

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

**File Ref: F2002153
Decision Ref: D0382002**

Participants:

Temwood Holdings Pty Ltd
Complainant

- and -

**Department for Planning and
Infrastructure**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – correspondence and filenotes relating to a dispute over the imposition of a condition of subdivision – clause 7(1) – legal professional privilege – privileged communications – whether waiver of privilege

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

Town Planning and Development Act 1928 (WA) sections 20AA and 28A

Metropolitan Region Town Planning Scheme Act 1959 (WA)

Esso Australia Resources Ltd v The Commissioner of Taxation [1999] 201 CLR 49

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

Trade Practices Commission v Sterling [1979] 36 FLR 244

Commissioner of Taxation of the Commonwealth of Australia v Spotless Services Ltd (1996) 141 ALR 92

Temwood Holdings Pty Ltd v Western Australian Planning Commission & Anor [2001] WASCA 298

Great Atlantic Insurance Co v Home Insurance Co and Others [1982] 2 All ER 485

Mann v Carnell (1999) 201 CLR 1

The Commonwealth of Australia v Temwood Holdings Pty Ltd & Ors [2002] WASC 107

Temwood Holdings Pty Ltd v Western Australian Planning Commission & Anor [2001] WASCA 354

Ampolex Ltd v Perpetual Trustee Co (Canberra) (1996) 40 NSWLR 12

DECISION

The decision of the agency is varied. I find that:

- folios 268 and 272 of Volume 5 of file 112616; the last 7 lines of Document A37(d); Document A30 and its copy, Document A29 (except for the facsimile cover sheet), are exempt under clause 7(1) of Schedule 1 to the FOI Act; and
- the facsimile cover sheet to Document A29; Documents A35, A37(a), A38 and A68 are not exempt under clause 7(1) of Schedule 1 to the FOI Act.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

22 November 2002

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Department for Planning and Infrastructure ('the agency') to refuse Temwood Holdings Pty Ltd ('the complainant') access to documents requested by it under the *Freedom of Information Act 1992* ('the FOI Act').
2. There is a current legal dispute between the complainant and the Western Australian Planning Commission ('the Commission') stemming from the imposition by the Commission of a condition of subdivision on Lot 1001, Singleton Beach Road, Singleton near Mandurah, which is owned by the complainant and known as Bayshore Gardens Estate ('the land'). The land has been progressively subdivided since 1993.
3. Under section 20A of the *Town Planning and Development Act 1928*, the Commission requires the complainant to vest in the Crown, free of cost and without any payment of compensation, a proposed foreshore reserve of approximately 20 hectares (reserved for Parks and Recreation under the *Metropolitan Region Scheme* in 1963), which would then be transferred to public ownership at subdivision. An effect of the condition would be to avoid any payment of compensation by the Crown for injurious affection of that portion of the foreshore land under the *Metropolitan Region Town Planning Scheme Act 1959*.
4. The complainant has made three applications to the Commission for approval to subdivide the land. The Commission approved each of those applications, subject to the condition referred to above. The complainant lodged three appeals against the condition and those appeals were heard together by the Town Planning Appeal Tribunal ('the Tribunal') on 18 October 2000. On 21 March 2001, the Tribunal upheld the validity of the condition and dismissed the appeal.
5. The complainant appealed the Tribunal's decision to a single judge of the Supreme Court of Western Australia. On 4 July 2001, the Supreme Court dismissed that appeal. The complainant appealed to the Full Court of the Supreme Court, which allowed its appeal. I understand that an appeal by the Commission to the High Court of Australia is now pending. In addition, in related proceedings, the complainant applied to the Supreme Court for a mandatory injunction against the Commission for contempt. Wheeler J heard that matter, on 4 and 7 September 2001.
6. On 20 March 2002, the complainant's solicitors applied to the Commission for access, under the FOI Act, to documents relating to the planning approval process for the land, including documents relating to the review and appellate processes. The FOI request was dealt with by the agency, which provides administrative support to the Commission. The agency offered the complainant access by inspection to documents on three subdivision files, with the exception of certain documents, listed on a schedule, to which access was refused on the basis that those documents were exempt. The complainant did not inspect the subdivision files, but lodged a complaint with me seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

7. After receiving this complaint, I directed the agency to provide the complainant with a revised schedule, describing the disputed documents and giving reasons why those

documents were claimed to be exempt. The agency provided the complainant with three schedules (A, B and C) containing a total of 111 documents. The agency claimed that two additional documents were not covered by the terms of the complainant's access application and did not include those two documents on the schedules. However, having examined those two documents, I considered that they were covered by the terms of the complainant's access application. At that stage, there were 113 documents in dispute.

8. In the course of my dealing with this complaint, each party made some concessions, which reduced the number of disputed documents. Further disclosures and concessions were made, after I informed the parties of my preliminary assessment of this complaint and my reasons. As a result, only nine documents remain in dispute.

THE DISPUTED DOCUMENTS

9. The disputed documents are those numbered A29, A30, A35, A37(a), part of A37(d), A38 and part of A68, on Schedule A and folios 268 and 272 of Volume 5 of File 112616, which are the two additional documents that I consider are within the scope of the complainant's access application. The agency claims that folios 268 and 272, Documents A29, A30, A35, A37(a), A38 and the disputed information in A37(d) and A68, are exempt under clause 7 of Schedule 1 to the FOI Act. The complainant submits that, in respect of Documents A29 and A30, any legal professional privilege that may have attached to those two documents has been waived.

THE EXEMPTION: Clause 7 - Legal professional privilege

10. 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. 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] 201 CLR 49. Legal professional privilege may attach to communications with a lawyer who is a salaried employee (see: *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54).
11. The agency acts as the administrative arm of the Commission. I consider that, for the purposes of a claim of legal professional privilege, the 'client' is both the Commission and the agency. Alternatively, the agency is the agent of the Commission. I am satisfied that, in this matter, the legal advisers of the Commission and the agency are the Crown Solicitor's Office ('CSO'), the agency's in-house legal staff and a Queen's Counsel engaged on behalf of the Commission.

Folios 268 and 272

12. Folio 268 is an internal agency email message, dated 20 February 2002, sent to a number of officers of the agency. Folio 272 contains two email replies to the message in folio 268. Those replies are dated 20 February 2002 and 21 February 2002 respectively. Having examined the contents of these documents, and taking into account other matter in the disputed documents, I am satisfied that folios 268 and 272 consist of information sought by the CSO from the agency to enable the CSO to conduct the appeal to the High Court of Australia on behalf of the agency.

13. The decision in *Trade Practices Commission v Sterling* [1979] 36 FLR 244 at pp. 245-246 makes it clear that legal professional privilege extends to various other classes of documents, including 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 contain a record of those communications, or relate to information sought by the client's legal advisers to enable them to advise the client or to conduct litigation on their client's behalf.
14. Having examined folios 268 and 272, I am satisfied that they consist of documents to which legal professional privilege applies because they contain information sought from the agency by the CSO, in order to conduct the appeal. I am therefore satisfied that they would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find folios 268 and 272 exempt under clause 7.

Documents A35, A37(a), A38 and A68

15. Document A35 consists of a facsimile cover sheet, dated 22 August 2001. An attachment to this coversheet is not in dispute and does not form part of this document. The agency claims that the cover sheet is a confidential communication between a solicitor and client and that its disclosure would reveal the nature of legal advice sought.
16. Document A37(a) is a letter dated 5 September 2001 from the CSO to the agency. Document A38 is a letter dated 2 October 2001 from the CSO to the agency. Document A68 is a letter dated 26 February 2002 from the Commission to the CSO. The agency claims that each of those documents is a confidential communication between a solicitor and client made for the dominant purpose of litigation and, in respect of Document A68, that it would be possible for the complainant to discern the nature of the instructions given to the CSO from that document.
17. I accept that Documents A35, A37(a), A38 and A68 consist of confidential communications between the agency or the Commission and the CSO. However, the agency has not made any submissions to me concerning the purpose for which each of those documents was created. The test in *Esso* is whether the document was made or brought into existence for the dominant purpose of giving or seeking legal advice or for use in existing or anticipated legal proceedings. In *Commissioner of Taxation of the Commonwealth of Australia v Spotless Services Ltd* (1996) 141 ALR 92, the High Court, in a different context, considered the meaning of the term "dominant purpose" and stated that "*in its ordinary meaning dominant indicates that purpose which was the ruling, prevailing, or most influential purpose*".
18. It does not appear to me, on the face of Documents A35, A37(a), A38 and A68, that they were created for the dominant purpose of their use in legal proceedings or for the dominant purpose of giving or seeking of legal advice. On their face, A35 and A37(a) appear to me to have been created for the dominant purpose of providing information to the agency and A68 appears to me to have been created for the purpose of confirming the terms of a previous letter. In respect of Document A68, I do not accept that it would be possible for the complainant to discern the nature of any legal advice sought or given from that document.

19. Accordingly, I am not satisfied that Documents A35, A37(a), A38 and A68 would be privileged from production in legal proceedings on the ground of legal professional privilege. I find that those documents are not exempt under clause 7.

Document A37(d)

20. Document A37(d) is dated 5 September 2000 and contains two hand-written file notes made by an officer of the CSO. Only the second file note (the last seven lines of the document) remains in dispute. The agency claims that part of A37(d) is exempt under clause 7, because it records a confidential communication between a solicitor and client made for the dominant purpose of providing advice or to enable the solicitor to act for the client in relation to litigation, which was then on foot.
21. I have examined the last 7 lines of Document A37(d) and considered information provided by the agency. I accept that the disputed matter is a note made by an officer of the CSO of a telephone conversation with an officer of the agency, which relates to information sought by the CSO in order to advise its client or to conduct litigation on the Commission's behalf. In my opinion, the disputed matter in A37(d) is a record of a privileged communication as described in category (d) in *Sterling's* case. Accordingly, I find that the last seven lines of Document A37(d) are exempt under clause 7.

Documents A29 and A30

22. Document A29 is dated 2 August 2001 and consists of a facsimile coversheet and a six-page letter from the CSO to the agency. Document A30 is the original of the CSO's letter. In my opinion, the fax coversheet to Document A29 is not exempt, for any reason and I find accordingly.
23. The agency claims Document A29/A30 was brought into existence for the dominant purpose of giving or seeking legal advice or for use in existing or anticipated legal proceedings and is, therefore, privileged in accordance with the test in *Esso*. Having examined it, I accept Document A29/A30 is a confidential communication between the CSO and the agency, which was clearly made for the purpose of giving legal advice to the agency in relation to existing or anticipated legal proceedings. Therefore, I am satisfied that Documents A29/A30 are, *prima facie*, privileged documents.
24. However, the complainant asserts that the Commission has waived privilege in respect of Documents A29/A30. The complainant and the agency made detailed submissions to me about the complainant's claims on the issue of waiver. Those submissions were exchanged between the parties, for their consideration and response. As a result, it is unnecessary for me to set out their respective submissions in detail, in this decision.

The complainant's submissions

25. The complainant contends that the privilege which would ordinarily attach to Document A29/A30 has been impliedly waived by the Commission because, during the contempt proceedings in the Supreme Court on 4 September 2001, before Wheeler J (*Temwood Holdings Pty Ltd v Western Australian Planning Commission & Anor* [2001] WASCA 298), in submissions made to the Court by counsel for the Commission, counsel referred to certain legal advice apparently received by the Commission. The complainant contends that, as a result, there was an implied waiver of privilege of the legal advice in Document A29/A30.

26. The complainant submits that the references to the legal advice by counsel for the Commission, in the contempt proceedings, amounts to a waiver of the privilege for the whole of the Commission's legal advice. The complainant submits that counsel disclosed the effect (rather than the substance) of the legal advice in Document A29/A30 and, on the authority of *Great Atlantic Insurance Co v Home Insurance Co and Others* [1982] 2 All ER 485, privilege for the whole document has been waived.
27. The complainant submits, in the alternative, that counsel for the Commission put the Commission's legal advice in issue or, alternatively, the Commission's state of mind, which is said to have been based on the legal advice and thus, impliedly, waived privilege for the legal advice recorded in Document A29/A30.

The agency's submission

28. The agency rejects the complainant's claim that there has been any waiver of privilege. The agency submits that, in the present matter, no unfairness has, or will, arise from the non-disclosure of the legal advice in Document A29/A30, notwithstanding the references made to it by counsel. The agency submits that this is not a case in which part of a privileged document was disclosed and not the remainder, so that the partial disclosure makes it unfair to allow the Commission to maintain the privilege, nor is it a case where the legal advice, or the state of mind of the Commission based on that legal advice, was in issue in the contempt proceedings before Wheeler J.

Waiver of privilege

29. The test of implied waiver is set out by the High Court in *Mann v Carnell* (1999) 201 CLR 1. In that case, the High Court said, at p. 13, "*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*".
30. In *The Commonwealth of Australia v Temwood Holdings Pty Ltd & Ors* [2002] WASC 107, Wheeler J referred to the principles of so-called 'state of mind' at paragraphs 7 and 9:

"...a reference or allusion to privileged material in order to prove or corroborate facts and issues in the principal proceedings, which may be confirmed or refuted by access to the privileged material, will give rise to a waiver: Hoad v Nationwide News Pty Ltd & Ors (1998) 19 WAR 468. Reference to the existence of legal advice will not ordinarily amount to a waiver of its contents, but disclosure of an assertion in it or of its effect may mean that fairness requires that the privilege has been waived in relation to the whole of the communication."....."So far as the "state of mind" question is concerned, there is some reason to doubt whether "state of mind" is a distinct class of waiver, or whether it is a particular example of general principles of fairness which will in some circumstances require that the privilege be considered to be waived."

31. I have considered the parties' submissions and reviewed the relevant authorities, which the parties submit support their respective claims. Having considered that material, and also examined the transcript of the proceedings for the 4th of September 2001 ('the Transcript'), I am not persuaded that, in the specific circumstances of the contempt

proceedings before Wheeler J, the conduct of counsel for the Commission, by referring to the fact that certain legal advice had been received by the Commission, had the effect of waiving the privilege that attached to the Commission's legal advice.

32. For the reasons set out below, I am not satisfied that counsel's references to the Commission's legal advice, during the course of those contempt proceedings, had the effect of disclosing either the substance or effect of that legal advice, as the complainant claims. I am also not satisfied, on the material before me, that the complainant has established that counsel for the Commission put in issue the Commission's legal advice or, in the alternative, that he put the Commission's state of mind in issue, in the contempt proceedings.

The references to the legal advice

33. I do not accept the complainant's claim that the *Great Atlantic* case is indistinguishable from the case presently before me. Rather, I consider that the facts of that case are clearly distinguishable from the facts of this case. In the *Great Atlantic* case, counsel for the plaintiff deliberately read out in court two paragraphs of a document, which he wrongly, but excusably, considered ought to be disclosed. The English Court of Appeal found that the whole of the document was, *prima facie*, privileged but because the whole document dealt with the same subject matter, severance of the part read into Court was not possible and the whole document was required to be disclosed, together with all material bearing on that communication. The Court held that a party was not entitled to disclose only those parts of a document that were to that party's advantage; both the Court and the opposing party were entitled to know whether the material disclosed represented all of the material relevant to the issue in question.
34. However, that is not the case in this matter. This is not, in my view, a case of waiver by tender at trial. No part of Document A29/A30 was read out in Court and I am satisfied, therefore, that the substance of the legal advice was not disclosed. However, the complainant submits that the effect of the advice was disclosed. In my opinion, the question is whether the references by counsel, at pages 17, 20 and 21 of the transcript, about the view taken by the Commission, which were apparently based upon the legal advice to which counsel referred, amounts to a disclosure of the view of the Commission or a disclosure of the material on which that view was based (cf. *Ampolex Ltd v Perpetual Trustee Co (Canberra)* (1996) 40 NSWLR 12 at 18). In my opinion, the references by counsel disclose only the view of the Commission; they do not, in my opinion, disclose the substance or the effect of the legal advice given to the Commission.

Was the legal advice put in issue?

35. The primary issue before Wheeler J, on 4 and 7 September 2001, was whether the complainant's contempt proceedings were defective. I consider that the submissions made by counsel for the Commission were directed primarily to the apparent procedural defects, identified by counsel for the Commission, in the complainant's application for a mandatory injunction for contempt of Court. In those contempt proceedings, the complainant alleged that the Commission's refusal to endorse its diagrams/plans for subdivision, until the appeal process had been finalised, constituted a contempt, because the Commission's alleged intention was to "...place illegitimate economic pressure" on the complainant to prevent it from pursuing its appeal.

36. In my view, the Transcript shows that the brief references to the legal advice by counsel for the Commission, were references to what the Commission's defence might be to a properly pleaded allegation of contempt and, further, that counsel for the Commission envisaged that the Commission would file an affidavit to the effect that its decision not to endorse the complainant's diagrams has been based on legal advice. Pages 20 and 21 of the Transcript also make it clear, in my view, that counsel for the complainant submitted, in response, that if counsel for the Commission sought to rely upon the legal advice he alluded to, as a defence to the complainant's contempt proceedings then, on the authority of *Thomason v Campbell Municipal Council* (1939) 39 SR(NSW) 347, that legal advice would have to be disclosed to the complainant.
37. Wheeler J found that there was a real question as to whether the Supreme Court had jurisdiction in the contempt proceedings to make the order sought by the complainant, but found it unnecessary to decide that question since she decided that no factual basis for the allegation of contempt had been established. On appeal, the Full Court of the Supreme Court rejected the complainant's contention that the determination by Wheeler J was an incidental direction to the principal proceedings and held that the Supreme Court had no authority to deal with the contempt allegation or to grant the interlocutory relief sought as an alternative remedy: *Temwood Holdings Pty Ltd v Western Australian Planning Commission & Anor* [2001] WASCA 354.
38. The material before me relating to the contempt proceedings clearly establishes, in my opinion, that the Commission defended the contempt proceedings before Wheeler J, and the subsequent appeal to the Full Court of the Supreme Court from Wheeler J's decision, not on the basis of the legal advice referred to by counsel for the Commission, but on the basis of the procedural defects in the complainant's application for an injunction; the requirements for a mandatory injunction; and the Commission's powers under s.20AA of the *Town Planning and Development Act 1928*. Having regard to the foregoing, I am not persuaded that the complainant has established, on the facts, that counsel for the Commission either put in issue the legal advice that the Commission received from its legal advisers or, in the alternative, that counsel put the Commission's state of mind in issue, in the contempt proceedings.
39. In the circumstances, I accept the agency's submission that neither the legal advice (Document A29/A30) nor the Commission's state of mind were put in issue in the contempt proceedings and were not, therefore, determinative of those proceedings, as the complainant asserts. I reject the complainant's submission that privilege has been waived in respect of Documents A29/A30. I am satisfied that Documents A29/A30 would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find Documents A29/A30 exempt under clause 7.
40. By way of comment only, even if there may have been a waiver of privilege (which, for the reasons given above, I do not accept) then I am not satisfied that the complainant suffered any prejudice or disadvantage in the contempt proceedings, such that considerations of fairness require the disclosure of Documents A29/A30 to the complainant. The legal advice in question was not relied upon nor used to defend the complainant's contempt proceedings nor was it determinative of those proceedings.
