

JONES AND JUSTICE

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

**File Ref: 97023
Decision Ref: D01897**

Participants:

Edith Winifred Jones
Complainant

- and -

Ministry of Justice
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - memorandum of legal advice - clause 7 - legal professional privilege - waiver of privilege - several disclosures of document - whether waiver to be implied.

Freedom of Information Act 1992 (WA) Schedule 1 clause 7.

Local Government Act 1960 (WA) s.158.

Re Walker and Town of Mosman Park (Information Commissioner, WA, 27 May 1997, unreported, D01697).

Grant v Downs (1976) 135 CLR 674.

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

Waterford v Commonwealth (1987) 153 CLR 54.

British Coal Corp v Dennis Rye Ltd and Another (No. 2) [1988] 3 All ER 816.

Goldberg v Ng (1995) 132 ALR 57.

Bulk Materials (Coal Handling) Services Pty Ltd v Coal and Allied Operations Pty Ltd (1988) 13 NSWLR 689.

State of South Australia v Peat Marwick Mitchell (1995) 65 SASR 72.

Network Ten Ltd v Television Holdings Ltd and Another (1995) 16 ACSR 138.

Goldberg v Ng (1994) 33 NSWLR 639.

Woollahra Municipal Council v Westpac Banking Corporation (1992) 33 NSWLR 529.

DECISION

The decision of the agency is confirmed. The document is exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

26th June 1997

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Ministry of Justice ('the agency') to refuse Mrs Jones ('the complainant') access to a document requested by her under the *Freedom of Information Act 1992* ('the FOI Act').
2. The background to this complaint involves a third party, Mr Walker, who is also a complainant in respect of other matters before me. Two of those matters were dealt with in my decision in *Re Walker and Town of Mosman Park* (27 May 1997, unreported, D01697). From about 1968, Mr Walker was employed by the Town of Mosman Park as Town Clerk and later as Town Clerk and Engineer. In September 1988, the Council of the Town of Mosman Park resolved to terminate the services of Mr Walker. As required by s.158 of the *Local Government Act 1960* ('the Local Government Act'), in 1989 the Council ordered an inquiry in relation to the proposed termination of Mr Walker's employment. The inquiry was conducted by Mr Bernard O'Sullivan, JP and, following that inquiry, Mr Walker's employment was terminated.
3. In 1990, the complainant wrote to the then Attorney General complaining about various matters arising out of the conduct of the inquiry. It appears that the Attorney General sought advice from the Crown Solicitor's Office ('the CSO') in respect of the complainant's letter. The memorandum of advice to the Attorney General from the CSO is the subject of the complaint before me.
4. I further understand that, as a result of the continuing concerns raised by Mr Walker and by the complainant in respect of the inquiry conducted by Mr O'Sullivan, a review was undertaken by Mr Martin, a consultant engaged for that purpose by the Department of Local Government ('the Department'). Mr Martin provided the Department with a confidential report dated 4 June 1996 which detailed his findings and, amongst other things, referred to the memorandum of advice from the CSO received by the Attorney General in respect of the complainant's communication in 1990.
5. By letter dated 12 December 1996, the complainant lodged an access application with the Attorney General and sought access under the FOI Act to a copy of the memorandum of advice from the CSO. The complainant's access application was transferred to the agency as the requested document was not held by the Attorney General but was held on the files of the CSO, which is part of the agency for the purposes of the FOI Act.
6. By letter dated 24 January 1997, the agency refused the complainant access to the requested document on the ground that it is exempt under clause 7 of Schedule 1 to the FOI Act. The complainant sought internal review of that decision on the basis that legal professional privilege had been waived by the act

of circulating the document to third parties, specifically to Mr Martin for the purpose of his review. However, the internal reviewer confirmed the initial decision of the agency that the requested document is exempt under clause 7 and, on 11 February 1997, the complainant lodged a complaint with the Information Commissioner seeking external review of that decision.

REVIEW BY THE INFORMATION COMMISSIONER

7. I obtained a copy of the disputed document from the agency, together with a copy of the agency's file maintained in respect of this matter. After reviewing the material before me, including the disputed document, on 7 March 1997, I informed the parties in writing of my preliminary view of this complaint and my reasons. It was my view that the disputed document may be exempt under clause 7 and that, in all the circumstances, the privilege attached to that document had not been waived.
8. The complainant provided further submissions for my consideration. Given that the disputed document is now some seven years old, my office attempted to conciliate this matter by seeking, through the agency, the views of the present Attorney General with respect to whether he was now prepared to consider waiver of any privilege that may attach to the document, and consent to disclosure of the document to the complainant. However, that attempt at conciliation did not succeed. The Attorney General is not prepared to agree to disclosure and the agency maintains its claim that the document is exempt. Accordingly, the question of whether the document is exempt under clause 7 remains for my determination.

THE DISPUTED DOCUMENT

9. The disputed document is a memorandum of advice to the then Attorney General, dated 9 May 1990, from a Senior Assistant Crown Solicitor.

THE EXEMPTION

10. Clause 7 of Schedule 1 to the FOI Act provides:

"7. *Legal professional privilege*

Exemption

- (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)."*

11. The requirements to establish whether a document would be privileged from production in legal proceedings on the ground of legal professional privilege are well established by case law in Australia, and I have referred to those principles in a number of my formal decisions. Legal professional privilege applies to, *inter alia*, documents created for the sole purpose of use in legal proceedings and to confidential communications between a client and legal adviser for the sole purpose of giving or obtaining legal advice: *Grant v Downs* (1976) 135 CLR 674. An agency is entitled to claim the privilege in respect of advice obtained from salaried legal officers who are employed within government as legal advisers, where the advice given is within the professional relationship between the legal officer and the client, and the advice is independent in character: *Attorney General (NT) v Kearney* (1985) 158 CLR 500; *Waterford v Commonwealth* (1987) 153 CLR 54.
12. From my examination of the disputed document, I am satisfied that it is a confidential communication between the CSO, a professional legal adviser, and the Attorney General, the client, made for the sole purpose of giving legal advice to the Attorney General in respect of certain matters. In my view, therefore, the disputed document would, *prima facie*, be privileged from production in legal proceedings on the ground of legal professional privilege.
13. However, there appear to have been several disclosures of the document. From my examination of the material contained in the agency's files, it appears that, in response to the complainant's letter in 1990, the Attorney General informed the complainant that he had forwarded her letter and his reply to the Minister for Local Government ('the Minister') as it was more appropriate that the Minister respond to the issues raised by the complainant. It appears that the Attorney General also forwarded a copy of the disputed document to the Minister and returned the original of the disputed document to the CSO for filing. A copy of the disputed document was subsequently disclosed to Mr Martin. It seems that this disclosure was as a result of the Department making all its relevant files available to Mr Martin for the purposes of his inquiry.
14. The disputed document was referred to by Mr Martin in his report, although its contents were not reproduced in full in that report. Mr Martin's report is clearly marked "Strictly Confidential" and "Not to be copied" and the Department has informed this office that the report was distributed only to the Governor, the Chief Executive Officer of the Department, the Director of Corporate Services of the Department, the CSO and Mr Walker. The report has not otherwise been published by the Department in any other manner and copies were provided to the parties concerned on condition that it would not be copied nor published in any manner.

Waiver of privilege

15. 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: D. Byrne and J. D. Heydon, *Cross on Evidence Service*, Butterworths, at paragraph 25010. The question which arises in the circumstances of this matter is whether there has been a waiver of privilege by virtue of the disclosure of the disputed document, or part of the document, in the circumstances which I have outlined in paragraphs 13 and 14 above. That is, did any of the acts of disclosure - by the Attorney General to the Minister, by the Minister to the Department, by the Department to Mr Martin, or by Mr Martin in his report - amount to an act of conduct constituting a waiver of the legal professional privilege attaching to the document?
16. Not every disclosure to a third party will amount to a waiver of privilege: *British Coal Corp v Dennis Rye Ltd and Another (No. 2)* [1988] 3 All ER 816. Waiver of privilege may be expressed or implied. 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 and the question will turn upon whether, in all the circumstances, it would be unfair to maintain the privilege, whether or not the privilege-holder intended to waive it: *Goldberg v Ng* (1995) 132 ALR 57 at 64.
17. On the basis of my understanding of the processes of Government, and in the absence of any evidence to the contrary, I do not consider any of the disclosures referred to in paragraphs 13 and 14 above to have been an act amounting to express waiver of the privilege attaching to the document. Accordingly, the question is whether waiver of the privilege should be imputed from any of those acts of disclosure.

Disclosure by the Attorney General to the Minister

18. It appears to me that the Attorney General sought advice from the CSO in respect of a communication from the complainant. Following receipt of that advice, the Attorney General decided that the matter was more appropriately dealt with by the Minister and, accordingly, forwarded the relevant documentation, including the complainant's communication and the CSO's advice, to the Minister to be dealt with by him.
19. Legal advice may be sought from the CSO by any of the Ministers of the Crown for the time being in respect of legal issues arising out of his or her ministerial responsibilities. Accordingly, had the complainant's communication been forwarded to the Minister in the first instance, rather to the Attorney General, and had the Minister considered that he required legal advice in respect of that communication, that advice could have been obtained by or for the Minister from the CSO. The CSO had also previously provided advice to the Department in

- respect of various legal issues related to the matter the subject of the complainant's letter to the Attorney General.
20. With that in mind, it seems to me that the principles of fairness do not require in this instance that waiver of the privilege attaching to the document be implied because of the Attorney General having disclosed the document to the Minister. On the contrary, it appears to me that it would be unfair to impute waiver of the privilege merely because the complainant's communication was addressed in the first instance to the wrong Minister. Further, the Attorney General clearly has not used the communication in any way to benefit himself or to disadvantage the complainant. Rather, he appears to have endeavoured to assist the complainant by forwarding her correspondence and the advice received to the appropriate Minister to be dealt with. There is no evidence before me that the Attorney General by that disclosure intended to waive the privilege attaching to the document, nor do I consider that in all the circumstances waiver should be implied from that act.
 21. There may also be an argument that in those particular circumstances the document may be protected by "common interest privilege" which has been held to exist in several State jurisdictions and the federal courts. That privilege applies to protect privileged communications disclosed to a person having a common interest in a particular legal question. That is, each of those with the common interest can avail himself of the legal professional privilege enjoyed by the other and the document will be privileged from production in the hands of either: *Bulk Materials (Coal Handling) Services Pty Ltd v Coal and Allied Operations Pty Ltd* (1988) 13 NSWLR 689 at 695. It is not limited to actual or contemplated litigation: *State of South Australia v Peat Marwick Mitchell* (1995) 65 SASR 72.
 22. However, I have found no Western Australian authority, binding upon me, that common interest privilege applies in this jurisdiction. I do not, therefore, rely on that principle as the basis for my decision. The concept of "common interest privilege" appears to me in any event to be based on considerations of fairness and to concern particular incidents in which fairness does not require that waiver of privilege be implied from a limited disclosure to a third party. Following the authority of the High Court in *Goldberg v Ng*, therefore, as I have said, I consider the relevant question to be whether it would be unfair for the privilege to be maintained. For the reasons given in paragraph 20, in this instance, I do not.
 23. As I discussed in my decision in *Re Walker*, it has also been suggested in a line of New South Wales cases that, where communications the subject of legal professional privilege are disclosed to a third party by the holder of the privilege for a limited and specific purpose, legal professional privilege is waived only for that limited and specific purpose as against that third party only, and not as against other parties: see *Network Ten Ltd v Television Holdings Ltd and Another* (1995) 16 ACSR 138; *Goldberg v Ng* (1994) 33 NSWLR 639; and *Woollahra Municipal Council v Westpac Banking Corporation* (1992) 33 NSWLR 529. In the two minority judgments of the High Court in *Goldberg v Ng*, on appeal from the New South Wales Court of Appeal, the concept of

limited waiver was recognised as an exception to express general waiver: per Toohey J. at page 75 and Gummow J. at page 81. However, the majority, upholding the majority decision of the Court of Appeal, based its decision upon whether considerations of fairness required that waiver of privilege be imputed from the particular act of disclosure.

Disclosure by the Minister to the Department

24. In my opinion, the Minister is not the holder of the privilege attaching to the disputed documents. In my view, the privilege is that of the Attorney General. As the Attorney General is the holder of the privilege, only the Attorney General or his agent may waive the privilege. As I do not consider that the Minister can be considered to have been the agent of the Attorney General in this matter, clearly I do not consider that any act of disclosure on the part of the Minister can be considered to amount to a waiver of privilege by the Attorney General.
25. In any event, it is my understanding of the processes of Government, as explained to me in the course of my dealing with a number of previous complaints, and as is evident from documents provided to me in respect of this and other related complaints to me by the complainant in respect of similar matters, that correspondence received by a Minister in respect of a particular matter and copies of any replies to that correspondence sent by the Minister in respect of a matter the concern of a department under that Minister's portfolio is filed in the relevant department, rather than in the Minister's office. The matter of the complainant's ongoing criticisms and complaints concerning the inquiries relating to the termination of Mr Walker's employment with the Town of Mosman Park is clearly such a matter.
26. The Department maintains a number of files relating to the matter. Although there is no direct evidence before me as to how the disputed document came to be on the Department's file, my understanding is that it would be the normal course of events for the Minister to have forwarded the document to the Department either after responding to the complainant for information and filing, or before responding to the complainant, in order that the Department may provide to the Minister advice or a draft reply or both or reply directly to the complainant.
27. Although in many respects and for many purposes the Minister and a department for which he or she is responsible are distinct and separate agencies, in these circumstances, I am of the view that they cannot be regarded as unrelated such that disclosure by a Minister to one of his departments of legal advice received by the Minister in respect of a matter primarily the responsibility of the department, or by a department to its Minister in respect of such matter, can be considered a disclosure to a third party amounting to waiver of any privilege attaching to the document. In those circumstances, I consider the relevant department to be effectively the agent of the particular Minister.

28. Accordingly, I do not consider the Minister's disclosure of the document to his department in this instance to be capable of being characterised as an act of disclosure to a third party amounting to waiver of any privilege attaching to the document.

Disclosure to Mr Martin

29. In my decision in *Re Walker and Town of Mosman Park*, at paragraphs 21-41, I discussed the question of whether the disclosure of two privileged documents by the Town of Mosman Park to Mr Martin for the purposes of his inquiry constituted waiver of the privilege attaching to the documents. For the reasons given in those paragraphs, I found that the privilege had not been waived. For similar reasons to those, I do not consider that, if the holder of the privilege in the disputed documents in this matter were the Department (or if the Department were capable, as agent of the Minister, of claiming or waiving privilege in respect of the document), the Department's disclosure of the disputed document to Mr Martin for the purposes of his review would amount to waiver of the privilege attaching to the document.
30. However, as I have said, in my opinion the privilege is that of the Attorney General and only the Attorney General or his agent can waive it. I do not consider the Department to have been the agent of the Attorney General in this matter and, accordingly, do not consider the act of disclosure by the Department to Mr Martin to have been an act of waiver by the Attorney General or his agent.

Disclosure by Mr Martin in his report

31. I have found only one reference to the disputed document in Mr Martin's report. That is on page 63 of the report and comprises one sentence, in which one sentence only of the disputed document is quoted *verbatim*. As I have expressed the view that the legal professional privilege is that of the Attorney General - and as Mr Martin clearly was not an agent of the Attorney General in the preparation of his report - it follows that I do not consider Mr Martin to be or to have been capable of waiving privilege in respect of the disputed document. Similarly, as the Department was not in my view an agent of the privilege-holder, its acts of disclosure of that sentence by way of the provision of copies of Mr Martin's report to several other parties could not amount to waiver of the privilege.
32. In any event, even if either of Mr Martin or the Department were capable of waiving the privilege, I do not consider that considerations of fairness would require waiver to be imputed from the limited disclosures which were made to a small group of people, in circumstances of confidentiality, for a specific purpose, and not for a use for the benefit or advantage of the privilege-holder. Further, even if I considered that the privilege had been waived in respect of the one sentence of the disputed document reproduced in Mr Martin's report, I would not consider that privilege in respect of the whole document had been waived.

That sentence does not, in my opinion, reveal the substance of the advice. It is not, in my view, part of the advice given in the balance of the document and could properly be severed from the balance of the content of the document.

Conclusion

33. Accordingly, it is my view that none of the disclosures mentioned in paragraphs 13 and 14 above and discussed in paragraphs 18-32 above amounts to a waiver of legal professional privilege attaching to the disputed document. I find, therefore, that it has not been established that legal professional privilege in the document has been waived. It is my view that the document would be privileged from production in legal proceedings on the ground of legal professional privilege and, accordingly, I find that the disputed document is exempt under clause 7 of Schedule 1 to the FOI Act.