

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

**File Ref: F2004226  
Decision Ref: D0092005**

Participants:

**Linda Elsie Manning**  
Complainant  
  
- and -  
  
**University of Western Australia**  
Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – documents relating to a dispute re plant breeders’ rights – clause 7 – legal professional privilege – whether solicitor/client relationship - the dominant purpose - whether documents created in anticipation of litigation - whether waiver of privilege

*Freedom of Information Act 1992 (WA)*: sections 30(f), 30(h), 102(1); Schedule 1, clause 7(1); Schedule 2, Glossary

*Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 168 ALR 123

*Trade Practices Commission v Sterling* [1979] 36 FLR 244

*Commissioner of Australian Federal Police and Another v Propend Finance Pty Ltd and Others* [1997] 188 CLR 501

*Attorney-General (NT) v Kearney* (1985) 158 CLR 500

*Waterford v The Commonwealth of Australia* (1987) 163 CLR 54

*Re Geary and Australian Wool Corporation* (Commonwealth AAT, No. V86/575, 16 October 1987, unreported)

*Re Page and Metropolitan Transit Authority* (1988) 2 VAR 243

*Re Ventura Motors and Metropolitan Transit Authority* (1988) 2 VAR 277

*Alcoota Aboriginal Corporation and Another v Central Land Council and Others* [2001] NTSC 30

*Re Potter and Brisbane City Council* (1994) 2 QAR 37

*Spark and Another v IAMA and Another* [2000] WASC 150

*Grant and Downs* (1976) 135 CLR 674

*Mitsubishi Electric Australia Pty Ltd v Victorian Work Cover Authority* (2002) 4 VR 332

*Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd and Others* (1998) 81 FCR 526

## DECISION

The decision of the agency is varied. I find:

- Document 74 is exempt under clause 7(1); and
- Documents 43, 44, 45, 47, 53 and 109 are not exempt under clause 7(1).

D A WOOKEY  
A/INFORMATION COMMISSIONER

26 May 2005

## REASONS FOR DECISION

1. This complaint arises from a decision made by the University of Western Australia ('the agency') to refuse Ms Manning ('the complainant') access to documents requested by her under the *Freedom of Information Act 1992* ('the FOI Act').

## BACKGROUND

2. I understand that the complainant has been involved in a dispute with the agency over plant breeders' rights since July 2000.
3. On 30 July 2004, the complainant applied to the agency under the FOI Act for "[d]ocuments generated by, or relied on by, persons investigating my claim for recognition of my right to be known as the 'breeder' of the *Chamelaucium uncinatum* plant variety 'Manning White' internationally, 'Moondance' in Israel, 'M' and 5001' at the Department of Agriculture and UWA" and other specified documents concerning a royalty agreement, royalty payments and breeder registration.
4. On 14 September 2004, the agency gave the complainant access to certain documents, in full or in an edited form, but refused access to other documents, on the basis that they are exempt under clauses 3(1) and 7(1) of Schedule 1 to the FOI Act.
5. On 15 October 2004, the complainant sought an internal review of the agency's decision on access in relation to a number of documents. On 2 November 2004, in what purported to be a decision pursuant to section 30 of the FOI Act, the agency denied the complainant access to those documents, claiming that each was privileged.

## REVIEW BY A/INFORMATION COMMISSIONER

6. On receipt of this complaint, I obtained the agency's FOI file relevant to the complainant's access application. I required the agency to make further inquiries concerning the requested documents and to provide me with further information in support of its claims for exemption. In the course of dealing with this matter, the complainant withdrew her complaint in relation to a number of documents.
7. The agency's notices of decision in this matter were deficient because they did not comply with the statutory requirements of section 30 of the FOI Act. In particular, they did not include, in respect of each of the requested documents, specific findings on material questions of fact underlying the reasons for the refusal of access, nor did they refer to the material on which those findings were based, as required by section 30(f). In addition, the agency's notice of decision on internal review gave no information on the complainant's rights of external review, as required by section 30(h).

8. Under section 102(1) of the FOI Act, the onus is on the agency to establish that its decision on access is justified or that a decision adverse to another party should be made. Applicants are not required to establish that they are entitled to access the requested documents; it is up to the agency to establish a case for exempting a document from disclosure. The obligation to provide applicants with notices of decision that contain all of the information prescribed by section 30 is intended to ensure that the true basis of a decision is clearly explained. Only if applicants understand all of the elements involved in applying a particular exemption and why access is refused are they in a position to properly decide whether to accept the decision as reasonable or to test the decision by way of complaint to the Information Commissioner.
9. The agency has a clear statutory duty to comply with all of the procedural requirements of the FOI Act, including a statutory duty to ensure that its notices of decision comply with all of the requirements of section 30.
10. On 12 April 2005, I provided the parties with a letter setting out my preliminary view of this complaint. My preliminary view was that certain documents were exempt under clause 7(1) but that others were not. In addition, I considered that a small amount of personal information in three of the documents - which were not otherwise exempt in my preliminary view - was exempt under clause 3(1). The parties were given until 21 April 2005 to provide me with their responses and further submissions.
11. The agency made no further submissions and did not respond to my preliminary view. The complainant provided me with further information and submissions and withdrew her complaint in respect of two documents and the following information in Documents 43, 44 and 45:
  - the name of the third party in Document 43;
  - the signature and signature block of the third party in Document 44; and
  - the name and title of the third party and the signature in Document 45.

Accordingly, the information listed in the bullet points is no longer in dispute.

## **THE DISPUTED DOCUMENTS**

12. There are seven documents remaining in dispute in this matter. They are described in the schedule of documents given to the complainant by the agency, as follows:

*Document 43:* Handwritten notes dated 6 November 2003 of Mr Heitman regarding telephone attendance on a third party.

*Document 44:* A letter dated 12 November 2003 from Rural Industries Research and Development Corporation ('RIRDC') to Mr Heitman.

*Document 45:* A letter dated 18 November 2003 from Mr Heitman to RIRDC.

*Document 47:* A memorandum dated 28 January 2004 from Mr Heitman to

Ms McAlpine, attaching a letter dated 28 January 2004.

*Document 53*: An email dated 20 February 2004 from Ms Massey to members of the Senate of the agency ('the Senate'), copied to Mr Heitman.

*Document 74*: Notes [handwritten] dated 23 March 2004 of Mr Heitman concerning the complainant's letter to senators.

*Document 109*: Notes [handwritten] dated 16 January 2003 of a telephone conversation.

13. I understand that RIRDC is a Commonwealth government agency which is a statutory corporation under the *Primary Industries and Energy Research and Development Act 1989* (Cth) and that it is one of the registered owners of the plant for which the complainant claims plant breeders' rights.

#### **CLAUSE 7 – LEGAL PROFESSIONAL PRIVILEGE**

14. The agency claims that Documents 43, 44, 45, 47, 53, 74 and 109 are exempt under clause 7(1) of Schedule 1 to the FOI Act. Clause 7(1) provides that matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.
15. In brief, legal professional privilege protects from disclosure confidential communications between clients and their legal advisers, if those communications were made or brought into existence for the dominant purpose of giving or seeking legal advice or for use in existing or anticipated legal proceedings: *Eso Australia Resources Ltd v The Commissioner of Taxation* (1999) 168 ALR 123 at 132.
16. Although legal professional privilege is most commonly applied to communications between clients and their legal advisers, it also extends to other classes of documents. For example, in *Trade Practices Commission v Sterling* (1979) 36 FLR 244, Lockhart J of the Federal Court of Australia held that the privilege extends to the following categories of document:
  - “(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) Communications between the various legal advisers of the client, for example between the solicitor and his partner or his city agent with a view to the client obtaining legal advice or assistance...;
  - (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) *Communications and documents passing between the party's solicitor and a third party if they are made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence...;*
- (f) *Communications passing between the party and a third person (who is not the agent of the solicitor to receive the communication from the party) if they are made with reference to litigation either anticipated or commenced, and at the request or suggestion of the party's solicitor; or, even without any such request or suggestion, they are made for the purpose of being put before the solicitor with the object of obtaining his advice or enabling him to prosecute or defend an action...;*
- (g) *Knowledge, information or belief of the client derived from privileged communications made to him by his solicitor or his agent... ”.*

17. 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 p.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.”*

### **The parties' submissions**

18. On 28 February 2005, in response to my request for further information, the agency made detailed submissions to me in respect of each of the disputed documents. On 19 April 2005, in response to my letter of 12 April 2005 setting out my preliminary view of this complaint, the complainant provided me with further information and submissions. I have set out those submissions in my consideration of each of the disputed documents, below.

### **Consideration**

19. The Glossary in Schedule 2 to the FOI Act defines “officer” of an agency to include a member of the agency; the principal officer of the agency; and any person employed in, by, or for the purposes of the agency. In this case, I accept that the agency is the client for the purposes of the solicitor/client relationship and that the officers of the agency and the Senate are also the ‘client’.

20. I am satisfied that the following individuals, referred to in the agency's schedule of documents, are all officers of the agency for the purposes of the FOI Act:
- Mr Kimberley Heitman, a lawyer and the agency's Director, Legal Services;
  - Ms Shelley McAlpine, an assistant in the Vice Chancellor's office; and
  - Ms Jackie Massey and the other individuals referred to in Document 53, who are all members of the Senate.
21. The first question for my consideration is whether a solicitor/client relationship exists between the Director, Legal Services, and the agency. If a privileged relationship exists in this case, the next question is whether the disputed documents are privileged.
22. The High Court of Australia has held that legal professional privilege attaches to confidential communications between government agencies and salaried legal officers in government employment in respect of legal advice, 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 The Commonwealth of Australia* (1987) 163 CLR 54. Neither of those cases dealt directly with the question of salaried legal officers who are employed directly by a government agency as in-house legal advisers, as both involved communications between a Commonwealth government agency and the Commonwealth Attorney-General's Office or the equivalent of the State Solicitor's Office.
23. In *Waterford's* case at page 72, Brennan J suggested that there was a distinction between legal advisers employed in a traditional legal office, such as the State Solicitor's Office, and salaried legal advisers employed by government departments or statutory authorities. However, that distinction was not supported by the other High Court judges in that case (see Mason and Wilson JJ at page 62; Deane J at pages 81-82; and Dawson J at pages 95-97) who focussed on the nature of the advice given and the quality of the relationship between legal adviser and client. The views of the majority of the High Court in *Waterford* accord with the views of Gibbs CJ and Dawson J in *Kearney's* case, at pages 510 and 530-531.
24. Since the decision in *Waterford*, courts and tribunals have accepted that legal professional privilege may apply to communications to or from salaried legal advisers employed by statutory authorities: see, for example, *Re Geary and Australian Wool Corporation* (Commonwealth AAT, No. V86/575, 16 October 1987, unreported); *Re Page and Metropolitan Transit Authority* (1988) 2 VAR 243; *Re Ventura Motors and Metropolitan Transit Authority* (1988) 2 VAR 277; and *Alcoota Aboriginal Corporation and Anor v Central Land Council and Ors* [2001] NTSC 30 at paragraph 24. I agree with that proposition.
25. In *Re Potter and Brisbane City Council* (1994) 2 QAR 37 at pages 45-47, the Queensland Information Commissioner discussed the requirements for establishing the necessary degree of independence that will secure to the legal

advice an independent character and listed the following as guidelines arising from the relevant cases:

- privilege would extend to legal advice given by salaried legal advisers provided that, in giving the advice, they are acting in their capacity as legal advisers;
- the legal advice would be privileged if the legal adviser who gives it has been admitted to practice as a barrister or solicitor; is listed on a roll of current practitioners; holds a current practising certificate or works under the supervision of such a person; and remains subject to the duty to observe professional standards and the liability to professional discipline.

26. In this case, the Director, Legal Services, advises that:

- the agency has its own discrete Legal Services Office;
- the agency's Strategic and Operational Plan 2003-2005 ('the Plan') provides that the role of the Legal Services Office is "*to provide general counsel, professional legal advice and assistance to senior officers of the University in connection with the University's operations and business and to deal with external parties on behalf of the University where appropriate*";
- he works within the Legal Services Office and his full title is "University Lawyer and Director, Legal Services"; and
- the Plan and his statement of duties provide that the role of "University Lawyer" includes the provision of independent professional advice to the Vice Chancellor and Executive across the broad spectrum of the University's activities "*...particularly, but not only, where there is a legal element or aspect*".

27. I also note that the Director, Legal Services, is listed in the Law Almanac as a certificated legal practitioner.

28. On the information before me, I am satisfied that the Director, Legal Services, is an appropriately qualified legal adviser who provides independent legal advice to the Vice Chancellor and Executive of the agency, such that it is capable of attracting legal professional privilege.

### ***Documents 43, 44 and 45***

29. As previously noted, Document 43 is a record of a telephone conversation between the Director, Legal Services, and an officer of RIRDC ('the first third party'), dated 6 November 2003; Document 44 is a letter from another officer of RIRDC ('the second third party') to the Director, Legal Services, dated 12 November 2003; and Document 45 is a letter from the Director, Legal Services, to RIRDC in response to Document 44.

30. In its document schedule provided to the complainant, the agency says that Documents 43, 44 and 45 were "*created for the dominant purpose of obtaining information for legal advice - third party*".



31. In its letter to me of 28 February 2005, the agency submits that Document 43, read in context with Documents 44 and 45, is a record of confidential communications made by its legal adviser as set out in paragraph (d) of *Sterling's* case (reproduced in paragraph 16 above).
32. In this case, the communication in Document 43 is not, of itself, privileged as it might be if it contained notes made by the Director, Legal Services, of a telephone conversation with the agency's external legal advisers or if those notes recorded advice which the Director, Legal Services, had himself given to the agency.
33. Instead the communication was between the Director, Legal Services, and a third party and I understand the agency to claim that Document 43 comprises:

*“[n]otes ... made by ... the legal adviser of the client of communications which ... relate to information sought by the client's legal adviser to enable him to advise the client or to conduct litigation on his behalf... ”.*
34. Having examined Document 43, I consider that it contains simply factual information which can be characterised as a request from RIRDC to the agency.
35. Legal professional privilege has been said to apply to three kinds of communication - see, for example, *Spark and Another v IAMA and Another* [2000] WASC 150 - that is, communications between:
  - (1) the client (or the client's agent) and the client's professional legal advisers;
  - (2) the client's professional legal advisers and third parties, if made for the purpose of anticipated or existing legal proceedings; and
  - (3) the client (or the client's agent) and third parties, if made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the purpose of obtaining advice on anticipated or existing legal proceedings.
36. If legal professional privilege is claimed over communications passing between a solicitor and a non-agent third party, the claimant must satisfy a two-part test, per Barwick CJ in *Grant v Downs* (1976) 135 CLR 674 at 677. That test can be expressed as follows:
  - (1) at the time of preparation of the communication, litigation was either anticipated or commenced; and
  - (2) the communication was brought into existence for the dominant purpose of that litigation (the *Esso* case in 1999 changed the “sole purpose” requirement to the “dominant purpose”).
37. In *Mitsubishi Electric Australia Pty Ltd v Victorian Work Cover Authority* (2002) 4 VR 332 at [10], the Victorian Court of Appeal held that a ‘dominant’

purpose is that which was the ruling, prevailing or most influential purpose. It is more than the primary or substantial purpose; it must be clearly paramount: see also *Cross on Evidence* [25240].

38. It is not clear from the agency's explanation as to the background of Document 43 whether the Director, Legal Services, or RIRDC, initiated the telephone call. The complainant advised me that she wrote to RIRDC on 1 and 7 October 2003 concerning her dispute with the agency. Copies of those communications were provided to me, which show that her email of 1 October 2003 to RIRDC was forwarded to the first third party for his consideration. In my opinion, having examined Documents 43 and 44, the latter is effectively the formal expression of the information recorded in the former. On the face of those documents and the information provided to me by the complainant, it appears to me that the first third party made the telephone call to the Director, Legal Services, on 6 November 2003, as recorded in Document 43. I invited the agency to clarify this point but it did not respond to that invitation.
39. On the information before me, I consider that Document 43 was created by the Director, Legal Services, for the dominant purpose of creating an administrative record of an unsolicited telephone call. In my opinion, the brevity of the notes contained in Document 43 indicates that it was made as an administrative record of the conversation only and there is nothing before me from the agency to establish that those notes were recorded for the dominant purpose of anticipated legal proceedings or that the communication was for that purpose.
40. Whether or not legal proceedings are anticipated is a question of fact which must be determined objectively: see, for example, *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd and Others* (1998) 81 FCR 526 at 559 per Goldberg J:

*“Whether legal proceedings are reasonably anticipated requires a consideration of the existing state of facts taken in conjunction with the subject-matter which gives rise to the context in which the document comes into existence or the communication is made.”*
41. The context in this case is the protracted dispute between the agency and the complainant which had proceeded under the agency's own *Intellectual Property Regulations* 1996 ('the IP Regulations'), made pursuant to section 16E of the *University of Western Australia Act 1911*, until the arbitration failed in September 2003.
42. The complainant advises that she first approached the agency in April 2000 and wrote formally in July 2000 asking the agency to recognise her as the breeder of the plant variety 'Manning White'.
43. The complainant says that at all times the process followed was that set out in the IP Regulations. Regulation 11 of the IP Regulations provides that disputes are put first to a mediator and, if not resolved, an arbitrator will be appointed to investigate and decide the matters in dispute.

44. The complainant says that a mediation was convened under the IP Regulations commencing on 13 January 2003 and ending, unsuccessfully, on 20 January 2003. The arbitration commenced in May 2003 and ended, again unsuccessfully, on 19 September 2003.
45. The complainant advises that when the parties to that arbitration were unable to reach an agreement over the terms of reference and costs of the arbitration, she did not seek to go to court and did not threaten to do so. Instead, the complainant says that she appealed to the Senate for an external and independent inquiry. The complainant submits that she has been most reluctant to enter into litigation with the agency.
46. The complainant does not accept that the agency was anticipating litigation and submits that the actions she has taken to date through the Office of the Parliamentary Commissioner for Administrative Investigations and through the Office of the Freedom of Information Commissioner support her claim that she was not intending to go to litigation.
47. The complainant says that in October 2003 she wrote to ask RIRDC to ask it, among other things, to intervene with the agency and she had hoped that pressure from RIRDC would get the agency back to the table. She advises that she took this step because she held an RIRDC scholarship when performing the breeding work and RIRDC was a registered owner of the plant in Israel.
48. The complainant provided me with a copy of an email which she sent to RIRDC on 1 October 2003 in relation to her dispute with the agency and an unsigned letter dated 7 October 2003, addressed to the second third party which formally sets out the background to the dispute and which supports her statement that she was opposed to litigation.
49. I accept that, at the time that Document 43 was created, the arbitration between the complainant and the agency had ended unsuccessfully. However, there is nothing on the face of Document 43 or in the material before me to suggest that litigation was reasonably anticipated by the agency at that time. Consequently, on the information currently before me, I am not satisfied that Document 43 is a privileged document, as claimed by the agency.
50. Document 44 is a letter from RIRDC to the Director, Legal Services, and Document 45 is the latter's response to RIRDC's letter. The agency acknowledges that there is no solicitor/client relationship between the Director, Legal Services, and RIRDC but claims that those documents come within categories (e) and (g) of *Sterling's* case and that they are privileged on the part of the agency.
51. In other words, I understand the agency to claim that:
  - Document 44 is a communication between the agency's legal adviser and a third party which was made or prepared when litigation was anticipated with a view to obtaining evidence or advice to be used in that litigation, or obtaining information which may result in the obtaining of

such evidence; and

- Document 45 constitutes the agency's knowledge, information or belief derived from privileged communications between the agency and its external legal advisers. The agency identifies paragraph 4 of Document 45 as being privileged and notes that other statements in that document would have been derived from legal advice also obtained from that source.
52. The agency submits that the real purpose of Documents 44 and 45 was to exchange information between RIRDC and the agency concerning the complainant's claim "*which would extend to both organisations for the purposes of both obtaining advice with respect to anticipated legal proceedings.*"
  53. The agency claims that the fact that litigation was anticipated is supported by the content of Document 42 on the agency's document schedule and it was likely that, in the event of litigation proceeding, RIRDC would be involved. The agency did not provide me with a copy of Document 42 but says that it contains a statement by the complainant to the effect that she has "*only litigation left*" following the failure of mediation in January 2003. However, I do not consider that that statement of itself supports the view that litigation was anticipated at that time.
  54. Having considered Documents 44 and 45, together with the material before me, I am not satisfied that those documents were made when litigation was anticipated with a view to obtaining evidence or advice to be used in that litigation, or obtaining information which may result in the obtaining of such evidence. On its face, Document 44 was created to enable RIRDC to deal with the matter referred to in paragraph 1 of that document. In my view, that was the dominant purpose for which Document 44 was created.
  55. Further, having perused Document 45, I consider that it tends to support the complainant's view that litigation was not reasonably anticipated by the agency at the date of that document. However, I am unable to explain the basis for that statement because section 74(1) of the FOI Act requires me to ensure that exempt matter is not disclosed during the course of dealing with a complaint and section 74(2) places a further obligation upon me not to include, among other things, exempt matter in a decision on a complaint or in reasons given for a decision.
  56. With regard to Document 45, the agency accepts that there is no solicitor/client relationship between the agency and RIRDC. Further, on the face of the document and in the context of Document 44, I consider that Document 45 was created for the dominant purpose of responding to Document 44 and providing information to RIRDC and not for the dominant purpose of obtaining evidence or advice to be used in anticipated legal proceedings.
  57. I accept that paragraph 4 appears to contain information provided to the agency by its external legal advisers which is *prima facie* privileged although I am unable to identify any other information in that document derived from the same

source. However, since that information was provided to a third party - RIRDC - I consider that the agency has waived privilege in that information. On 12 April 2005, I invited the agency to provide me with submissions on that point but it did not do so.

58. The legal principles relevant to waiver of legal professional privilege are those set out in the High Court's decision in *Mann v Carnell* (1999) 201 CLR 1 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.”*

59. In the present case, I consider that the disclosure to a third party by the Director, Legal Services, on behalf of the agency, of information given to the agency by its external legal advisers is, from an objective standpoint, a waiver of privilege in that information, because such disclosure was inconsistent with the maintenance of that privilege. Since the agency has provided me with no information or submissions opposing that proposition, I am not dissuaded from my view. Accordingly, I find that Documents 43, 44 and 45 are not exempt under clause 7(1).

#### **Document 47**

60. In its document schedule, the agency notes that Document 47 was “*created for the dominant purpose of obtaining internal legal advice*” and is a communication between the agency and its internal legal adviser.
61. In its submissions to me of 28 February 2005, the agency says that Document 47 was created in response to Document 46. Document 46 - which is not in dispute in this matter - is a request by the agency to the Director, Legal Services, to take certain action. The agency says that this request was made because of the claims made by the complainant and the anticipated legal proceedings in respect of those claims. The agency submits that Document 47 is a communication between solicitor and client confirming legal advice given and legal actions taken, in line with category (a) in *Sterling's* case.
62. The complainant submits that, in her view, the dominant purpose of creating of Document 47 was not to give legal advice but to explain to senators what the Pro Vice Chancellor (Research and Innovation) and the Deputy Vice Chancellor were doing in relation to this matter. In addition, the complainant considers that Document 47 is the document referred to by Ms Massey in an email disclosed to the complainant by the agency which notes that “*...Kim Heitman has provided a summary of the history of the disagreement*”. The complainant submits that a document of that nature should not attract legal professional privilege.

63. Unlike the complainant, I have had the advantage of reading the disputed document and other relevant material and, having done so, I do not accept the complainant's submission.
64. Having examined Document 46, I accept that it is a request from the agency to the Director of Legal Services to take certain action. In my view, it is in the nature of an instruction rather than a request for legal advice.
65. I also accept that the memorandum in Document 47 ('the Memorandum') is the Director of Legal Services' response to that request. I note that the copy letter attached to the Memorandum ('the Letter') is signed by the Director of Legal Services and sent to the complainant on 28 January 2004. From information on the face of Document 47, I understand that the original of the Letter was sent to the complainant before the Director, Legal Services, forwarded the Memorandum.
66. Having examined both Documents 46 and 47, it does not appear to me that the Memorandum or the Letter is a communication between the agency's internal legal adviser and the agency made for the dominant purpose of obtaining or giving legal advice or assistance. Noting the wording in both Documents 46 and 47; the use of the past tense in line 1 of the Memorandum; and information on the face of the Letter, I take the view that the Memorandum and the Letter were created for the dominant purpose of keeping the author of Document 46 informed and not for the purpose referred to in category (a) of *Sterling's* case.
67. In my view, Document 47 (that is, both the Memorandum and the Letter) is not privileged and, thus, I find that it is not exempt under clause 7(1).

### ***Document 53***

68. The agency submits that Document 53 was created for the dominant purpose of obtaining legal advice in line with category (a) in *Sterling's* case. The agency says that it is an email from an employee of the agency, who is also a member of the Senate, which was sent to other members of the Senate and copied to the Director of Legal Services. The agency submits that the members of the Senate - together and separately - constitute the agency and are thus, the client, so that there is no waiver of privilege.
69. The agency submits that, while there is no specific request for legal advice, the wording of the email is clearly a request for legal advice from the Director of Legal Services.
70. I accept that the members of the Senate together and separately, with others, constitute the agency. Having examined Document 53, I note that it contains a reference to the Director of Legal Services but I do not consider that the communication contained in Document 53, with nothing more, can be construed as a request for legal advice, however indirectly.
71. In my view, on its face, Document 53 was provided to the Director of Legal Services for his information and was not created for the dominant purpose of

giving or seeking legal advice. In my view, Document 53 is not privileged and, thus, I find that it is not exempt under clause 7(1).

#### ***Document 74***

72. The agency submits that Document 74 was created for the dominant purpose of the agency's obtaining legal advice from the Director of Legal Services. The agency advises that Document 74 contains notes made by the Director of Legal Services which comprise a record of confidential communications as set out in category (d) of in *Sterling's* case.
73. With regard to Document 74, the complainant advises me that she wrote to the Senate setting out a history of the dispute and requesting an external and independent inquiry. The complainant submits that the dominant purpose of Document 74 was to test the veracity of her assertions to the Senate rather than to seek legal advice. The complainant contends that it would have been up to the Chancellor's Committee to make the legal decisions once it had confirmation from the Director of Legal Services that her assertions were correct.
74. Once again, unlike the complainant, I have had the advantage of reading Document 74 and, having done so, I do not accept the complainant's submission. I am satisfied that Document 74 comprises notes made by the agency's legal adviser to enable him to advise the agency and that it therefore comes within category (d) of *Sterling's* case. In my view, Document 74 would be privileged from production in legal proceedings on the ground of legal professional privilege and I find that it is exempt under clause 7(1).

#### ***Document 109***

75. The agency says that Document 109 was made for the purpose of obtaining information "*which may be useful to the mediation between the complainant and the agency and for litigation if the matter proceeded.*"
76. The agency submits that Document 109 was created for the dominant purpose of seeking/providing legal advice and is a record of communications between the agency and third parties made or prepared when litigation was anticipated, with a view to obtaining evidence or information, in line with category (e) in *Sterling's* case.
77. I understand that the third parties referred to in Document 109 work for other government agencies and at 16 January 2003 - the date the document was created - the complainant's claim was still the subject of mediation by the agency. The agency has not explained why the third parties named in Document 109 were consulted.
78. The agency submits that legal proceedings were anticipated by 16 January 2003 - the date of Document 109 - but provides me with no information or material in support of that claim. The complainant says that legal proceedings were never considered at that date and when the mediation failed, the complainant asked the

agency to appoint an arbitrator in line with the agency's IP Regulations.

79. In the circumstances, it seems to me more likely that Document 109 was created for the dominant purpose of use in the mediation which was then on foot and I am not satisfied that the agency has established that legal proceedings were reasonably anticipated at the relevant date. Accordingly, I am not satisfied that the agency has established that the dominant purpose for the creation of this document was anticipated litigation.
80. In light of that, and in view of the lack of any other probative material, I am not satisfied that Document 109 comes within category (e) of *Sterling's* case and is a privileged document. I find that Document 109 is not exempt under clause 7(1).

### Notices of decision

81. As part of her response to my letter of 12 April 2005, the complainant asked whether - since the agency had failed to comply with section 30(f) of the FOI Act with respect to its notices of decision - it could be asked to "*redo the decision in the correct manner*" and noted that there might be some documents that she had missed.
82. Following the receipt of this complaint, my Senior Legal Officer, under delegated authority, required the agency to provide further information in support of its claims for exemption. In other words, the agency - at that point - was required to set out the information required to be included in its notices of decision under section 30(f) of the FOI Act. That information was included in my letter to the parties of 12 April 2005 and that matter has now been dealt with. Further, on the material and information before me, there is nothing to indicate that further documents within the scope of the complainant's access application exist or should exist. It is open to the complainant to make a new access application to the agency under the FOI Act if she considers that further documents should exist.

\*\*\*\*\*