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Determination

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

Applicant:	Carlo Meschino
Agency:	City of Charles Sturt
Ombudsman reference:	2021/00256
Agency reference:	15/2020/2021
Determination:	The determination of the agency is varied.
Date of Ombudsman's determination:	18 June 2021
Issues considered:	Legal Professional Privilege Waiver of Privilege
Exemption clauses relied upon:	Clause 10 Clause 6(2)
Legislation considered:	Freedom of Information Act 1991

Terms of the original application:

“the document concerning the alleged "False, Offensive and Defamatory Statements" that the Council refer to in Item 6.48 09/06/2020 Part 2 of its motion and a copy of the "Allegations of Corruption" that the Council allege that I have made in my submission, under the Freedom of Information Act 1991”

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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 documents concerning his submission made to the City of Charles Sturt (the **council**). The document to which he requested access was;

“the document concerning the alleged "False, Offensive and Defamatory Statements" that the Council refer to in Item 6.48 09/06/2020 Part 2 of its motion and a copy of the "Allegations of Corruption" that the Council allege that I have made in my submission, under the Freedom of Information Act 1991”

2. Following consultation between the council and the applicant, it was confirmed that the applicant was seeking documents that detail what the specific statements are that were considered to be false, offensive and defamatory, and that allege corruption.

Background

3. For ease of reference, procedural steps relating to the application and the external review are set out in Appendix 1.

Jurisdiction

4. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.
5. The applicant lodged his application for external review beyond the 30 day statutory period. I to exercise my discretion under section 39(4) to extend the time for making the application.
6. The delay in the processing of the application by the agency as well as the good faith of the applicant in attempting to ensure that the timeframes for review were complied with were relevant considerations in deciding to accept the application outside of the 30 day statutory period.

Provisional determination

7. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 28 May 2021. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
8. The applicant provided submissions in response. I have considered these submissions in this determination, but they have not changed my views.

Relevant law

9. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
10. 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

¹ *Freedom of Information Act 1991*, section 12.

various exemption clauses which may be claimed by an agency as a basis for refusing access.

11. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
12. 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.
13. The agency determined to refuse access to the document on the basis that it was exempt under clause 10(1) of Schedule 1 of the FOI Act.
14. 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.

15. Additionally, I have considered clause 6, of which the relevant portions provide:

Clauses 6(1), 6(2) and 6(3) of Schedule 1 to the FOI Act–Documents affecting personal affairs

- (1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).
- (2) A document is an exempt document if it contains allegations or suggestions of criminal or other improper conduct on the part of a person (living or dead) the truth of which has not been established by judicial process and the disclosure of which would be unreasonable.
- (3) A document is not an exempt document by virtue of subclause (1) or (2) merely because it contains information concerning the person by or on whose behalf an application for access to the document is made.

Documents in issue

16. The agency identified a single document within the scope of the application.
17. The document in question is an email thread between Ms Tracey Riddle, a lawyer, and the council.
18. As the final email in the email thread contained legal advice from a legal professional, the agency considered this document was exempt under clause 10(1) and refused access to the document.

Issues in this review

19. Having regard to the agency's determination and submissions, and the exemption clauses provided in Schedule 1 of the FOI Act, it is for me to determine whether to confirm, vary or reverse the agency's determination in regards to the document in issue.

Consideration

20. The agency has submitted that the document in issue is exempt by virtue of clause 10(1) of Schedule 1 of the FOI Act.
21. 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.'
22. 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.²
23. Regarding the document in question, the emails between Ms Tracey Riddle and the council constitute confidential communication between a client and its solicitor that was created for the dominant purpose of obtaining or giving legal advice. As a result of this, the document is subject to the legal professional privilege afforded by clause 10(1).
24. Legal professional privilege exists to protect the confidentiality of communications between a lawyer and their client. Although a document attracts legal professional privilege, at common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive that privilege. I note that it is the client who is entitled to the benefit of the privilege and, as such, it is the client who may waive it.³
25. 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.⁴ 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.⁵
26. It is inconsistency between the conduct of the client and the maintenance of confidentiality which effects an implied waiver of the privilege⁶. The person entitled to the benefit of legal professional privilege can be taken, by their conduct, to have waived the privilege even if they did not intend that consequence.⁷
27. If privilege is asserted, it must generally be asserted as to an entire document.⁸ There may be some exception to this rule if different parts of the document in question are easily severable because they deal with different incidents or different subject-matter. However, such severance should not involve a loss of meaning of those parts of the document disclosed. In most cases, disclosure of part of a document is considered to be inconsistent with claiming that legal professional privilege is maintained in respect of the remainder. In litigation, maintaining privilege over the remainder in such circumstances is often held to be unfair to the opposing party.

² *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49.

³ *Baker v Campbell* (1983) 153 CLR 52 at 84.

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

⁵ *Commissioner of Taxation v Rio Tinto Ltd* (2006) 229 ALR 304.

⁶ *Mann v Carnell* (1999) 201 CLR 1; *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303.

⁷ *Benecke v National Australia Bank* (1993) 35 NSWLR 110.

⁸ *Great Atlantic Insurance Co v Home Insurance Co* (1981) 2 All ER 485; *Zentai v O'Connor (No 2)* (2010) 183 FCR 180.

28. A partial express waiver of a portion of a privileged document can import an implied waiver on the balance of the document in question.⁹
29. 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.¹⁰
30. I am of the view that in this instance, the council has waived its privilege through the release of parts of the document in question. The confidential communication between Ms Tracey Riddle and the council is summarised in the council Minutes from the council meeting on 23 April 2020. The framing and content of the summary provided by the council at the meeting resulted in key elements of the confidential advice being disclosed on the public record; an act not in keeping with the confidentiality of the advice.
31. In the Minutes of Meeting for the council meeting dated 10 August 2020, the council resolved:¹¹
- That the Council notes that the response contained in Mr Meschino's previous responses from 29 March 2019 and based on legal advice this response contained a number of false, offensive and defamatory statements therefore it would be inappropriate for the Council to include Mr Meschino's response in the public Council agenda.
32. The above motion was not only passed in a public meeting, but those minutes were also published on the council website. It therefore appears that any information that might have been confidential in the above statement has lost that quality and has entered the public domain, due to the council's actions.
33. The information disclosed by the motion goes well beyond the effect of the advice that 'it would be inappropriate for the Council to include Mr Meschino's response [dated 29 March 2019] in the public Council agenda'. The information disclosed also includes the reasons given in the legal advice that 'this response contained a number of false, offensive and defamatory statements'. It might be understandable that the council wished to inform the public that it has considered advice in forming its view, but providing the reasons that support that advice resulted in a waiver of any privilege in the advice the council had received.
34. In assessing fairness, I take into account that:
- in following the advice, the council did not consider or deliberate on the submissions of the applicant in the public forum in which it considered the question of whether to continue its treatment of the applicant as an unreasonable complainant
 - the council placed on the public record that it had received legal advice that it should not place the submissions of the applicant in the public forum
 - the legal advice made recommendation on the basis that the applicant's statements were 'false', 'offensive' and 'defamatory'
 - it is unclear if the council members had an opportunity to consider the legal advice or the applicant's submissions before the meeting

⁹ *Churton v Frewen* (1865) 62 ER 669; *Argyle Brewery Pty Ltd v Darling Harbourside (Sydney) Pty Ltd* (193) 48 FCR 1; *Carbone v National Crime Authority* (1994) 52 FCR 516 at 527.

¹⁰ *Attorney-General for the Northern Territory v Maurice and Others* 161 CLR 475 at [11].

¹¹ City of Charles Sturt, Minutes of Meeting, 10 August 2020 item 6.72

- the advice appeared to have been placed on the public record to justify the council's decision to not allow the applicant's submissions to be considered on the public record of the meeting.
35. I now consider the severability of the information in the document.
36. In *Great Atlantic Insurance Co v Home Insurance Co* Templeman LJ said that 'the simplest, safest and most straightforward rule' is that if a document is subject to legal professional privilege the privilege must be asserted as to the whole document unless the document deals with separate subject matters so that it can be divided into two separate and distinct documents, each of which is complete¹². This statement of principle was endorsed by Gibbs CJ in *Attorney-General for the Northern Territory v Maurice*¹³.
37. I note that the test set out by Templeman LJ in *Great Atlantic* was applied by the Federal Court in *Bristol-Myers Squibb Company v Apotex Pty Ltd (No 3)*¹⁴ and *Schutz Australia Pty Ltd v VIP Plastic Packaging Pty Ltd (No 18)*.¹⁵
38. Given the state of the authorities and, in particular, the Chief Justice's statement in *Maurice*, I have applied the principle that privilege relating to a document which deals with one subject matter cannot be waived as to part of that single subject matter and asserted as to the remainder of that single subject matter. The question is therefore whether the document in issue deals with more than one subject matters.
39. In my view, the document in question contains two related subject matters, but these matters are distinct enough to divide the document into two separate and distinct documents, each of which is complete.¹⁶ I therefore accept that the document may be severed and, on the issue of privilege and waiver, the document need not be treated as a whole. The severance of the document may be achieved by considering the part of the email (including the content under the first three headings) separately from the content under the final heading of the document. I do not consider that waiver extends to this last part.
40. It is therefore my view that the agency waived its legal professional privilege through the partial express disclosure and subsequent waiver of the subject matter of the first part of the document in question. This section of the document is therefore not covered under the legal professional privilege afforded under clause 10(1).
41. The waiver of legal privilege does not apply to the final section of the final email in the thread referred to above and, as such, this section is exempt under clause 10(1).
42. The remainder of the emails in the thread refer solely to the subject matter to which the agency waived its legal privilege and, as such, should be released in whole.

Clause 6

43. Some of the information within the legal advice refers to allegations made against persons who are not the applicant. The information concerned is found within the part of the document that I consider is not exempt under clause 10(1), due to the council's waiver of its privilege.

¹² *Great Atlantic Insurance Co v Home Insurance Co* (1981) 2 All ER 485.

¹³ *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475.

¹⁴ *Bristol-Myers Squibb Co v Apotex Pty Ltd (No 3)* [2012] FCA 1310.

¹⁵ *Schutz Australia Pty Ltd v VIP Plastic Packaging Pty Ltd (No 18)* [2013] FCA 407.

¹⁶ *Great Atlantic Insurance Co v Home Insurance Co* (1981) 2 All ER 485

44. I consider that some of the allegations allege criminal or other improper conduct on the part of a person the truth of which has not been established by judicial process. I therefore apply clause 6(2) of Schedule 1 of the FOI Act to the document.
45. I am required by the clause to consider whether disclosure of the information would be unreasonable.
46. In *Treglown v SA Police* the South Australian District Court said that when interpreting 'unreasonable' in clause 6, a decision maker needs:
- ... to consider not merely the content of the information which is sought to be disclosed, although in some circumstances that may be sufficient, but, as well, its relationship with other material known to the applicant, its level of sensitivity, the attitude of the person affected by the disclosure, the circumstances in which the information was originally obtained, whether it was already known to the applicant, the nature of the applicant's interest in it and any disclosed intentions with respect to its use.¹⁷
47. I note the following additional factors which are considered to be relevant when considering the reasonableness of disclosure in the context of clause 6(2):
- First, whether or not the allegations or suggestions were found to be substantiated in the investigation
 - The action taken
 - The seriousness of the allegations
 - Whether there are issues of wider importance
 - The fair treatment of the individual in not disseminating unsubstantiated allegations.¹⁸
48. While *Sellars v SA Police* considered the factors above in the context of police investigations, I accept them to be relevant in considering allegations made to a council, too.
49. In addition, unreasonableness has 'as its core, public interest considerations'.¹⁹
50. There is no evidence that the allegations in question have been substantiated. The allegations are of varying degrees of seriousness, but all carry a degree of seriousness that makes them more than trifling. It is relevant that the applicant made the allegations (which he has reiterated to me) and therefore knows what those allegations are, but I have also considered that in light of the ongoing conflict between the applicant and the council disclosure of this portion of the document would likely fuel the conflict and I therefore consider that disclosure of those parts of the document would be unreasonable.
51. I consider that a 'person (living or dead)' does not relate to the incorporated body of the council or any another third party referred to therein. Therefore those allegations made generally against the council or any third party incorporated body are not subject to the exemption provided by clause 6(2).
52. I also note that the document contains mobile numbers, which I accept are the personal affairs of an officer of the agency and of a third party. I do not consider that disclosure of the same would be reasonable in light of the lack of public interest in their disclosure taken together with impact this would have on the personal affairs of those persons.

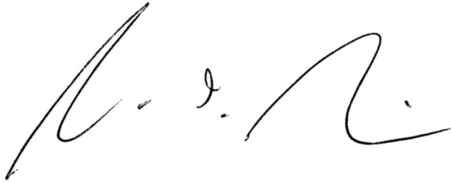
¹⁷ *Treglown v SA Police* (2011) 278 LSJS 231, [133], considering *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALD N257, 259 and *Victoria Police v Marke* (2008) 23 VR 223, [18] and [106]-[103].

¹⁸ *Sellars v SA Police* [2012] SADC 9

¹⁹ *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429, 438.

Determination

53. In light of my views above, I vary the agency's determination and release the document to the applicant with the redactions my Legal Officer enclosed in his letter to the agency on 28 May 2021.

A handwritten signature in black ink, appearing to read 'W. Lines', written in a cursive style.

Wayne Lines
SA OMBUDSMAN

18 June 2021

APPENDIX 1

Procedural steps

Date	Event
2 October 2020	The agency received the FOI application dated 2 October 2020.
23 October 2020	The agency determined the application.
25 November 2020	The agency received the internal review application dated 25 November 2020.
3 December 2020	The agency confirmed the determination.
7 January 2021	The Ombudsman received the applicant's request for external review dated 7 January 2021.
19 January 2021	The applicant provided the Ombudsman with their submissions and documentation.
22 January 2021	The Ombudsman advised the agency of the external review and requested submissions and documentation.
16 February 2021	The agency provided the Ombudsman with its submissions and documentation.
28 May 2021	The Ombudsman issued his provisional determination and invited submissions from the parties.