

WALKER AND MOSMAN PARK

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

**File Refs: 96167 & 97025
Decision Ref: D01697**

Participants:

Douglas Athol Walker
Complainant

- and -

Town of Mosman Park
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - letters from legal adviser to agency produced to consultant for purposes of inquiry - clause 7 - legal professional privilege - whether waiver of privilege - whether implied waiver - whether limited waiver.

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

Local Government Act 1960 (WA) ss.158, 635, 640.

Local Government Act 1995 (WA)

Grant v Downs (1976) 135 CLR 674.

Re Weeks and Shire of Swan (Information Commissioner, WA, 24 February 1995, unreported, D00595).

Goldberg v Ng (1995) 132 ALR 57.

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

Woollahra Municipal Council v Westpac Banking Corporation and Another (1994) 33 NSWLR 529.

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

Goldberg v Ng (1994) 33 NSWLR 639.

DECISION

The decisions of the agency are confirmed. The disputed documents are exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

27th May 1997

REASONS FOR DECISION

BACKGROUND

1. These matters arise out of two applications for external review by the Information Commissioner arising out of two decisions made by the Town of Mosman Park ('the agency') to refuse Mr Walker ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act'). Although the disputed documents in the two complaints are different, the background, the parties and the issues for determination are the same. Accordingly, for convenience, I have dealt with both complaints together.
2. From 1968, the complainant was employed by the agency as Town Clerk and later as Town Clerk and Engineer. I understand that, in September 1988, following a protracted dispute between the complainant and the Council of the agency, the Council resolved to terminate the services of the complainant. Accordingly, in 1989 an inquiry was held, as required by s.158 of the *Local Government Act 1960* ('the Local Government Act'), in relation to the proposed termination of the complainant's employment. Following that inquiry, the complainant's employment with the agency was terminated. I further understand that, as a result of concerns raised by the complainant in respect of that inquiry, a review was undertaken by a consultant engaged for that purpose by the agency, Mr Gary Martin. Mr Martin provided the agency with a report dated 4 June 1996 following his inquiries.

The first application

3. By letter dated 10 September 1996, the complainant lodged his first access application with the agency and sought access to two documents related to the termination of his employment. Initially the requested documents could not be found in the agency. However, they were eventually located and, on 14 October 1996, the agency refused access on the grounds that the documents are exempt under clause 7. The agency's decision in that respect was confirmed following internal review. On 14 November 1996, I received a complaint from the complainant in respect of the first matter.

The second application

4. By letter dated 7 December 1996, the complainant lodged a second access application with the agency. In his second application he sought access to a number of other documents, including a letter received by the agency from its solicitors dated 20 November 1988.

5. The complainant was granted access to all documents, save for the letter from the agency's solicitors which was claimed to be exempt under clause 7. The complainant sought internal review of that decision. By letter dated 5 February 1997, the agency confirmed its initial decision to refuse access to that document. The complainant then lodged a complaint with the Information Commissioner seeking external review.

REVIEW BY THE INFORMATION COMMISSIONER

6. After making preliminary inquiries in respect of the first complaint and after examining the documents in dispute, I formed a preliminary view that one of the disputed documents may be exempt under clause 7 as claimed by the agency. However, I was not satisfied that a claim for exemption under clause 7 had been established with respect to the second document. The parties were informed in writing of my preliminary view and reasons.
7. Thereafter, the agency withdrew its claims in respect of that one document and a copy of that document was released to the complainant. I received further submissions from the agency and the complainant and my office made further inquiries in respect of the complainant's submission that privilege had been waived for the remaining document.
8. Subsequently, I informed the parties in writing of my view on the question of whether privilege had been waived in respect of that document. At the same time, I informed the parties in writing of my preliminary view in respect of the document in dispute in the complaint arising out of the second access application and my reasons. Based on the material before me, and for similar reasons in respect of each, I was of the view that both documents were subject to legal professional privilege and that privilege had not been waived in respect of either. Accordingly, it was my view that both documents are exempt under clause 7 of Schedule 1 to the FOI Act. However, the complainant made a number of submissions to my office in respect of both complaints relating to the issue of waiver of legal professional privilege and did not withdraw his complaints.

THE DISPUTED DOCUMENTS

9. In respect of the first complaint (my reference 96167), the document in dispute is a letter dated 25 November 1988 to the agency from its legal advisers. In respect of the second complaint (my reference 97025), the document in dispute is a letter dated 20 November 1988 to the agency from its legal advisers.

THE EXEMPTION

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

"7. *Legal professional privilege*

Exemption

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

Limit on exemption

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

11. The requirements to establish whether a document would be privileged from production in legal proceedings on the ground of legal professional privilege are well established by case law in Australia, and I have referred to those principles in a number of my formal decisions. Legal professional privilege applies to, *inter alia*, documents created for the sole purpose of use in legal proceedings and to confidential communications between a client and legal adviser for the sole purpose of giving or obtaining legal advice: *Grant v Downs* (1976) 135 CLR 674.
12. On the basis of my examination of the disputed documents, I am satisfied that those documents are confidential communications between the agency and its legal advisers made for the sole purpose of giving legal advice to the agency. Accordingly, I consider that, *prima facie*, they would be protected from production in legal proceedings on the ground of legal professional privilege.

The complainant's claims

13. The complainant does not dispute the character of the documents and that they are, *prima facie*, protected by legal professional privilege. However, he disputes my preliminary view that the privilege was not waived by the production of the documents to Mr Martin for the purpose of his review. That view was on the basis that Mr Martin conducted the review as a Government Inspector of Municipalities under the Local Government Act and the documents were produced to him by the agency under compulsion of law, pursuant to a statutory duty, and their general confidentiality was maintained.
14. The complainant submits that Mr Martin was not acting as a Government Inspector of Municipalities whilst undertaking the review and had no authority to demand the production of the agency's documents to him. As I understand it, the essence of the complainant's submission, therefore, is that any privilege that attaches to those documents has been waived by the agency because the disputed

documents were disclosed by the agency to a third party in circumstances in which there was no statutory requirement to do so.

The agency's claims

15. The agency claims that privilege in the documents has not been waived. The agency submits that the documents were requested by the Minister for Local Government for the purposes of conducting an inquiry and that s.640 of the Local Government Act gave the Minister power to require the production to him of documents of the agency. On the material before me, it is clear that the documents were requested by Mr Martin and not by the Minister. Further, s.640 empowers auditors and Government Inspectors of Municipalities to require the production of certain documents in certain circumstances. That section does not so empower the Minister. Accordingly, I have found the submissions of the agency on this point to be of no assistance and I reject them.

Capacity of the reviewer

16. Inquiries by my office have established that Mr Martin was appointed a Government Inspector of Municipalities on 10 January 1992 in accordance with s.635 of the Local Government Act. Accordingly, although the appointment may have ceased to have effect upon the repeal of that Act, effective from 30 June 1996, at the relevant time Mr Martin was, in my view, a Government Inspector of Municipalities. Until its repeal and replacement with the *Local Government Act 1995*, the Local Government Act authorised the appointment of inspectors with the duties of inquiring into and reporting on certain matters specified in s.635(2) of the Local Government Act. For the purpose of an inspection or inquiry, s.640 of that Act gave such inspectors power to demand the production of an agency's documents.
17. I have examined Mr Martin's letter of appointment, the conditions of his appointment and his report. Whilst Mr Martin has signed the report as "Gary Martin, Government Inspector of Municipalities", there is no other reference in any of the documents to his having carried out his review in that capacity. The letter of appointment offers to engage him as a consultant to perform the services set out in that letter and subject to the conditions of appointment attached to that letter. One of the services to be undertaken was "*Inquiry into Doug Walker situation at Town of Mosman Park*". Throughout, Mr Martin is referred to as "*the consultant*" and the principal is stated to be the Department of Local Government. There is no mention in that document, or in the conditions of appointment, of Mr Martin being a Government Inspector of Municipalities nor of him carrying out any of the services in that capacity.
18. Similarly, in Mr Martin's report on his inquiry into that matter there is no mention of it having been an inquiry conducted under the Local Government Act, nor any mention of Mr Martin having or exercising any of the statutory powers of an inspector. There is no reference to his conducting an inquiry into any of the

matters specified in s.635(2)(a) of the Local Government Act or that he was directed by the Minister under s.635(2)(c) or (d) of the Local Government Act to conduct an inquiry. In addition, upon further inquiry, I was informed by the Department of Local Government that Mr Martin was engaged to conduct the review in accordance with the consultancy agreement and not as a Government Inspector of Municipalities. It was merely incidental that Mr Martin was an inspector, but his inquiry was not an inquiry conducted under the Local Government Act.

19. Mr Martin, on the other hand, has informed my office that he is of the view that he did carry out the inquiry in his capacity as a Government Inspector of Municipalities, with all the powers and protections of that office. Mr Martin's understanding was that the consultancy agreement was drawn up and entered into because he was not then a permanent employee of the Department of Local Government and the agreement was necessary in order that he could be remunerated. Mr Martin agreed that he had not demanded the production of the documents to him, nor purported to exercise the power provided by s.640 of the Local Government Act. The agency had voluntarily provided all its files to him. He was unsure what action he would have taken had that not been the case.
20. On the material before me, I tend to the view that, even though Mr Martin was at the relevant time a Government Inspector of Municipalities, he conducted his inquiry as a consultant to the Department of Local Government in accordance with the terms of the consultancy and his duties arose from the terms of that agreement and not from the office he also held as a Government Inspector of Municipalities. However, even if it were the case that Martin conducted his inquiry as a Government Inspector of Municipalities, it is clear on the material before me that the agency's documents were not produced to him under compulsion of law nor any threatened compulsion of law. Mr Martin did not purport to exercise any power under the Local Government Act in conducting the inquiry or, more specifically, to require the production of the documents to him. I refer to Mr Martin hereafter as 'the consultant'.

Waiver of legal professional privilege

21. I dealt with the issue of waiver of privilege in my decision in *Re Weeks and Shire of Swan* (24 February 1995, unreported, D00595), at paragraphs 22-27. Waiver occurs where the party entitled to privilege performs an act which is inconsistent with the confidence preserved by it. The consequence of waiver where it occurs is that the person becomes subject to the normal requirements of disclosure of the communication: Byrne D. and Heydon J.D., *Cross on Evidence Service*, Butterworths, at paragraph 25010.
22. Waiver of privilege may be express or implied. The question of whether or not there has been an implied waiver of privilege most often arises when there has been a limited disclosure of the contents of the privileged material and the question will turn upon whether, in all the circumstances, it would be unfair to maintain the privilege, whether or not the privilege-holder intended to waive it:

Goldberg v Ng (1995) 132 ALR 57 at 64. In the circumstances of this matter, I do not consider the disclosure of its files to the consultant for the purposes of his review to have been an act by the agency amounting to express waiver of the privilege attaching to any of the documents. The question, therefore, is whether waiver of the privilege attaching to the disputed documents should be imputed from the act of the agency in producing those documents to the consultant. I have considered the relevant authorities.

23. In the English case of *British Coal Corp v Dennis Rye Ltd and Another (No.2)* [1988] 3 All ER 816, it was held that the privilege protecting certain documents which had been prepared in anticipation of civil proceedings was not waived by the plaintiff having provided the documents to the defendants in the course of and for the purpose of criminal proceedings. In that case, the court considered that making the documents available for a limited purpose only, being to assist in the conduct first of a criminal investigation and then of a criminal trial, could not be construed as a waiver of any rights available to the plaintiff in the civil action.
24. That case was cited in *Woollahra Municipal Council v Westpac Banking Corporation and Another* (1994) 33 NSWLR 529, at 539, as authority for the proposition that not every disclosure to a third party is a waiver of the privilege and that disclosure in accordance with a duty to disclose is not a waiver. In that case it was held that certain documents produced by the council to two government inspectors, on terms of confidentiality, for the limited purpose of the discharge of the inspectors' statutory duty and under threat of compulsory processes, was not a waiver of the privilege. In that case, Giles J. considered, at 540, that the question was whether, in light of the whole of the particular circumstances of the case, the person entitled to the privilege has so acted that the confidentiality essential to the claim has been abandoned.
25. At 538, His Honour said:

"...there was no implied waiver by the Council on grounds of fairness in the manner there considered. In making available to the inspectors documents entitled to legal professional privilege the Council was not making use of that material in any relevant sense. It was complying with the inspectors' request in circumstances in which it had been made sufficiently plain that refusal to comply would result in compulsion, or at least an attempt at compulsion since whether legal professional privilege over-rode the inspectors' powers was not explored, and it did not use the material in such a way that it would be unfair for it to maintain the privilege against [a named party] or any other party to these proceedings."
26. In the matter before me, there is no suggestion that the agency was under any compulsion nor any threat of compulsion to provide the disputed documents to the consultant for the purposes of his review. Section 640 of the Local Government Act provided power for a Government Inspector of Municipalities to demand the production of certain documents for the purpose of an inquiry under that Act. However, as I have stated above, I am not persuaded that the

review by the consultant was conducted in his capacity as a Government Inspector. Further, even if it were, the consultant did not demand or purport to demand production of the documents under s.640, or any other section, of the Local Government Act.

27. In the case of *Network Ten Ltd v Television Holdings Ltd and Another* (1995) 16 ACSR 138, Giles J. said that what he had said in *Woollahra Municipal Council v Westpac Banking Corporation* had to be taken subject to the decision in the Court of Appeal in *Goldberg v Ng* (1994) 33 NSWLR 639, in which case there had been further consideration of the effect of limited disclosure.
28. In the *Network Ten Ltd* case (at pages 145-147), His Honour referred in some detail to the three judgments of the Court of Criminal Appeal in *Goldberg v Ng* (at pages 145-147) and concluded that from them two bases could be discerned for the proposition that there can be limited disclosure without relevant loss of legal professional privilege. The first of those is, from the dissenting judgment of Kirby P, that the British cases are authority that it is possible to have a limited waiver of legal professional privilege in respect of a non-litigant third party, and yet maintain fully that privilege against a litigant party and that the English decisions were correct in principle, and as a matter of legal policy, and should be followed.
29. The alternative basis, discerned from the majority judgments of Mahoney J A and Clarke J A, is that the law will not impute a waiver unless a party intentionally performs an act which renders it unfair to another party that the privilege be maintained. His Honour held that, on either basis, the provision of a letter of advice from its solicitors by Television Holdings Limited to a purchaser of its shares and to its banker on undertakings of confidentiality did not constitute waiver of legal professional privilege in respect of the letter as against Network Ten Limited in the civil proceedings.
30. The decision of the Court of Appeal in *Goldberg v Ng* was appealed to the High Court of Australia. In that case a client had made a complaint to the Law Society about certain conduct on the part of his solicitor. Upon meeting with the Law Society and discussing the matter with a representative of the Law Society, and upon the request of that representative, the solicitor provided the representative with copies of a number of documents including two statements prepared by the solicitor for his legal adviser. The solicitor provided the copies only after requesting and receiving from the representative assurances of confidentiality and after stating that any privilege in the documents was preserved, with which statement the representative agreed. The client later served upon the Law Society a subpoena requiring production of those documents in court proceedings against the solicitor.
31. The majority of the High Court upheld the majority decision of the Court of Appeal that by providing the copies of the documents to the Law Society the solicitor had waived legal professional privilege in respect of them. The basis of the majority decision was that, in the circumstances of the case, fairness required that waiver of privilege should be imputed regardless of the solicitor's intention

- when he handed over the documents. The court considered that the documents had been given voluntarily. Although the Society had powers of compulsion, those had not been invoked. Further, the solicitor had stated that he was prepared to give the papers in his desire to be full and frank. The court considered that, as well as being provided voluntarily, the documents had been provided for the calculated purpose of assisting the solicitor to have the complaint against him resolved adversely to the client (at 68).
32. The majority noted that the Law Society's usual practice in dealing with such a complaint would have been to require the solicitor to provide a written response to the complaint. The majority also noted that, if the solicitor had not chosen to rely on privileged documents to answer the complaint but had used other non-privileged material to combat his client's complaint to the Law Society, that material would have been available to the clients for use in their related court proceedings against him. The majority considered that unfairness arose from those circumstances and especially from the fact that the Law Society had decided to dismiss the client's complaint against the solicitor on the basis of material not shown to the client so that the reasons why the complaint of a failure to account for a large sum of money was considered not to involve a question of professional misconduct or unsatisfactory professional conduct could be a matter of speculation only (at 69). Accordingly, the majority was prepared to find an imputed waiver of privilege by the solicitor.
33. In the minority, Toohey J. held that there had been a limited waiver only which was not an express waiver of the privilege generally, and nor could a waiver be imputed (at 77). His Honour considered that the concept of limited waiver is well accepted and is an exception to express general waiver (at 75). It was His Honour's view that considerations of fairness are relevant to determining whether there has been imputed waiver, but do not arise where the issue is one of limited waiver (*ibid.*). Gummow J. agreed that limited waiver is an exception or qualification to express waiver and that general considerations of fairness do not arise on any aspect of express waiver and the appeal turned upon the doctrine of implied or imputed waiver as an imposition of law (at 81). His Honour saw no sufficient reason for the disclosure of the documents to the Law Society to deprive the solicitor of the protection of legal professional privilege (at 85).
34. In my opinion, the matter before me can be distinguished on its facts from *Goldberg v Ng*. Disclosure to the consultant was not disclosure to a quasi-judicial tribunal, as it was in *Goldberg v Ng*. It was not the role of the consultant to determine issues as between parties. It was the consultant's role to conduct a general review of the actions undertaken by the council in respect of certain matters concerning the complainant. The consultant had no determinative powers. In addition, the documents in question in *Goldberg v Ng* were statements prepared by the solicitor for his legal adviser, detailing his account of the matters the subject of the complaint against him. The documents in this matter are letters containing advice from the agency's legal adviser to the agency.
35. However, most significantly in my view, the disputed documents do not appear to have been provided by the agency in support of an argument against

allegations by the complainant. The agency did not seek to put the documents to any particular use as against the complainant or any person. The agency did not seek to use the disputed documents to have the review resolved adversely to the complainant or any other person or to the agency's advantage. Rather, they were produced merely as part of the files which were made available, in their entirety, to the consultant.

36. In all the circumstances of this matter I do not consider that providing the documents to the consultant for his limited purpose - as part of the files only and not in any way designed to persuade the inquirer to a particular view - and subject to the conditions of confidentiality described above, amounts to an act on the part of the agency which would render it unfair to a party in any proceedings that the privilege be maintained. Accordingly, in my view, considerations of fairness do not require that waiver of privilege be imputed.
37. Alternatively, in my opinion, it is clear that the disputed documents were provided to the consultant in circumstances of confidentiality for the purposes of the review only. In those circumstances, I am of the view that, if there can be limited waiver of privilege without loss of the privilege, then there has been such limited waiver in this instance and, accordingly, the documents would remain privileged from production in legal proceedings on the ground of legal professional privilege.
38. In my opinion, the circumstances do not indicate any intention on the part of the agency to waive the privilege that attaches to the documents. It is clear from the inquiries by my office that they were produced to the consultant for the specific purpose of enabling him to carry out his duty to conduct a full and thorough review of the matters arising out of the termination of the complainant's employment with the agency.
39. In addition, the conditions of appointment imposed upon the consultant strict requirements of confidentiality. Clause 8 of the conditions requires that all works, items, materials or information whatsoever produced or developed by the consultant or under the direction of the consultant in the course of the review became the sole and complete property of the Crown in right of the State of Western Australia and that the consultant is not to use any such works, items, materials or information otherwise and for the purpose of performing the services for which he was engaged without the prior written consent or license of the Department of Local Government. Clause 19(i) requires the consultant to treat as confidential all information disclosed to him, made known to him or developed by him during the course of or for the purpose of the review. Clause 20 provides that, immediately upon the completion of the review and the termination of the consultant's engagement, the consultant was to deliver to the department all documents and materials relating to the confidential information held by the consultant and clause 20(ii) specifies that that condition survives the termination of the consultant's engagement. Clause 21 provides that the consultant shall not use or disclose or authorise the use or disclosure of the confidential information to any person or company without the prior consent in writing of the principle.

40. The consultant's final report is clearly marked "Strictly Confidential" and "Not to be copied" and the agency has informed this office that the report was distributed only to the Governor, the Chief Executive Officer of the Department of Local Government, the Director of Corporate Services of the Department of Local Government, the Crown Solicitor's Office and the complainant himself. The agency has further advised that the report has not been published in any other manner and that all of the parties provided with a copy were advised that the report is not for publication and is not to be copied.

41. On either basis, I consider the material before me is sufficient to establish that, whether or not the consultant was conducting the review in his capacity of a Government Inspector of Municipalities, legal professional privilege which clearly attaches to the documents has not been waived by the production of the documents to him. Accordingly, I consider that the documents would be privileged from production in legal proceedings on the ground of legal professional privilege and I find them to be exempt under clause 7.
