

Final Determination
External review - section 39 *Freedom of Information Act 1991*

Applicant	Mr Clive Ragless
Agency	Yorke Peninsula Council
Ombudsman reference	2017/04401
Agency reference	17/24991
Determination	The determination of the agency is varied.

REASONS

Application for access

1. By application under the *Freedom of Information Act 1991* (the **FOI Act**) the applicant requested access from the agency to:

Doc No's 1, 2, 3, 4, 5, 6, 7, 8, 9 – FOI response to Steven Griffiths [sic] letter 8 Feb ref Freedom of Information[.]

Background

2. For ease of reference, the procedural steps relating to the application are set out in the appendix.

Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

4. I provided my tentative view to the parties by my provisional determination dated 23 June 2017. I informed the parties that subject to my receipt and submissions from the parties I proposed to vary the agency's determination.
5. By email dated 3 July 2017 the applicant provided submissions in response to my provisional determination.
6. By letter dated 13 July 2017 the agency provided submissions in response to my provisional determination.
7. In response to my provisional determination, the applicant submitted:

Until I receive the subject documents I am unable to establish if the yet unseen documents satisfy my requirements. I request that a final determination not be made until I see the denied documents.

8. The applicant otherwise submitted, *inter alia*:
 - as he has complied with the agency's request that he lodge a development application with respect to the subject development, 'there is no scope for any legal action by the Council, so no legal privilege'
 - he does not consider 'strategic advice' to be captured by exemption clause 10(1), as 'the Council should be acting in [his] best interest and not as a combatant'
 - the agency's position as to the application of section 54 of the *Development Act 1993* to the subject development 'would need to be declared in a Statement of Claim or a Defence to a Claim and therefore the argument details should not be denied' to him
 - he considers the subject development may have been erected in compliance with section 54 of the Development Act, and that the agency's request that he pay a development application fee may have been 'illegal' in circumstances where the agency did not have 'a legal argument but only an assertion that there is an argument' supporting its own position.

9. I am unable to facilitate the applicant's request that he be permitted to view the documents at issue before I finalise the present external review. The external review process would be rendered nugatory if I were to disclose the information at issue to the applicant or otherwise purport to direct the agency to do so. I observe the remarks of the Supreme Court of South Australia in *Bray and Smith v Workers Rehabilitation and Compensation Corporation and Stanley*, which I consider to be apposite to the present circumstances:

The Court faced an odd situation. We each had a sealed copy of the report of T J Sinclair and Associates. We could not decide whether any part of it was exempt without reading it. Yet we could hardly allow the second respondent, the person who wanted to see the whole report, to see it prior to giving our decision. It is very unattractive to make a decision about information in a document without hearing from all parties concerned. The second respondent could hardly offer an argument about the nature of the information in the document without seeing it. Yet we were constrained to proceed without releasing the document to the second respondent. We could do nothing else.¹

10. Responding to the applicant's other submissions in turn, I observe:
 - relevant case law does not appear to support the argument that legal professional privilege is extinguished by the absence of litigation or anticipated litigation between the parties
 - the agency's obligations to the applicant as a ratepayer are not relevant to its entitlement to assert privilege over the documents at issue; privilege is not asserted or waived with respect to specific classes of persons, but is asserted against the world at large
 - the agency would not in the ordinary course be compelled to reveal the content or nature of its legal advice through any (hypothetical) pleadings; legal professional privilege is not in any case waived by the *anticipated* conduct of a party.

11. Whether the position adopted by the agency in its correspondence with the applicant was supported by its legal advice is a relevant consideration for the purposes of determining whether the agency has sought to abuse its claim to privilege by creating an inaccurate perception of the documents at issue.

¹ *Bray and Smith v Workers Rehabilitation and Compensation Corporation and Stanley* (1994) 62 SASR 218 at [20].

12. Although mindful of the operation of section 39(15) of the FOI Act, it is difficult for me to address this issue in these reasons without some recourse to the information the agency considers exempt.
13. I can perceive no harm in my observing in the circumstances that the information within the documents withheld from the applicant does not appear capable of resolving this central issue. I therefore have nothing before me to suggest that the agency in its correspondence with the applicant has created an inaccurate perception of its legal advice. This is not a consideration that has informed my determination in the circumstances.
14. The agency in its response to my provisional determination expressed disappointment with my tentative views. The agency submitted, generally:

In writing to Mr Ragless as it did in the terms set out in document 8, the Council sought to assure Mr Ragless that it was acting reasonably, had carefully considered the material submitted by Mr Ragless and that its actions were only motivated by maintenance of the law and not based on any other considerations. The Council had made the decision not to take enforcement action but rather to deal with the matter by requesting Mr Ragless submit a development application. Accordingly it is, with respect, not correct as stated by you that the Council had not made a decision.² The Council's intention was to provide Mr Ragless with as much information as it could to explain the position it had taken.

[...]

The reference to legal advice in document 8 was to reassure Mr Ragless the Council had carefully considered the matter, had sought out external, independent, legal advice, was acting reasonably, was not motivated by political considerations and had decided not to take enforcement action but to resolve the matter in a non-adversarial manner. That is, to provide Mr Ragless with the fullest information as to the approach the Council had taken to this matter.

The reference to legal advice in [the council's correspondence to the applicant] did not in [the council's] view result in any unfairness to Mr Ragless. He could have sought out his own advice and/or maintained his position. The contents of [the council's correspondence] insofar as legal advice is mentioned, did not prevent Mr Ragless from [sic] taking either of those actions

15. The agency otherwise submitted, *inter alia*:
- my provisional report appeared to suggest that the agency's maintenance of privilege over the documents at issue was intended to create an inaccurate perception of its legal advice, which the agency disputes
 - the agency's statement in its correspondence with the applicant that its 'position is consistent with legal advice' could have been interpreted to identify the agency's position with respect to the 'general issue of how to approach coastal erosion', rather than the agency's position with respect to the application of section 54 of the Development Act
 - the agency's purpose in writing to the applicant 'was to reassure Mr Ragless that the Council had given due regard and consideration to his submissions, was acting reasonably in its decision not to take enforcement action and to inform Mr Ragless of the other options available under the legislation'; there being no unfairness to the applicant in these circumstances
 - the agency's motives in writing to the applicant in this regard were 'not dissimilar' to the motives of the Attorney-General as identified in *Osland*

² Here the council is referring to my comments distinguishing the circumstances of this matter with those in *Osland v Secretary to the Department of Justice* [2008] HCA 37.

- the relative position between the parties was not considered as a relevant factor in *Osland*, and is therefore not a relevant consideration in the present circumstances
 - to the extent that my provisional determination referred to the agency's use of its legal advice to 'bolster its own position', 'an identical argument was not accepted by the Court in *Nine Films*'
 - it does not agree with my view that a reasonable person would infer from the agency's letter to the applicant that the agency's legal advice suggested that it had a reasonable prospect of succeeding in civil enforcement proceedings
 - even if such an inference were reasonably possible, my provisional determination did not identify the relevance of the inferences to be drawn from the agency's correspondence to the question of whether the agency waived legal professional privilege
 - the agency 'has not disclosed the substance or content of the advice in relation to civil enforcement proceedings which is a necessary element for privilege to be waived'
 - if the agency 'had not made reference to it having taken advice, Mr Ragless may very well have thought the Council did not give due regard and consideration to his submission'
 - the agency's assertion that its position with respect to section 54 of the Development Act was 'consistent' with legal advice received was the 'same' as the assertions made in *Nine Films*
 - the 'suggestion that referring to legal advice to bolster one's position amounts to a waiver is, with respect, wrong'
 - my consideration of the relative position between the applicant and the agency and the effect of the agency's correspondence upon the applicant's actions amounted to the consideration of 'overriding principles of fairness', which, per *Mann v Carnell*, is not the relevant test
 - to the extent that the agency may have 'purported to restate elements' of its legal advice, it 'can only possibly be said to have done so in relation to the enforcement options available'
 - to the extent that the agency may have waived privilege, 'it can only be said to have impliedly waived privilege in that part of document 3 that relates to enforcement options'; the remaining information within the documents at issue being unnecessary for the applicant to achieve a proper understanding of the relevant passage.
16. As I have observed above in responding to the applicant's submissions, my provisional determination did not conclude that the agency's correspondence with the applicant created an inaccurate perception of its legal advice.
17. I have considered the council's remaining submissions and addressed them where necessary in the body of this determination.

Relevant law

18. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.³
19. The FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusing access.

³ FOI Act, section 12.

20. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
21. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

Documents in issue

22. The agency identified nine documents within the scope of the application. Of these documents, the agency determined to grant access to two documents (documents 5 and 6).
23. The agency determined to refuse access to the remaining documents on the basis that they are exempt under clause 10(1) of Schedule 1 of the FOI Act.
24. Clause 10(1) of Schedule 1 provides:

10—Documents subject to legal professional privilege

- (1) A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.

25. The agency in its determination advised:

[The refused documents] are deemed to be exempt documents as they are subject to legal professional privilege and:

- were provided on a confidential basis (i.e. with the expectation that their contents would not be disclosed);
- were communications between Norman Waterhouse Lawyers, in its capacity as the Council's lawyers and the Council as the client; and
- were created for the dominant purpose of seeking or providing legal advice, or for use in actual or anticipated legal action.

26. The agency confirmed this determination at internal review.

Issues in this review

27. The applicant requested that I review the agency's determination to refuse him access to the documents at issue.

Submissions of the parties

Submissions of the applicant

28. By email dated 28 April 2017 the applicant submitted to my Office (emphasis in original):

Following a severe storm in 9/5/16 I asked the Council for information on the process of obtaining approval for a construction to protect my property from risk of further extreme wave action and the public from risk of injury. [...]

I received no information in the reply but was advised that my enquiry was forwarded to the Coastal Protection Board. [...]

A letter was received from the CPB advising that there was an option in Section 54 of the development act for me to proceed as Urgent building work if my property or personal safety was at risk. [...]

Photos [...] show clearly that emergency action was required for the reasons anticipated by sect. 54, [...] Work proceeded but was stopped in progress by Council officers and was recommenced shortly afterwards with the permission of the officers after I explained my authorisation through sect. 54.

I complied with part 2 (a) and advised Council. [...]

I later received a letter from Council requesting that I put in a development application and threatening me with legal action and a fine of \$160,000.as well as a claim that they had sought legal advice that sect. 54 did not apply as it was not an emergency. [...] (*This was in spite of the fact that the CPB gave the advice being fully aware of all relevant facts.*)

I lodged the application and paid the required fees some of which were costs to Council for actions that they did not carry out. [...]

It is my view that no valid legal opinion was received as I cannot see that a lawyer would be qualified to make a judgement on the question of emergency, less than a month later another severe storm occurred and I believe that if advice was given it could only be something like “*the only way around this is to claim that it was not an emergency*” Eventually my development application was refused.

Submissions of the agency

29. By letter dated 26 May 2017 the agency submitted to my Office:

The Council maintains our position that the [...] documents that access was refused for the initial FOI application and confirmed in the subsequent Internal Review of FOI [sic] submitted by Mr Ragless were done so [sic] pursuant to Clause 10(1) of Schedule 1 of the Freedom of Information Act 1991[.]

Consideration

30. The agency has submitted that the seven documents at issue are exempt by virtue of clause 10(1) of Schedule 1 of the FOI Act.
31. For a document to be exempt under exemption clause 10(1), it must contain ‘matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.’
32. In *Esso Australia Resources Limited v The Commissioner of Taxation*, the High Court decided that a document is privileged from production in legal proceedings if it is a confidential communication between a client and their solicitor that was created for the dominant purpose of obtaining or giving legal advice; or if it is a confidential communication made for the dominant purpose of use, or obtaining material for use in, pending or anticipated legal proceedings.⁴

⁴ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49.

33. At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive that privilege. It is the client who is entitled to the benefit of the privilege, and who may waive it.⁵
34. Privilege may be waived through intentional disclosure of privileged material by a client. Privilege may also be waived by implication. Inconsistency between the conduct of the client and maintenance of confidentiality may effect a waiver of the privilege.⁶
35. When considering whether privilege has been waived by implication, it is not relevant that the party in question did not subjectively intend to waive that privilege.⁷
36. Mason and Brennan JJ in *Attorney-General for the Northern Territory v Maurice and Others* observed:

An implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege. The holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication.⁸

37. In a separate concurring opinion, Dawson J observed:

Legal professional privilege exists to secure confidentiality in communications between a legal adviser and his client but it can have no application in relation to a document the purpose of which is to communicate information to others. Of course, what is contained in such a document may reveal some confidential communication between a legal adviser and his client, but if it does do so and so waives privilege, the waiver is of the privilege in the anterior communication and not in the document itself.

Thus, if in a pleading the contents of a privileged communication are set out then the privilege attaching to that communication may be waived by the pleading. But for this to happen the content of the communication itself must be revealed. The mere reference to the occasion, such as a conversation or a letter, without reference to its content will not constitute a waiver of the privilege.⁹

38. The majority of the High Court of Australia sitting in *Mann v Carnell* observed:

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.¹⁰

39. Their Honours went on to observe:

Disclosure by a client of confidential legal advice received by the client, which may be for the purpose of explaining or justifying the client's actions, or for some other purpose, will waive privilege if such disclosure is inconsistent with the confidentiality which the privilege serves to protect. Depending upon the circumstances of the case, considerations of fairness may be relevant to a determination of whether there is such inconsistency.¹¹

40. The High Court of Australia in *Osland v Secretary to the Department of Justice* considered the effect upon a claim of legal professional privilege of a press release issued by the Attorney-General of Victoria seeking to justify his recommendation that the Governor of Victoria deny a petition of mercy lodged by the appellant. The gravamen of this press release was that the Attorney-General's recommendation had

⁵ *Baker v Campbell* (1983) 153 CLR 52 at 84.

⁶ *Trevorrow v SA (No 2)* (2005) 94 SASR 369; *Trevorrow v South Australia (No 4)* (2006) 94 SASR 64.

⁷ *Commissioner of Taxation v Rio Tinto Ltd* (2006) 229 ALR 304.

⁸ *Attorney-General for the Northern Territory v Maurice and Others* 161 CLR 475 at [11].

⁹ *Ibid* at [8]-[9] (citations omitted).

¹⁰ *Mann v Carnell* (1999) 201 CLR 1 at [29].

¹¹ *Ibid* at [34].

been made following consideration of legal advice to the Government recommending ‘on every ground that the petition should be denied.’

41. In determining that the press release did not amount to a waiver of legal professional privilege over the legal advice in question, the majority observed:

The conduct of the Attorney-General in issuing the press release and including in it certain information about the joint legal advice is to be considered in context, which includes the nature of the matter in respect of which the advice was received, the evident purpose of the Attorney-General in making the disclosure that was made, and the legal and practical consequences of limited rather than complete disclosure.

[...]

The evident purpose of what was said in the press release was to satisfy the public that due process had been followed in the consideration of the petition, and that the decision was not based on political considerations. The three eminent lawyers who gave the advice were appointed following consultation with the State Opposition. They were external to the Department. Their advice covered all the grounds upon which the petition was based. They recommended denial of the petition. Their advice was carefully considered, and the petition was denied. The Attorney-General was seeking to give the fullest information as to the process that had been followed, no doubt in order to deflect any criticism, while at the same time following the long-standing practice of not giving the reasons for the decision. This did not involve inconsistency; and it involved no unfairness to the appellant. If she had a legal right to reasons for the decision, then she still has it. If she had no such right, the press release did not deprive her of anything to which she was entitled. What the Attorney-General said did not prevent the appellant from making public her petition, or any part of it, as and when she desired.

Whether, in a given context, a limited disclosure of the existence, and the effect, of legal advice is inconsistent with maintaining confidentiality in the terms of advice will depend upon the circumstances of the case. As Tamberlin J said in *Nine Films and Television Pty Ltd v Ninox Television Ltd*, questions of waiver are matters of fact and degree.¹²

42. The Federal Court of Australia in *Nine Films and Television Pty Ltd v Ninox Television Limited* considered whether privilege had been waived in circumstances where the respondent had, among other things, issued a statement to the media that it had ‘reviewed’ the advice of senior counsel ‘in great detail’ and was ‘moving forward based on his recommendations.’
43. In concluding that this statement did not amount to a waiver of legal professional privilege over the legal advice in question, Tamberlin J observed (emphasis in original):

Whilst I accept that, in some circumstances, a clear disclosure of the “bottom line” of the advice, and the course of conduct taken thereafter, may be sufficient to amount to waiver of legal professional privilege, I do not think these matters have been established in the present case. On a fair and reasonable reading, the statement to the effect that senior counsel had been engaged and that he had reviewed matters in detail and that steps were being taken **based on** his recommendations is not sufficient to amount to a waiver of the legal advice. The substance or content of the advice is not disclosed with specificity or clarity. Questions of waiver are matters of fact and degree and, in this instance, I am not persuaded that the conduct, assertions or admissible evidence are sufficient to warrant the necessary implication that legal professional privilege has been waived.¹³

44. Legal professional privilege, validly invoked, applies to communications rather than documents.¹⁴ The Supreme Court of Western Australia in *Dalleagles Pty Ltd v Australian Securities Commission* relevantly observed:

¹² *Osland v Secretary to the Department of Justice* [2008] HCA 37 at [46]-[49].

¹³ *Nine Films & Television Pty Ltd v Ninox Television Limited* [2005] FCA 356 at [26].

¹⁴ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49 at [36].

What is protected, of course, is that which is communicated between solicitor and client. It is the communication that is privileged. But this is not to say that material that is not literally a communication or manifestly the record of a communication is never protected. There are many instances of protection being extended to such material. The examples of the draft letter that never leaves the solicitor's office, the draft agreement and the draft statement of claim have already been referred to. The reason why such material is protected is often stated to be that disclosure of it will, or will tend to, reveal the privileged communication. [...] Thus a note made by a solicitor of a conference with his client will be privileged insofar as it is a record of the communication from the client (that communication being privileged) but also insofar as it might contain notes of the solicitor's own thoughts in regard to the matters communicated to him. Protection is afforded in the latter case on the ground that disclosure of that material might tend to reveal what had been communicated to the solicitor.¹⁵

45. Exemption clause 10(1) does not incorporate a public interest test. That is, if an agency considers that a document contains information the subject of legal professional privilege, it may refuse access to that information without proceeding to consider the public interest factors weighing for or against release.

Are the documents at issue exempt?

46. All of the documents at issue bar one comprise email correspondence between the agency and its solicitors.
47. The exception is document 8, a letter from the agency to the applicant in its draft form.

Attachments to documents 1 and 4

48. I note that document 1 includes two email attachments, each constituting a single photograph. Out of an abundance of caution, I have elected not to describe what is depicted in each photograph in these reasons.¹⁶
49. I do not have any information before me to clarify how and why each photograph came to be created. Notwithstanding that they appear to have been communicated to the agency's solicitors for the purpose of obtaining legal advice, there is no information presently before me to suggest that they were created for this dominant purpose.
50. I similarly have no information before me to suggest that either photograph was created for the dominant purpose of use (or obtaining material for use in) pending or anticipated legal proceedings.
51. Document 4 includes an attachment appearing to reproduce information from the Land Services Division of the Department of Transport, Planning and Infrastructure.
52. Consistent with my views above, I am not satisfied that the records comprising this attachment were created for the dominant purpose of obtaining legal advice or for the dominant purpose of use (or obtaining material for use in) pending or anticipated legal proceedings.
53. In both cases, it appears that the records comprising the attachments have been reproduced, rather than created, for the purpose of the agency obtaining legal advice.

¹⁵ *Dalleagles Pty Ltd v Australian Securities Commission* (1991) 4 WAR 325 at 333.

¹⁶ Section 39(15) of the FOI Act states that I should avoid disclosing in my reasons for a determination 'any matter that the agency claims is exempt matter' whether or not I agree with that claim.

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54. I am not satisfied that disclosure of the attachments at issue would tend to reveal material that is otherwise the subject of legal professional privilege.
 55. It follows that I am not satisfied that the attachments to documents **1** and **4** contain matter that would be privileged from production in legal proceedings on the ground of legal professional privilege. I am therefore not satisfied that these attachments are exempt by virtue of clause 10(1) of Schedule 1 of the FOI Act.
 56. I vary the agency's determination so as to release these attachments to the applicant.

Email communications

57. I have reviewed documents **1, 2, 3, 4, 7** and **9** and am satisfied that each document (save for the attachments discussed above) constitutes a series of communications between the agency and its solicitors.
58. I am satisfied that each constituent communication within these documents (that is, each individual email) was created for the dominant purpose of obtaining or giving legal advice.
59. I am therefore satisfied that, save for the associated attachments, documents **1, 2, 3, 4, 7** and **9** were at the time of their creation the subject of legal professional privilege.
60. Although not expressly raised by the applicant, I consider it necessary in the circumstances to consider whether the privilege attaching to some or all of the communications at issue has been waived.
61. In this regard, I have considered the contents of a letter sent by the agency to the applicant on 9 September 2016, in which the agency made explicit reference to certain aspects of the legal advice from its solicitors communicated in the documents at issue.
62. This letter provided:

Dear Clive

Unauthorised seawall adjacent Sections 290 & 291 North Coast Road, Point Turton

I refer to our discussions and recent correspondence in relation to this matter and, in particular, your email of 1st September 2016.

I have reviewed the information that you have presented and sought legal advice from the Council's solicitors.

The Council maintains its request that you immediately lodge a development application seeking retrospective development authorisation under the Development Act 1993 (the Act) for the unauthorised seawall works. Should such an application not be made within two weeks of the date of this letter the Council will have no alternative but to refer this matter to its solicitors. While the Council wishes to work with residents and the Coast Protection Board to explore a longer term solution to issues caused by ongoing coastal erosion, it can no longer ignore individuals undertaking ad hoc and unauthorised coastal protection works.

The Council's position is based on the following:

You have caused, suffered or permitted building work to be undertaken in the form of the construction of a seawall on land adjacent Section 290 & 291 North Coast Road, Point Turton. That work was completed on or about 26 July 2016. It involved building work and thus "development" which required development authorisation under the Act. It is a

criminal offence to undertake development without development authorisation (see Section 44 of the Act). Upon prosecution for such an offence, the Environment, Resources and Development Court may impose a fine of up to \$120,000. In addition to a prosecution, the Council has been advised that it also has the option of instituting civil action against you by way of enforcement notice or the institution of civil enforcement proceedings in the Environment, Resources and Development Court pursuant to section 85 of the Act. In any such proceedings orders could be sought requiring you to remove the unauthorised seawall and reinstate the land. In such circumstances orders would also be sought that the Council's costs of instituting such action be paid by you. These costs would not be insignificant.

The Council does not accept that the building work undertaken by you had to be performed as a "matter of urgency" to protect any person or dwelling on Sections 290 or 291 in the sense that this concept is used in Section 54 of the Act. While the general issue of coastal erosion adjacent Sections 290 and 291 and other properties will need to be considered in an orderly and strategic way in light of recent storm events and ongoing erosion, the circumstances under which you performed the current work were not such that would permit you to take the benefit of the exemption in Section 54 of the Act. The Council's position is consistent with legal advice that it has received.

If a development application under the Act seeking retrospective approval for the unauthorised work is lodged within the requested timeframe the Council will defer any further consideration of formal enforcement action pending the determination of that application. Should you be uncertain as to what is required in respect to the lodgement of such a development application then please urgently contact Mr Roger Brooks on 8832 0000 or roger.brooks@yorke.sa.gov.au.

The Council looks forward to your cooperation in resolving this matter. In the event that a development application is not lodged and pursued by you as requested, the Council reserves its rights to take such further action as it may be advised without further notice.

63. As can be seen, the agency's letter to the applicant expressly asserted that:
- the agency had sought legal advice from its solicitors
 - the agency had been advised that it had the 'option' of taking civil action against the applicant 'by way of enforcement notice or the institution of civil enforcement proceedings [...] pursuant to Section 85 of the [Development] Act'
 - the agency did not accept that the applicant was entitled to take the benefit of section 54 of the Development Act as the agency did not accept that the work undertaken by the applicant was performed as a 'matter of urgency' within the meaning of section 54, and that this position was 'consistent with legal advice' received by the agency.
64. Regarding this final assertion, the agency in its response to my provisional determination submitted that, owing to the construction of the relevant passage, '[as] far Mr Ragless could have known, the legal advice could have been in relation' to the 'general issue of how to approach coastal erosion.'
65. With respect to the agency, this is not the plain reading of the relevant passage. The agency's reference to the need to develop a strategic response to the 'general issue of coastal erosion' was at best incidental to the thrust of this paragraph.
66. Although not expressly asserted, I consider that a reasonable person in the applicant's position would have also drawn the following inferences from the agency's letter:
- legal advice received by the agency suggested that if the agency instituted civil enforcement proceedings it could seek an order for removal of the structure erected by the applicant
 - this legal advice further suggested that the agency could seek an order for its costs in instituting such proceedings

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- this legal advice suggested that the agency's costs in the circumstances would 'not be insignificant'
 - this legal advice suggested that the agency had a reasonable prospect of succeeding in civil enforcement proceedings initiated against the applicant.
67. Considering the letter as a whole and in light of the surrounding circumstances, I consider that these implied assertions were intended by the agency.
68. The agency in its response to my provisional determination took issue with respect to the final implied assertion identified above. The agency submitted that its correspondence with the applicant did not 'expressly or impliedly contain such an assertion.'
69. In my view, the imputation at issue is supported by the agency's reference in its letter to the orders available to it through civil enforcement proceedings, including the payment of 'not insignificant' costs by the applicant. The agency in referring to these orders was clearly suggesting that there was some prospect of the agency succeeding (at least in part) in such an action.
70. The agency went on to submit:
- However, even if such an inference is reasonably possible you have not, with respect, explained the relevance of the inferences that could be drawn from [the agency's letter to the applicant] to the question of whether the council has waived privilege.
71. I have already observed that I consider these imputations to have been intended by the agency in the circumstances. To this end, they are relevant to understanding the evident purpose of the agency's disclosure of the existence and effect of its legal advice, and in assessing whether there is any inconsistency (where necessary, informed by considerations of fairness to the applicant) between this disclosure and the agency's desire to maintain the confidentiality of the advice itself.
72. The agency further submitted in response to my provisional report:
- The Council has not disclosed the substance or content of the advice in relation to civil enforcement proceedings which is a necessary element for privilege to be waived.
73. Again, with respect to the agency, the letter to the applicant expressly asserted that the agency had been advised that it was able to initiate enforcement action against the applicant under the Development Act. It would not have been at all unreasonable for the applicant to interpret the sentences that followed this assertion (concerning the orders available to the agency through such an action) to also be consistent with that legal advice. I do not consider it material in the circumstances that these passages largely restated relevant provisions of section 85 of the Development Act.
74. As observed in *Nine Films and Television v Ninox*, the question of whether legal professional privilege has been waived is a matter 'of fact and degree.'
75. Consistent with the approach adopted by the High Court of Australia in *Osland*, I consider that the evident purpose of the relevant disclosures by the agency in this matter will have some bearing on its claim to privilege over the communications at issue.
76. Plainly, the primary purpose of the agency's letter to the applicant was to convince the applicant to lodge a development application seeking retrospective approval of the offending structure. In advancing this point, the agency made reference to the

consequences it submitted would follow in the event that the applicant declined to seek such approval.

77. The agency in its response to my provisional determination submitted:

[T]he purpose of [the letter to the applicant] was to reassure Mr Ragless that the Council had given due regard and consideration to his submissions, was acting reasonably in its decision not to take enforcement action and to inform Mr Ragless of the other options available under the legislation.

[...]

If the council had not made reference to it having taken advice, Mr Ragless may very well have thought the Council did not give due regard and consideration to his submission.

78. I accept that these may all have been positions that the agency wished to convey to the applicant through its correspondence. That said, I remain of the view that the predominant purpose of both the agency's letter and its disclosure of the existence and effect of its legal advice was to cause the applicant to lodge a development application with respect to the subject development. This is made plain by the overall structure and tone of the letter. It is in my view further reinforced by the preliminary communications between the agency and its solicitors within document 3.

79. It was not necessary for the agency to refer to its legal advice in order to merely request that the applicant take the course proposed by the agency. In my view, the purpose of the express and implied assertions arising from the agency's reference to that legal advice was to convince the applicant that the agency's proffered construction of section 54 of the Development Act was legally sound and that the agency was on strong footing in the event that it was forced to initiate proceedings against the applicant.

80. In this regard, I consider that the circumstances of this matter may be distinguished from that in *Osland*, where the purpose of the agency's disclosure was ostensibly to reassure the public that the course adopted by the Government was consistent with qualified, independent advice and thereby divorced from political considerations. To the extent that the agency in that matter referred to otherwise confidential legal advice, it did so not to advance its own position in its dealings with the applicant but to justify a decision already made.

81. Owing to what I consider to have been the primary purpose of the agency's letter to the applicant, I am unable to agree with the agency's submission, made in response to my provisional determination, that its motives in writing to the applicant were 'not dissimilar' to the motives of the Attorney-General as identified in *Osland*.

82. The agency in the present matter clearly *was* seeking to bolster its own position by reference to the legal advice at issue. This is not a situation in which the agency has determined to make a limited disclosure justifying its decision to take or not to take enforcement action against the applicant (that is, after the fact of that decision); rather, the agency has deployed the fact that it received legal advice, and the substance of that advice, in an effort to bring about a change in the applicant's position.

83. The agency in its response to my provisional determination submitted:

[You] appear to be suggesting that the Council has waived privilege in the documents by referring in [its letter to the applicant] to legal advice it had obtained to '*bolster its own position*'. However, an identical argument was not accepted by the Court in *Nine Films*.

[...]

[T]he Council only stated in [its letter to the applicant] when discussing Section 54 that its position was consistent with legal advice. I submit that such an assertion by the Council is the same as the assertions made in *Nine Films* and which the Court held did not amount to a waiver.

[...]

The suggestion that referring to legal advice to bolster one's position amounts to a waiver is, with respect, wrong.

84. These submissions in my view misstate the relevant conclusions expressed in my provisional determination. As I have already observed, the agency in its correspondence with the applicant went far beyond mere reference to its legal advice (or, per *Nine Films*, mere suggestion that its position was *based upon* legal advice).
85. To the extent that the agency did refer to its position being 'consistent' with legal advice, it did so immediately after purporting to restate elements of that very advice and in circumstances where it had described its position with a degree of specificity far exceeding that in *Nine Films*.
86. The Federal Court of Australia in *Nine Films* identified that the question of whether privilege has been waived is a matter 'of fact and degree.' In my view, plain analysis of the nature and extent of the communications considered by the Court in those proceedings undermines any direct equivalence with the matter at hand.
87. I do not consider my views in this matter to stand for the proposition that a party's reference to legal advice to bolster its own position will necessarily (or even ordinarily) bring about a waiver of privilege.
88. In my view, the substance of the agency's representations to the applicant about its legal advice is materially different to that in the cases canvassed earlier in these reasons. The agency's letter to the applicant did not merely allude to legal advice said or implied to have informed its position; it in actual fact purported to restate elements of that advice and, in the case of the passage addressing the applicant's entitlement to claim the benefit of section 54 of the Development Act, implicitly asserted that the advice contradicted the applicant's stated position.
89. The agency made these assertions in the capacity of a public authority writing to a member of the public. There is nothing in the information before me to suggest that the agency believed or had cause to believe that the applicant would seek independent legal advice on the issue. The applicant was, of course, entitled to seek his own advice. I have no information before me to suggest that he did so.
90. I note that the applicant appears to have submitted a development application form to the agency within days of receiving the agency's letter. The applicant in his correspondence with my Office expressly identified the agency's representations with respect to its legal advice as the basis for his decision to do so.¹⁷
91. In my view, the nature of the relationship between the agency and the applicant, and the relative power imbalance between the two parties, was such that the agency could reasonably have expected that the assertions made in its letter would have been assigned considerable weight by the applicant.
92. In my view, the nature of the agency's express and implied assertions with respect to its legal advice in its letter to the applicant, when viewed in light of the surrounding

¹⁷ Email from the applicant dated 28 April 2017 ('It is on the basis of the legal opinion that I was forced to lodge a Development Application and the refusal of the application has left me in limbo.')

circumstances and the respective positions occupied by the parties, is such that it would now be inconsistent and unfair for the agency to seek to rely upon the confidentiality of the legal advice said to support its position.

93. The agency in its response to my provisional determination submitted:

[I]n *Osland* the High Court did not consider the relative position of the Attorney-General as a factor. Certainly if that was a relevant factor in assessing whether conduct of a party was inconsistent with maintaining privilege, it would have had application in that case.

[...]

[Y]our statements in these paragraphs are irrelevant and it could be interpreted as you advancing a view as to the 'overriding principles of fairness' in this case being a basis upon which the Council has waived privilege. However, as held by the Court in *Mann v Carnell* and specifically quoted in your provisional determination, overriding principles of fairness do not bring about waiver. Further, if 'power imbalance' was a relevant consideration, it would have had even more application in *Osland* on its facts.

94. I do not agree that my consideration of the respective positions of the parties in this matter amounts to the consideration of 'overriding principles of fairness' within the meaning of the majority judgment in *Mann v Carnell*. As I stated in my provisional determination, the relative power imbalance between the parties is relevant to understanding what, if any, reasonable expectations the agency may have had with respect to its decision to make strategic use of the existence and nature of its legal advice in its correspondence with the applicant. It is not a factor, in and of itself, that has brought about a waiver of privilege in the circumstances.
95. As I have stated above, the circumstances in the present matter are substantially different from those in *Osland*, owing if nothing else to the intended audience and primary purpose of the communication at issue in those proceedings. By nature, considerations of fairness capable of informing a decision-maker's assessment of any inconsistency between a party's conduct and the maintenance of privilege will vary depending on the circumstances unique to each situation.
96. I consider that the agency waived its claim to privilege over these communications by its letter to the applicant purporting to summarise and restate aspects of that advice.
97. A question arises as to whether the agency has waived its claim to privilege with respect to all or only some of the documents at issue and, in turn, all or only some of the email communications comprising those documents. It might even be suggested that privilege has only been waived in relation to a constituent part (or parts) of a communication.
98. In its response to my provisional determination, the agency submitted:

[W]hilst the Council maintains its view that the documents are subject to legal professional privilege, to the extent that you are correct that the Council has '*purported to restate elements of that advice*', it can only possibly be said to have done so in relation to the enforcement options available. The other references to legal advice in [the letter to the applicant] are merely to that the Council has sought legal advice and its position is consistent with legal advice.

[...]

Accordingly, in the alternative, the Council submits that if at all, it can only be said to have impliedly waived privilege in that part of document 3 that relates to enforcement options and the remainder of document 3 and all of documents 1, 2 and 4 are subject to legal professional privilege. [The Council] also note[s] that your provisional determination

contains no discussion or express justification as to the basis upon which it is contended that the Council has waived privilege in documents 1, 2 and 4 each of which are communications from Council to its legal advisers seeking rather than receiving legal advice. Clearly, none of these documents disclose legal advice received by the Council.

In relation to document 3, as you have identified, it is possible to waive privilege in one piece (or part) of advice. In this case, [the Council] submit[s] even if [it] has impliedly waived privilege in part of document 3, it has not waived privilege in relation to the other parts of document 3 and it has not waived privilege at all in relation to documents 1, 2 and 4. The other parts of document 3 and none of documents 1, 2 and 4 are necessary to a proper understanding of that part of document 3 for which you contend that privilege has been impliedly waived (if at all).

99. I do not consider the agency has waived privilege only in relation to the aspects of its legal advice relating to the enforcement options available to it. In my view, the agency's statement that its position with respect to the applicant's ability to claim the benefit of section 54 of the Development Act was 'consistent with legal advice', when viewed in its proper context,¹⁸ was also capable of bringing about a waiver of privilege in relation to that material.

100. With respect to the agency's submission as to the severability of document 3, I note the remarks of Yates J in *Bristol-Myers Squibb Company v Apotex Pty Ltd (No 3)*:

The true principle in operation in the present case is that privilege relating to a document which deals with one subject matter cannot be waived as to part and asserted as to the remainder[.]¹⁹

101. The Supreme Court of Victoria sitting as the Court of Appeal in *British American Tobacco Australia Services Ltd v Cowell* also relevantly observed:

A reference in one letter of advice to an earlier letter of advice does not expose the latter to scrutiny by the other party to litigation merely because legal professional privilege is waived in relation to the former: implied waiver is not so generous a doctrine. As we apprehend it, where legal professional privilege is waived in relation to one piece (or part) of advice, the privilege is impliedly waived in relation to another if - and only if - that other is necessary to a proper understanding of the first. As established by the High Court (at least since *Mann v Carnell*) the test in such cases is whether it would be "inconsistent" for a party to rely upon, and so to waive legal professional privilege in respect of, the one without also being taken to have waived privilege in respect of the other.²⁰

102. Document 3 plainly and specifically concerns the application of the Development Act to the development constructed by the applicant and the agency's potential response(s) to that development. It does not traverse any other subject. In my view, per the remarks of Yates J in *Bristol-Meyers*, the agency has waived privilege with respect to the whole of this document.

103. Although documents 1, 2 and 4 largely set out the agency's instructions to its solicitors, I consider these communications are necessary for the applicant to achieve a proper understanding of the legal advice received by the agency.

¹⁸ That is, viewed in light of the evident purpose of the relevant communication and the other express and implied representations within the agency's correspondence. See also paragraph 85 of these reasons.

¹⁹ *Bristol-Myers Squibb Company v Apotex Pty Ltd (No 3)* [2012] FCA 1310 at [29], citing Templeton LJ in *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529 at 538. See also *Schütz Australia Pty Ltd v VIP Plastic Packaging Pty Ltd (No 18)* [2013] FCA 407 at [29].

²⁰ *British American Tobacco Australia Services Ltd v Cowell* [2002] VSCA 197 at [121] (citations omitted). See also *Merial, Inc v Intervet International BV (No 2)* (2016) FCA 1070 at [19] ('Without disclosure of the other communications between Merial's lawyers and Mr Pieloch about the subject-matter of the proceeding, Intervet is unable to ascertain whether the comments recorded in the file note are a complete and accurate representation of Mr Pieloch's views on these matters as discussed with Merial's lawyers or, rather, a selective representation of such views.')

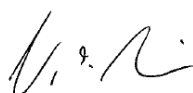
104. I consider that the agency has waived legal professional privilege in relation to the communications comprising documents **1, 2, 3 and 4**.
105. It follows that I am not satisfied that documents **1, 2, 3 and 4** contain matter that would be privileged from production in legal proceedings on the ground of legal professional privilege. I am therefore not satisfied that these documents are exempt by virtue of clause 10(1) of Schedule 1 of the FOI Act.
106. I do not consider the agency to have waived privilege with respect to the communications comprising documents **7 or 9**. These communications both appear to have followed the drafting of the agency's letter to the applicant and are not necessary for the applicant to reach a proper understanding of the legal advice referred to in that letter. I am therefore satisfied that these communications are exempt by virtue of clause 10(1) of Schedule 1 of the FOI Act.
107. I therefore vary the agency's determination so as to release documents **1, 2, 3 and 4** to the applicant in full.

The draft letter

108. Document **8** is unique from the other documents at issue insofar as it constitutes a draft letter from the agency to the applicant.
109. The content of the surrounding documents makes it clear that this document was drafted by the agency's solicitors in accordance with the agency's instructions.
110. I have reviewed this document and am satisfied that its content mirrors that of the agency's 9 September 2016 letter to the applicant in all but letterhead and date. That is, the substance of this draft letter is identical to the letter that was ultimately sent to the applicant.
111. While I consider that legal professional privilege may have once attached to this document, I consider that this privilege was unambiguously waived by the agency when it sent a letter in the exact same terms to the applicant.
112. It follows that I am not satisfied that document **8** contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege. I am therefore not satisfied that this document is exempt by virtue of clause 10(1) of Schedule 1 of the FOI Act.

Determination

113. In light of my views above, I vary the agency's determination so as to release documents **1, 2, 3, 4 and 8** to the applicant in full.
114. I confirm the determination of the agency in all other respects.



Wayne Lines
SA OMBUDSMAN

19 July 2017

APPENDIX

Procedural steps

Date	Event
28 February 2017	The agency received the FOI application dated 24 February 2017.
27 March 2017	The agency determined the application.
6 April 2017	The agency received the internal review application dated 4 April 2017.
19 April 2017	The agency confirmed the determination.
28 April 2017	The Ombudsman received the applicant's request for external review dated 28 April 2017.
5 May 2017	The Ombudsman advised the agency of the external review and requested submissions and documentation.
29 May 2017	The agency provided the Ombudsman with its submissions and documentation.
23 June 2017	The Ombudsman provided his provisional determination to the parties.
3 July 2017	The applicant provided submissions in response to the Ombudsman's provisional determination.
13 July 2017	The agency provided submissions in response to the Ombudsman's provisional determination.