

DECISION SUMMARY ISSUED BY THE INFORMATION COMMISSIONER (WA)

Decision title and citation: *Re Post Newspapers Pty Ltd and City of Nedlands* [1999] WAICmr 20

COMPLAINT No: F0781999

DECISION No: D0201999

PARTIES: POST NEWSPAPERS PTY LTD

Complainant

CITY OF NEDLANDS

Respondent

No. of documents in dispute: 1

Exemption clause(s): Clause 7

In November 1998, amendments were made to the *Local Government (Elections) Regulations 1997* ('the regulations'). Among other things, the amended regulations require a candidate to disclose to the Chief Executive Officer of a local authority gifts received or promised during a period commencing 6 months before the relevant election day and concluding 3 days after the election date for unsuccessful candidates. For successful candidates, the relevant period commences 6 months before the relevant election date and concludes on the start day for the lodgement of financial interest returns. The regulations also require the Chief Executive Officer of the local authority to maintain a register of disclosed gifts which is open for public inspection.

Local Government elections scheduled for May 1999 were to be the first elections conducted under the amended regulations. Prior to the conduct of those elections, the City of Nedlands ('the agency') sought advice from the agency's solicitors on the interpretation of the regulations. The agency's solicitors provided the requested advice and the agency forwarded a copy of that advice to the Department for Local Government for comment.

On 13 May 1999, a reporter employed by Post Newspapers Pty Ltd ('the complainant') lodged an application with the agency seeking access under the *Freedom of Information Act 1992* ('the FOI Act') to a copy of the legal advice. The agency refused access to that document on the ground that it is exempt under clause 7 of Schedule 1 to the FOI Act. Subsequently, on 1 June 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

Review by the Information Commissioner

I obtained the disputed document from the agency and my office made inquiries with the agency and with the Department for Local Government concerning the circumstances in which the legal advice had been forwarded to that Department. On 19 July 1999, after considering the material before me, including submissions from the complainant alleging that any privilege in the document had been waived, I informed the parties in writing of my preliminary view of this complaint and my reasons. It was my preliminary view that the privilege attaching to the document had not been waived, expressly or impliedly and, therefore, that the document may be exempt under clause 7.

I received a further submission from the complainant but I am not dissuaded from my preliminary view that the document is exempt under clause 7. A summary of my reasons follows.

Clause 7 – Legal professional privilege

Clause 7 provides that matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.

The common law principle is that confidential communications between a solicitor and his or her client will be privileged from production in legal proceedings if made for the sole purpose of giving or receiving legal advice or for use in existing or anticipated legal proceedings. In *Grant v Downs* (1976) 11 ALR 577, at page 588, the majority of the High Court (Stephen, Mason and Murphy JJ) stated "[f]or this and the reasons which we have expressed earlier we consider that the sole purpose test should now be adopted as the criterion of legal professional privilege".

In determining whether a document was created for the 'sole purpose' of giving or receiving legal advice it is necessary to enquire into the purpose for bringing the document into existence. This is a question of fact. In dealing with this

complaint I have had access to the correspondence requesting the opinion and I am satisfied that the instructions to the agency's solicitors were specifically a request for legal advice in respect of the amended regulations. Having examined the letter containing the advice given to the agency in response to that request, I am satisfied that it consists of legal advice, which attracts legal professional privilege. The complainant claims that the privilege attached to the document has been expressly and impliedly waived by its disclosure by the agency to the Department for Local Government.

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. Waiver may be express or implied. Express waiver involves the intentional disclosure of protected material to another person: *Goldberg v Ng* (1995) 132 ALR 57. The meaning of implied waiver was described by Mason and Brennan JJ in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 (at page 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."

My inquiries have established that the document was given to the Department in confidence and it was received in confidence. The Department maintained the confidentiality of the document. No copies were made; it was stored in a locked filing cabinet and was seen only by three officers, two of whom had provided input into the drafting of the regulations. In those circumstances, I am satisfied that there was no intention to waive privilege and therefore no express waiver of privilege in the document.

Further, I do not consider that the action of providing the document to the Department, in confidence, for the limited purpose of ensuring that the advice was in conformity with the principles of the legislation, amounts to an act by the agency which would render it unfair to maintain the privilege according to the standard of ordinary notions of fairness. In my view, waiver of privilege in the document should not be implied in the circumstances of this case.

The limit on exemption – clause 7(2)

Clause 7(2) states that matter that appears in an internal manual of an agency is not exempt matter under subclause (1). Section 95 of the FOI Act provides that a reference in the Act to an "internal manual" is a reference to:

- (a) a document containing interpretations, rules, guidelines, statements of policy, practice or precedents;
- (b) a document containing particulars of any administrative scheme;
- (c) a document containing a statement of the manner, or intended manner, of administration of any written law or administrative scheme;
- (d) a document describing the procedure to be followed in investigating any contravention or possible contravention of any written law or administrative scheme; or
- (e) any other document of a similar kind.

The complainant also claims that the limit on exemption in clause 7(2) applies and that the agency must establish that the document does not form part of its internal manual. The complainant submits that the interpretation or guidelines sought by the agency's Returning Officer prior to the election campaign and nomination of candidates was sought as a management tool and that it should, therefore, form part of an internal manual and ought to be disclosed.

My inquiries have established that there are no administrative documents in the agency falling within the definition of an "internal manual" in s.95 of the FOI Act that contain, replicate or summarise the contents of the legal advice given to the agency in this instance. In the normal course of events, I would expect that internal manuals of any agency would contain administrative instructions, rules or guidelines that may very well be based on legal advice. However, that has not yet occurred in respect of this matter. Accordingly, I am satisfied that the limit on exemption in clause 7(2) does not apply.

For the reasons given to the parties, which I have summarised above, I find that the disputed document would be privileged from production in legal proceedings on the ground of legal professional privilege and that it is therefore exempt under clause 7 of Schedule 1 to the FOI Act. I confirm the decision of the agency to refuse access to that document.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER
2 August 1999