

## WEEKS AND SWAN

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

**File Ref: 94108  
Decision Ref: D00595**

Participants:

**Steven George Weeks**  
Applicant

- and -

**Shire of Swan**  
Respondent

### DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - solicitor's letter of advice - prepared at request of respondent - Schedule 1 clause 7 - legal professional privilege - document brought into existence for "sole purpose" of giving or receiving legal advice - waiver of privilege - circumstances in which waiver applies - disclosure of parts of a privileged document - whether disclosure of part of a document amounts to a waiver of privilege in respect of the whole document.

*Freedom of Information Act 1992 (WA)* ss. 68(1); 72(1)(b); 75(1); Schedule 1 clause 7.

*Grant v Downs* (1976) 135 CLR 674.

*Baker v Campbell* (1983) 153 CLR 52.

*Great Atlantic Insurance Co v Home Insurance Co and others* [1981] 2 All ER 485.

*Webster v James Chapman and Co. (a firm) and Others* [1989] 3 All ER 939.

*Re Stanhill Consolidated Ltd* [1967] VR 749.

## DECISION

The decision of the agency of 19 July 1994 is set aside.

In substitution therefore, it is decided that the document remaining in dispute, namely the letter dated 24 November 1993 to the agency from the agency's solicitors is not exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992* and the applicant is entitled to be given access to it in the form requested.

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

February 1995

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Shire of Swan ('the agency') to refuse Mr Steven George Weeks ('the applicant') access to copies of correspondence between the agency and its solicitors created in November 1993.
2. The applicant operates a business known as "Action Auctioneers and Valuers" from his home address in West Swan. It is my understanding that the applicant originally operated this business under a Home Occupation (Office) permit and that he had also obtained approval from the agency to use some of his land for a Restaurant/Nursery complex. In August 1992, the applicant sought approval from the agency for his businesses to operate as a "Cottage Industry". Approval was subsequently given by the agency in September 1992. However, the applicant's land is zoned "General Rural" and it appears that the conduct of auctions was not a use that was permitted within land zoned "General Rural" although the agency had approved, for a limited period, the use of the land in the manner proposed by the applicant subject to certain conditions.
3. In September 1993, the applicant made an application for review of his Cottage Industry Approval and also sought a relaxation of the conditions attached to the "Cottage Industry" 1992 approval, because those conditions had caused him considerable inconvenience in the conduct of his businesses over the previous twelve months. The applicant sought a variation to the conditions that limited the frequency of auctions conducted on the site. The agency considered that an increase in the frequency of auction activities would amount to the conduct of an "Auction Mart", an activity that is apparently not permitted upon land zoned "General Rural". At a subsequent meeting of the agency it was resolved that legal advice be sought on the power of the agency to grant the approval requested by the applicant.
4. On 19 November 1993, the applicant apparently attended at the agency where he was shown a copy of the agency's request for legal advice. The applicant noted that there was an error in the information provided to the agency's lawyers as regards the zoning of his land. The agency had informed its lawyers that the land was zoned "Swan Valley Rural" when in fact the applicant's land was zoned "General Rural". The agency subsequently sent a facsimile to its lawyers correcting the error and advising them of the correct land zoning category.
5. On 26 November 1993, Mr S M Hiller, Executive Manager, Community Planning and Development of the agency, advised the applicant that on 24 November 1993, the agency had received the legal advice referred to in paragraph 3 above. After considering that advice the agency apparently decided not to grant renewal of the Cottage Industry approval in respect of the applicant's land. Instead, the

agency resolved to amend Appendix 6B of the Town Planning Scheme No 9 to allow the applicant's property to be used for the conduct of "Auction Marts".

6. It is my understanding of the background to this complaint that the applicant believes that the legal advice, upon which the application for review of the Cottage Industry approval was denied and the amendment to Appendix 6B of the Town Planning Scheme No 9 was initiated by the agency, may not be correct because of the initial error in relation to information about the land zoning in the agency's request for legal advice.
7. On 12 June 1994, the applicant applied to the agency under the *Freedom of Information Act 1992* ('the FOI Act') seeking copies of the correspondence sent to its solicitors in November 1993 and a copy of the legal opinion received by the agency in reply to that request ('the requested documents'). On 27 June 1994, the agency's FOI Co-ordinator, Mr Stephen Dodd, refused the applicant access to three documents, on the ground that they were exempt under clause 7 of Schedule 1 to the FOI Act. The requested documents consist of:
  - (a) a letter dated 11 November 1993 from the agency to its solicitors seeking advice (Document 1);
  - (b) a facsimile request sent by the agency to its agency's solicitors on 19 November 1993, correcting an anomaly in Document 1 relating to the zoning of the land about which the advice was sought by the agency (Document 2); and
  - (c) a letter dated 24 November 1993 to the agency from the agency's solicitors providing the advice requested in Document 1 (Document 3).
8. On 12 July 1994, the applicant applied to the agency for internal review of the decision to deny him access to the requested documents. By a decision dated 19 July 1994, Mr A C Frewing, Acting Chief Executive Officer of the agency, confirmed the decision of Mr Dodd and claimed the requested documents were exempt under clause 7 (Legal professional privilege). On 16 September 1994, by facsimile, the applicant applied to the Information Commissioner for external review of the decision to deny him access to the requested documents. This complaint was supplemented by a submission from the applicant and details of the decision to be reviewed which were received by my office on 21 September 1994.

## **REVIEW BY THE INFORMATION COMMISSIONER**

9. On 28 September 1994, in accordance with the requirements of s.68(1) of the FOI Act, I notified the agency that I had accepted this complaint for review. Pursuant to s.75(1) and 72(1)(b) of the FOI Act, I sought the production to me of the requested documents together with the file maintained by the agency concerning the access application. These were delivered to my office on 29 September 1994.

10. By 10 October 1994, I had examined the requested documents and considered the additional information provided by the agency in support of its claims. At that point in my deliberations, I was satisfied that the requested documents would, *prima facie*, be privileged from production in legal proceedings on the ground of legal professional privilege. Therefore, I informed the agency and the applicant that it was my preliminary view that the documents were exempt under clause 7 of Schedule 1 to the FOI Act. The applicant was invited, in light of this preliminary view, to re-consider his complaint.
11. On 17 October 1994, the applicant informed me that he did not wish to withdraw his complaint. On 27 October he lodged a further submission for my consideration. In that submission, the applicant claimed that he had been shown a copy of Document 1 and was allowed to read it and, at a subsequent meeting with officers of the agency, parts of Document 3 had been read to him. On that basis, he questioned the application of the exemption provided by clause 7.
12. On 7 November 1994, I wrote to the Chief Executive Officer / Town Clerk of the agency and sought the agency's response to the matters raised by the applicant in his submission of 27 October 1994. The agency's response was received by my office on 10 November 1994 and it was signed by Mr Hiller on behalf of the agency. Mr Hiller confirmed the applicant's recollection of events and informed me that on 19 November 1993, he allowed the applicant to read Document 1. When he read Document 1, the applicant apparently detected an error in the letter because the land in question was incorrectly stated to be zoned "Swan Valley Rural" when in fact it was zoned "General Rural". When the applicant brought the error to the attention of Mr Hiller, the agency sent a facsimile (Document 2) to its solicitors correcting the error.
13. I was also informed by Mr Hiller that, on 15 June 1994, a meeting was held at Mr Hiller's office. Apart from Mr Hiller and the applicant, another officer of the agency and a third party, a Planning Consultant, who had previously represented the applicant attended that meeting. Mr Hiller advised me that in an endeavour to satisfy the applicant's request to know the nature of the advice in Document 3, he read to the applicant and to the third party, "*selected but relevant parts of the four page legal advice in support of the approach and recommendations made by the Planning Services to Council in respect to Mr Weeks application.*"
14. After receiving this confirmation of the applicant's account of events, I invited the agency to make submissions to me as to the basis of its claim that privilege had not been waived by the acts of disclosure of those documents to the applicant. By letter dated 3 February 1995, the agency informed my office that it no longer considered Document 1 to be a privileged communication and that it did not object to a copy of that document being provided to the applicant. Further, the agency agreed to provide copies of Documents 1 and 2 to the applicant. However, the agency maintained its claim that Document 3 was privileged as a confidential communication between solicitor and client and declined to exercise its discretion and waive that claim for privilege. As the applicant maintained his claim for access to this document and no further conciliation between the parties seemed likely, I proceeded to a formal decision in respect of Document 3.

## THE EXEMPTION - LEGAL PROFESSIONAL PRIVILEGE

15. The agency claimed that Document 3 was exempt on the ground of legal professional privilege under clause 7 of Schedule 1 to the FOI Act.

Clause 7 provides as follows:

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

### ***Limit on exemption***

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

16. The purpose of this exemption is to ensure that documents which would be protected from production in legal proceedings cannot otherwise be obtained under the FOI Act. The doctrine of legal professional privilege is founded on consideration of high public policy. In the joint judgement of Stephen, Mason and Murphy JJ in *Grant v Downs* (1976) 135 CLR 674 at 685 it was said :

*"The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege, legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision."*

17. In *Grant v Downs*, the High Court considered whether the privilege attached to reports made by officers of the Health Commission of New South Wales following the death of a patient in a psychiatric hospital. In support of the claim, an affidavit was sworn by an officer of the Health Commission to the effect that the documents concerned were brought into existence for a number of purposes - to determine whether any member of the staff was guilty of breaches of discipline, to detect whether there were any shortcomings in the hospital administration and for submission to the legal advisers of the Health Commission in the event that disciplinary proceedings involving staff arose, or coronial proceeding arose, or in the event that a civil claim arising from the death was initiated against the Health Commission. The High Court unanimously rejected this claim to privilege and

held that only those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings are entitled to immunity from production.

18. After consideration of the matters in issue, Stephen, Mason and Murphy JJ further said, at p688:

*"All that we have said so far indicates that unless the law confines legal professional privilege to those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings the privilege will travel beyond the underlying rationale to which it is intended to give expression and will confer an advantage and immunity on a corporation which is not enjoyed by the ordinary individual. It is not right that privilege can attach to documents which, quite apart from the purpose of submission to a solicitor, would have been brought into existence for other purposes in any event, and then without attracting any attendant privilege. It is true that the requirement that documents be brought into existence in anticipation of litigation diminishes to some extent the risk that documents brought into existence for non-privileged purposes will attract the privilege but it certainly does not eliminate the risk. For this and the reasons we have expressed earlier we consider that the sole purpose test should now be adopted as the criterion of legal professional privilege.*

19. Thus, the test to be applied in order to decide whether a document attracts legal professional privilege is the "sole purpose" test. This requires a consideration of whether the document was brought into existence for the sole purpose of giving or receiving legal advice or for use in existing or anticipated legal proceedings: *Grant v Downs, op. cit; Baker v Campbell* (1983) 153 CLR 52.

### **Does Document 3 meet the "sole purpose test"?**

20. I am satisfied, from my examination of Document 3, and from the evidence before me as to the circumstances in which it was created, that Document 3 meets the "sole purpose" test in *Grant v Downs*, cited in paragraph 18 above. It is a confidential communication between the agency and its legal advisers, brought into existence for the sole purpose of giving and receiving legal advice. Ordinarily, on that basis, the document would attract the exemption contained in clause 7 of Schedule 1 to the FOI Act.
21. However, in this matter, there is uncontradicted evidence before me from Mr Hiller that parts of Document 3 were disclosed by him to the applicant and to a third party at the meeting on 15 June 1994. Therefore, I must consider whether in these circumstances the privilege which would ordinarily attach to Document 3 has been waived and whether, in this instance, the intentional act of partial disclosure of the contents of a confidential communication between a solicitor and a client (the agency) by Mr Hiller, an officer of the agency, amounts to a loss of legal professional privilege.

## Waiver of privilege

22. *Cross on Evidence*, Law Book Company, 1989, Ch 13, states, *inter alia*, at paragraph 25010:

*"Waiver occurs where the party entitled to privilege performs an act which is inconsistent with the confidence preserved by it. ...The consequence of waiver where it occurs is that the person becomes subject to the normal requirements of disclosure of the communication."*

23. *Halsbury's Laws of England*, 4th Edition Re-issue, 1989, Volume 3(1) paragraph 526 states, *inter alia*:

*"The privilege is the privilege of the client...It may be waived by the client but never ceases unless waived by the client or his successors in title. Privilege is not waived by referring to a document in a pleading, affidavit or list of documents; but it is waived when a document is disclosed to the other party in the course of litigation, unless the other party has procured inspection of the documents by fraud or, on inspection, realises that he has been permitted to see the documents only by reason of an obvious mistake. When privilege is waived by disclosure of a document before trial or by its use in cross examination, the waiver relates only to the document itself; but, if a privileged document is adduced in evidence, the waiver extends to the transaction to which the evidence goes and to other documents relevant to that transaction..."*

24. In the case of *Great Atlantic Insurance Co v Home Insurance Co and others* [1981] 2 All ER 485, the Court of Appeal considered the question of an apparent waiver of privilege where part of a document had been disclosed in open court. The Court of Appeal considered an appeal against an order of Lloyd J. that the plaintiffs give discovery of the whole of that document. At the substantive hearing of the case between the parties, counsel for the plaintiffs read out part of a document in open court, when opening the plaintiffs' case. The respondents subsequently sought, and obtained, from Lloyd J. an order that the plaintiffs give discovery of the remainder of the document. The plaintiffs appealed to the Court of Appeal against the order of Lloyd J.

25. The argument before the Court of Appeal was whether the plaintiffs, once the plaintiff's counsel had used part of the document and read out part of it in open court in opening the plaintiff's case, could maintain a claim that the remainder of the document was still privileged. The Court of Appeal held, *inter alia*, that the introduction of part of a memorandum into the trial record constituted waiver of privilege given that the whole of the document dealt with a single subject. The Court of Appeal further held that a party may be able to claim privilege for part of a document, whilst disclosing other parts of that document, *"...where the document deals with separate subject matters so that the document can in effect be divided into separate and distinct documents each of which is complete."* *Great Atlantic Insurance op. cit.* per Templeman J, at p 490.



26. The Court of Appeal concluded that, as the whole of the document under consideration dealt with the one subject matter, a party was not entitled to disclose only those parts of a document that were to his advantage. Both the court and the opposing party were entitled to know whether the material released from privilege represented the whole of the material relevant to the issue in question.
27. Privilege may also be lost in circumstances where documents are inadvertently disclosed to another party. In the case of *Webster v James Chapman and Co. (a firm) and Others* [1989] 3 All ER 939, a copy of a report intended for the plaintiff was mistakenly enclosed with a letter to solicitors for another party to the action. The plaintiff's solicitors sought the return of the document and that was refused. The Court held, at pp. 943-944 that "...once a privileged document or copy of a privileged document passes into the hands of some other party to the action, prima facie, the benefit of the privilege was lost and the party who had obtained the document then has in his hands evidence which, pursuant to the principle in *Calcraft v Guest*, can be used at trial."

**Does the act of an officer of an agency reading from a privileged document amount to waiver of privilege by the agency?**

28. Waiver is an "act of conduct" that amounts to the foregoing of a right to keep certain information confidential: *Re Stanhill Consolidated Ltd* [1967] VR 749 at 752. Although the authorities to which I have referred in paragraphs 24-27 concern waiver of privilege in the context of legal proceedings, it would appear that waiver is not confined to the release of information only to a court. It can operate where the privileged information is disclosed to anyone in any circumstances: (*ibid.*). Legal professional privilege attaches to the client and may be waived by the client.
29. I am satisfied from the evidence before me, that parts of Document 3 were read to the applicant on 15 June 1994, by Mr Hiller. Mr Hiller informed me that the applicant asked him for an explanation of the solicitor's opinion in general terms, in respect of the definition of "Auction Mart" and why the definition of "Cottage Industry" could not apply to the activities carried out on his property. Mr Hiller then read selected and relevant points from the four page letter comprising Document 3.
30. I am also satisfied from the evidence before me that Mr Hiller is an officer of the agency. It is also my understanding from the evidence that in all matters related to this complaint that Mr Hiller was performing the duties and functions of his office as Executive Manager, Community Planning and Development in accordance with his duties and obligations as an officer of the agency. Mr Hiller dealt with the applicant's permit application to the agency as part of his normal responsibilities. It was under his signature that the letter seeking advice was sent to the agency's solicitors on 11 November 1993. Further, the reply from the agency's solicitors is addressed to the Shire Clerk and marked for attention by Mr Hiller. In the absence of any evidence to the contrary, in my view, Mr Hiller was

acting within the scope of his duties and on behalf of the agency when he sought and received legal advice and when he dealt with the applicant.

31. On this basis, I consider it is reasonable to conclude that Mr Hiller is authorised to request and to receive and deal with legal advice provided to the agency by its legal advisers related to various planning issues that may arise from time to time. In my view, Mr Hiller has authority to claim legal professional privilege on behalf of the agency and to waive the agency's right to claim legal professional privilege in respect of Document 3. No evidence or submissions were provided to me that would enable a different conclusion to be drawn.
32. I acknowledge that Mr Hiller may not have intended to waive the agency's claim of privilege when he disclosed parts of Document 3 to the applicant and to the third party, and I accept that he did so in an attempt to assist the applicant to understand the decision that had been taken about his property. Although the plaintiffs and their legal advisers in the *Great Atlantic Insurance* case cited in paragraph 24 above, did not intend to waive privilege, their actions in disclosing the document were not the result of any mistake induced by the defendants nor as the result of misconduct by the defendants. In that case, disclosure had in fact resulted from a deliberate act on the part of the plaintiffs and, in those circumstances, it was held that they had effectively waived any privilege attaching to the whole document.
33. There is no suggestion that the applicant induced Mr Hiller to disclose Document 3 to him, nor is there any suggestion that the disclosure occurred through misconduct by the applicant. Mr Hiller claimed that he had only disclosed 7% of Document 3 and that, in his opinion, this did not amount to a waiver of privilege with respect to that document. In my view, the decision in the *Great Atlantic Insurance* case does not depend on the quantity of information disclosed. Rather, it is the act of disclosure itself that has the effect of waiving the privilege, particularly when that act is a deliberate act on the part of the client whose privilege it is.
34. I am satisfied, from the evidence before me, that there has been an intentional disclosure of parts of Document 3. I am also satisfied that the act of reading parts of that document amounts to a waiver of privilege concerning the whole document, in accordance with the decision in the case of *Great Atlantic Insurance*.
35. Therefore, on the basis of the evidence before me, I find that legal professional privilege has been waived in relation to Document 3 and that it is therefore not exempt under clause 7 of Schedule 1 to the FOI Act.

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