
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : DEPARTMENT OF HOUSING AND WORKS -v-
BOWDEN [2005] WASC 123

CORAM : MCKECHNIE J

HEARD : 29 APRIL 2005

DELIVERED : 10 JUNE 2005

FILE NO/S : SJA 1016 of 2005

MATTER : Application to the Acting Information Commissioner
for external review pursuant to s 65 of the *Freedom of
Information Act 1992*

BETWEEN : DEPARTMENT OF HOUSING AND WORKS
Appellant

AND

LYLE ALBERT BOWDEN
Respondent

ON APPEAL FROM:

Jurisdiction : INFORMATION COMMISSIONER OF WESTERN
AUSTRALIA

Coram : D A WOOKEY

Citation : BOWDEN v DEPARTMENT OF HOUSING AND
WORKS

File No : D 02320 of 2004

Catchwords:

Freedom of Information - Exempt matters - Legal professional privilege - Whether privilege able to be waived - Whether finding of waiver able to be inferred by fairness - Scope of Act - Severance of privileged material - *Queensland Law Society Inc v Albietz* [2001] 1 Qd R 621 not followed

Legislation:

Freedom of Information Act 1992 (WA)

Result:

Appeal allowed

Category: A

Representation:

Counsel:

Appellant : Ms J C Pritchard
Respondent : In person

Solicitors:

Appellant : State Solicitor
Respondent : In person

Case(s) referred to in judgment(s):

Attorney-General (NT) v Maurice (1986) 161 CLR 475
Baker v Campbell (1983) 153 CLR 52
Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia (1999) 201 CLR 49; [1999] HCA 67
Great Atlantic Insurance v Home Insurance (1981) 2 All ER 485
Hoad v Nationwide News Pty Ltd (1998) 19 WAR 468
Mann v Carnell (1999) 201 CLR 1; [1999] HCA 66
O'Reilly v Commissioners of State Bank of Victoria (1983) 153 CLR 1
Parry-Jones v Law Society (1969) 1 Ch 1
Queensland Law Society Inc v Albietz [2001] 1 Qd R 621

Temwood Holdings Pty Ltd v West Australian Planning Commission [2003]
WASCA 112
Waterford v The Commonwealth of Australia (1987) 163 CLR 54

Case(s) also cited:

Nil

MCKECHNIE J:**Introduction**

1 The *Freedom of Information Act 1992 (WA)* ("*FOI Act*") gives citizens a general right of access to State documents. However, certain categories of documents are exempt from disclosure. One such category is to be found in Sch 1 cl 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."

2 Mr Bowden was employed by the Building Management Authority, the predecessor of the Department of Housing and Works. Pursuing a claim for unpaid travel entitlements, he issued a Freedom of Information ("*FOI*") request to the Department. The Department produced a number of documents but considered that certain documents were exempt from disclosure on the basis that they were subject to legal professional privilege.

3 Mr Bowden sought external review. There were five documents which the Department contended were exempt documents. The Acting Information Commissioner ("*Commissioner*") held that two were exempt from disclosure but found that the Department had impliedly waived its right to claim privilege over three of the documents (one being a photocopy of another). The relevant documents are:

- Document 4 – a letter dated 28 August 2003 to the Acting Manager, Human Resources from the Crown Solicitor's Office ("*CSO*").
- Document 7 – a photocopy of document 4.
- Document 8 – a confidential memorandum dated 29 August 2003 from the Manager Employee Relations to the Ed Director Business Strategies and the Manager Human Resources.

4 From that finding the Department appeals to this Court on three grounds which are particularised. In summary, ground 1 asserts that the Commissioner, having found the documents to be *prima facie* privileged, erred in holding that privilege had been waived. Ground 2 asserts that in addition the Commissioner erred in making a finding of unfairness so that

privilege should be regarded as waived. Ground 3 asserts that, in any event, the Commissioner ought to have severed the legal advice into discrete issues and found that some of the advice was privileged and exempt from disclosure.

5 In *Temwood Holdings Pty Ltd v West Australian Planning Commission* [2003] WASC 112 Wheeler J, in deciding an appeal from the decision of the Commissioner, did not find it necessary to decide the construction of Sch 1, cl 7: see *Temwood Holdings* at [5]. She came to this view because there was no waiver of privilege in any event. The construction point not decided by Wheeler J is directly raised in this appeal.

6 At [58] and [59] of her reasons, the Commissioner concluded that documents 2 and 4 are *prima facie* privileged as they are confidential communications between the agency and its legal adviser, clearly made for the dominant purpose of seeking and giving legal advice. (Document 7 is a photocopy of document 4 and therefore a photocopy of the privileged communication). At [61] the Commissioner held that document 8 was *prima facie* privileged.

7 Once the Commissioner reached the view that the documents were *prima facie* the subject of legal professional privilege the question arises whether she was required to do more and go on to determine whether, in the event the documents were relevant in legal proceedings, privilege would be held to be waived. There were and are no legal proceedings between the parties.

The scheme under the FOI Act

8 The short title of the *FOI Act* provides:

"An Act to provide for public access to documents, and to enable the public to ensure that personal information in documents is accurate, complete, up to date and not misleading, and for related purposes."

9 Part 2 Div 1 sets out a right of access to an agency's documents. Division 2 sets out the procedure for dealing with access applications. Section 23 provides that an agency may refuse access to a document if it is an exempt document. Division 5 provides for an internal review of decisions within an agency. A person who is aggrieved by a decision made by an agency has a right to have the decision reviewed by another officer within an agency. Under Pt 4 Div 1 the Office of Information

Commissioner is established. No particular qualifications are required for the position, by which I mean, especially, that it is not necessary for a Commissioner to be a legal practitioner. The main function of the Commissioner is to deal with complaints about decisions made by agencies in respect of access applications: s 63(1).

10 In order to deal with a complaint the Commissioner may obtain information from such persons and sources, and make such investigations and inquiries, as the Commissioner thinks fit: s 70(1). Proceedings are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of the Act and a proper consideration of the matters before the Commissioner permit, and the Commissioner is not bound by rules of evidence: s 70(2). The Commissioner may deal with the complaint without holding formal proceedings or hearings: s 70(5)(a). The Commissioner may administer an oath or affirmation and examine a person on oath or affirmation: s 73(1).

11 The Commissioner has power to refer to the Supreme Court a question of law that arises in the course of dealing with a complaint: s 78(1).

12 In summary, the *FOI Act* sets up a regime where access to agency documents, except exempt documents, is to be achieved expeditiously. There are three levels of decision-making, none of which require that the decision-maker has had legal training. There is an ability to refer questions of law to the Supreme Court for resolution: s 78.

Legal professional privilege

13 In *Baker v Campbell* (1983) 153 CLR 52 Deane J said at 115 – 116:

"Once one recognizes that the principle underlying legal professional privilege is that a person should be entitled to seek and obtain legal advice without the apprehension of being prejudiced by subsequent disclosure of confidential communications and that the privilege is not confined to such communications as are made in the course of or in anticipation of litigation but extends generally to confidential communications of a professional nature between a person and his lawyer made for the purpose of obtaining or giving legal advice, common sense points to a conclusion that the principle should not be seen as restricted to compulsory disclosure in the course of such proceedings."

14 The test at common law for legal professional privilege in relation to documents is whether a communication was made or a document was prepared for the dominant purpose of a lawyer providing legal advice or legal services: *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49; [1999] HCA 67. The privilege attaches to legal advice from government lawyers to departments: *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54.

The construction of Sch 1 cl 7

15 This brings me to the issues raised in argument in this appeal and the construction of Sch 1 cl 7.

16 In general, it is only necessary for a decision-maker, including the Commissioner, to decide whether, on its face, or after information has been received, if necessary, a document is *prima facie* privileged from production in legal proceedings.

17 Whether privilege has been waived may involve subtle questions of law: see, for example, *Mann v Carnell* (1999) 201 CLR 1; [1999] HCA 66. It may, but need not, necessarily, involve consideration of subjective intention of an agency and whether a particular officer stands in the shoes of the agency in disclosing material intentionally. It may involve questions of inconsistency of conduct. These matters are often difficult to resolve.

18 Parliament could not have intended that these questions should be resolved at every level of an FOI request by persons untrained in the law and in a vacuum without the matrix of extant legal proceedings to resolve the question of waiver.

19 A finding that a document is *prima facie* the subject of legal professional privilege is a finding that the matter would be privileged from production in legal proceedings on that ground. It may be that in specific legal proceedings, following inquiry, a court might hold that the privilege had been waived. Such a finding of waiver does not derogate from the proposition that legal professional privilege once attached to a document and attached at the time of the FOI request.

20 A different view was perhaps taken in *Queensland Law Society Inc v Albietz* [2001] 1 Qd R 621. Justice Williams upheld the decision of the Information Commissioner who had held that privilege in a

communication had been waived by the actions of the department (the Queensland Law Society). Justice Williams held at [17]:

"... It is not necessary in this case to finally determine whether or not the first respondent was correct in limiting the hypothetical legal proceeding to a proceeding in which the applicant for access under the FOI Act was a party. In my view it is sufficient for present purposes to say that where the advice has come into existence for the purpose of facilitating the discharge by the applicant of a statutory duty, and use has been made of the advice in connection with that matter in such a way as to constitute a waiver of privilege, the applicant cannot defeat the second respondent's application under the FOI Act by relying on s43(1)." [the equivalent of Sch 1 cl 7]

21 Williams J reached that conclusion, in part, by reliance upon *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 in the passage which he quoted from at 487 – 488 where Mason and Brennan JJ both confined the issue of fairness to litigation:

"In order to ensure that the opposing litigant is not misled by an inaccurate perception of the disclosed communication, fairness will usually require that waiver as to one part of a protected communication should result in waiver as to the rest of the communication on that subject matter...

Hence, the implied waiver inquiry is at bottom focused on the fairness of imputing such a waiver."

Attorney-General (NT) v Maurice is a case about existing legal proceedings.

22 With respect, the difficulty in the approach of Williams J, and in the approach of the Commissioner in the present case, is that conclusions were reached by hypothesising about legal proceedings. In the facts of this case, and no doubt in many other cases, there is no litigation. Without knowing the effect on a litigant as party to a proceeding, it is impossible to measure the effect of fairness, or more correctly unfairness, on a failure to disclose some part of legal professional advice. In my opinion, it is for this reason that the High Court in *Mann v Carnell* were at pains to confine the impact of fairness to legal proceedings. It is only in legal proceedings that a judgment can be made, *inter alia*, about considerations of fairness. Such considerations of fairness cannot operate at large: *Mann v Carnell* at [29].

23 Mr Bowden, in his submissions on the appeal, points to the *Public Sector Management Act 1994* (WA) which defines standards to be observed by government agencies and refers particularly to s 8 of general principles of human resource management which are to be observed in relation to the public sector including:

" ...

- (c) employees are to be treated fairly and consistently and are not to be subjected to arbitrary or capricious administrative acts;"

24 Of course, I accept that employees have such an obligation. There are issues (which I need not resolve) as to whether a breach of that obligation has created rights for a person such as an employee, other than the rights contained within the *Public Sector Management Act*. However, the concept of fairness, in cases in relation to legal professional privilege, refers to a different form of fairness; one which relates, and is integral, to legal proceedings.

25 In my opinion, Parliament did not intend that decision-makers under the FOI should be required to go through the factual permutations that may operate to resolve questions of waiver of privilege, especially when the exercise is hypothetical because there are no legal proceedings. If it appears, *prima facie*, that a matter would be privileged from production in legal proceedings on the ground of legal professional privilege then it is exempt matter.

26 In the present case there is a dispute as to whether money is owed for a travel allowance but this is irrelevant as an applicant's right to be given access to documents is not affected by any reasons for wishing to obtain access or the agency's belief as to what the applicant's reasons are: *FOI Act* s 10. The scheme of the *FOI Act* is to require access to documents, except exempt matter. If, on its face, a document falls within Sch 1 access is not given. If it does not fall within Sch 1, or any other exemption, then access is to be given.

27 To the extent that *Queensland Law Society Inc v Albietz* is authority to the contrary, and I acknowledge that it is, I decline to follow it notwithstanding a general need for comity in the interpretation of similar legislation. The reason I do not follow *Queensland Law Society Inc v Albietz* is, in part, because the general statement of principle of fairness by the majority in *Mann v Carnell* was not published in 1998 when *Queensland Law Society Inc v Albietz* was delivered. Williams J decided

the case on a general notion of fairness not confined to legal proceedings: [15]. In my respectful opinion, that reasoning is no longer sound following *Mann v Carnell*.

28 I therefore hold that the Commissioner was wrong in proceeding to determine the question of waiver. Once she had concluded that the documents were *prima facie* privileged in legal proceedings, then it followed that the three documents were exempt matter and access was not permitted.

29 There is another reason for favouring the construction of the Sch 1 cl 10. As this was not the subject of submissions and argument, this line of reasoning is ancillary to my principal reasons for construing the *FOI Act* as outlined.

30 The *FOI Act* (WA) is plainly modelled on similar legislation throughout Australia. In particular, the Sch 1 cl 7 has its exact counterpart in earlier and later legislation: *FOI Act* (Cth) s 42; *FOI Act* (Vic) s 32; *FOI Act* (NSW) Sch 1 cl 10; *FOI Act* (SA) Sch 1 cl 10; *FOI Act* (Tas) s 29; *FOI Act* (Qld) s 43.

31 The first *FOI Act* in Australia was the *FOI Act* (Cth) which was assented to on 9 March 1982 and commenced operation on 1 December 1982.

32 The second *FOI Act* was the *FOI Act* (Vic) which received assent on 5 July 1983 and came into operation in two parts on 5 July 1983 and 5 January 1984.

33 Other *FOI Acts* followed with New South Wales in 1989, South Australia and Tasmania in 1991, Queensland and Western Australia in 1992.

34 It is a reasonable conclusion that the *FOI Act* (WA) was directly modelled on the *FOI Act* (Cth).

35 In 1982 there was considerable doubt whether legal professional privilege applied generally or only applied to legal proceedings. *O'Reilly v Commissioners of State Bank of Victoria* (1983) 153 CLR 1 was argued on 10 – 11 March 1982 and judgment delivered on 16 December 1982.

36 The Court held, by majority, that the doctrine of legal professional privilege is limited to judicial and quasi-judicial proceedings. The Court applied *Parry-Jones v Law Society* (1969) 1 Ch 1.

37 A parliamentary drafter would have been familiar with the state of the law in *Parry-Jones v Law Society* although it is not possible to say whether the drafter would have known of the pending argument in the High Court.

38 It is a reasonable assumption that the expression "privileged from production in legal proceedings" is intended to do no more than define legal professional privilege in the terms of the scope of privilege then understood.

39 After the *FOI Act* (Cth) came into operation, the High Court reversed its decision in *Baker v Campbell* (1983) 153 CLR 52, a case argued in February 1983 and delivered on 26 October 1983.

40 The Court then held, by majority, that the doctrine of legal professional privilege is not confined to judicial and quasi-judicial proceedings.

41 If the *FOI Act* (Cth) had been drafted after *Baker v Campbell* the expression "privileged from production in legal proceedings" might then have been regarded either as otiose or as a confinement of the scope of privilege.

42 Yet clearly it has not been interpreted in this way. In *Waterford v The Commonwealth of Australia*, Mason and Wilson JJ, in the course of construing *FOI Act* (Cth) s 42, said at 63:

"... The common law, in the view that we have taken, recognizes that legal professional privilege attaches to confidential, professional communications between government agencies and their salaried legal officers undertaken for the sole purpose of seeking or giving legal advice or in connexion with anticipated or pending litigation." (my emphasis)

43 Further, in the judgment after reference to *FOI Act* (Cth) s 42, they continue at 64:

"The plain reading of this provision would suggest that Parliament has acknowledged expressly that legal advice

tendered in connexion with the process of administrative decision making will attract the privilege."

44 It is true that Mason and Wilson JJ, shortly after this passage, said:

"... If the conditions giving rise to legal professional privilege are satisfied, and the privilege is not waived, then the document is not disclosed."

45 This passage in isolation is against the construction of Sch 1 cl 7 for which I contend. However, two things may be said. First, the comment is *obiter dicta* as *Waterford v The Commonwealth of Australia* did not concern possible waiver of privilege. The judgment at this point is dealing with an argument whether public interest immunity attached. Secondly, in my respectful opinion, the comment would not find general support after *Mann v Carnell*.

46 For these ancillary reasons, I hold that once a document is determined, *prima facie*, to be the subject of legal professional privilege, questions of waiver do not arise under the *FOI Act*.

47 I conclude the question of waiver is one that is only able to be answered in legal proceedings when the fairness of maintaining the privilege to the detriment of a litigant is able to be judged and balanced in the absence of legal proceedings, there is nothing to balance and fairness does not operate at large.

Waiver by reference to legal advice

48 In *Temwood*, Wheeler J considered an imputed waiver said to arise because of reference made to legal advice during the course of proceedings in open court. Wheeler J noted that in such a case, since the proceedings were open to the public at large, use of legal advice by reading or a recounting of its substance in open court would plainly be inconsistent with any future maintenance of the privilege: [18]. At [19] she noted that a partial or incomplete reference to the substance of advice during the course of legal proceedings in open court may also give rise to such waiver before concluding at [20]:

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

49 In the present case, Mr Beaver wrote to Mr Bowden on 22 September 2003 concerning the travel claim and said in the course of that letter:

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

50 The Commissioner construed this letter and in particular the passage I have just quoted. She concluded that the letter amounted to Mr Beaver's understanding of the advice received and purported to state that advice, not his own view. As she concluded at par 95:

"... I consider that the word 'advice' in the Letter is a reference to the Legal Advice, and is reasonably understood to be so. Since the agency has not claimed that the information in the Letter was inadvertently disclosed, I have not considered that an issue in respect of that document."

51 It is not entirely clear how the Commissioner reached this conclusion in view of other material to which she had access. She wrote in her reasons:

"74. Following the receipt of those submissions, my Legal Officer contacted Mr Beaver by telephone who advised that, to the best of his recollection, the advice referred to in the Letter was advice he had received from Ms Lesley Howe, Manager Human Resources. My Legal Officer then spoke to Ms Howe by telephone who advised that she did give advice of the kind referred to in the Letter to Mr Beaver and that, as far as she could recall, that advice was based on her general experience of dealing with such issues and with the *Industrial Relations Act 1979*. Ms Howe confirmed that she had read the Legal Advice provided to Mr Stacey – who had been acting in her position at the time that he had sought that advice from the CSO – after she had returned from leave on 29

August 2003. She could not say with certainty whether her advice to Mr Beaver also reflected the Legal Advice.

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

...

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

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

52 She concluded:

- "86. Turning to the Letter, for the reasons given above, I consider that Mr Beaver's statement in that document amounts to his understanding of the advice received and purports to state that advice, not his own view. Having considered Documents 4, 7 and 8, it is clear to me that Mr Beaver's statement in the Letter is a statement of his understanding of the substance and effect of that advice. In my view, the agency has disclosed the substance of the Legal Advice in the same way as the statement by

Ampolex ... that it had legal advice supporting the proposition it espoused '*...that the correct ratio was 1:1*'. It seems to me that the Letter contains the essence of the Legal Advice as given to the agency."

53 Mr Beaver did not use the words "legal advice" at any stage in his letter although in a telephone conversation with Mr Bowden he did say that he had sought legal advice. The letter of 22 September 2003 sets out two facts: First, Mr Beaver sought advice and has been informed about the Deed; second, Mr Beaver's understanding of a time limit for recovery action.

54 The Commissioner ultimately based her decision on a concept of fairness: [93] and I have set out my views concerning the relevance of fairness.

55 However, the finding that the letter reflects legal advice was a finding on the facts that was open to the Commissioner. Even if it is a wrong finding, it is not a finding which can be overturned in this Court where appeals are confined to questions of law.

Reliance on the Memorandum to decide fairness

56 The mere disclosure of the effect of legal advice does not, without more, waive privilege. Questions, *inter alia*, of fairness become live: see generally *Hoad v Nationwide News Pty Ltd* (1998) 19 WAR 468 at 475.

57 One of the documents relied on by the Commissioner in her reasons for decision was an internal memorandum from Mr Beaver to the Executive dated 21 November 2003 ("the Memorandum") which contained a statement reproduced in the reasons of the Commissioner. I do not reproduce it because I consider the Memorandum to be subject to legal professional privilege. Indeed, the Commissioner concluded at [124]:

"I am inclined to accept the agency's submission that the mention of the legal advice contained in the Memorandum was inadvertently disclosed to the complainant in the circumstances suggested by the agency. I am also inclined to the view that that disclosure alone would not amount to an act sufficiently inconsistent with the preservation of the privilege to amount to a waiver of the privilege in the Legal Advice..."

58 Nevertheless, the Commissioner considered the Memorandum in the course of her reasons and in reaching her conclusion that the statement in the letter is a statement of Mr Beaver's understanding of the substance and effect of legal advice. She said at [127] "that the Memorandum discloses the effect of legal advice and that the letter disclosed both the substance and effect of that advice". She concluded at [128]:

"Moreover, in view of the fact that those two disclosures reveal different versions of the effect of that advice, and the basis for the refusal of the complainant's claim, I consider that fairness between the parties weighs in favour of the disclosure of Documents 4, 7 and 8 to the complainant."

59 In referring to the Memorandum at all the Commissioner erred. Once she decided that the Memorandum was a privileged document, its contents should have been ignored by the Commissioner. She should also have disregarded the fact that it had been disclosed to Mr Bowden because the disclosure did not amount to a waiver. Therefore, she should not have considered the Memorandum in weighing claims of fairness. Yet she did so at [128] when she concluded:

"...In my opinion, given the disclosures made to the complainant and the conflicting versions of the basis for the refusal of his claim given to him by those disclosures, it would be unfair and misleading to allow the privilege to be maintained."

60 The reliance on the Memorandum by the Commissioner in her reasons was an error of law.

61 Further, her use of the disclosure of the Memorandum to Mr Bowden in considering the issue of fairness was also an error of law. The effect of inadvertent disclosure of the Memorandum meant that it should be treated as not having been disclosed at all. Mr Bowden was not entitled to take advantage of the contents of the Memorandum because privilege was maintained in respect of it.

Severance

62 The Commissioner considered and rejected the view that the legal advice could be severed because, although it was said that it dealt with five topics, the legal advice was in respect of one matter. Severance is possible if the document deals with different subject matters or different incidents and could in fact be divided into different memoranda dealing

with different subject matter: *Great Atlantic Insurance v Home Insurance* (1981) 2 All ER 485 per Templeman LJ at 490.

63 Having read the legal advice, I agree with the Commissioner that if privilege has been waived then the whole of the legal advice ought to be disclosed. The advice cannot be severed into constituent portions, some of which remain privileged.

Conclusion

64 I allow the appeal, set aside the decision of the Commissioner and in lieu order that documents 4, 7 and 8 are exempt matter under the *Freedom of Information Act* and the respondent is therefore to be denied access to them.

65 The appellant does not seek the costs of this appeal so there will be no order as to costs.