires are regarded by the LPCC and you as "non-personal".

26. I note that you now advise that Document 100(a) "contains handwritten notations by agency officers". You will recall that that is the reason I gave you as to why I wanted access to the transcript you actually worked on", rather than apply to the Attorney-General for a "clean" copy of the

transcript. Naturally, I seek access to that document to see what those handwritten notations say.

27. *Your reference to* Re Leighton and Shire of Kalamunda *misinterprets the scope of my access application, as explained earlier. The description of the documents sought in my access application of 1 June 2011 was framed in accordance with the descriptions in the LPCC's Information Statement to cover every document in any way relevant to the enquiry into my conduct.*

E. "THE AGENCY'S SEARCHES AND INQUIRIES"

28. *If there are in fact no documents in the relevant period, that seems to indicate that the LPCC has mastered the art of not putting in writing any information which it would be required to grant access to under the FOI legislation. This raises the question of the provisions of section 63(2)(d) of the FOI Act.*

F. CLAUSE 7(1) - LEGAL PROFESSIONAL PRIVILEGE

29. *1 disagree with your view that " no further balancing of public interests needs to occur." The privilege exists because of the public interest, but in particular cases a greater public interest can override the privilege.* In R v Bell; ex parte Lees [1980] HCA 21; (1980) 146 CLR 141 at [8], page 147 *Gibbs CJ said : "The privilege, which only arises because the public interest requires it, does not exist when it is seen that it would be contrary to a higher public interest to give effect to it."*

G. "WAS THERE A SOLICITOR/CLIENT RELATIONSHIP?"

30. *In the first paragraph under this heading, you state: "In the present case, the agency's legal advisers are... and certain external legal advisers." I take it that this does not mean LPCC committee members. Was there one or more external legal advisers other than the out-of-State Senior Counsel? If so, who were those external legal advisers? Was he or were they holders of a then current practice certificate in Western Australia, which is one of the relevant factors identified by Williams JA in* Glengallan Investments Pty Ltd [2001] QCA 151? (sic).

31. *In the second-last paragraph on page 11, you state: "As I understand it, one of the primary purposes of employing legal officers is to provide the agency with impartial and balanced legal advice as to whether or not a practitioner has a case to answer." What is the basis for that understanding? It could be incorrect. For example, the Australian Taxation Office has openly stated that the role of their appeals officers is not to review an assessment to see whether a taxpayer's claim should be allowed but is to work out how the assessment can be defended.*

32. In the second new paragraph at page 12, you stated that the SLO "did not play a role in the decision-making concerning your case"; how then can his advice be protected by privilege and not available to me?

33. In that paragraph, you also state that you are "satisfied" that the SLO "provided confidential independent legal advice". However, what you have stated, including quoting from the agency's Role Description for that post, does not support satisfaction on either "confidential" or "independent". What, then, are your grounds for being "satisfied" on those matters? As presently stated, your purported "satisfaction" is not well-grounded in law.

34. In response to your comment that the LPCC's internal review decision-maker could have perceived the legal issues to be straightforward, I was advised on 8 August 2011 that the file had been passed to that officer who would contact me "in due course", the LPCC's Information Statement states that the result of the internal review will be notified "within 15 days", the internal review in my case took four days (12 August 2011), and the external review (complaint) took in excess of six months from the date of lodgement of my submissions of 27 October 2011 until your preliminary advice of 8 May 2012. In the light of these periods, do you still think that the internal review was a properly conducted independent review?

H. ARE THE DOCUMENTS PRIVILEGED AS THE AGENCY CLAIMS?

35. You have concluded that Document 100 is privileged and have formed that view based on the quotation from Lockhart J in Trade Practices Commission v Sterling. *However, the quotation relied upon does not support your conclusion. The quoted paragraph (d) refers to "(notes* [etc] *of communications which are themselves privileged, or a record of those communications".*

The transcript (Document 100) is not a "communication" which is itself privileged, nor does it contain a record of those "communications". The transcript is not a communication between any relevant persons; it is a record of the words spoken in the trial in the Supreme Court of the accused persons. Paragraph (d) goes on to say "or relate to information sought by the client's legal adviser to enable him to advise". I am unaware of, and you have not given, any reason why extracts from the transcript were sought by external legal advisers [plural] for the purpose of providing legal advice as to whether a charge of grossly excessive charging could be established against me.

I. "NO PROHIBITION AGAINST DISCLOSURE OF EXEMPT MATTER"

36. Although the LPCC has exercised its discretion not to grant me access to documents containing exempt matter (which in itself casts a very poor light on the attitude of the LPCC in the legal system and legal profession in this State), section 67(1)(b) of the Act gives you the power to substitute

your own exercise of discretion for the exercise by the LPCC. Your exercise of discretion, as an administrator, is to be done "on the merits" and is not dependent upon your finding the existence of factors which would enable a Court to overturn the LPCC's decision on a ground of judicial review (such as the types of grounds set out in the Administrative Decisions (Judicial Review) Act 1977 *(Cth) or at common law as stated by Dixon J in* Avon Downs Pty Ltd v Commissioner of Taxation (Cth) (1949) 78 CLR 353 at 360. *You "stand in the shoes of" the LPCC. I again ask you to exercise your discretions in my favour, for the reasons given in this letter and earlier correspondence to your Office.*

J. "PRIVILEGE CAN BE OVERRIDDEN BY A GREATER PUBLIC INTEREST"

37. See my paragraph 29 above re Gibbs CJ in R v Bell; ex parte Lees.

K. "RIGHT TO RECEIVE PARTICULARS OF A DECISION"

38. With respect, a proper understanding of the decision in Bailey v Commissioner of Taxation (Cth) [1977] HCA 11; (1977) 136 CLR 214 *is to be derived from an analysis of the reasons for judgment of Barwick CJ at paragraph [4], page 217 and Aickin J at paragraph [25], page 231. The entitlement is to particulars as to the facts which were "the process" leading to the decision. Here, the relevant decision made by the LPCC was the decision to enquire into my conduct under the provisions of the then Legal Practitioners Act, and I am entitled to know the facts upon which the process leading to that decision was based. That is the position even though ultimately the outcome was that, under a separate decision, it was decided not to charge me with an offence.*

L. "ILLEGAL OR IMPROPER PURPOSE"

39. In my earlier submissions, I have said that privilege does not attach to communications re fraud, crime, illegal or improper purpose, and I have not described them as "exceptions" to privilege.

40. Re the principle stated in the first dot point on page 15, the deliberate non-creation of written documents and the unfairness in being denied access to the documents sought which do exist obviously adversely affect the ability of an applicant to raise the sufficient doubt required

41. Re the fourth dot point, I have never asserted that the out-of-State Senior Counsel had an illegal or improper purpose. Significantly, that Counsel advised that a charge against me could not be established, and further significantly, it took the LPCC in excess of a further eight months to advise me that (FOI 76 dated 21 October 2005, and FOI 96 dated 30 June 2006). These factors are prima facie evidence.

42. Please provide me with the documents before you which show that more than one officer or member of the LPCC believed that there was a prima

facie case against me: who are these people? (Two Senior Counsel held the contrary view : the independent out-of-State Senior Counsel and [another named Counsel])

… see [the third party's] *letter of 12 July 2006, first paragraph, FOI 98.*

43. In my previous and current submissions and in the correspondence from my Counsel … there are numerous instances identified of procedural fairness being denied to me. The LPCC simply chose to ignore that, and that is one of the unsatisfactory aspects of the operation of the LPCC.

44. Section 76(1)(b) of the Act gives you the power to reach your own decisions in matters in substitution for the decisions made by the LPCC. It is even more so the case that you must exercise your power to make your own decisions where the LPCC has acted on "a flawed understanding of the legal requirements attending the making of an administrative decision."

M. "WAIVER"

45. I have in earlier submissions argued why you should not follow the decision in the Bowden *case. The fact that the* Bennett *case was decided before the* Bowden *case is not a valid reason for not following the* Bennett *decision, especially when* Bennett *is a decision of the Federal Court and of the Full Court of that court. The* Bennett *case is not mentioned in the reasons for judgment in the* Bowden *case and the decision in* Bowden *appears to have been given per incuriam the* Bennett *decision.*

46. You cannot dismiss the Rio Tinto *case merely by saying that it was not an FOI case. Very importantly, in* Rio Tinto *the Full Court of the Federal Court pointed out that the High Court in* Esso Australia Resources Ltd v Commissioner of Taxation (Cth) [1999] HCA 67; (1999) 201 CLR 49 *had held: " The common law of legal professional privilege governs pre-trial procedures". My dealings with the LPCC and your Office are pre-trial procedures. Waiver is part of the common law of legal professional privilege. The Full Court of the Federal Court found in* Rio Tinto *at paragraph [76] that "the Commissioner is to be taken to have waived privileged over the eight privileged scheduled documents.*

In the Daniels *case, the Full Court of the High Court held that the common law of legal professional privilege could not be overridden unless by express legislation, not by implication. There is no express abolition of the doctrine of waiver in relation to privilege in the FOI Act (WA). If the Parliament of Western Australia had intended to abolish waiver in section 7 of the Act, it would have expressly provided so (and under the law as held in* Daniels *it must do so for that to be the situation. That is the law even though the* Daniels *case was decided after the FOI Act was enacted). In* Rio Tinto *the Full Federal Court twice referred to the High Court in* Mann v Carnell (1999) HCA 66; (1999) 201 CLR 1 *saying that it does not matter that the privilege-holder did not subjectively*

intend to lose the benefit of the privilege: see paragraphs [43] and [74] of Rio Tinto*. On the basis of the authority of the High Court decisions in* Mann, Esso *and* Daniels *and the decision of the Full Federal Court in* Rio Tinto *(which importantly was decided after* Bowden*), you should not apply the single justice decision of the Supreme Court reached in* Bowden*.*

N. "CLAUSE 6(1) – DELIBERATIVE PROCESSES" – "CONTRARY TO THE PUBLIC INTEREST"

47. I thank you for your view that disclosure would serve, rather than detract from, those public interests and that you are not satisfied that the documents are exempt under clause 6(1).

48. The extent to which the LPCC has resisted access to these documents again illustrates the extremes to which the LPCC is prepared to go to maintain excessive secrecy, instead of being open with fellow professional colleagues. At this stage in the matter (six years after completion by the LPCC), why cannot the LPCC simply say: "OK …, we've got nothing to hide, we'll open up all our files in this matter to you."

O. "CLAUSE 3(6) –THE PUBLIC INTEREST"

49. Thank you for your view that Document 89.1 is not exempt under clause 3(1) because of the operation of clause 3(6).

P. "PRELIMINARY VIEW"

50. I do not withdraw my complaint in respect of the documents specified. I have adopted the alternative course offered by you and have provided you with further submissions in support of my contentions.

Q. "PUBLISHING THE DECISION ON THE WEBSITE AND IDENTIFYING THE PARTIES TO THE COMPLAINT"

51. You say that it is your usual practice to identify the parties to a complaint in published reasons for decision. It is only a practice, not a legislative requirement. This has not previously been advised to me. It is not mentioned in the LPCC " Information Statement" which advises of the availability of an external review. Further, it was not advised in the Complaints Procedure attached to your letter of 13 October 2011. The only statement in the Complaints Procedure about identity was about not revealing identity: "Where the issues involve certain kinds of sensitive or private matters, the Commissioner will not publish the identity of the complainant in order to protect that person's privacy." This matter is a very private matter to me, as it relates to an enquiry into my conduct... any benefit thought to arise by publishing your decision in this

matter will not be enhanced or improved by identifying me in your reasons for decision. It would, in effect, be a very severe penalty imposed upon me when I have not done anything against the law or unprofessional (and in a matter where whether I engaged in unprofessional conduct is not in question), but for merely exercising, in an administrative forum, the right to request access given to me by the FOI Act.

R. OBSERVATIONS

52. With due respect, I also note your functions under sections 63(2)(e) and 63(2)(f) of the Act.

53. I trust, with due respect, that, pursuant to section 63(2)(d) of the Act, you will make the LPCC aware of its responsibilities under the Act and bring to its attention the matters in which it needs to change its operations to fully comply with the requirements under the Act.

54. Thank you for your time and effort in considering these further submissions, which are being forwarded to you by both email and mail."

21. In an email dated 5 August 2012, the complainant further submitted that:

"This letter is my final representations to the Commissioner in the formulation of his views on my first FOI application of 1 June 2011. Thank you for your advice that the Commissioner will not name me in any published decision in this matter. I thank your office for the decisions made in my favour to date which have enabled me to obtain access to documents and information which the LPCC denied to me but should have provided to me. Following your preliminary view that I should be granted access to the drafts of LPCC correspondence to me, and the forwarding of those drafts to me on 8 June 2012 by the LPCC, I withdraw that part of my FOI application, ie documents 14.1, 30.1, 31, 39.1, 39.2, 42,2, 42.4, 94.1, 94.2 and 95.1. It seems that I am to be thwarted in my attempt to find out the name of the informant to the LPCC about my … by the deliberate decision by everyone associated with the LPCC not to make a record of his name. This is most unsatisfactory as the informant caused two years' unnecessary attention to the matter by me, many unnecessary hours by others, $10,000 Counsel fees paid interstate, a conclusion that a charge against me could not be established, and not even an apology to me from the LPCC. I have been unsuccessful in my attempt to ascertain the names of the Out-of-State Counsel by making a request outside the provisions of the FOI Act. See attached letter of 31 July 2012 from [the agency] to me. In my opinion, that information should be available under the provisions of the FOI Act. The names of Counsel are not protected by legal professional privilege, because they are not legal advice which attracts the privilege. It is in the public interest that applicants be given access to the names of Counsel who provide advice on legal matters about themselves which will affect their standing within the legal profession and

the community. It is natural justice and procedural fairness that practitioners know the identities of Counsel who have been briefed to advise the LPCC in these matters. There is even less reason why the names of Counsel should remain secret when their advice was that a charge could not be established against me. There cannot be any adverse opinion on them by me, by virtue of their findings in my favour. Similarly, the names of the members of the LPCC who sat in judgment of me at the various LPCC meetings should be made the subject of access to me. Practitioners should be entitled to know which other professional (and lay) persons sit in judgment upon them. Confidence in the complaints system requires that. If the matter had gone to the State Administrative Tribunal or the Supreme Court of Western Australia for decision, then the identities of those sitting in judgment on the Bench would have been known. Even if the Counsel and LPCC members are asked and refuse to allow their names to be revealed, their names should be given to me, as there is no valid reason why this information should be denied to me. ..., in another matter against me, the Law Complaints Officer gave me an unedited copy of the Opinion of a Queen's Counsel in that matter on the day she received it, and in my FOI request in that matter I was provided with LPCC minutes which included the names of all persons in attendance at each meeting. I also ask you to apply the provisions of Schedule 1, clause 3(4) of the FOI Act and Regulations 9(2)(a), (e) and (f) of the FOI Regulations. Under these provisions, I should be given the persons' names, and their functions, duties and anything done in performing under their contracts for services for the LPCC. Clearly, it is the intention of the FOI legislation that such information be provided to applicants."

22. On 15 August 2012, the complainant further submitted that:

A. "The Disputed Information"

The information in dispute can generally be described as being the name, address, or contact details of persons other than myself.

The situation in this matter is that I am being denied the identity details of the "certain persons" who provided information to [a third party] *about* [the subject matter of the complaint];

the LPCC members who, over a period of two years, sat in judgment of me at the various committee meetings deliberating on the enquiry into my conduct (and who decided to brief two out-of-State Counsel to advise in the matter and who still continued to examine some matter or matters about my conduct for a prolonged period even after those Counsel had advised that a charge could not be established against me); and the two out-of State Counsel who provided their Opinion that no case could be established against me.

B. "Personal information"

There is no personal information here because there is no "information or opinion" …about an individual. There is no information or opinion about the members of the LPCC who sat on the committee to enquire into my conduct or about the two out-of-State Counsel. The identification referred to in paragraphs (a) and (b) of the definition of "personal information" is the individual in relation to whom the information or opinion must relate. Those paragraphs do not say that the identity itself is the information or opinion. The definition only applies where the individual's identity is stated or is able to be deduced and there is some information in the document which gives some information or opinion about that individual, eg. where the person's identity is stated or can be deduced and the document states something such as that the person is suffering from a terminal illness. Merely revealing the names of persons who attended meetings or who wrote the out-of-State advice does not reveal any personal information about those particular persons themselves.

To treat the identity of the third parties as the information or opinion about which the provision is speaking is to misinterpret the wording of the provision.

Your approach seems to contradict your correct statement in the fourth new paragraph at page 9 of your letter: "The FOI Act is not intended to …open their [private individuals'] private affairs to public scrutiny." Their identities are not their "private affairs".

There is no "personal privacy" of the out-of-State Counsel or LPCC members involved here. There is no information "about them" which needs to be shielded. If I were given their names, I would not then be in possession of information "about them" which should properly be protected from the public gaze.

C. Whether the Counsel Acted Under a Contract For Services

The question here is not whether Counsel acted under a costs agreement, or whether Counsel are entitled to sue for their fees, which are "red herrings". A costs agreement merely sets out the amount to be payable for the services to be provided under the contract. Keesing v Adams *is therefore irrelevant in this matter, except for the confirmation of the position stated in the final quoted paragraph at page 7 of your letter ("That is the sole function of a costs agreement."). The essential question here is the nature of the professional relationship entered into by the Counsel and the LPCC, by Counsel being engaged to provide legal advice and providing that advice.*

In Dimos v Hanos and Egan (2001) VSC 173 *Gillard J of the Supreme Court of Victoria said at paragraph 100: "In the absence of any contrary evidence, the retention of the barrister would result in a contract between the barrister and the solicitor".*

That dictum was followed by His Honour Judge Shelton of the County Court of Victoria in Southall v Hill [2010] VCC 123 *at paragraph 9: "It is well established that when a solicitor retains a barrister on behalf of a client, in the absence of any evidence to the contrary, there is a contract between the barrister and the solicitor rather than between the barrister and the client."*

The eight factors identified in Re Lyall and Insurance Commission of Western Australia*, quoted at page 5 of your letter, establish that there were contracts for services entered into between the Counsel and the LPCC.*

The contracts were either of service or for services. By virtue of the independence of the Counsel from the LPCC, their contracts with the LPCC were for services, and the provisions of clause 3(4) apply.

The submissions in the third to fifth paragraphs under the heading "The agency's submissions" at page 4 of your letter are expressed tentatively by the LPCC and without certainty as to what the actual position was. In addition, the only ground stated in that fifth paragraph is exemption under clause 3(1), which of course falls away if the overriding provisions of clause 3(4) or 3(6) apply to remove the exemption.

The general position at law is that the only contract required to be in writing is one which is covered by provisions derived from the Statute of Frauds *(eg.* Property Law Act 1969 (WA)*, section 34) which, in general terms, is a contract dealing with an interest in land, which is not the case with the engagement for the services of a barrister. See also your quoted extract from* Re Lyall *at page 5 of your letter.*

D. "Public Interest"

In the context of the FOI Act, a matter is in the 'public interest' if it advances the promotion and fulfilment of the object and purpose of the Act which is that applicants should be granted access to information and documents, such object and purpose being clear from the whole terms of the Act itself, its particular provisions, and the Minister's Second Reading Speech.

Your quotation from DPP v Smith *at the first paragraph of page 8 of your letter is entirely consistent with what I have just said in the preceding paragraph. Once again, please read the Minister's Second Reading Speech as well as the Act. It is in the public interest, in the context of openness and accountability, that the LPCC members who are involved in making agency decisions or Counsel who provide advice be identified rather than being able to hide behind FOI Commissioner-approved anonymity. Editing fails to satisfy the purpose or object of the Act.*

You are wrong to take into account as a factor "you have a personal interest in the disclosure … [in] the pursuit of your grievance against the

> *agency". First, that is an express breach of sections 10(2)(a) and (b) of the Act. Secondly, every applicant under the Act makes the application because of her or his "personal interest" in the disclosure of the information. That is why the Act was enacted, ie. to enable persons affected by agency decisions to obtain information or documents in matters of personal interest to them. That is a reason for granting access, not for denying it.*
>
> *You have not given any reason why the names of the LPCC members who participated in the meetings which dealt with my matter should not be disclosed.*
>
> *When you write your final letter to the LPCC or your published decision, I again ask you to direct the LPCC how it should meet all its requirements and obligations under the FOI Act."*

23. The complainant also referred me to another matter involving a high profile public servant and an investigation by another regulatory body.

PRELIMINARY ISSUES

Scope of the access application

24. I note that there is some dispute as to whether the information sought was personal or non-personal in nature. But in any event I note that the agency has not refused the complainant access to any documents on the basis that they were outside the scope of the application by virtue of them containing personal information about third parties.

25. As that is an issue which I am not required to decide, I will not consider it further. The matter of the claim for exemption under clause 3(1) is dealt with later in this decision starting at paragraph 56.

Scope of the complaint to the Information Commissioner

26. The complainant initially claimed that the scope of this complaint is not limited to the Part 2 documents. The complainant has since confirmed in an email dated 15 November 2012 that the scope of this complaint is limited to the Part 2 documents and the agency's decision to refuse access to those documents in full or in part under clauses 3(1) and 7(1) of Schedule 1 to the FOI Act; and the complainant's claim that additional documents should exist which come within the scope of the access application but to which access has been refused under s.26 of the FOI Act.

THE DISPUTED DOCUMENTS AND THE EXEMPTIONS CLAIMED

27. The documents in dispute in this matter are listed in the schedule attached to this decision. The agency makes the following claims for exemption:

- Documents 36, 36.1, 43, 46, 46.1, 46.2, 46.3, 47, 48, 50, 50.1, 50.2, 50.3, 51, 51.1, 53, 59, 60, 62, 64, 64.1, 64.2, 64.3, 65, 70, 70.1, 71, 71.1, 75, 75.1, 92, 92.1 and 100 are exempt under clause 7(1); and
- certain information in Documents 40, 52, 58, 67, 67.1, 68, 69, 70.2, 72, 73, 80 and 80.1 is exempt under clause 3(1).

SECTION 26 – DOCUMENTS THAT CANNOT BE FOUND OR DO NOT EXIST

28. Section 26 of the FOI Act deals with the obligations of an agency in circumstances where it is unable to locate the documents sought by an access applicant or where those documents do not exist. Section 26 states:

> *"(1) The agency may advise the applicant, by written notice, that it is not possible to give access to a document if –*
>
> *(a) all reasonable steps have been taken to find the document; and*
>
> *(b) the agency is satisfied that the document –*
>
> *(i) is in the agency's possession but cannot be found; or*
>
> *(ii) does not exist.*
>
> *(2) For the purposes of this Act the sending of a notice under subsection (1) in relation to a document is to be regarded as a decision to refuse access to the document, and on a review or appeal under Part 4 the agency may be required to conduct further searches for the document."*

29. I consider that in dealing with s.26, the following questions must be answered. First, whether there are reasonable grounds to believe that the requested documents exist or should exist and are, or should be, held by the agency. Second, where those questions are answered in the affirmative, the next question for me to consider is whether the agency has taken all reasonable steps to find those documents.

30. I do not generally consider that it is my function to physically search for documents on behalf of a complainant. Provided I am satisfied that the requested documents exist, or should exist, I take the view that it is my responsibility to inquire into the adequacy of the searches conducted by an agency and to require further searches to be conducted if necessary.

The complainant's submissions – section 26

31. The complainant stated that the claim made in the application for external review did not refer to documents being inaccurate *"but to insufficiency or incompleteness of the information provided, i.e. information should have been recorded and provided to me, but was not."*

32. In addition, the complainant submits that the reference to *Re Leighton and Shire of Kalamunda* in my letter of 8 May 2012, misinterprets the scope of the complainant's access application. The complainant's description of the documents sought was framed to cover every document in any way relevant to the agency's enquiry into the complainant's conduct.

33. The complainant also submits that "... *If there are no documents in the relevant period, that seems to indicate that the LPCC has mastered the art of not putting in writing any information which it would be required to grant access to under the FOI legislation. This raises the question of the provisions of section 63(2)(d) of the FOI Act."*

34. The complainant also specifically stated that access is sought to:

    (a) the copy of the Court transcript of the relevant trial that was "*actually worked on*" by the agency;

    (b) any memoranda of advice prepared by the agency's officers dealing with the results and recommendations following examination of that transcript; and

    (c) any documents that dealt with the agency's inquiries concerning the complainant in relation to matters about which the complainant had not been informed, including the results of any such inquiry.

35. The documents referred to in (a) and (b) above are documents to which access was refused under clause 7. They are not documents to which access was refused under s.26 of the FOI Act. Accordingly I have dealt with those documents in relation to the agency's claims for exemption under clause 7 at paragraphs 97-159.

36. The documents referred to in (c) are outside the scope of the complainant's access application (as set out in paragraph 4 of this decision). An applicant cannot unilaterally extend the scope of his or her access application at the stage of external review – see *Re Leighton and Shire of Kalamunda* [2008] WAICmr 52 at [27]. To do so would undermine the effective operation of the FOI Act.

37. Section 63(2)(d) of the FOI Act is not relevant to my determination of any of the issues in dispute in this matter. That section relates to my function in ensuring that agencies are aware of their responsibilities under the FOI Act.

38. I consider, based on my understanding of the complainant's submissions in relation to s.26, that those submissions are misconceived. It appears there is some confusion between a decision made under that section and a decision to refuse access to documents or information under the provisions of Schedule 1 to the FOI Act. Nevertheless, I have briefly considered whether the agency took all reasonable steps to find the documents, the subject of the complainant's access application, including the documents referred in (c) above.

39. From the material before me, I am satisfied that the agency has conducted reasonable searches for documents containing the information that the complainant seeks. I have detailed those searches below.

40. The agency advised me that its searches included –

- the original hard copy complaint file;
- the agency's functions files for records of correspondence between the agency's former Law Complaints Officer and the agency's Chairman, in June and July 2004;
- the agency's electronic document management system, Objective, that has been in place since 2009;
- electronic documents produced by lawyers not printed onto hard copy, including backup discs from 2004 to 2006; and
- searches for emails sent and received by the agency's Law Complaints Officer in June and July 2004, both in hard copy and electronic format.

41. In relation to issues of concern that the complainant had raised, the agency noted that its searches located no documents from the Chairman of the agency advising the agency of the complaint and that Document 1 (from the Part 1 documents disclosed to the complainant), dated 5 July 2004, is the earliest document relating to the inquiry into the complaint. No documents were identified for the period 5 July 2004 to 20 September 2004. The agency clarified that the agency's file reference numbers do not relate to the dates of any individual document.

42. In my view, there are no reasonable grounds to believe that additional documents within the scope of the complainant's access application exist and are held by the agency. Having reviewed the information before me, I consider that the agency has taken all reasonable steps to locate the requested documents and that they do not exist or cannot be found.

CLAUSE 3 - PERSONAL INFORMATION

43. The agency claims that Documents 89.1 and 100 are exempt under clause 3(1) and that the following information deleted from Documents 40, 52, 58**,** 67, 67.1, 68, 69, 70.2, 72, 73, 80 and 80.1 is exempt under clause 3(1) of Schedule 1 to the FOI Act:

Document 40:	The writer's name, address and contact details in the top right hand corner of page 1; and the signature block on page 2.
Document 52:	The addressee's name and address; the name following the salutation; words 16-19 in sentence 1; words 14-15 in sentence 2; and words 1-2 in sentence 3 of paragraph 1.
Document 58:	The contents of the 'From' line; words 1-3 in sentence 2; words 1-3 in sentence 4; the telephone number in sentence 5; and the signature block.

Document 67:	The addressee's name, address and email address; the name following the salutation; and words 12-13 in sentence 1.
Document 67.1:	The contents of the 'To' line; and the name following the salutation.
Document 68:	Email 1 at top of page: words 4-6 in the 'Subject' line; words 3-4 in sentence 1; words 1-2 in sentence 2; word 1 in sentence 3; and word 1 in sentence 4 of the email at the top of the page. Email 2: words 3-5 in the 'Subject' line; words 1-3 in sentence 1; word 3 and the telephone number in sentence 2 of the second email.
Document 69:	The name on line 3.
Document 70.2:	Word 1 on line 1; and word 1 on line 3.
Document 72:	Line 2 on the attached yellow sticker; words 10-13 in sentence 1; and the signature block.
Document 73:	The address and contact details at the head of the page; and the last three words in the subject line.
Document 80:	The writer's name, address and contact details in the top right hand corner of page 1; and the signature block.
Document 80.1:	The writer's name, address and contact details in the top right hand corner; and the names in lines 2, 4 and 6 of the listed items and amounts.

44. Clause 3, insofar as it is relevant, provides:

> *"**3. Personal information***
>
> *(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*
>
> *(2) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.*
>
> *(3) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to –*
>
> *(a) the person;*
>
> *(b) the person's position or functions as an officer; or*

> *(c) things done by the person in the course of performing functions as an officer.*
>
> *(4) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, prescribed details relating to -*
>
> *(a) the person;*
>
> *(b) the person's position or functions as an officer; or*
>
> *(c) things done by the person in the course of performing functions as an officer.*
>
> *(5) ...*
>
> *(6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."*

45. 'Personal information' is defined in the Glossary to the FOI Act to mean:

> *"information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead −*
>
> *(a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or*
>
> *(b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample."*

46. The definition of 'personal information' in the Glossary makes it clear that any information or opinion about a person – whether the access applicant or some other individual – from which that person can be identified is *prima facie* exempt under clause 3(1).

47. The purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State or local government agencies and other government authorities. The exemption recognises that State and local government agencies collect and hold sensitive and private information about individuals, which should not ordinarily be publicly accessible.

The complainant's submissions

48. The complainant submits that information deleted from Documents 40, 52, 58**,** 67, 67.1, 68, 69, 70.2, 72, 73, 80 and 80.1 is not exempt under clause 3(1) by virtue of the operation of the limit on exemption in clause 3(4) of Schedule 1 to the FOI Act.

49. By email of 5 August 2012, the complainant submitted that it is in the public interest that applicants be given access to the names of counsel who provide advice on legal matters relevant to those persons, especially where those matters will affect their standing within the legal profession and the community. *"It is natural justice and procedural fairness that practitioners know the identities of Counsel who have been briefed to advise the LPCC in these matters."*

50. In addition, the complainant submitted that there was even less reason why the names of counsel should remain secret when their advice was that a charge could not be established against them. By virtue of their findings in the complainant's favour, the complainant cannot have any adverse opinion of them.

51. Moreover, the complainant submitted that there is no valid reason why counsel names should be denied to them. The complainant noted that in another matter the Law Complaints Officer gave them an unedited copy of the opinion of a Queen's Counsel on the day that the officer received it.

The agency's submissions

52. In light of the complainant's submissions, my Principal Legal Officer asked the agency for information on its engagement of counsel and the agency provided me with that information on 31 July 2012.

53. The agency advises me that it engaged counsel to provide legal advice on an issue pertaining to the complainant and relied on clause 3(1) of Schedule 1 to the FOI Act in editing the disputed documents on the basis that there was no contract for services between the agency and counsel.

54. The agency submits that, on the face of the disputed documents, it is clear that one counsel proposed to operate under a costs agreement – but not under a contract as set out in s.38I(3) of the *Legal Profession Act 1987 (NSW)* ('the NSW LP Act'). However, the agency has not been able to establish whether it accepted that proposal as a costs agreement or not. Instead, the agency submits that the implication is that the proposal was treated as disclosure of counsel's charge out rate.

55. With regard to the other counsel, the agency says that it may also be inferred from the lack of any written contract pursuant to s.38I of the NSW LP Act that there was also no contract in that case so that the common law position applied. That is, *"that the way in which a barrister practised was not to perform legal services on a contractual basis"*: *Keesing v Adams* [2002] NSWSC 336 at [18].

56. The agency's FOI Coordinator advised my officer that the agency had consulted with the relevant third parties about the disclosure of their personal information but that those persons had objected to disclosure on the ground that the information was exempt under clause 3(1).

Consideration

57. Having examined the disputed information, I note that it consists, in the main, of the names, addresses, signatures and contact details of counsel. In my view, all of that information is 'personal information' as defined in the FOI Act because those persons' identities are apparent or could reasonably be ascertained from that information and is, *prima facie,* exempt under clause 3(1) of Schedule 1 to the FOI Act.

58. Clause 3(1) is subject to the limits on the exemption in clauses 3(2)-3(6). In my view, only the limits in clauses 3(4) and 3(6) are relevant to my consideration of Documents 40, 52, 58, 67, 67.1, 68, 69, 70.2, 72, 73, 80 and 80.1.

Clause 3(4)

59. From the edited documents given to the complainant, it is evident that the third party information identifies senior counsel who provided legal advice to the agency on the matter concerning the complainant.

60. Clause 3(4) provides that certain information – 'prescribed details' – about persons performing services for an agency under a contract for services is not exempt under clause 3(1). Those prescribed details are set out in Regulation 9(2) of the *Freedom of Information Regulations 1993*. ('the Regulations')

61. In *Re Lyall and Insurance Commission of Western Australia* [2004] WAICmr 15, the former A/Information Commissioner considered whether individual medical specialists, who provided services to the respondent agency to assist with insurance and claims-related matters, were persons who had performed services for that agency under a contract for services. In that case, the A/Commissioner said, at [44]:

> *"... a contract for services is a contract between an independent contractor and the person requiring the services. The question in this case, is whether the specialists have performed services for the agency under a contract for services. A contract may be oral, written, or a combination of both and it may be created either by implication or expressly. At common law the following elements are essential to the creation of a contract:*
>
> - *offer;*
> - *acceptance;*
> - *an intention to enter legal relations;*
> - *sufficient consideration;*
> - *a capacity to contract;*
> - *legality of purpose;*
> - *genuine consent; and*
> - *certainty of terms."*

62. In this matter, on the information before me, I understand that there was a proposal by one third party to enter into a costs agreement under the NSW LP

Act (Document 40). The third party specifically states that the agreement would not be *"a contract under sub-section 38I(3) of the* [NSW LP] *Act"*. At the relevant time, s.38I(3) provided:

> *"A barrister or solicitor may enter into a contract for the provision of services with a client or with another legal practitioner. The barrister or solicitor may accordingly sue and be sued in relation to the contract."*

63. Consequently, I understand the third party to have proposed a costs agreement in place of a contract for services. The Supreme Court of NSW in *Keesing v Adams* [2010] NSWSC 336 considered the history of costs agreements in a case where the plaintiff, a barrister, sued the defendants, solicitors and partners in a law firm, for a declaration that the solicitors were parties to a costs agreement under the NSW LP Act in respect of the barrister's fees. In that case, Brereton J said at paragraph [13]:

> *"Conventionally, a barrister was not entitled to sue for his or her fees, which were regarded in law as an honorarium and in ethics as a debt of honour due by the solicitor to the barrister, but not legally enforceable. This was because there was no contract between the barrister and either the instructing solicitor or the lay client..."*

64. At [14] his Honour stated:

> *"As a result of there being no contract between barrister and solicitor or client, there was no legal basis on which the barrister could recover fees from either..".*

65. His Honour then reviewed a number of authorities in support of this proposition, including *Moore v Row* [1629] 1 Rep Ch 38, *Rondel v Worsley* [1969] 1 AC 191 and *Re Neville; Ex Parte Pike* [1896] 17 NSW (B&P) 24 before stating at paragraph 18 that:

> *"Those cases, to my mind, establish that until the intervention of legislation the inability of a barrister to recover fees was not just a consequence of public policy holding that a barrister should not be entitled to sue for fees, but of recognition that the way in which barristers practised was not to perform legal services on a contractual basis. In the absence of a contract, there was no legal basis upon which fees could be recovered.*"
>
> ...

and further, at [21], that:

> *"Legislation now permits a barrister to contract with a client, or with a solicitor, and to sue on such a contract. The legislation applicable for the purposes of the present case, which occurred before the commencement of the* Legal Profession Act 2004 (NSW) *is the* Legal Profession Act 1987 (NSW), *in which s 38I provided as follows:*

38I Client Access

(1) ...
(2) ...
(3) Contracts

A barrister or solicitor may enter into a contract for the provision of services with a client or with another legal practitioner. The barrister or solicitor may accordingly sue or be sued in relation to the contract"

66. At [22] Brereton J further stated:

> *"While s.38I permitted a barrister to enter into a contract for legal services for the provision of legal services with a solicitor or lay client, it did not require the barrister to do so. The result, in my view, was that a barrister could continue if he or she wished, generally or in any particular case, to render legal services on the conventional non-contractual basis, or could choose to render legal services generally or in a particular case on a contractual basis by entering into a contract for provision of legal services with a client..."*

and at [23]:

> "*... In my view, the correct position is that a barrister who chooses to enter into a contract for legal services can, by way of s 38I, recover his or her fees at law pursuant to that contract. A barrister who elects to render services on the conventional non contractual basis would not be entitled to recover fees at law and would be left to the traditional* extra curial *remedies."*

67. At [24] and [25] his Honour considered the meaning of "costs agreement" under the NSW LP Act:

> *"As well as providing for barristers to enter into contracts for legal services, the 1987 Act also provides for a barrister, as well as a solicitor, to enter into a costs agreement, with the instructing solicitor or with the lay client. "Costs agreement" is defined by s.173 to mean an agreement referred to in s.184 as to costs for the provision of legal services". Section 184 provided as follows:*
>
> *(1) An agreement as to the costs of the provision of legal services may be made with a client by:*
>
> *(a) the barrister or solicitor who is retained by the client to provide the services, or*
>
> *(b) the barrister or solicitor retained on behalf of the client by another barrister or solicitor.*
>
> *(2) An agreement as to the costs of the provision of legal services may also be made between the barrister or solicitor providing the*

> *services and another barrister or solicitor who retained that barrister or solicitor on behalf of the client.*
>
> *(3) An agreement under this section is called a costs agreement.*
>
> *(4) A costs agreement is void if it is not in writing or evidenced in writing.*
>
> *(5) A costs agreement may form part of a contract for the provision of legal services.*
>
> *(6) A costs agreement may consist of a written offer that is accepted in writing or by other conduct. A disclosure in accordance with Division 2 under section 175 or 176 may constitute an offer for the purposes of this subsection.*
>
> *Again, it is notable that such an agreement is described as 'an agreement as to the costs of the provision of legal services' and* may *form part of, but is a distinct concept from, a contract for the provision of legal services...*
>
> *... the practical effect of a costs agreement is to remove from the scope of an assessment the capacity of the client to dispute the quantum of the gross fee or the quantum of the rate charged, as distinct from the reasonableness or the performance of individual items of work comprising a whole bill charged according to a rate. That is the sole function of a costs agreement. It is an agreement 'as to the costs of the provision of legal services' because it is an agreement as to what the costs of those services will be."*

68. In the present case, there is a clear intention of one third party not to enter into a contract for services and, insofar as both third parties are concerned, there is nothing to evidence that any contracts for services were entered into.

69. In light of the explanation in *Keesing* of the common law position regarding the payment of barristers' fees, I am not persuaded that the persons referred to in the third party information were engaged by the agency under a contract for services. As a result, the personal information about those individuals is not prescribed details and the limit on the exemption in clause 3(4) does not apply to that information.

Clause 3(6)

70. Clause 3(6) provides that matter will not be exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. The term 'public interest' is not defined in the FOI Act. In my opinion, the meaning of that term is best described by the Supreme Court of Victoria in *DPP v Smith* [1991] 1 VR 63 at page 65, where the Court said:

> *"The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals... On the other hand, in the daily affairs of the community, events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest per se is not a facet of the public interest."*

71. In brief, the public interest is not primarily concerned with the private interests of any individual or with public curiosity. Rather, the question is whether disclosure of personal information about third parties would be of some benefit to the public generally and whether that public benefit is sufficient to outweigh any public interest in maintaining the privacy of those third parties.

72. Pursuant to s.102(3) of the FOI Act, the complainant bears the onus of persuading me that the limit in clause 3(6) applies to the disputed information about third parties and that the disclosure of personal information about those persons, without their consent, would, on balance, be in the public interest.

73. Determining whether or not disclosure would, on balance, be in the public interest involves identifying the relevant competing public interests – those favouring disclosure and those favouring non-disclosure – weighing them against each other and making a judgment as to where the balance lies in the circumstances of the particular case.

74. In favour of disclosure, I recognise that there is a public interest in applicants being able to exercise their right of access under the FOI Act. That right is not an absolute right but is expressed in s.10(1) to be subject to and in accordance with the FOI Act, which includes a range of exemptions designed to protect other specific public interests. In the present case, I consider that particular public interest has been substantially satisfied by the agency giving the complainant access to edited copies of the disputed documents.

75. I recognise public interests in applicants having access to information that explains the basis of government decision-making – particularly where, as here, that decision-making affects the applicant – and in agencies' accountability for the manner in which they discharge their functions. However, on the information before me, I am not persuaded that the disclosure of counsel names would further those particular public interests.

76. I recognise a particular public interest in people being informed of complaints or allegations made about them and being given an opportunity to respond to those allegations before any decisions adverse to their interests are made. That is a key requirement of procedural fairness, which agencies are legally obliged to afford in processes such as that undertaken by the agency. However, I consider that public interest to have been largely satisfied by the information concerning

the substance of the matters investigated by the agency which the agency has given to the complainant.

77. I do not agree with the complainant's claim that procedural fairness or the public interest necessarily requires the disclosure of the names of counsel who gave their opinion to the agency in the matter concerning them, particularly where those persons have objected to the disclosure of their personal information and that is balanced against the public interest in the protection of personal privacy.

78. With regard to the complainant's comment that they were given an unedited copy of the opinion of a Queen Counsel in another matter before the agency, it is not evident whether that matter concerned an FOI application. Even if it did, under the FOI Act agencies have discretion to give access to documents that may be exempt (see s.23(1)). However, simply because an agency chose to exercise its discretion in one case, does not mean that it is obliged to do the same in a second case.

79. Against disclosure, I recognise that there is a very strong public interest in maintaining personal privacy.

80. The objects of the FOI Act – as set out in s.3(1) – are to enable the public to participate more effectively in governing the State and to make the persons and bodies responsible for State and local government more accountable to the public. The FOI Act is not intended to call to account private individuals or to open their private affairs to public scrutiny, other than in circumstances where stronger public interests than the public interest in the protection of personal privacy may require that to occur. The purpose of the exemption in clause 3(1) is to protect that public interest, which will only be displaced by some stronger countervailing public interest that requires the disclosure of personal information.

81. I understand that the complainant has a personal interest in the disclosure of the third party information, being the pursuit of their grievance against the agency. In my view, that interest primarily is a private interest. However as noted at [73] I consider that an individual exercising their rights under the FOI Act is a valid public interest in any event.

82. I consider that the public interests favouring non-disclosure outweigh those favouring disclosure. Accordingly, I find that the information deleted from Documents 40, 52, 58**,** 67, 67.1, 68, 69, 70.2, 72, 73, 80 and 80.1 is exempt under clause 3(1) of Schedule 1 to the FOI Act.

Documents 89.1 and 100

83. The agency claims Documents 89.1 and 100 are exempt under clause 3(1) of Schedule 1 to the FOI Act. However, as I find that Document 100 is exempt under clause 7(1), as outlined below, it is not necessary for me to consider whether that document is also exempt under clause 3(1).

The agency's submissions – Document 89.1

84. The agency claims that Document 89.1 is exempt under clause 3(1) because it contains numerous and multiple references to information, and/or opinions about individuals whose identity is apparent, or could reasonably be ascertained and it is not practicable to release an edited copy to the complainant.

The complainant's submissions – Document 89.1

85. The complainant is the author of Document 89.1and is therefore familiar with its contents.

Consideration

86. Document 89.1 is a memorandum dated 16 February 2006 that the complainant wrote and provided to the agency as part of their response to its investigation.

87. In cases where access applicants seek access to their own documents, agencies frequently agree to give access outside the FOI Act. This is because, in dealing with such a request under the FOI Act, agencies are required to consider the application of the exemption provisions in Schedule 1 to the FOI Act. In particular, agencies are required to consider the application of clause 3(1) in relation to any 'personal information' as defined in the FOI Act, which in turn imposes the obligation on agencies to consult with all third parties referred to in the relevant documents, if access is proposed to be given. That can impose significant difficulties where third parties may be unaware of the existence of such documents and would, if they sought access to those documents themselves, be likely to find that they were also denied access on the basis of clause 3(1). However, the agency has not taken that option so I am obliged to deal with Document 89.1 under the FOI Act.

88. Having examined the contents of Document 89.1, I am satisfied that it contains 'personal information' as that term is defined in the FOI Act because that information would identify both the complainant and other individuals. The information, other than the information about the complainant, is about private individuals who are not officers or former officers of the agency. All of that information is *prima facie* exempt under clause 3(1).

89. The complainant is clearly aware of the content of Document 89.1. However, the right of access to documents under the FOI Act does not depend on what an applicant knows or claims to know of the content: *Police Force of Western Australia v Kelly and Smith* (1996) 17 WAR 9 at [14].

90. The exemption in clause 3(1) is subject to a number of limits on the exemption, which are set out in clauses 3(2)-(6). In the present case, in relation to Document 89.1, I consider that clauses 3(2) and 3(6) are relevant.

Clause 3(2) – personal information about the applicant

91. Clause 3(2) provides that matter is not exempt under clause 3(1) merely because its disclosure would reveal personal information about the complainant. The use of the term 'merely' in clause 3(2), means – according to its ordinary dictionary meaning – 'solely' or 'no more than' personal information about the applicant: *Re Mossenson and Others and Kimberley Development Commission* [2006] WAICmr 3 at [23].

92. In this case, the personal information in Document 89.1 goes beyond 'merely' revealing personal information about the complainant because it is intertwined with personal information about other people. Therefore, the limit on the exemption in clause 3(2) does not apply to that information.

Clause 3(6) – the public interest

93. As stated previously at paragraph 69 of this decision, Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Under s.102(3) of the FOI Act, as the access applicant, the complainant bears the onus of establishing that it would, on balance, be in the public interest for the agency to disclose personal information to the complainant.

94. In this instance, with reference to document 89.1, I take the view that, weighing against disclosure, there is a public interest in maintaining personal privacy. That public interest is recognised by the inclusion of the exemption provided by clause 3(1). In my view, that public interest may only be displaced by some other stronger public interest that requires the disclosure of private information about another person. However, the practical reality is that the information in Document 89.1 is information provided by the complainant and known only by the complainant and the agency.

95. Although the public interest in personal privacy is a strong one, I consider that interest is substantially weakened in this case, where the document in question is simply a copy of a document that the complainant had created and where it was open to the agency to give the complainant a copy of that document outside the FOI Act.

96. In favour of disclosure, I also recognise a public interest in individuals being able to exercise their rights of access under the FOI Act, subject to the exemptions in Schedule 1, and in being able to access their personal information held by government agencies. That latter public interest is recognised in s.21 of the FOI Act, which provides that when considering the public interest, the fact that a document contains personal information about the applicant must be regarded as a factor in favour of disclosure.

97. In weighing the competing public interests, I consider that those favouring non-disclosure of the disputed matter in Document 89.1 to the complainant outweigh those favouring disclosure in the particular circumstances of this complaint. Consequently, I consider that the limit on the exemption in clause 3(6) does not

apply in this case and that Document 89.1 is exempt under clause 3(1) of Schedule 1 to the FOI Act.

CLAUSE 7(1) – LEGAL PROFESSIONAL PRIVILEGE

98. The agency claims that Documents 36, 36.1, 43, 46, 46.1, 46.2, 46.3, 47, 48, 50, 50.1, 50.2, 50.3, 51, 51.1, 53, 59, 60, 62, 64, 64.1, 64.2, 64.3, 65, 70, 70.1, 71, 71.1, 75, 75.1, 92, 92.1 and 100 are exempt under clause 7(1) of Schedule 1 to the FOI Act (together 'the clause 7 documents').

99. Clause 7(1) provides as follows:

> *"**7. Legal professional privilege***
>
> *(1) Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege."*

100. Legal professional privilege is a common law doctrine which protects the confidentiality of communications between legal advisers and their clients. It is also referred to as client legal privilege because the privilege can only be waived by the client. The privilege exists to serve the public interest in the proper administration of justice by encouraging full and frank disclosure by clients to their lawyers. The principle of legal professional privilege is borne out of the weighing up of competing public interests. Therefore, no further balancing of public interests needs to occur, which is the reason why the exemption in clause 7(1) is not limited by a public interest test.

101. In brief, legal professional privilege protects from disclosure confidential communications between clients and their legal advisers, if those communications were 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].

102. In *Commissioner of Taxation v Pratt Holdings Pty Ltd* [2003] FCA 1641 at [39] Kenny J stated:

> *"The common law in Australia is, therefore, that legal professional privilege attaches to:*
>
> *(1) confidential communications passing between a client and the client's legal adviser, for the dominant purpose of obtaining or giving legal advice ('legal advice privilege'); and*
>
> *(2) confidential communications passing between a client, the client's legal adviser and third parties, for the dominant purpose of use in or in relation to litigation, which is either pending or in contemplation ('litigation privilege')."*

103. 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.

104. J D Heydon in *"Cross on Evidence "* (7th Australian edition) at [25225] notes:

> *"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

105. The complainant's submissions are set out in their communications to my office made on 23 September 2011, 27 October 2011, 14 November 2011, 3 June 2012, 5 August 2012 and 15 August 2012. In summary, the complainant submits that the clause 7 documents are not protected by legal professional privilege because:

- The legal advice given to the agency by its internal staff – who are part of its decision-making function – did not have the necessary independent character; that view is supported by the speed with which the internal reviewer made her decision.

- In particular cases, a greater public interest can override the privilege: *R v Bell; ex parte Lees* (1980) 146 CLR 141 per Gibbs J at p.147 at [8].

- There is no basis for implying that one of the primary purposes of employing legal officers is to provide the agency with impartial and balanced legal advice as to whether or not a practitioner has a case to answer.

- If the agency's Senior Legal Officer ('the SLO') did not play a role in the decision-making how can his advice be protected by privilege? The complainant does not accept that there is sufficient evidence for me to be satisfied that the SLO provided confidential legal advice.

- The complainant does not accept that the internal review was properly conducted because it took only four days when the agency's Information Statement says that the result of an internal review will be notified "*within 15 days"* and, to date, the external review has taken in excess of six months.

- Document 100 is not a privileged document as described by Lockhart J in *Trade Practices Commission v Sterling (1979) 36 FLR 244* at paragraph (d), since the transcript is not a 'communication' nor does it contain a record of any 'communication'.

- Under the FOI Act, the agency is required to give the complainant access to the name of the informant where that can properly be done. There is no

prohibition in the FOI Act against agencies giving access to matter that is exempt.

- Section 67(1)(b) gives the Information Commissioner the power to substitute his own exercise of discretion "on the merits" for that of the agency and the complainant asks for that discretion to be exercised on his behalf.

- In *Bailey v Commissioner of Taxation (Cth)* (1977) 136 CLR 214, the High Court unanimously upheld the right of a person to receive particulars of an administrator's decision to take action against that person. The entitlement is to particulars as to the facts which were "the process" leading to the decision.

- The agency enquired into the complainant's conduct under the provisions of the former *Legal Practice Act 2003* (WA) and the complainant is entitled to know the facts upon which the process leading to that decision was based. The fact that the complainant was ultimately not charged with an offence does not alter that position.

- Legal professional privilege does not apply if the legal advice is given in a situation where there is a fraud, a crime or an improper purpose. In the complainant's opinion, the agency's enquiry into their conduct comes within the wide meaning of improper purpose, where that purpose was to subject them "*to having to handle an unnecessary enquiry over a protracted period"* although the complainant had at the start advised of a valid defence, which the agency never properly addressed.

- The complainant considers it "*bizarre and extraordinary*" that the Chairman of the agency has personally taken action to initiate the agency's inquiry into their conduct. If the agency's inquiry was carried out for *"an improper purpose, for an ulterior motive, in bad faith, with malice, as part of a vendetta, as vindictiveness, or vexatious"* it could not be lawful and its exercise of the power was *ultra vires*.

- The agency's exercise of power to initiate an enquiry was also illegal because of its failure to consider a relevant factor; its failure to consider relevant material (the complainant's written explanation); and its failure to provide the complainant with procedural fairness because it did not advise the complainant whether other conduct by them was the subject of inquiry.

- The complainant does not assert that the out-of-State Senior Counsel had any illegal or improper purpose since that Counsel advised that the charge against the complainant could not be established. The fact that the agency took more than eight months to advise the complainant that a charge could not be established is significant and *prima facie* evidence of illegal or improper purpose. In addition, the complainant has provided numerous instances of the agency's having denied the complainant procedural fairness.

- The complainant's claims in this regard are not mere assertions. The deliberate non-creation of written documents and the unfairness in being denied access to the documents sought, which do exist, adversely affect the complainant's ability to raise the sufficient doubt required.

- The decision of McKechnie J in *Department of Housing and Works v Bowden* [2005] WASC 123 should not be followed because it was wrongly decided and incorrect on a number of points. At least two decisions of the Full Court of the Federal Court have held that waiver is available to override a claim of legal professional privilege: *Bennett v CEO Australian Customs Service* [2009] 210 ALR 220, especially Tamberlain J, and *Commissioner of Taxation (Cth) v Rio Tinto Limited* [2006] FCAFC 86. The Full Court of the Federal Court is a more authoritative court than a single justice of the Supreme Court of Western Australia.

- The fact that *Bennett*'s case was decided before *Bowden*'s case is not a valid reason for not following it. *Bennett* was not mentioned in *Bowden*.

- The decision in *Rio Tinto,* although not an FOI case, is relevant. In that case, the Full Court of the Federal Court points out the High Court in *Esso* had held: "*The common law of legal professional privilege governs pre-trial procedures".* The complainant's dealings with the agency and with this office are both pre-trial procedures. Waiver is part of the common law of legal professional privilege.

- Based on the Full Court of the High Court decision in *The Daniels Corporation Pty Ltd v ACCC* (2002) 213 CLR 543, waiver is available unless it is expressly excluded or excluded by necessary implication, which is not the case here. The agency has waived any privilege by advising in its correspondence that the advice of out-of-state Senior Counsel was that a charge against the complainant could not be established but not advising the reasons on which that conclusion was based. There is no express abolition of the doctrine of waiver in the FOI Act as required by *Daniels.* That is the law even though *Daniels* was decided after the FOI Act was enacted.

- In *Rio Tinto*, the Full Court of the Federal Court cited at [43] and [74] the High Court's decision in *Mann v Carnell* (1999) 201 CLR 1, saying that it does not matter that the privilege holder did not subjectively intend to lose the benefit of the privilege. On the basis of the authority of High Court decisions in *Mann*, *Esso* and *Daniels*, the Information Commissioner should not apply the single justice decision in *Bowden.*

- Clause 7(1) states a factual position as to whether documents would be privileged from production in legal proceedings on the ground of legal professional privilege. In this instance, the answer is that the documents would not be privileged from production in legal proceedings because the agency has waived the privilege. That is the factual position. The

decision-maker does not have to weigh up concepts of fairness but merely has to note that the agency has stated Senior Counsel conclusion but has not given the reasoning on which that conclusion was based.

106. In addition, the complainant made the following submissions concerning specific documents:

Documents 36 and 36.1: legal professional privilege does not apply because the advice was not prepared by an independent lawyer but by an employee. The advice is of a similar administrative character to the documents in *Grant v Downs* [1976] 135 CLR 674.

Documents 39.1, 39.2, 42.2, 42.4, 43, 46, 50, 50.1, 50.2, 50.3, 51, 51.1, 52, 53, 59, 60, 64.1, 64.2, 64.3, 65, 75 and 94.1: there is no basis or valid basis for refusing access to these documents.

Documents 46.1, 46.2, 46.3, 47, 62, 64, 69-70, 70.1, 71 and 71.1: the agency has waived privilege because of improper purpose. There is a greater public interest in the complainant being given access to these documents.

Document 48: privilege is inapplicable as the Index does not set out the facts or contain legal advice.

Documents 92 and 92.1: Documents prepared by an employee carrying out an administrative function of a similar character to the documents in *Grant v Downs*.

The agency's submissions

107. The agency's submissions are contained in its notices of decision dated 17 March 2011 and 12 August 2011. In brief, they are as follows:

- Documents 36, 36.1, 75, 75.1, 92 and 92.1 are confidential communications, or would reveal confidential communications, between the agency and its legal officers (who all held current practice certificates) employed by the agency in their capacities as legal advisers. Those confidential communications were made for the dominant purpose of seeking and providing professional legal advice to the agency.

- Documents 43, 46, 46.1, 46.2, 46.3, 47, 48, 50, 50.1, 50.2, 50.3, 51, 51.1, 53, 59, 60, 62, 64, 64.1, 64.2, 64.3, 65, 70, 70.1, 71 and 71.1 are confidential communications, or would reveal confidential communications, between the agency, its officers and external legal advisers (all of whom held current practice certificates) made for the dominant purpose of seeking and providing professional legal advice to the agency and its officers.

Consideration

Was there a solicitor/client relationship?

108. The first question for my determination is whether a solicitor/client relationship exists between the agency and its legal advisers. In the present case, the agency's legal advisers are its salaried legal officers and certain external legal advisers. With regard to the agency's legal officers, I have considered whether the legal advice obtained was of the necessary independent character.

109. The High Court of Australia has held that legal professional privilege attaches to confidential communications between salaried legal officers in government employment in respect of legal advice given, where that advice is within the professional relationship between the legal officer and his or her employer and the advice is independent in character: *Attorney General (NT) v Kearney* (1985) 158 CLR 500; *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54.

110. Since the decision in *Waterford,* courts have accepted that legal professional privilege may apply to communications to or from salaried legal advisers employed by statutory authorities provided that all other requirements for the application of legal professional privilege are satisfied: 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.

111. In considering the independence of legal advice passing between government agencies and their salaried legal officers, Branson J in *Rich v Harrington* [2007] FCA 1987 said at [39]-[40]:

> "*The* Macquarie Dictionary *(online version) relevantly defines 'independent' in the following ways:*
>
> *1. not influenced by others in matters of opinion, conduct, etc; thinking or acting for oneself*: an independent person
> *2. not subject to another's authority or jurisdiction; autonomous, free.*
> *3. not influenced by the thought or action of others; independent research..."*

112. The Shorter Oxford English Dictionary, 5th Edition, 2002 includes the following definitions of 'independent':

> *"not subject to the authority or control of any person, country etc; free to act as one pleases, autonomous;*
> *not influenced or affected by others (of an inquiry, audit, investigator, observer etc);*
> *not influenced by others in one's opinion or conduct; thinking or acting for oneself;"*

113. In Rich v Harrington, Branson J at [40] stated*:*

> *"The content of the requirement that a legal adviser be independent is understandably less stringent than the requirement that, for example, a judge be independent. However, it is informed by the same notions of absence of fear or favour. The concepts of independence and objective impartiality are closely linked* (The Queen (Brooke and Another) v Parole Board and Others *[2007] EWHC 2036 (Admin) at [19]). An independent legal adviser is one who can bring a disinterested mind to bear on the subject matter of legal advice. In the words of Brennan J in* Waterhouse*, what is required is a legal adviser who is able to be "professionally detached" in giving the advice."*

114. See also *Re Linda Elsie Manning and University of Western Australia* [2005] WAICmr 9 at paragraph 28, which concluded that the Director, Legal Services at the University of Western Australia was :

> *"an appropriately qualified legal adviser who provides independent legal advice to the Vice Chancellor and executive of the agency, such that it is capable of attracting legal professional privilege".*

115. Under the *Legal Profession Act 2008 (WA)*, the agency has statutory responsibility for supervising the conduct of legal practitioners in this State and its role is to enquire into complaints and other concerns in respect of legal practitioners. As I understand it, one of the primary purposes of employing legal officers is to provide the agency with impartial and balanced legal advice as to whether or not a practitioner has a case to answer.

116. Documents 36, 36.1, 75, 75.1, 92 and 92.1 all contain advice given to the agency by its SLO. The SLO was admitted in the Supreme Court of Western Australia and holds a Western Australian practice certificate. One of the key responsibilities of the SLO position – taken from the agency's Role Description for that post – is to provide *"... quality advice and recommendations on factual and legal matters to the Law Complaints Officer and the LPCC."*

117. In my opinion, a core function of the SLO role is to provide independent legal advice to the agency.

118. On the information before me, the SLO did not play a role in the decision-making concerning the complainant's case but simply provided advice to the agency's decision-makers. In the circumstances, I am satisfied that the SLO was an appropriately qualified legal adviser who provided confidential independent legal advice to the agency that is capable of attracting legal professional privilege.

119. Although the complainant submitted that the speed with which the agency's internal review decision-maker made her decision indicated that the legal advice given to the agency did not have the necessary quality of independence, such action is open to other explanations, for example, that the officer perceived the legal issues to be straightforward.

120. With regard to the opinion of external Counsel (Documents 70. 70.1, 71 and 71.1), I consider that advice to be privileged either because Counsel is the agency's legal adviser for the purpose of the rule or because Counsel is the alter ego of the legal adviser: *Mayor and Corporation of Bristol v Cox* [1884] 26 Ch D 678.

121. From the information before me, and from my own enquiries, I am satisfied that the agency's legal advisers, both internal and external as referred to in the clause 7 documents, were appropriately qualified and, in advising the agency, were acting within their professional capacities and with the necessary degree of independence. In my view, there existed a solicitor/client relationship between the agency and its legal advisers, both internal and external, that was capable of attracting legal professional privilege.

Are the documents privileged as the agency claims?

122. I accept that not all documents that are produced by legal practitioners attract legal professional privilege. For example, memoranda of fees and the like that do not disclose the nature or extent of privileged material are not privileged: *Lake Cumberline Pty Ltd v Effem Foods Pty Ltd* (1994) 126 ALR 58. Dawson J in *Baker v Campbell* (1983) 153 CLR 52 at [9] held that:

> *"...there is no privilege for documents which are the means of carrying out, or are evidence of, transactions which are not themselves the giving or receiving of advice or part of the conduct of actual or anticipated litigation."*

123. At the same time, I acknowledge that the scope of communications between legal adviser and client is not to be drawn too narrowly, provided that the dominant purpose of the communications is the obtaining of legal advice: *Balabel v Air India* [1988] Ch 317.

124. I have considered whether Documents 36, 36.1, 43, 46, 46.1, 46.2, 46.3, 47, 48, 50, 50.1, 50.2, 50.3, 51, 51.1, 53, 59, 60, 62, 64, 64.1, 64.2, 64.3, 65, 70, 70.1, 71, 71.1, 75, 75.1, 92 and 92.1, as described in the schedule of documents attached to this letter, are privileged. Those documents consist of memoranda of advice; papers provided for the agency's consideration; briefs and drafts of briefs to Counsel; and communications containing legal advice or material. Based on my examination of those documents I am satisfied that they are all privileged because they are *prima facie* confidential documents created by the agency or its legal advisers for the dominant purpose of seeking or giving legal advice.

125. In addition, Document 100 consists of extracts from the transcript of proceedings in the Supreme Court of WA with handwritten notations. On the information before me, I am satisfied that Document 100 in its annotated form was created at the instigation of the agency's external legal advisers for the purpose of providing legal advice.

126. In *Trade Practices Commission v Sterling* (1979) 36 FLR 244, Lockhart J of the Federal Court of Australia set out various categories of documents that are covered by the privilege, which include:

> *"(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."*

127. In my view, Document 100 comes within that category and is privileged.

128. The complainant submits that they are entitled to access the clause 7 documents and Document 100, notwithstanding any *prima facie* claim of privilege.

No prohibition against disclosure of exempt matter

129. The complainant submits that there is no prohibition against agencies giving access to matter that is exempt. That contention is correct. Section 23(1) of the FOI Act provides that, subject to s.24 (the deletion of exempt matter), the agency 'may' refuse access to an exempt document. The use of 'may' indicates that the agency can choose to give access to an exempt document. In addition, s.3(3) provides, among other things, that nothing in the FOI Act is intended to prevent or discourage the giving of access to documents, including documents containing exempt matter, otherwise than under the Act if that can properly be done.

130. The complainant also refers me to s.67(1)(b) of the FOI Act and claims that that section gives the Information Commissioner the power to substitute his own exercise of discretion "on the merits" for that of the agency and the complainant asks for that discretion to be exercised in this matter.

131. Section 67(1)(b) provides that the Information Commissioner may decide not to deal with a complaint, or to stop dealing with a complaint because it is frivolous, vexatious, misconceived or lacking in substance. I have instead taken this to be a reference to section 76(1)(b) which provides:

> *"In dealing with a complaint the Commissioner has, in addition to any other power, power to –*
>
> *…*
>
> *(b) decide any matter in relation to the access application or application for amendment that could, under this Act, have been decided by the agency."*

132. In any event, s.76(4) of the FOI Act provides that if it is established that a document is an exempt document, then the Information Commissioner does not have the power to make a decision to the effect that access is to be given to the document. I understand that to mean that I do not have a discretion, as agencies do, to release documents which contain exempt matter.

Privilege can be overridden by a greater public interest

133. The complainant submits that legal professional privilege can be overridden by a greater public interest and refers me to *R v Bell, ex parte Lees* (1980) 146 CLR 141. That case concerned a family law matter where privilege applied to a client's address, which had been given by the client to her solicitor in confidence. In that case, the solicitor did not know that his client was acting in disregard of a custody order and had wrongfully retained possession of a child.

134. In my view, *R v Bell* is distinguishable on its facts from this matter and is also an example of those cases where legal professional privilege is displaced when communications are made for an illegal or improper purpose. I have considered the question of illegal or improper purpose at paragraphs 135 to 144 inclusive.

Right to receive particulars of a decision

135. The complainant submits that in *Bailey v Commissioner of Taxation* (Cth) (1977) 136 CLR 214, the High Court of Australia upheld the right of a person to receive particulars of an administrator's decision to take action against them. However, in my opinion, that case is distinguishable on its facts from this case since the agency did not make a decision to take action against the complainant. On the contrary, the agency decided not to do so.

Illegal or improper purpose

136. The principles by which legal professional privilege may be displaced due to an illegal or improper purpose are set out in the High Court judgments of *Attorney General (NT) v Kearney* (1985) 158 CLR 500 and *Commissioner Australian Federal Police v Propend Finance Pty Ltd* [1996-1997] 188 CLR 501.

137. In *Propend,* Gaudron J at 545 referred to the judgment of Dawson J in *Kearney* at 528. Dawson J identified different expressions of the nature of wrongdoing that would displace legal professional privilege. These include "a criminal or unlawful proceeding", "an improper or illegal act", "illegality or fraud or trickery": "crime or fraud or civil offence" [528-529].

138. In *Re Duggan and Department of Agriculture and Food* [2011] WAICmr 31, I noted that 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 p.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".*

139. An analysis of the principles drawn from those 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.

- The person contesting the existence of legal professional privilege bears the onus of demonstrating a *prima facie* case that the relevant communications were made in furtherance of an illegal or improper purpose.

- 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.

140. I agree with that analysis and, since I consider that Documents 36, 36.1, 43, 46, 46.1, 46.2, 46.3, 47, 48, 50, 50.1, 50.2, 50.3, 51, 51.1, 53, 59, 60, 62, 64, 64.1, 64.2, 64.3, 65, 70, 70.1, 71, 71.1, 75, 75.1, 92, 92.1 and 100 are *prima facie* privileged, I have considered whether the illegal or improper purpose 'exception' applies to those documents.

141. In their submissions the complainant contends that it is of concern that the agency commenced an investigation into their conduct in view of their history with its Chairman and that, if the inquiry had been for an improper purpose or ulterior motive, among other things, it could not be lawful and privilege would not apply to the relevant documents. In support of their view, the complainant submits that the improper purpose was to subject the complainant to an unnecessary inquiry for a protracted period. The complainant also contends that the agency's inquiry was illegal because it had failed to consider relevant material and arguments and also failed to provide the complainant with procedural fairness.

142. However, on the information before me, it appears that the agency did consider all relevant material and arguments. Gibbs CJ makes the relevant point in *Kearney* that: "[t]*he privilege is of course not displaced by making a mere charge of crime or fraud or, as in the present case, a charge that powers have been exercised for an ulterior purpose."*

143. Other than the complainant's submissions, there is no information before me that would lead me to conclude that the agency conducted its inquiry for an improper purpose. There are documents before me that indicate that more than one officer or member of the agency believed that there was a *prima facie* case to justify an investigation after the initial referral was made. As noted in *Re Murphy,* there must be *prima facie* evidence to raise sufficient doubt as to a claim of privilege and a mere assertion of impropriety – which is all that is before me at this time – is insufficient.

144. In my view, the complainant has not discharged the evidentiary onus of establishing that any of the disputed documents was made in furtherance of an illegal or improper purpose. Consequently, I am not persuaded that the 'exception' to the rule governing legal professional privilege for documents prepared in furtherance of an illegal or improper purpose applies in this case.

145. Furthermore, on the information before me I am not satisfied that the agency failed to afford the complainant procedural fairness but, in the event that is incorrect, it is not evident to me that that would establish the improper purpose exemption. Instead, that would amount to a flawed understanding of the legal requirements attending the making of an administrative decision: see *Re Murphy.*

146. In my decision in *Re Duggan and Department of Agriculture and food* [2011] WAICmr 31, I decided that I am bound by the interpretation of clause 7 as stated by McKechnie J in *Bowden.*

147. At paragraphs [30]-[40] in *Duggan,* I stated:

> *"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."*

Waiver

148. The complainant has made a number of submissions concerning waiver of legal professional privilege in connection with the advice that the agency obtained from Counsel, which I have summarised at paragraph 105, and referred me to *Bowden*.

149. The complainant submits that the decision in *Bowden* is incorrect and should not be followed. The complainant refers me to *Bennett v CEO Australian Customs Services* [2009] 210 ALR 220 and *Commissioner of Taxation (Cth) v Rio Tinto Limited* [2006] FCAFC 86 in support of that contention. However, the decision in *Bennett*, although it concerned an FOI matter, was decided on 25 August 2004, prior to the decision in *Bowden,* and the decision in *Rio Tinto* is distinguishable on the basis that it is not referrable to an FOI matter.

150. In my view, the decision in *Bowden* is directly relevant and is of binding authority. *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. In light of that, I do not accept the complainant's submissions as to why waiver applies to the agency's advice in this case.

151. In light of the above, I consider that Documents 36, 36.1, 43, 46, 46.1, 46.2, 46.3, 47, 48, 50, 50.1, 50.2, 50.3, 51, 51.1, 53, 59, 60, 62, 64, 64.1, 64.2, 64.3, 65, 70, 70.1, 71, 71.1, 75, 75.1, 92, 92.1 and 100 would be privileged from production in legal proceedings on the ground of legal professional privilege and, thus, are exempt under clause 7(1).

CONCLUSION

152. For the reasons given above, the agency's decision to give access in edited form to documents and to refuse access to other documents is varied. I find that:

- The agency's decision to refuse access under section 26(1) of the FOI Act on the ground that the requested documents cannot be found is justified;
- Documents 36, 36.1, 43, 46, 46.1, 46.2, 46.3, 47, 48, 50, 50.1, 50.2, 50.3, 51, 51.1, 53, 59, 60, 62, 64, 64.1, 64.2, 64.3, 65, 70, 70.1, 71, 71.1, 75, 75.1, 92, 92.1 and 100 are exempt under clause 7(1);
- Documents 40, 52, 58, 67, 67.1, 68, 69, 70.2, 72, 73, 80 and 80.1 are not exempt under clause 7(1);
- the information deleted from Documents 40, 52, 58, 67, 67.1, 68, 69, 70.2, 72, 73, 80 and 80.1 is exempt under clause 3(1) of Schedule 1 to the FOI Act; and
- Document 89.1 is exempt under clause 3(1) of Schedule 1 to the FOI Act.

****

APPENDIX

The disputed documents

Document No.	Description
36	Memorandum of advice dated 12 April 2005 from third party to agency.
36.1	Copy memorandum of advice dated 12 April 2005 from third party to agency and annexures.
40	Original and copies of letter dated 6 May 2005 to agency from third party.
43	File copy of email dated 13 May 2005 from third party to agency.
46	File copy letter dated 24 May 2005 from agency to a third party enclosing documents 46.1-46.3.
46.1	Draft letter dated 23 May 2005 to third party.
46.2	Draft letter dated 23 May 2005 to third party.
46.3	Draft brief undated to third party.
47	File copy undated draft brief to third party.
48	Draft index of documents undated.
50	Original facsimile dated 25 May 2005 from third party to agency.
50.1	Document 46.1 with handwritten comments dated 23 May 2005.
50.2	Document 46.2 with handwritten comments dated 23 May 2005.
50.3	Document 46.3 with handwritten comments and post-it note, undated.
51	File copy letter dated 25 May 2005 from agency to third party.
51.1	Original letter dated 25 May 2005 from agency to third party.
52	File copy letter dated 25 May 2005 from agency to third party.
53	Original brief to third party and annexures, undated.
58	File copy email dated 6 June 2005 to agency from third party.
59	Original and copies of letter dated 6 June 2005 to agency from third party third party.
60	Memorandum dated 7 June 2005 of agency.
62	File copy email letter dated 7 June 2005 from agency to third party.
64	Email letter dated 14 June 2005 from agency to third party.
64.1	Agency email cover sheet dated 14 June 2005 for document 64.
64.2	Original post-it note on document 64, undated.
64.3	File copy of Document 64 dated 14 June 2005.
65	Index of Documents to brief with handwritten Amendments, undated.
67	Email letter dated 1 August 2005 from agency to third party.
67.1	Agency email cover sheet dated 2 August 2005 for document 67.
68	Telephone attendance note dated 5 August 2005 between agency and third party.
69	Telephone attendance note dated 23 September 2005 agency and third party.
70	File copy email dated 23 September 2005 from third party to

	agency document 70.1.
70.1	Draft memorandum of advice dated 23 October 2005 from counsel.
70.2	Original post-it on document 70, undated.
71	Letter dated 30 September 2005 from third party to agency enclosing Document 71.1.
71.1	Memorandum of Advice dated 29 September 2005.
72	Original letter from third party to agency dated 30 September 2005.
73	Memorandum of fees dated 5 October 2005.
75	Original memorandum of advice from third party to agency, dated 11 October 2005.
75.1	Copy original memorandum of advice from third party to agency and annexures.
80	Letter third party to agency enclosing document 80.1, dated 24 November 2005.
80.1	Memorandum of fees, tax invoice and post-it note, dated 16 November 2005.
89.1	Original memorandum of complainant dated 16 February 2006.
92	Original memorandum of advice from third party to agency, dated 4 April 2006.
92.1	Copy original memorandum of advice from third party to agency and annexures.