OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: F2004064** **Decision Ref: D0232004**

Participants:

Lyle Albert Bowden
Complainant

- and -

Department of Housing and Works
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents containing or seeking legal advice – clause 7 – legal professional privilege – illegal or improper purpose – flawed process – disclosure of substance or effect of legal advice – implied waiver and inadvertent disclosure – implied waiver and fairness.

Freedom of Information Act 1992 (WA): Schedule 1, clause 7(1)
Industrial Relations Act 1979
Limitation Act 1935
Freedom of Information Act 1992 (Qld): section 43(1)

Esso Australia Resources Ltd v The Commissioner of Taxation (1999) 168 ALR 123
Commissioner of Australian Federal Police and Another v Propend Finance Pty Ltd and Others [1997] 188 CLR 501
Waterford v The Commonwealth of Australia (1987) 163 CLR 54
Trade Practices Commission v Sterling [1979] 36 FLR 244
R v Bell; Ex parte Lees (1980) 146 CLR 141
Attorney-General for the Northern Territory v Kearney (1985) 158 CLR 500
Attorney-General for the Northern Territory v Maurice (1986) 161 CLR 475
Great Atlantic Insurance Co v Home Insurance Co [1981] 2 All ER 485
Re Murphy and Queensland Treasury (1998) 4 QAR 446
Mann v Carnell (1999) 201 CLR 1
Commonwealth of Australia v Temwood Holdings Pty Ltd and Others [2002] WASC 107
Hooker Corporation Ltd v Darling Harbour Authority and Others (1987) 9 NSWLR 538
Sanfead and Rovell Drilling Pty Ltd and Others (unreported, Supreme Court of Western Australia, Library No. 950651, 29 November 1995)
Re Sanfead and Ministry of Justice [1996] WAICmr 17
Goldberg v Ng (1995) 185 CLR 83
Temwood Holdings Pty Ltd v Western Australian Planning Commission and Another [2003] WASCA 112
Brambles Holdings Ltd v Trade Practices Commission (No.3) (1981) 58 FLR 452
Re Dwyer and Department of Finance and Others (unreported, Commonwealth Administrative Appeals Tribunal No. A.84/163, 11 November 1985)
R v Cox and Railton (1884) 14 QBD 153
Derby & Co Ltd v Weldon (No 10) [1991] 1 WLR 660; [1991] 2 All ER 9078
Hoad v Nationwide News Pty Ltd and Others (1998) 19 WAR 468
Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd (1996) 40 NSWLR 12
Queensland Law Society v Albietz and Another [2000] 1 Qd R 621
Re Hewitt and Queensland Law Society Inc (1998) 4 QAR 328
Spedley Securities Ltd (In Liq) v Bank of New Zealand (1991) 26 NSWLR 711
Lombe v Pollak [2004] FCA 264

Meltend Pty Ltd and Others v Restoration Clinics of Australia Pty Ltd and Others [1997] FCA 545
Lord Ashburton v Pape [1913] 2 Ch 469
Guiness Peat Properties Ltd v Fitzroy Robinson Partnership [1987] 1 WLR 1027
DSE (Holdings) Pty Limited and Intertan Inc [2003] FCA 384

DECISION

The decision of the agency to refuse access is varied. I find that Documents 2 and 6 are exempt under clause 7(1) but that Documents 4, 7 and 8 are not exempt under clause 7(1).

D A WOOKEY
A/INFORMATION COMMISSIONER

22 December 2004

REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Housing and Works ('the agency') to refuse Mr Bowden ('the complainant') access to documents under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. The complainant is a former employee of the now-defunct Building Management Authority ('the BMA'). I understand that the agency has taken over responsibility for the affairs of the BMA.

3. In 1993 the complainant submitted a claim for compensation against the BMA. That matter was settled in the District Court of Western Australia in September 1994 by the issue of a consent judgment in return for the payment of a sum of money to him by the State of Western Australia. That same month, the complainant took voluntary severance from his employment and he and the BMA entered into a deed of severance, dated 16 September 1993 ('the Deed').

4. Recently the complainant has been pursuing a claim for unpaid travel entitlements relating to his former employment with the BMA and, as a result, the agency has had cause to consider the terms of the Deed. As I understand it, the chronology of events relevant to this complaint is as follows:

    - 26 August 2003: the complainant claims that Mr Bevan Beaver, Executive Director Business Strategies at the agency, advised him by telephone on 25 August 2003 that Mr Beaver had sought legal advice in relation to the Deed and that he would call the complainant when he had received a response. The agency advises that the only record of that conversation is the complainant's own record.

    - 26 August 2003: Mr Stacey, A/Manager Human Resources, wrote to the Crown Solicitor's Office ('the CSO'), as the State Solicitor's Office was then called, seeking legal advice.

    - 28 August 2003: the CSO responded in a letter which set out the legal advice requested by the agency ('the Legal Advice'). That letter and a copy of it are two of the disputed documents (Documents 4 and 7) in this matter.

    - 5 September 2003: the agency says that Mr Beaver met with the complainant, although no record of that meeting was provided to me by the agency.

    - 15 September 2003: the agency says that Mr Beaver spoke by telephone to the complainant, although once again no evidence of that conversation was provided to me.

- 22 September 2003: Mr Beaver wrote a letter to the complainant ('the Letter'), a copy of which the complainant has provided to me, in which he said:

  "I have sought advice with respect to this matter, and have been informed that the Deed of Severance does not prohibit a signatory from pursuing action before the WA Industrial Relations Commission in relation to the underpayment of wages or other entitlements. Notwithstanding, I understand that in accordance with Section 114 (2) of the Industrial Relations Act recovery action must be commenced within 6 years of the entitlement to payment arising."

- 21 November 2003: Mr Beaver wrote an internal memorandum to "Executive" ('the Memorandum') which states:

  "*I had refused the claim based on the fact that he signed a Deed of Severance, which included a clause that released the BMA from all other claims etc. However, legal advice suggested that it would be more appropriate to decline it based on the Statute of Limitations."*

5. The agency provided a copy of the Memorandum to the complainant outside the FOI Act when he went to inspect documents placed on his personnel file.

6. On 22 December 2003, the complainant applied to the agency for access to certain documents including, among other things, the Legal Advice.

7. The agency identified 13 folios as coming within the scope of the access application and, on 12 January 2004, the agency gave the complainant access to 2 of those folios but denied him access to the remaining 11 folios on the ground that they are exempt under clause 7 of Schedule 1 to the FOI Act. The agency confirmed that decision on 26 February 2004. Thereafter, the complainant applied to me for external review of the agency's decision.

THE DISPUTED DOCUMENTS

8. There are five documents in dispute in this matter.

- Document 2 is a letter, with an attachment, dated 26 August 2003, to the CSO from Mr S Stacey, A/Manager Human Resources;

- Document 4 is a letter, dated 28 August 2003, to the A/Manager Human Resources from the CSO;

- Document 6 is a draft copy of the letter - without the attachment – which is Document 2;

- Document 7 is a copy of Document 4; and

- Document 8 is a "Confidential Memorandum" dated 29 August 2003 from Mr S Stacey, Manager Employee Relations, to Mr B Beaver, Executive Director Business Strategies, and Ms L Howe, Manager Human Resources.

REVIEW BY THE A/INFORMATION COMMISSIONER

9. After receiving this complaint, I required the agency to produce, for my examination, the FOI file relating to the complainant's access application and the originals of the disputed documents. I considered those documents, including the complainant's 47-page (undated) letter to the agency seeking internal review of its decision ('the Submission') – received by the agency on 11 February 2004 – and the agency's response to the Submission set out in its notice of decision dated 26 February 2004.

10. On 17 June 2004, I informed the parties, in writing, of my preliminary view of this complaint. It was my preliminary view that Documents 4, 7 and 8 were not exempt under clause 7(1) of Schedule 1 to the FOI Act but that Documents 2 and 6 were exempt under that provision.

11. In light of my preliminary view, I invited both parties to provide me with further information and submissions relevant to my determination of this matter.

12. The agency did not accept my preliminary view in relation to Documents 4, 7 and 8 and made further submissions in support of its view that all of the disputed documents are exempt under clause 7(1). The complainant did not accept my preliminary view that Documents 2 and 6 are exempt under clause 7(1) and made further submissions in relation to those documents.

CLAUSE 7 – LEGAL PROFESSIONAL PRIVILEGE

13. The agency claims that all of the disputed documents are exempt under clause 7 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.

14. Legal professional privilege protects from disclosure confidential communications between clients and their legal advisers if 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) 168 ALR 123 at 132.

15. The privilege is concerned with confidential communications and seeks to promote communication with a legal adviser, not to protect the content of a particular document. In *Commissioner of Australian Federal Police and Another v Propend Finance Pty Ltd and Others* [1997] 188 CLR 501, Toohey J observed, at 525:

> *"… privilege does not attach to a piece of paper. It attaches to a communication, written or oral, and it is the communication that is at issue. While it is natural to speak of legal professional privilege in terms of documents, it is the nature of the communication within the document that determines whether or not the privilege attaches."*

16. *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54 is authority for the proposition that government agencies - such as the agency - may claim legal professional privilege in respect of confidential communications between salaried legal officers employed by offices such as the CSO and the agency concerned, provided that there is a professional relationship between them and the advice is of an independent character. In this case, the "legal adviser" for the purpose of the privilege is the CSO and the "client" is the agency.

17. Although the rule is most commonly applied to communications between client and legal adviser, it also extends to various other classes of documents: see, for example, the categories listed by Lockhart J in *Trade Practices Commission v Sterling* [1979] 36 FLR 244 at pp.245-246, as follows:

> *"(a) Any communication between a party and his professional legal adviser if it is confidential and made to or by the professional adviser in his professional capacity and with a view to obtaining or giving legal advice or assistance; notwithstanding that the communication is made through agents of the party and the solicitor or the agent of either of them…;*
>
> *(b) Any document prepared with a view to its being used as a communication of this class, although not in fact so used…;*
>
> *(c) …;*
>
> *(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…;*
>
> *(e) …;*
>
> *(f) …;*
>
> *(g) Knowledge, information or belief of the client derived from privileged communications made to him by his solicitor or his agent…".*

The complainant's submissions

18. In brief, the complainant submits that:

(1) the disputed documents are not privileged because they exist as part of the pursuit of a process that is both unlawful and flawed; and

(2) the disputed documents do not have the character of confidence and such privilege which may have attached to them has been waived.

19. In relation to the first point, the complainant alleges that a number of illegal or improper acts may have occurred and refers to offences such as fraud, official corruption and conspiracy offences. The complainant sets out a number of events which he alleges lead to the possibility of fraud, conspiracy and official corruption by the agency. These include the alleged deliberate misquoting of the terms of the Deed by Mr Beaver, Acting Executive Director Business Strategies, as a means to defeat the complainant's travel claim; the alleged inaccurate and prejudicial advice provided to the Executive by Mr Beaver; the agency's lack of reference to the submissions and supporting documents provided to it by the complainant; the complainant's allegation that he was prevented from meeting with the Director General of the agency; and an alleged conspiracy between various officers of the agency to obtain the signature of the Director General of the agency on various letters and to take other improper action.

20. The complainant claims that the purpose of the Letter was to persuade him to abandon his claim for the payment of entitlements through normal administrative processes by citing the *Industrial Relations Act 1979* and he submits that this action extinguishes any claim for privilege for Documents 4, 7 and 8.

21. The complainant states that, although the Letter does not refer to the advice being sought as "legal advice", Mr Beaver did inform him by telephone on 26 August 2003 that he had sought legal advice in relation to the Deed. The complainant has given me the record that he made of that telephone conversation in support of his statement.

22. The complainant submits that the Memorandum also clearly refers to legal advice received by Mr Beaver and that it can be inferred that its mention was intended to influence the outcome of the Executive's consideration. He submits that the extract quoted in paragraph 4 represents a deliberate attempt to deceive because the phrasing of the last sentence suggests that the original basis on which the claim was denied was still a legitimate (albeit less desirable) alternative.

23. The complainant also submits that it is unlikely that the CSO would suggest that the responsibility for processing his claim in accordance with the normal processes would be affected in any way by the *Limitation Act 1935.* He considers that the words "*… it would be more appropriate to decline it based on the Statute of Limitations"* contained in the Memorandum do not appear in the Legal Advice "*and it was deceitful and corrupt to infer that they were*."

24. The complainant further submits that, where a client pursues an unlawful purpose, legal professional privilege will not by granted by the court, citing *R v Bell; Ex*

parte Lees (1980) 146 CLR 141 and *Attorney-General for the Northern Territory v Kearney* (1985) 158 CLR 500 in support of this principle.

25. I also understand the complainant to submit that privilege does not attach to the disputed documents as they are part of a process which is flawed because:

- the agency did not process the complainant's claim in accordance with the normal procedures which apply for the payment of claims;
- Ms Howe, Manager Human Resources, became preoccupied with the passage of time since the costs were incurred and put up various barriers to oppose the payment of the complainant's claim;
- at no time has anyone shown that there is a time limit for making such a claim and, in the complainant's opinion, Ms Howe's reference to the Statute of Limitations is of no relevance to the responsibility for properly processing the claim; and
- the complainant considers the seeking of legal advice was totally unnecessary and was undertaken in order to pursue the misrepresentation which he claims occurred in the generation of the briefing notes for the Executive, set out in the Memorandum.

26. In the Submission, the complainant also raised concerns that the author of Document 2 - Mr Stacey - although acting in place of Ms Howe as Manager, Human Relations, at the time that Document 2 was created, – "*could be construed to be acting in his substantive capacity of Manager, Employee Relations*" and was, thus, acting in that role on behalf of Mr Beaver. Although it is unclear, I understand the thrust of those remarks to relate to the question of who is the "client" with regard to the solicitor-client relationship claimed by the agency in respect of Document 2.

27. In response to my preliminary view, the complainant provided me with further submissions as to "*the nexus between Document 2 and 'the various deceitful actions'*" of the agency and summarised the information he had already given me which, in his view, is evidence of the agency's deceit in its dealing with him. As I understand those submissions, the complainant claims that Document 2 was brought into existence by the agency as "*an escape route*" since it was created after he had lodged an access application under the FOI Act requesting documents relating to the processing of his claim. The complainant contends that the agency sought legal advice from the CSO so that he and others could be told that the agency was acting on legal advice, which would, thus, be privileged and protected from disclosure.

28. In relation to the complainant's second point - that the disputed documents do not have the character of confidence and that privilege in them has been waived - the complainant makes a number of claims.

29. With regard to Document 2, the complainant asserts his belief that the attachment is the Deed and I understand his argument to be that the Deed is

effectively a standard document, the format of which is in the public domain. In support of that argument, the complainant refers me to conversations he has had with various officers of the agency. He advises me that he has a copy of the agency's sample deed of severance and that he has been advised by officers of the agency that the Deed was drafted by the CSO and that, with the exception of the re-employment provisions, the conditions in the Deed are identical to those in the agency's sample deed of severance. Accordingly, the complainant submits that the Deed has been used by all government agencies and can in no respect be considered to be a confidential document.

30. The complainant also claims that if, as he surmises, Document 2 sought advice in relation to the application of the *Limitation Act 1935* or the *Industrial Relations Act 1979*, the meaning of those statutes can in no way be construed as confidential. The complainant also makes various submissions as to why Document 2 is not privileged based on its assumed characteristics and his own interpretation of various case law precedents.

31. Accordingly, the complainant submits that Document 2 (and – I assume – therefore Document 6) *"does not disclose anything"* and also that *"the ability to promote communications with a legal adviser"* does not require maintenance of privilege in this case, since nothing that is communicated is in any way confidential.

32. The complainant also submits that privilege in the disputed documents has been waived by the disclosures made by Mr Beaver in his telephone call to the complainant on 26 August 2003 and in Mr Beaver's statements in the Letter of 22 September 2003 and the Memorandum of 21 November 2003.

33. Accordingly, the complainant claims that the agency has waived its right to claim privilege in respect of the Legal Advice and, in support, refers me to the decision of the High Court of Australia in *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475, and the cases cited therein. The complainant also makes various statements in relation to the nature of legal professional privilege.

34. The complainant cites the decisions in *Maurice* (1986) and *Great Atlantic Insurance Co v Home Insurance Co and Others* [1981] 2 All ER 485, amongst others, in support of his submission that the agency has waived privilege in this case.

The agency's submissions

35. In relation to the complainant's submission that the disputed documents exist as part of the pursuit of an unlawful and flawed process, the agency notes that the complainant acknowledges that to prove the existence of an improper purpose there needs to be proof of "intent" and submits that such "intent" has not been shown in this case.

36. The agency submits that reference to conversations is not proof of improper purpose and where there are disagreements as to what was said, it is a case of

one person's word against another. The agency submits that the complainant's claims that the process was flawed are purely subjective comments and assessments of events.

37. The agency cites the decision of the Queensland Information Commissioner in *Re Murphy and Queensland Treasury* (1998) 4 QAR 446 and other cases to demonstrate the application of the so-called "improper purpose exception" to legal professional privilege. The agency submits that the following principles as set out in *Re Murphy* at pp. 459-460 - which I have summarised below - can be drawn from those cases:

- To displace legal professional privilege, there must be *prima facie* evidence that the relevant communication was made in preparation for, or furtherance of, some 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.

38. The agency submits that the complainant has provided no substantiated grounds to show that there has been an unlawful or flawed process and there is no *prima facie* evidence that the disputed documents were made in preparation for, or furtherance of, an illegal or improper purpose. The agency submits that the privilege cannot be displaced by merely making a charge of crime or fraud.

39. In relation to the complainant's submission that the disputed documents do not have the character of confidence and that privilege in them has been waived, the agency makes a number of submissions.

40. The agency says that Document 2 is held on a file within its Human Resources Branch entitled "Employee Relations Legal Opinions F90146Y96A" to which there is restricted access and that this clearly demonstrates the confidential nature of Document 2.

41. The agency submits that legal professional privilege in Documents 4, 7 and 8 has not been waived because:

(i) neither the provision of the Letter nor the Memorandum to the complainant could properly be said to constitute conduct by the agency which was inconsistent with the maintenance of the confidentiality which legal professional privilege protects;

(ii) the extent of the disclosure in the present case did not amount to a disclosure of the substance of the legal advice given;

(iii) to the extent that the High Court in recent cases has referred to fairness as a consideration relevant to the question of waiver, that consideration is not relevant in the present case, which arises outside the litigation context;

(iv) in the alternative, even if there has been a disclosure of part of the legal advice, nevertheless, that legal advice comprises a number of separate questions and any waiver which occurred pertained to one aspect of that advice only. The agency submits that there was no waiver of the privilege in the remainder of the advice.

42. The agency says that the complainant's conjecture that Mr Beaver was quite prepared to divulge the substance of the Legal Advice is speculation and an attempt to cast doubt over the confidential nature of that communication. The agency states that the complainant is implying that Mr Beaver's telephone call to him on 26 August 2003 and the agency's statement in the Letter are linked and that, in some way, the privilege attached to the communication in Documents 4 and 7 has been waived. However, with regard to that telephone conversation, the agency observes that the only evidence of that discussion is the complainant's own record.

43. The agency submits that the test of implied waiver is that set out by the High Court of Australia in *Mann v Carnell* (1999) 201 CLR 1. The agency also refers to the decision in *Commonwealth of Australia v Temwood Holdings Pty Ltd and Others* [2002] WASC 107 to illustrate the application of the principles of implied waiver.

44. The agency submits that the cases cited by the complainant relate in the main to the partial disclosure of legal advice in the course of the opening of a legal case. In the agency's opinion, the parallels do not apply to the circumstances in this case, especially on the grounds of intentional or implied waiver or the general principles of fairness.

45. With regard to point (i) in paragraph 41 above, the agency notes that the Letter uses the term 'advice' rather than 'legal advice' and submits that the reference to 'advice' could be advice from any agency officer and is not restricted to the Legal Advice. In support of this contention, the agency says that the complainant's dispute with the agency concerns his alleged entitlement to allowances arising out of his employment with the agency and that such disputes are ordinarily dealt with by the agency's Human Resources and Industrial Relations staff, either alone or in conjunction with the employee's branch manager. The agency says that, in the context of a dispute about employment related matters, advice is often sought by managers from the staff of the Human Resources and Industrial Relations section ('HR section'). Sometimes legal advice will be sought from the CSO (as occurred in this case) but that advice will usually be sought by or through the Human Resources and Industrial Relations staff. The agency submits that, in this case, the Legal Advice was sought by the A/Manager of Human Resources but that, in this context, it cannot be concluded that the reference in the Letter to 'advice'

having been sought should necessarily be construed as being a reference to the Legal Advice.

46. The agency submits that such a conclusion is not supported by the fact that the Letter followed Mr Beaver's telephone conversation with the complainant on 26 August 2003, since the Letter was written almost one month after that telephone call and almost one month after the agency received the Legal Advice - obtained on 28 August 2003 - set out in Documents 4 and 7. The agency also submits that, following that telephone conversation, Mr Beaver met with the complainant on 5 September 2003 when they spoke at length and they spoke again by telephone on 15 September 2003. On the basis of those two discussions, which occurred after the agency had obtained the Legal Advice, the agency submits that it cannot properly be inferred that the Letter referred to legal advice, which Mr Beaver had indicated that he intended to seek one month earlier or, as I understand it, to the Legal Advice.

47. The agency submits that the complainant could not reasonably have understood the reference in the Letter to 'advice' to be a reference to 'legal advice' because it is apparent that the complainant has not discerned the contents of the Legal Advice. The agency submits that the complainant's apparent understanding of what he considers to be the Legal Advice demonstrates that the complainant has not made a link between the reference to 'advice' in the Letter and the Legal Advice given to the agency by the CSO.

48. The agency also submits that the disclosure of the Memorandum to the complainant by the agency cannot be considered to have waived legal professional privilege in the Legal Advice - as set out in Documents 4 and 7 and referred to in Document 8 - because it constituted an inadvertent disclosure to the complainant. The agency says that the Memorandum was disclosed to the complainant outside the FOI Act when he was given access to his personnel file by an officer who did not appreciate that that document contained a reference to the Legal Advice.

49. The agency refers me to the decisions in *Hooker Corporation Ltd v Darling Harbour Authority and Others* (1987) 9 NSWLR 538, *Sanfead and Rovell Drilling Pty Ltd and Others* (unreported, Supreme Court of Western Australia, Library No. 950651, 29 November 1995) and *Re Sanfead and Ministry of Justice* [1996] WAICmr 17, in support of its contention that inadvertent disclosure in this case should not be taken as having waived privilege in Documents 4, 7 and 8.

50. With regard to point (ii) in paragraph 41 above, the agency submits that, for the reasons given above, the Letter did not disclose the Legal Advice at all. The agency notes that, although the Letter contained a reference to one issue which was, in fact, contained in the Legal Advice, Mr Beaver could have reached that conclusion on his own without reference to the Legal Advice.

51. Moreover, the agency submits that, in the event that I find that the disclosure of the information in the Letter and the Memorandum is inconsistent with the maintenance of the confidentiality in the Legal Advice, nevertheless, the

information disclosed in those two documents does not amount to the substance of the Legal Advice. The agency contends that the Legal Advice dealt with five issues and that the Letter refers to only two of those issues. Further, the agency claims that one of those issues was not referred to in the Letter in the context of the 'advice' which was obtained but was simply referred to as being Mr Beaver's 'understanding' and that that understanding could have been reached from a variety of sources of information, and not necessarily from any legal advice obtained by the agency. Therefore, the agency submits that that reference cannot be viewed as a disclosure of the substance of the Legal Advice.

52. With regard to point (iii) in paragraph 41 above, the agency submits that the question of fairness between the parties to this complaint is not a relevant consideration in cases outside the litigation context. The agency considers that the Memorandum does not reveal a different version of the effect of the Legal Advice but reflects Mr Beaver's understanding of the Legal Advice. The agency contends that the complainant considers the information advanced in the Letter and the Memorandum to be different, although that is because he has his own views on the legal advice which is likely to have been given by the CSO and does not know the content of the Legal Advice. The agency submits that this is no basis for concluding that it would be unfair not to disclose the Legal Advice to the complainant since the perceived 'unfairness' is no more than that which necessarily arises by virtue of the fact that legal professional privilege provides a basis for refusing to disclose privileged communications to another party.

53. Furthermore, the agency submits that the test of "fairness" does not ordinarily arise in determining whether there has been a waiver of privilege in cases outside the litigation context and that the test is that of inconsistency between the conduct of the client and the maintenance of confidentiality, as set out by the majority of the High Court in *Mann v Carnell* at 13, where their Honours said:

> "*What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and the maintenance of the confidentiality; not some overriding principle of fairness operating at large."*

54. The agency refers me to *Goldberg v Ng* (1995) 185 CLR 83 and *Maurice* in support of its view that questions of fairness will ordinarily only be relevant to disclosures of privileged material in the context of litigation and says that the administration of justice (which the privilege secures) necessarily comprises the fairness of proceedings before courts and tribunals. The agency observes that the maintenance of privilege in the context of litigation, in circumstances which would involve unfairness to the other party to the litigation, would hardly further the administration of justice but that the same considerations of fairness do not arise outside that context.

55. The agency notes that in *Mann*, a case which did not involve a disclosure in the context of ongoing litigation, the majority judges did not apply any consideration of "fairness" in determining whether there had been an implied waiver of privilege. Rather, they confined their attention to whether the disclosure in that case was inconsistent with the maintenance of the confidentiality in the legal advice.

56. The agency also refers me, in support of that argument, to the decision in *Temwood Holdings Pty Ltd v Western Australian Planning Commission and Another* [2003] WASCA 112 and says that, in that case, Wheeler J, at paragraph 19, noted that considerations of fairness may be relevant to disclosures of privileged material in the context of litigation but did not apply considerations of fairness in determining whether there had been a waiver of privilege in that matter, where production of the legal advice was sought well after legal proceedings had concluded.

57. The agency submits that in *Mann* the High Court was concerned to ensure that fairness did not operate as some overriding principle and that outside the litigation process there is no measure for what conduct will be unfair. The agency contends that in the litigation context there are well recognised rules designed to ensure that the parties to the adversarial process are on an even playing field with regard to those processes but that outside the litigation context, the question of what is "fair" will be subjective rather than objective. The agency submits that to refer to considerations of fairness in the context of the present case is to elevate the concept of "fairness" to the status of an overriding principle.

Consideration

58. I have examined the disputed documents. The legal advice sought by the agency in relation to the complainant's travel claim is set out in Documents 2 and 6. The Legal Advice is set out in Documents 4 and 7 and a brief summary of the Legal Advice is contained in Document 8.

59. I consider that, on their face, Documents 2 and 4 are *prima facie* privileged as they are confidential communications between the agency and its legal adviser, clearly made for the dominant purpose of seeking and giving legal advice. I also consider that Document 6 is of a kind described in paragraph (b) or (d) of *Sterling'*s case – cited in paragraph 17 above – since it appears to have been prepared with a view to its being used as a communication of this class, although not in fact so used, and in any event contains a record of a privileged communication.

60. Document 7 is a photocopy of Document 4 and therefore a copy of the privileged communication. As it is the communication that is privileged, Document 7 is also *prima facie* privileged in my opinion. Further, the privilege attaching to a document will be accorded to a copy made of it, provided confidentiality is maintained and "[i]*f for example Counsel's advice is circulated among officers of a corporation obtaining the advice, then privilege is preserved, whether the circulation is of the original or of copies":*

Komacha v Orange City Council (unreported, Supreme Court of New South Wales, Rath J, 30 August 1979), cited with approval in *Brambles Holdings Ltd v Trade Practices Commission (No.3)* (1981) 58 FLR 452 at 458. There is no evidence before me that the copy was made for any purpose other than internal use within the agency.

61. Document 8 is an internal memorandum from one officer of the agency to two others setting out a brief summary of the substance of the Legal Advice. In *Komacha*'s case, cited with approval by the Federal Court, as indicated in paragraph 60 above, Rath J went on to say that *"*… [i]*f in such a case an officer of the corporation were to report to another officer setting out portions of the advice, privilege would attach to the report in respect of those portions"* (ibid). As Document 8 refers to nothing other than the Legal Advice, it appears to me that the document is *prima facie* privileged.

62. The complainant submits that if the attachment to Document 2 is the Deed then the Deed is a standard administrative document which is effectively in the public domain and is, thus, not confidential. However, I have had the advantage denied the complainant of having examined the attachment and I am satisfied that it is not a standard administrative document in the form of a sample deed of severance. In any event, even if it were, as I understand the law as stated in the *Propend Finance* case, that particular copy of it – prepared for submission to the legal adviser for the purpose of seeking legal advice and forming part of the confidential communication for that purpose – would attract the privilege.

63. The agency states that Document 2 is held on a file to which there is restricted access and that this supports the agency's claim that it is a confidential document. In my opinion, it is not necessary that documents be kept under conditions of strict security or that they be marked "confidential" to establish confidentiality - see, for example, *Re Dwyer and Department of Finance and Others* (unreported, Commonwealth Administrative Appeals Tribunal No. A.84/163, 11 November 1985) - although that may tend to establish that they are confidential documents. In my view, a confidential communication remains confidential if it has not been disclosed to a third party, with certain exceptions.

Illegal or improper purpose and flawed process

64. The complainant claims that the disputed documents are not privileged because they are communications made in the course of an unlawful or flawed process.

65. I note that the principle of illegal or improper purpose 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.

66. In *Propend,* Gaudron J said, at 545, that "[c]*ommunications 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 *Kearney* at 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".*

67. As the agency notes in its submissions, an analysis by the Queensland Information Commissioner of this 'improper purpose exception' can be found in *Re Murphy*. I agree with that analysis and consider that the principles referred to there are correct.

68. Since the complainant alleges that legal professional privilege does not apply to the communications in the disputed documents by reason of an alleged illegal or improper purpose, he has the onus of establishing reasonable grounds for believing the communication concerned was for an improper purpose. Although the standard of proof is not required to the level of proof on the balance of probabilities that the communications were made in the commission of a fraud or other improper purpose, there must be "*something to give colour to the charge"* - see *Propend* at 514, where Brennan CJ said:

> "*In determining whether a claim of legal professional privilege can be upheld, it is open to the party resisting the claim to show reasonable grounds for believing that the communication effected by the document for which legal professional privilege is claimed was made for some illegal or improper purpose, that is some purpose that is contrary to the public interest … I state the criterion as "reasonable grounds for believing" because (a) the test is objective and (b) it is not necessary to prove the ulterior purpose but there has to be something "to give colour to the charge" … a "prima facie case" that the communication is made for an ulterior purpose …".*

69. In his submissions, the complainant has principally relied on allegations that various officers of the agency deliberately acted in ways intended to deceive him or their superior officers, or conspired to do so, or that the process of dealing with his travel claim was so flawed that it was illegal or improper.

70. The complainant provided me with additional submissions in respect of this claim in response to my preliminary view. However, in my opinion, he has produced no evidence to establish that the agency deliberately embarked on a course of action to deceive him in relation to his claim for travel entitlements or that any illegal or improper purpose was intended, let alone that the relevant communications were made in preparation for, or furtherance of, an illegal or improper purpose, or that there are reasonable grounds for believing that to be the case. In my opinion, the complainant's comments in this respect are unsupported speculation.

71. Nor, on the information before me, has the complainant established reasonable grounds for believing that the way in which the agency dealt with the complainant or his claim was so flawed that it amounts to some form of illegal or improper process. Again, in my view, this allegation is merely speculative.

72. In my opinion, it has not been established that the exception from the privilege for documents prepared in furtherance of an illegal or improper purpose applies in this case.

References to legal advice

73. The agency claims that it is not reasonable to conclude that the reference in the Letter to 'advice' is, in fact, a reference to the Legal Advice because it might have been advice given by the staff in the agency's HR section and also because the Letter was written almost one month after the agency had obtained the Legal Advice from the CSO. However, even if that is the case, if the 'advice' amounts to "[k]*nowledge, information or belief of the client derived from privileged communications made to him by his solicitor or his agent…*" - as set out in category (g) in *Sterling*'s case - then, in my opinion, the reference to 'advice' may still be a reference to a privileged communication and, thus, may amount to a waiver of privilege.

74. Following the receipt of those submissions, my Legal Officer contacted Mr Beaver by telephone who advised that, to the best of his recollection, the advice referred to in the Letter was advice he had received from Ms Lesley Howe, Manager Human Resources. My Legal Officer then spoke to Ms Howe by telephone who advised that she did give advice of the kind referred to in the Letter to Mr Beaver and that, as far as she could recall, that advice was based on her general experience of dealing with such issues and with the *Industrial Relations Act 1979.* Ms Howe confirmed that she had read the Legal Advice provided to Mr Stacey - who had been acting in her position at the time that he had sought that advice from the CSO - after she had returned from leave on 29 August 2003. She could not say with certainty whether her advice to Mr Beaver also reflected the Legal Advice.

75. In addition, Document 8 makes it clear that Mr Beaver and Ms Howe were given a summary of the Legal Advice on 29 August 2003 by the Manager, Employee Relations.

76. I do not accept the agency's conclusion that the delay of some four weeks between the agency's receipt of the Legal Advice and Mr Beaver's telephone conversation with the complainant and his writing of the Letter - or the fact that there had been two meetings between Mr Beaver and the complainant before the date of the Letter - makes it unreasonable to conclude that the Letter's reference to 'advice' was a reference to the Legal Advice, or that it is unreasonable to conclude that the complainant understood it to be so. The complainant has made it clear to me that he did, in fact, understand it to be so. The agency has not disputed that Mr Beaver told the complainant he was

seeking legal advice on the matter. Four and a half weeks later he wrote to the complainant and set out the substance of the 'advice' he had received.

77. As I understand it, Mr Stacey, the A/Manager Human Resources, had obtained the Legal Advice from the CSO in relation to the complainant's claim; Mr Stacey gave both Mr Beaver and Ms Howe a summary of that advice on the day it was received by the agency; Ms Howe had given advice to Mr Beaver at a time when she was aware of the Legal Advice; and Mr Beaver committed his understanding of the advice, in writing, to the complainant.

78. On that basis, I consider that – if the advice referred to in the Letter reflects the Legal Advice – then it is more probable than not that it refers to the Legal Advice and not to some other advice given to Mr Beaver by the Manager Human Resources or other of the agency's legal advisers or HR section staff. I consider that view is also supported by the similarity of wording between part of the advice referred to in the Letter and Documents 4 and 7. Nothing has been put before me in relation to the discussions between Mr Beaver and the complainant at their meetings on 5 and 15 September 2003, so I am unable to consider or comment on how the fact of those meetings bears on this matter.

79. The agency also claims that the complainant could not reasonably have understood the reference to 'advice' in the Letter to be a reference to the Legal Advice, because it is clear that he is not aware of the contents of Documents 4 and 7, based on his apparent understanding of the Legal Advice. The agency submitted that the Letter and the Memorandum do not reveal different versions of the effect of the Legal Advice, contending that the complainant considers the position in each to be different because he does not know the content of the Legal Advice which was in fact given. In my opinion, the Letter and the Memorandum clearly do reveal different versions of the effect of advice received by the agency. The relevant paragraph in the Memorandum indicates that legal advice to the agency suggested that two bases for refusing the complainant's claim were available to the agency, but one was more appropriate than the other. The Letter indicates two possible bases for refusing the claim, but that only one is available. Both purported statements of the advice suggest that the basis for refusing the claim is that it is out of time but each refers to a different statute in that regard.

80. Further, I do not accept the agency's argument that the complainant could not reasonably have understood the reference in the Letter to 'advice' to be a reference to 'legal advice' *"… because it is apparent that the complainant has not discerned the contents of the Legal Advice"*. It is apparent to me that the complainant has not discerned exactly the contents of the Legal Advice because he has been given at least two different versions of it. In any event, I consider that what the complainant may or may not understand to be the Legal Advice is not essential to the issue for my determination. In my view, the relevant question is whether the information disclosed by the agency to the complainant disclosed the substance or effect of the Legal Advice.

81. The complainant claims that – by telephone on 26 August 2003 – Mr Beaver advised him that he had sought legal advice in relation to the Deed. If the

complainant's telephone conversation with Mr Beaver on 26 August 2003 is an accurate record as he claims, I consider that the mere reference in that conversation to the fact that the agency had sought legal advice in relation to the Deed is not enough to waive privilege in the advice, since such reference does not disclose the substance or effect of the Legal Advice: *Derby & Co Ltd v Weldon (No 10)* [1991] 1 WLR 660 at 668; [1991] 2 All ER 9078 at 917; *Hoad v Nationwide News Pty Ltd and Others* (1998) 19 WAR 468 at 475; *The Commonwealth of Australia v Temwood.* However, the statements in the Memorandum and the Letter are clearly, in my view, more than mere references to the fact that the agency had sought, or had received, legal advice.

82. In *Temwood Holdings Pty Ltd v Western Australian Planning Commission and Another* [2003] WASCA 112, Wheeler J said, at [20]:

> *"… it has never been the case that a mere reference to the existence of legal advice is inconsistent with maintenance of the privilege. It is in the area between disclosure of all or a portion of the content of legal advice, and mere reference to it, that difficulty arises."*

83. In that case, Wheeler J considered the analysis by Rolfe J, in *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 40 NSWLR 12, of a disclosure which was difficult to categorise. That case concerned the operation of the *Evidence Act 1995* (NSW), which provided that legal professional privilege did not extend to prevent the adducing of evidence if a party had disclosed to another person the substance of the evidence. Her Honour said at [21]:

> "*There were two statements in particular which his Honour had to consider. One was a view expressed by a corporation in a Part B statement as to the likely outcome of certain litigation. The corporation asserted that on the basis of legal advice received, it would be successful. It went on to set out the corporation's views as to the likely outcome of the litigation, prefacing those views with the observations:*
>
> > *"The views set out below have regard to the pleadings, the evidence available … and the advice of the barristers and the solicitors engaged …"*
>
> *His Honour formed the view that what was set out in those passages was to be characterised properly as a statement of the corporation's view of the likely outcome of the litigation, rather than a statement of either the substance or effect of the legal advice received. Although it was true that the views were formed relying, or at least relying in part, on legal advice, his Honour considered that at no point did the statement rise above a statement of the corporation's own view and, because it did not purport to state the advice, its substance or effect, it did not amount to a disclosure of the advice. His Honour contrasted those passages with a statement which appeared elsewhere in the Part B statement which read:*

> *"There is a dispute about the conversion ratio. Ampolex maintains that the correct ratio is 1:1 and has legal advice supporting this position."*
>
> *His Honour held that those words amounted to a disclosure that the substance of the legal advice was that the correct ratio was 1:1 and therefore meant that there had been a waiver of privilege."*

84. Other cases make it clear that privilege may be waived if the nature, substance, effect or conclusion of the legal advice given is disclosed: see *Maurice; Queensland Law Society v Albietz and Another* [2000] 1 Qd R 621; *Hoad*; and *The Commonwealth of Australia v Temwood.*

85. The agency claims that Mr Beaver's statement in the Memorandum is his interpretation of the Legal Advice and reflects his own conclusions. The agency submits that, since that statement does not reveal the substance of the Legal Advice or quote directly from it, privilege has not been waived. I note that, in this case, the Memorandum clearly refers to the advice being 'legal advice'. Having considered Documents 4, 7 and 8, I am of the view that the Memorandum does purport to advise the recipients of the effect of the Legal Advice. In *Maurice*, at 493, Deane J said, in reference to documents which were required by the court to be produced:

> *"If, in such a document, a party sets forth part of the contents of a particular, identified … communication or asserts the effect of … a particular identified … communication, it may be that considerations of fairness might require that he be treated as having waived any legal professional privilege in relation to the whole … communication."*

86. Turning to the Letter, for the reasons given above, I consider that Mr Beaver's statement in that document amounts to his understanding of the advice received and purports to state that advice, not his own view. Having considered Documents 4, 7 and 8, it is clear to me that Mr Beaver's statement in the Letter is a statement of his understanding of the substance and effect of that advice. In my view, the agency has disclosed the substance of the Legal Advice in the same way as the statement by Ampolex (referred to in paragraph 83 above) that it had legal advice supporting the proposition it espoused "*… that the correct ratio was 1:1*". It seems to me that the Letter contains the essence of the Legal Advice as given to the agency.

87. The agency submits that, in any event, the information disclosed to the complainant in the Letter and the Memorandum did not amount to a disclosure of the substance of the Legal Advice which dealt with five issues. The agency claims that the Letter refers to only two of those issues. In my view, it is not necessary, as the agency claims, that all of the aspects canvassed in the Legal Advice be referred to in the information disclosed in the Letter before it can be said that the 'substance' of that advice has been disclosed. The Australian Concise Oxford Dictionary of Current English (third edition, 1997), at page 1361, defines 'substance' to mean, among other things: "***1 a*** *the essential*

*material … **3** the theme or subject of esp. a work of art, argument etc … **4** the real meaning or essence of a thing …".*

88. I do not agree with the agency's submission that the Legal Advice dealt with five separate issues and that the Letter dealt with only two of those, and that therefore if privilege is waived it is waived in respect of those issues only and not the balance of the advice. Having considered the Legal Advice, I am of the view that the agency is endeavouring to draw too fine a distinction in that submission. The agency did not seek and obtain legal advice on 5 distinct issues; it sought advice on one issue and the Legal Advice concerns that issue. The various matters to be considered in determining that issue are not separate issues in the way the agency seeks to argue, in my view.

Implied waiver and inadvertent disclosure

89. The agency contends that it has not waived privilege in Documents 4, 7 and 8 because the provision of the Letter and the Memorandum to the complainant was not conduct which was inconsistent with the maintenance of the confidentiality which legal professional privilege protects by reason of inadvertent disclosure and, in addition, the test of "fairness" is not a relevant consideration in cases outside the litigation context.

90. The legal principles relevant to waiver of legal professional privilege are those set out in the High Court's decision in *Mann v Carnell*, cited by the agency. In that case, the majority judges said, at page 13:

> "*Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. … What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large."*

91. An express waiver requires an intentional act with knowledge by the holder of the privilege, such as deliberately providing the opposing side in litigation with a privileged document. An implied waiver will arise where the conduct of the privilege holder is inconsistent with the maintenance of the privilege, even where there was no intention to waive privilege, for example, by the privilege holder publishing a letter containing legal advice in a newspaper.

92. In response to the agency's assertion that the principle of "fairness" does not arise in relation to questions of privilege outside the litigation context, I refer to *Re Hewitt and Queensland Law Society Inc* (1998) 4 QAR 328. In that case, the Queensland Information Commissioner examined the concept of imputed or implied waiver in the context of section 43(1) of the *Freedom of Information Act 1992* (Qld) and analysed relevant authorities in detail, concluding, at page 351:

> *"… that Australian law with respect to legal professional privilege allows for the application of principles of imputed waiver of privilege in the context of an extra-curial dispute, by reference to some act or omission of the privilege holder which, though falling short of intentional waiver, is inconsistent with the maintenance of the privilege, and by reference to what ordinary notions of fairness require having regard to all relevant circumstances attending the extra-curial dispute."*

93. That decision was upheld by the Supreme Court of Queensland in judicial review proceedings: see *Queensland Law Society v Albietz*. On that basis, I consider that the test for implied waiver applies equally to extra-curial disputes and that - following the decision in *Mann v Carnell* - the test for waiver is whether the holder of the privilege has acted inconsistently with the maintenance of confidentiality in the communication, having regard – where necessary – to considerations of fairness.

94. I have considered the question of whether the agency can rely on the cases referring to inadvertent disclosure to refute the claim that - by disclosing the Letter and the Memorandum - the agency has waived its right to privilege for Documents 4, 7 and 8.

95. With regard to the disclosure of the Letter, the agency has not claimed that, in writing it, Mr Beaver was unaware that certain information in it was privileged and that that information was inadvertently disclosed. Rather, the agency contends that the reference contained in the Letter to 'advice' is not a reference to 'legal advice'. I have dealt with the agency's submissions on that point and - for the reasons given above - I consider that the word 'advice' in the Letter is a reference to the Legal Advice, and is reasonably understood to be so. Since the agency has not claimed that the information in the Letter was inadvertently disclosed, I have not considered that an issue in respect of that document.

96. However, the agency submits that the disclosure of the Memorandum to the complainant did not waive privilege in Documents 4, 7 and 8 because it constituted an inadvertent disclosure. The agency refers me to the cases of *Hooker*, *Sanfead* and *Re Sanfead* in support of its contention that the inadvertent disclosure of the Memorandum to the complainant should not be taken as having waived privilege in Documents 4, 7 and 8.

97. The complainant advises that, on 14 August 2003, he applied under the FOI Act to the agency for access to personal information concerning him. On 3 September 2003, he received a letter from the agency which said that the documents he was seeking were on his personnel file. As a result, he had made an appointment with Ms Howe, Manager Human Resources, to attend at the agency and view his personnel file, which he did on or around 5 September 2003.

98. The complainant says that thereafter he went through this process five or six times over a period of time to check his personnel file and to see whether

anything new had been added to it. I note that the complainant's personnel file contains a record indicating that on 3 December 2003 he telephoned the then Manager, Employee Relations, seeking to view his personnel file for any documents relating to his travel claim and at his subsequent attendance at the agency he was given a copy of the Memorandum.

99. The complainant says that the usual process was that he would inspect his personnel file in a room adjacent to the HR section in the company of an officer of the agency. He would place yellow stickers on documents and then hand the file to the officer who would go and photocopy those documents and give the copies to him.

100. The complainant advises that he was involved in a workers' compensation claim in the period 2000 - 2002 with the former Department of Contract and Management Services ('CAMS'), but I understand that there were no legal proceedings anticipated or on foot between the complainant and the agency, or any other agency, in 2003.

101. The agency advises that the Memorandum was given to the complainant when the agency gave him access to his personnel file outside the FOI Act and that the officer who permitted the complainant's inspection of that file did not appreciate that the Memorandum contained a reference to legal advice obtained by the agency.

102. Clause 26 of the agency's Information Access Policy ('the Policy'), which is entitled "Access to Employee Personnel Records", provides:

> "*1. Employees will be able to access their own employee record by contacting the Manager Human Resources.*
> *2. …*
> *3. A request for access to information concerning an industrial relations or workers compensation matter, not disclosed as part of process, will have to be made under the FOI Act."*

The Policy is dated September 2002 and I understand that it is still current.

103. In my view, on the face of clause 26(3) of the Policy, the agency only intended to give careful consideration to the disclosure of records on its employees' personnel files when those records related to an industrial relations or workers' compensation matter.

104. On my office seeking clarification of the phrase "not disclosed as part of process", the agency advised that "*this phrase was intended to have the effect that the IAP s.26 process (ie access to employee records outside FOI) did <u>not</u> apply to industrial relations and workers compensation documents or files.*" The agency says that separate files are normally created by its Human Resources staff to hold such documents which, by their nature, are sensitive. Those files are then held in secure areas with restricted access.

105. The agency advises that in this instance a separate file was not created – probably because the complainant was not a current employee – and the Memorandum was placed on his old CAMS/BMA personnel file. The agency says that the officer overseeing the inspection of the complainant's file inadvertently gave him access to the Memorandum, which should not have been placed on that file, because that officer was unaware of its legal sensitivity or the implications of allowing such access.

106. As I understand it, the agency is claiming that the Memorandum was incorrectly placed on the complainant's file and the complainant was then inadvertently given a copy of that document. I also understand that the complainant obtained a copy of the Memorandum outside the FOI process in purported accord with the Policy.

107. In *Mann v Carnell*, the majority judges considered the circumstances in which there would be a clear inconsistency between disclosure of the material and maintenance of the privilege. Those circumstances included, at [34]: "[d]*isclosure by a client of confidential legal advice received by the client, which may be for the purpose of explaining or justifying the client's actions, or for some other purpose…".*

108. There is authority for the proposition that, by failing to claim privilege when it is available, the holder of the privilege acts in a way which is inconsistent with the maintenance of the confidentiality in the communication: *Spedley Securities Ltd (In Liq) v Bank of New Zealand* (1991) 26 NSWLR 711 at 730; *Lombe v Pollak* [2004] FCA 264 at [41].

109. However, there is also authority for the proposition that, where a privileged document is inadvertently disclosed, the privilege will not necessarily be held to have been waived: see *Hooker*'s case to which the agency has referred me. In *Hooker*, the notes of a meeting - which was held for the purpose of obtaining legal advice - were included in the list of documents provided by the second and third defendants to the plaintiff for the purposes of litigation then on foot, as part of the court process of discovery. Privilege was not claimed for the notes. Inspection was given and the plaintiff obtained a copy. The plaintiff used those notes in court for the purpose of opening its case and, afterwards, the plaintiff's counsel sought to use the notes in the course of cross-examination.

110. The question was whether privilege was lost by inadvertence in the circumstances of that case. Rogers J concluded that legal professional privilege in the notes had not been waived, apparently on the basis that the notes had been discovered and inspected by mistake and that it was necessary to take into consideration the need for the proper administration of justice by the speedy determination of disputes. His Honour noted:

> "*If documents, the subject of privilege, require careful and lengthy consideration, on a document by document basis, at the risk of privilege being lost by inadvertence, the opportunity of an early trial may well be lost."*

111. Rogers J took into consideration the fact that there was an accelerated, compulsory discovery process; a large number of discovered documents and "*other considerations equally pressing which made the task of discovery…burdensome";* and - since there was no jury - the use of the information in the course of the opening was capable of being remedied by the issue of an injunction.

112. The nature of the inadvertence in *Hooker* was that the defendants, in the course of the discovery process, had intended to claim privilege for documents where appropriate but, by reason of some oversight, had not claimed privilege in respect of the document in question.

113. The agency submits that the present case is analogous in that the disclosure of the Memorandum to the complainant was inadvertent and there was no intention on the agency's part to waive privilege.

114. Firstly, the agency contends that, if agencies are concerned that they might inadvertently waive privilege by releasing documents without first having them checked by lawyers, there would inevitably be a marked reduction in the number of documents disclosed and delays in disclosure and that this would be inimical to good government, which is served by openness and transparency and by the willingness of agencies to provide access to their documents either under, or outside, the FOI Act.

115. Secondly, the agency submits that the inadvertent disclosure in this case can be 'remedied' in the sense that - if it is recognised that it does not amount to waiver, the claim to privilege in the Legal Advice can be preserved and disclosure properly denied under the FOI Act. The agency contends that - notwithstanding its inadvertent disclosure of the Memorandum - it considers that the complainant has been unable to discern the nature of the information disclosed and, in any event, the complainant has not been able to use the information in any way whereby the privilege in the Legal Advice has been lost.

116. The agency also referred me to the decision of the Supreme Court of Western Australia in *Sanfead*. In that case, the defendants claimed legal professional privilege for two witness statements in the discovery process prior to the trial of the plaintiff's negligence claim against his employer in the District Court. Following the hearing of that matter, the plaintiff appealed to the Full Court of the Supreme Court of Western Australia from the decision of the District Court.

117. Prior to the hearing of the appeal, the State Government Insurance Commission ('the SGIC'), the defendant's insurer, disclosed the documents under the FOI Act to the plaintiff without realising that they were subject to a claim for legal professional privilege. The plaintiff subsequently sought to use those documents as fresh evidence on the appeal. The Full Court refused the plaintiff's application to adduce fresh evidence. Rowlands J, at page 4 of that decision, observed:

> "*Privilege can, of course, be abandoned or waived; but, in view of the importance which is attached to legal professional privilege as part of the administration of justice, any such abandonment or waiver would normally require a deliberate act with knowledge that the privilege was waived or abandoned. The accidental or inadvertent act in this case could not, in my view, be regarded as either an abandonment or waiver - see* Key International Drilling Company Limited v TNT Bulkships Operations Pty Ltd *[1989] WAR 280. It may well be that there will be cases where, because of inadvertence or some other reason, the loss of confidentiality is irretrievable. That is not this case."*

118. In *Sanfead*, the Full Court accepted that the two witness statements were the subject of a previous claim of privilege by the first defendant during the conduct of the plaintiff's litigation before the District Court and that there had been no deliberate decision to waive or abandon privilege in respect of the two documents concerned but that disclosure had been an accident or oversight by a party with a common interest in the litigation.

119. The agency also refers me to *Re Sanfead*, a decision in which the former Information Commissioner ('the former Commissioner') upheld a claim for exemption under clause 7(1) of Schedule 1 to the FOI Act in respect of documents held by the CSO in relation to Mr Sanfead's accident and subsequent court action. In that court action, the CSO had represented the defendant's insurer, the SGIC. The Supreme Court in its decision in *Sanfead* accepted that two witness statements were the subject of a previous claim of privilege and that their inadvertent disclosure by the SGIC could not be regarded as abandonment or a waiver of privilege.

120. Accordingly, in the FOI matter, the Ministry of Justice, as it then was, claimed that privilege had not been waived in respect of the other documents released to Mr Sanfead by the SGIC. The former Commissioner found that the documents in question were brought into existence when the complainant's litigation in the District Court had been anticipated or commenced and were documents of the kind described in the first defendant's list of discoverable documents filed in the District Court for which privilege had previously been claimed. The former Commissioner, in line with the decision in *Sanfead*, accepted that the inadvertent release of copies of those documents by the SGIC to the complainant did not amount to waiver of privilege.

121. In my opinion, the decisions in *Hooker, Sanfead* and *Re Sanfead* can be distinguished on their facts from the present case. All involved inadvertent production in the course of legal proceedings. In the latter two, a claim for privilege had been made in respect of the documents in question but by reason of some demonstrable oversight or inadvertence they had come into the hands of an opposing party. In the present case, no proceedings were on foot and no claim for privilege was asserted prior to the Memorandum being given to the complainant.

122. I note that other cases of inadvertent disclosure deal with the matter in a way more closely related to the operation of a court's equitable jurisdiction, whereby the confidentiality of a document - inadvertently disclosed in circumstances where parties to litigation or their solicitors take advantage of obvious mistakes made in the course of the discovery process - is protected: *Meltend Pty Ltd v Restoration Clinics of Australia Pty Ltd and Others* [1997] FCA 545; *Lord Ashburton v Pape* [1913] 2 Ch 469 and *Guiness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027.

123. I also note that the agency relies on, and urges me to apply, the principles from cases concerning inadvertent disclosure in the course of discovery proceedings in litigation, but at the same time submits that the cases cited by the complainant relating to the partial disclosure of legal advice in the course of the opening of the legal case should be distinguished on their facts. In my opinion, all of the cases can be distinguished on their facts; nonetheless, in my opinion, useful guidance is to be obtained from them. It should be kept in mind that the exemption is for documents which *"would be privileged from production **in legal proceedings** on the ground of legal professional privilege"* (my emphasis).

124. I am inclined to accept the agency's submission that the mention of the legal advice contained in the Memorandum was inadvertently disclosed to the complainant in the circumstances suggested by the agency. I am also inclined to the view that that disclosure alone would not amount to an act sufficiently inconsistent with the preservation of the privilege to amount to a waiver of the privilege in the Legal Advice. However, the same cannot be said, in my opinion, of the Letter. Even if Mr Beaver did not intend to waive privilege in the Legal Advice, he nonetheless wrote directly to the complainant advising him of the substance and effect of the advice he had received in respect of the agency's liability in relation to the complainant's claim, for the purpose of explaining or justifying the agency's actions. In my opinion, that was a deliberate act which is not consistent with the preservation of the privilege in the Legal Advice. In my view, in performing that deliberate act, Mr Beaver impliedly waived privilege in the Legal Advice because it was an act inconsistent with the preservation of the privilege.

125. In the *Great Atlantic Insurance Co* case, the plaintiff's counsel read out in court two paragraphs of a copy of a memorandum in respect of which privilege could have been claimed, without any intention of waiving privilege. Templeman LJ, with whom Dunn LJ agreed, held that that action had waived privilege in respect of the whole memorandum saying, at page 541:

> "*The court has no jurisdiction to relieve the plaintiffs from the consequences of their own mistakes particularly as those consequences cannot be wholly eradicated; part of the memorandum has in fact been read to the trial judge.*"

126. In my opinion, the disclosure made by Mr Beaver in the Letter was a disclosure of his understanding of confidential legal advice received by the agency which disclosure, on its face, was made for the purpose of both

explaining and justifying the agency's actions in rejecting the complainant's claim. From an objective standpoint, I consider that the agency has therefore waived privilege in Documents 4, 7 and 8 because disclosure of the information contained in the Letter was inconsistent with the maintenance of that privilege.

Implied waiver and fairness

127. In the present case, I consider that the Memorandum discloses the effect of the Legal Advice and the Letter discloses both the substance and the effect of that advice. However, as noted above, those two disclosures appear to me to reveal different versions of the effect of the Legal Advice. Applying the test for waiver in *Mann*, I consider that the agency, as the holder of the privilege, has acted inconsistently with the maintenance of confidentiality in the communications contained in Documents 4, 7 and 8 by disclosing the effect and substance of the Legal Advice to the complainant by way of the Letter.

128. Moreover, in view of the fact that those two disclosures reveal different versions of the effect of that advice, and the basis for the refusal of the complainant's claim, I consider that fairness between the parties weighs in favour of the disclosure of Documents 4, 7 and 8 to the complainant. It seems to me that fairness requires that the complainant be informed of the lawful basis for the agency's refusal of his complaint. As it is apparent to me from inspecting the agency's file that he has been given several different versions of the basis on which his claim has been refused – including two different versions of advice on which the refusal is purportedly based – it seems to me that disclosure of the Legal Advice will clarify that issue. In my opinion, given the disclosures made to the complainant and the conflicting versions of the basis for the refusal of his claim given to him by those disclosures, it would be unfair and misleading to allow the privilege to be maintained.

129. In *DSE (Holdings) Pty Limited and Intertan Inc* [2003] FCA 384, Allsop J examined the question of implied waiver in some detail and noted, at [24] as follows:

" *… legal professional privilege in Australia is not a mere matter of evidence; it is a rule of substantive law and an important, indeed fundamental, common law right or immunity …This is important to recognise in appreciating the operation of inconsistency, as opposed to some more broad ranging notion of fairness informed, perhaps, by the balancing of competing interests in the the administration of justice. The confidentiality is in the nature of an entitlement or right to keep the communications immune from disclosure; it is acting inconsistently with it that destroys that* fundamental *entitlement …".*

130. In *Maurice* the significance of the privilege was examined for the purpose of illustrating why a court should not be quick to imply waiver. However, that decision made it clear that waiver is to be implied where the circumstances are such that it would be unfair or misleading to allow the privilege to be maintained: see pages 481, 487-488, 492-493 and 497.

131. The agency submits that the majority judges in *Mann* did not apply any consideration of "fairness" in determining whether there had been any implied waiver of privilege but confined their attention to whether the disclosure in that case was inconsistent with the maintenance of the privilege. However, I understand the outcome of the High Court's decision in that case was to modify the test of waiver so that fairness is taken into consideration "*where necessary*" rather than operating as an overriding principle. I understand that, in the circumstances of *Mann*, it was not necessary to consider the question of fairness. However, in this case I do consider fairness to be a relevant consideration, although not the sole or primary consideration. I also reject the agency's submission that outside the context of litigation, the question of what is fair will be subjective rather than objective, since there are no legal rules designed to ensure that parties play on a level field. In my view that submission amounts to an argument that objectivity can only be achieved in the context of written rules, which I do not accept.

Conclusion

132. Accordingly, I find that the agency has impliedly waived its right to claim privilege for those documents and that they are not, thus, exempt under clause 7(1) of Schedule 1 to the FOI Act. It is also my view that Documents 2 and 6 are exempt under clause 7(1).

133. While partial waiver may be permitted in respect of one part of a privileged communication without waiving privilege in respect of the balance, my understanding is that that is generally only where the communication deals with discrete and severable subjects **(**see, for example, *Maurice*'s case at page 487). That is not the case in this instance. The advice in issue in this case deals with one subject.

134. I find that the agency has impliedly waived privilege in Documents 4, 7 and 8 and that, accordingly, those documents would not be privileged from production in legal proceedings and, thus, are not exempt under clause 7(1).

135. The agency claims, in the alternative, that even if there has been a disclosure of part of the Legal Advice there is no waiver of the whole and that, consequently, only that part of the Legal Advice that was disclosed in the Letter and the Memorandum should be disclosed in Documents 4, 7 and 8 and the remainder of that advice should be deleted from those documents. However, as I have noted above, I consider that the agency has acted inconsistently with the preservation of the privilege by disclosing the substance and effect of the Legal Advice and that fairness requires that the whole of the Legal Advice in Documents 4 and 7 and the reference to the Legal Advice in Document 8 should be disclosed to the complainant.

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