

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

**File Ref: F2003199
Decision Ref: D0032004**

Participants: **Peter Randles
Leonie Randles**
Complainants

- and -

Town of East Fremantle
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – correspondence included in a list of documents discovered in court process – clause 7(1) – legal professional privilege – privileged communication – whether illegal or improper purpose – whether privilege applies

Freedom of Information Act 1992 (WA): section 39(3)(a); section 76(4); Schedule 1, clause 7(1)

Cottage Holdings Pty Ltd v Town of East Fremantle and Another [1999] WASC 215

Cottage Holdings Pty Ltd v Town of East Fremantle and Another [2003] WASC 77

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

Grant v Downs (1976) 11 ALR 577

Goldberg v Ng (1995) 185 CLR 83

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

R v Cox and Railton (1884) 14 QBD 153

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

Re Murphy and Queensland Treasury (1998) 4 QAR 446

DECISION

The decision of the agency is confirmed.

The disputed document is exempt under clause 7(1) of Schedule 1 to the *Freedom of Information Act 1992*.

D A WOOKEY
A/INFORMATION COMMISSIONER

20 January 2004

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Town of East Fremantle ('the agency') to refuse Mr and Mrs Randles ('the complainants') access to a document requested by them under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. The complainants are the directors of Cottage Holdings Pty Ltd ('Cottage Holdings'). In 1994, Cottage Holdings was the registered proprietor of land in East Fremantle, described on the Certificate of Title, at that time, as Lots 86 and 87, Swan Location 306. Aldgate House, a turn of the century residence with outbuildings, is situated on that land.
3. In April 1994, the former State Planning Commission ('the Commission') approved subdivision of that land into three lots – Lots 11 and 12 fronting Staton Road and the remaining lot containing Aldgate House (initially referred to as Lot 13) fronting Preston Point Road. In August 1994, the Commission approved a further subdivision of Lot 13 into three lots – Lots 14, 15 and 16 ('the Land'). Aldgate House and its outbuildings is now situated on Lot 16, which comprises 1800 square metres. The total area of Lots 14, 15 and 16 is 3600 square metres.
4. A deed of agreement ('the Deed') was drawn up by the agency's solicitors, McLeod & Co, to implement a conservation plan for Aldgate House, gardens and stables, which was required as part of the approval for this subdivision. The Deed was signed by Cottage Holdings and the agency on 24 August 1995. Under the Deed, Cottage Holdings accepted certain obligations in relation to the Land and the agency lodged a caveat against the Certificate of Title to Lot 13 (that is, the proposed Lots 14, 15 and 16, since separate titles to those lots had not then been issued).
5. Subsequently, Cottage Holdings sold Lot 16 to third parties. On 11 December 1995, those third parties entered into a deed of agreement with the agency, authorizing the agency to lodge a new caveat against the Certificate of Title to Lot 16.
6. On 24 January 1996, new titles to Lots 14, 15 and 16 were issued and the caveat registered on Lot 13 was withdrawn in respect of Lot 16, which became subject to the new caveat lodged pursuant to the agreement of 11 December 1995, made between the agency and the purchasers of Lot 16.
7. In the meantime, Cottage Holdings built five residential units or cottages on Lots 14 and 15, for which strata titles were issued in 1997 by the former Department for Land Administration. However, the strata titles were issued with the remnant caveat from Lot 13 registered against them, to the consternation of the complainants who had understood the Deed to mean that, once new titles had been issued, a caveat would be registered against Lot 16

only. Since the purchasers of the cottages required unencumbered titles, sales contracts were lost and, in 1998, Cottage Holdings commenced litigation against the agency, which is still on foot, claiming rectification of the Deed and damages for breach of contract and in negligence.

8. In 1999, in the course of that litigation, Cottage Holdings applied for inspection of certain documents discovered by the agency for which legal professional privilege was claimed. That matter was decided in *Cottage Holdings Pty Ltd v Town of East Fremantle and Another* [1999] WASC 215 ('the 1999 case'). In 2003, Cottage Holdings challenged the right of the agency to claim privilege in relation to the same documents and the outcome to that action is set out in *Cottage Holdings Pty Ltd v Town of East Fremantle and Another* [2003] WASC 77 ('the 2003 case').
9. On 29 October 2003, the complainants applied to the agency for access, under the FOI Act, to two documents (referred to as documents 32 and 33 in a list of the documents in the action between Cottage Holdings and the agency, attached to an affidavit, dated April 1999, sworn by the Chief Executive Officer of the agency ('the Affidavit')). The agency claimed that both documents were subject to legal professional privilege and, thus, exempt under clause 7(1) of Schedule 1 to the FOI Act. However, the agency agreed to waive its right to claim privilege in respect of document 33 and gave the complainants access to it but maintained its claim that document 32 is exempt under clause 7(1).
10. Since the agency's decision was made by the Chief Executive Officer, who is the principal officer of the agency for the purposes of the FOI Act, internal review of that decision was not available to the complainants, pursuant to s.39(3)(a) of the FOI Act. Consequently, on 21 November 2003, the complainants made a complaint to the Commissioner seeking external review of the agency's decision.

REVIEW BY THE A/COMMISSIONER

11. I obtained the FOI file and document 32 from the agency. In addition, the agency provided me with a copy of the Affidavit, together with copies of the decisions in the 1999 case and the 2003 case, both of which considered the question of whether document 32, among others, is privileged. The complainants also provided me with information and documents relevant to this matter. Since it appeared to me that document 32 is an insubstantial document which does not contain information of the kind described by the complainants in their submissions to me (see paragraphs 18 and 20) and, in view of the fact that the agency had released to the complainants document 31 as well as document 33 listed on the Affidavit, I asked the agency to reconsider its decision and give access to the requested document. However, the agency maintained its exemption claim for document 32.

12. On 17 December 2003, after it became apparent that the complaint could not be resolved by conciliation, I informed the parties, in writing, of my preliminary view of this complaint, including my detailed reasons, based on the information and documents then before me. My preliminary view was that document 32 may be exempt under clause 7(1) of Schedule 1 to the FOI Act, as claimed.
13. In light of my preliminary view, I invited the complainants to either withdraw their complaint or provide me with further submissions. On 30 December 2003, the complainants made further submissions to me and confirmed that they wished to pursue their complaint. I have considered those submissions in conjunction with the information and the material described here.

THE DISPUTED DOCUMENT

14. The disputed document is described in the agency's notice of decision, dated 19 November 2003, as:

"32. Letter from Beres Coley, Town Clerk to Mcleod [sic] & Co dated 8 August 1995".

The disputed document is also listed as number 32 in Part 2 of the First Schedule in Annexure 'A' in the Affidavit as:

"32. Letter from Beres Coley, Town Clerk of the defendant to McLeod & Co 08.08.95".

Clause 7 – Legal professional privilege

15. The agency claims that the disputed document is exempt under clause 7(1) of Schedule 1 to the FOI Act. Clause 7(1) provides that:

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

16. The grounds upon which a document is subject to legal professional privilege are well settled in Australian common law. In *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 201 CLR 49, the High Court of Australia held that 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.

The agency's submission

17. The agency submits that the disputed document has been subject to earlier applications for discovery, in the course of the legal proceedings brought by the complainants against the agency and, among other documents, was held by the Supreme Court of Western Australia, in the 1999 case and the 2003 case, to

be subject to legal professional privilege. Accordingly, the agency submits that the disputed document is exempt under clause 7(1) of Schedule 1 to the FOI Act.

The complainants' submissions

18. The complainants state that the agency initially claimed that documents 31, 32 and 33, as listed in the Affidavit, were all privileged documents. However, the agency has since waived its claim to privilege for documents 31 and 33 and given them access to copies of those documents. Nevertheless, the complainants submit that document 32 is the most important of the three documents to them *“as this instruction clarifies how the deed should be structured and why.”*
19. The complainants submit that, by withholding the disputed document, the agency is acting unlawfully since the complainants' position is supported by all the authorities and other persons associated with the subdivision and development of the Land in 1995.
20. In response to my preliminary view, the complainants made the following further submissions, which I have set out, in brief, below:
 - The agency has not acted in accordance with a resolution of the Council of the agency, made on 31 July 1995, relating to the Land ('the Resolution'), which differed dramatically from the eventual outcome for the Land (as acknowledged by the former Mayor of the agency, at the relevant time) and, accordingly, the agency should forfeit any claim to privilege over the disputed document, otherwise the law would appear to be aiding an injustice.
 - McLeod & Co was commissioned to reflect the agreement between the complainants and the agency in the form of the Deed. The intent of both parties was to facilitate the eventual covenant over the future creation of a Lot 16 with a land size, as prescribed in writing, of 1800 square metres. However, although McLeod & Co had advised the complainants that the Deed reflected the Resolution, that is not the case.
 - With regard to the preparation of the Deed, McLeod & Co was acting for both the complainants and the agency, as can be proved by its actions in altering title particulars on the original Deed without notifying either the complainants or the agency.
 - All communications relating to the Resolution are vital to a complete understanding and clarification of this issue.
 - The agency, by its actions in this matter, is not demonstrating honest and open government and the complainants suspect that the disputed document has relevant content regarding either advice or instruction relating to the covenanting of Lot 16. Alternatively, if the content of

the disputed document is of no importance in this matter, the agency should not be concerned to disclose it and such disclosure may assist in averting the continuing legal action.

Consideration

21. I have considered the complainants' submissions and I have examined the documents they have given me, including the Resolution, the Deed and other correspondence. I have examined the disputed document, the Affidavit and the decisions of the Supreme Court of Western Australia in the 1999 case and the 2003 case. I am satisfied that the disputed document is document 32 in Part 2 of the First Schedule in Annexure 'A' of the Affidavit, produced by the agency as part of the discovery process in the 1999 case and that it, among others, was the subject of the decisions in the 1999 and 2003 cases. In those cases, the Supreme Court found that the disputed document, among others, is subject to legal professional privilege.
22. Having examined the disputed document, although it appears to me to be essentially administrative in nature, I accept that it forms part of the continuum of confidential correspondence between the agency and its legal advisers and was brought into existence by the agency for the dominant purpose of seeking legal advice from its solicitors. I find that the disputed document is, *prima facie*, privileged.
23. In the 1999 case, the test for legal professional privilege was the 'sole purpose' test expounded by the High Court in *Grant v Downs* (1976) 11 ALR 577 at 588, whereby confidential communications between clients and their solicitors were privileged from production in legal proceedings if made for the sole purpose of giving or seeking legal advice or for use in existing or anticipated legal proceedings. Following the High Court's decision in *Esso*, the 'sole purpose' test for legal professional privilege was replaced by the 'dominant purpose' test, which reflects the law as it now stands.
24. In the 2003 case, Master Sanderson of the Supreme Court considered whether the position had changed since the application before Master Bredmeyer in the 1999 case, on the basis of the complainants' claim that the agency's solicitors, McLeod & Co, had acted for both the agency and the complainants with regard to the drafting of the Deed. Master Sanderson accepted that the complainants had an arguable case on that question but observed that that was an issue for trial. In that case, the Supreme Court saw no basis for allowing inspection of the disputed document, among others, arising from the complainants' new submissions to the Court. I accept that that is the correct approach to this matter.
25. I do not accept the complainants' submission that, by withholding the disputed document, the agency is acting unlawfully. Legal professional privilege is a legal right. The Supreme Court of Western Australia, on two occasions, has found that the disputed document attracts legal professional privilege. In my view, the agency has done nothing more than rely on its claim of privilege for the disputed document, as it is entitled to do.

26. I understand that the agency has waived its right to claim privilege in respect of Documents 31 and 33 but maintains its claim of privilege for the disputed document. Although the complainants have not directly raised the issue, I have considered whether, by waiving privilege in respect of the two documents listed on either side of the disputed document in the Affidavit, the agency has impliedly waived its right to claim that the disputed document is privileged. Waiver occurs when the client performs an act that is inconsistent with preserving the confidence protected by the privilege. The consequences of waiver are that the client becomes subject to the normal requirements of disclosure of the communication: see *Goldberg v Ng* (1995) 185 CLR 83 at pages 95 and 106.
27. A waiver of privilege may be express or implied. Express waiver involves the intentional disclosure of protected material to another person. In this case, the agency has expressly waived its right to claim privilege for documents 31 and 33. Since, in any claim of privilege for communications between solicitors and their clients, the privilege is that of the client, any waiver of that right is at the client's discretion. Whether or not the complainants in this case have an argument that McLeod & Co were - or should be regarded as - acting for them as well as the agency, in my view, there was clearly a well-established client/solicitor relationship between the agency and the solicitors and, as I have said, I consider that the disputed document was clearly a confidential communication between them for the purposes of the agency obtaining legal advice.
28. In this case, the agency is the client for the purpose of claiming privilege and the agency has chosen not to exercise its discretion to waive the privilege. If the disputed document is exempt under clause 7(1), then only the agency has the ability to waive its right to claim privilege and I do not have the power to make a decision that it should be disclosed; s.76(4) of the FOI Act expressly prohibits me from doing so.
29. The meaning of implied waiver was described by Mason and Brennan JJ in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at pp.487-8:
- "An implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege. The holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication... Hence, the implied waiver inquiry is at bottom focused on the fairness of imputing such a waiver."*
30. The question of whether or not there has been an implied waiver of privilege most often arises when there has been a limited disclosure of the contents of the privileged material but, in this case, I have considered whether the fact that the agency has waived privilege in documents 31 and 33, referred to above, alters the position and, in particular, renders it unfair for the agency to maintain its claim for privilege in respect of the disputed document. The question will turn upon whether, in all the circumstances, it would be unfair to maintain the privilege, irrespective of the subjective intention of the privilege-

holder: *Goldberg v Ng* at pages 82 and 96. In my view it does not. Having inspected the documents, I do not consider that it could be said that disclosure of the disputed document is necessary in the interests of fairness in order to avoid an inaccurate perception of the disclosed communications. Therefore, for reasons similar to those given by Master Bredmeyer in the 1999 case, at paragraphs 3-6, I consider that the disclosure of documents 31 and 33 does not amount to an implied waiver of privilege in the disputed document.

31. In my view, none of the complainants' remaining submissions is directly relevant to the question that I must determine, which is whether the disputed document would be privileged from production in legal proceedings on the ground of legal professional privilege.
32. Although the complainants have not directly addressed the issue, I have also considered whether their submissions amount to a claim that the disputed document is not privileged because it is a communication made to facilitate the commission of a crime or fraud. This principle is not strictly speaking an 'exception' to the rule governing the application of legal professional privilege, since in those circumstances the privilege does not apply because "*no court can permit it to be said that the contriving of fraud can form part of the professional occupation of an attorney or solicitor*": *R v Cox and Railton* (1884) 14 QBD 153 at 168, citing *Follett v Jefferyes* (1850) 1 Sim (NS) 1.
33. In *Commissioner of Australian Federal Police and Another v Propend Finance Limited and Others* (1997) 188 CLR 501, McHugh J said, at page 556:

"Communications in furtherance of a fraud or crime are not protected by legal professional privilege because the privilege never attaches to them in the first place."

Similarly, in the same case, Gaudron J said, at page 545:

"Communications made in furtherance of wrongdoing fall outside legal professional privilege, although there is no particularly precise statement as to the nature of the wrongdoing that produces that result"

and referred to Dawson J's judgment in *Attorney-General (NT) v Kearney* (1985) 158 CLR 500, at pages 528-529, for different formulations of the nature of the wrongdoing which 'displaces' legal professional privilege. These include "*a criminal or unlawful act*", "*an improper or an illegal act*", "*illegality or fraud or trickery*", "*crime or civil fraud*" and "*wrongdoing*".

34. A helpful analysis of this 'improper purpose exception' can be found in *Re Murphy and Queensland Treasury* (1998) 4 QAR 446. In that case, the Queensland Information Commissioner, at pages 459-460, extracted the following principles from the decided cases:

"To displace legal professional privilege, there must be prima facie evidence (sufficient to afford reasonable grounds for believing) that the relevant communication was made in preparation for, or furtherance of, some illegal or improper purpose."

- *Only communications made in preparation for, or furtherance of, the illegal or improper purpose are denied protection, not those that are merely relevant to it (see Butler v Board of Trade [1970] 3 All ER 593 at pp 596-597). In other words, it is not sufficient to find prima facie evidence of an illegal or improper purpose. One must find prima facie evidence that the particular communication was made in preparation for, or furtherance of, an illegal or improper purpose.*
- *Knowledge, on the part of the legal adviser, that a particular communication was made in preparation for, or furtherance of, an illegal or improper purpose is not a necessary element (see R v Cox and Railton (1884) 14 QBD 153 at p 165; R v Bell; Ex parte Lees (1980) 146 CLR 141 at p 145); however, such knowledge or intention on the part of the client, or the client's agent, is a necessary element... ”.*

I agree with that analysis and consider those principles to be directly relevant to this case.

35. A person who alleges that legal professional privilege does not apply to a communication by reason of an alleged illegal or improper purpose has the onus of proving it. Although the standard of proof is not required to the level of proof on the balance of probabilities that the communication was made in the commission of a fraud or other improper purpose, there must be “*something to give colour to the charge*”: *Propend*, per McHugh J, at page 556. In their submissions to me, the complainants have principally relied on assertions that the Deed was not drafted in accordance with the Resolution and that their view is supported by various persons and authorities. However, it seems to me that this is essentially a question of interpretation.
36. The complainants have provided me with no evidence to show that the agency has deliberately embarked on a course of action to deceive them in relation to the drafting of the Deed or that any illegal or improper purpose was intended. Having considered all of the material before me, in my view, there is no evidence sufficient to afford reasonable grounds for believing that the disputed document was made in preparation for, or furtherance of, some illegal or improper purpose.
37. In my opinion, the complainants have not established that the particular communication contained in the disputed document was made in preparation of, or furtherance of, an illegal or improper purpose. Accordingly, I find that the disputed document is exempt under clause 7(1) of Schedule 1 to the FOI Act.
