

NOTE: Certain personal details have been deleted from this Decision, as published below.

TASMANIAN OMBUDSMAN

Freedom of Information Review under s.48 of the *Freedom of Information Act 1991*

MR TONY HASSETT AND THE LAW SOCIETY OF TASMANIA

Case Reference: 700-0811070

FINAL REASONS FOR DECISION

Introduction

The applicant in this review, Mr Tony Hassett, has for some time been in dispute with The Law Society of Tasmania (the Society). The question in this review is whether information the Society generated in the course of investigating certain complaints Mr Hassett made to the Society against five (5) legal practitioners is exempt from production pursuant to s 29 (the exemption for information affecting legal proceedings) of the *Freedom of Information Act 1991* (the Act).

The review falls under s 48 (2) (b) of the Act, which provides that a person who has applied for information in accordance with Part 2 of the Act may apply to the Ombudsman for a review of a decision that the information requested is exempt information.

In carrying out such a review under the Act the Ombudsman is not concerned with the merits of any dispute which might exist between an agency and the access applicant. The Ombudsman is solely concerned with whether the information is exempt from production by virtue of a provision of Part 3 of the Act. If the information is not exempt, s 7 of the Act gives a person a legally enforceable right to be provided with the information, in accordance with the Act.

The request

The relevant request, dated 25 September 2008, was broadly framed. Mr Hassett sought access, under the Act, to the “**FULL** details pertaining to **ALL** documents held by (the Society) in relation to **ALL** complaints” made him. Mr Hassett set out in 25 numbered paragraphs the “precise details” of the information which he was seeking.

Mr Hassett applied to the Society for a waiver of fees pursuant to s 17 (1) (g) (iii) (the applicant is impecunious) of the Act. He informed the Society that he received a disability pension and provided the Society with his pension card number. Mr Hassett authorised the Society “to confirm (his) situation with Centrelink”.

For completeness, I note that the request which Mr Hassett lodged with his application for review was different in some respects to the request sent to the Society. Nothing turns on this issue. The relevant document is the request which the Society acknowledged receiving.

How the Society dealt with the request

The Society acknowledged receipt of Mr Hassett's request on 30 September 2008.

By letter dated 16 October 2008 Martyn Hagan, Executive Director wrote to Mr Hassett saying that "in some respects" the request did not comply with s 13 (sufficient details of the information required) of the Act and "affording (Mr Hassett) an opportunity to consult with the Society with a view to (him) being helped to make a request in a form that does comply". Mr Hagan said that the Society required "a complete and accurate statement of (Mr Hassett's) income, assets and liabilities with supporting documents" in connection with the application to waive charges for the information.

By letter dated 23 October 2008, Mr Hassett responded to the Society saying that the request complied with s 13 of the Act and that the information required was all the information the Society held concerning his complaints. [\[Information deleted\]](#)

On my understanding, the Society does not require the payment of a charge and I do not need to say anything further about the issue.

By s 16 of the Act the Society was required to notify Mr Hassett of a decision on his request not later than 30 days after the Society received the request. It did not do so.

When the Society had not notified Mr Hassett of a decision by 10 November 2008, he applied for a review, as was his right under s 50 (1) of the Act, on the ground of a deemed refusal by the principal officer of the Society to grant the request.

External review process

There was a serious delay in the Society giving me the material required to carry out this review.

I will therefore set out the external review process in some detail.

My office received Mr Hassett's application for review on 11 November 2008.

By letter dated 13 November 2008 I requested that the Society give me the information responsive to the terms of the request by 24 November 2008. I invited the Society to make a submission if the information was claimed to be exempt.

The Society did not respond to my letter.

By letter dated 25 November 2008 I requested the Society to “urgently advise the current position”.

By letter dated 26 November 2008 Mr Hagan stated:

“Your letter dated 13 November 2008 was sent to the solicitor acting for the Society in this matter. I will ask him to contact you as soon as possible.”

The Society’s solicitor did not contact me.

Rather, by letter dated 27 November 2008 Mr Hagan reiterated the Society’s claim made to Mr Hassett that the request did not comply with s 13 of the Act. The Society then for the first time claimed certain information was exempt under s 29 and s 30 (the exemption for information affecting personal privacy) of the Act.

By letter dated 11 December 2008, I informed the Society that I would consider whether the request complied with s 13 of the Act as a preliminary issue. I yet again requested that the Society give me the information I needed to carry out the review by 19 December 2008, drawing the Society’s attention to the provisions of s 51 of the Act (inspection of exempt documents by Ombudsman).

In relation to the application of s 13 of the Act I made the following observation:

“All that is required by s 13 (1) and (2) of the Act for a valid request for access to information in the possession of an agency is that it:

- *be in writing, and*
- *contain sufficient details of the information required to enable a responsible officer of the agency to identify the information.*

Without expressing any final view it is difficult to see how the request lodged by Mr Hassett fails to comply with s 13 of the Act. I note that the reasons advanced in the Society’s letter to Hassett dated 16 October 2008 are that certain categories of the information requested “are too broad and non-specific to enable a responsible officer to identify the information”. Re Timmins and NMLS (1986) 4 AAR 311 (D105) is authority for the proposition that a request for access should be construed in a broad commonsense way and not by rules of construction developed for the interpretation of legal instruments. An access application does not know the contents of documents in question and often the best he or she can do is to identify a document by reference to a genus or class...”

When the Society still did not respond to my correspondence, I personally telephoned Mr Hagan on 12 February 2009 to request the information to carry out the review.

On 13 February 2009 I received a letter from Page Seager, Lawyers, instructed by the Society, stating that I could “arrange a suitable time ... to inspect the information”.

On 16 February 2009 I personally spoke with the Society’s solicitor.

The Society finally provided me with the information to carry out the review in this matter on 19 February 2009.

The information at issue

The Society's solicitor described the information forwarded to my office as being:

"...the Society's original files in the matters of [information deleted]"

He continued -

"... There are 2 folders for each file. The blue folder represents those documents which the Law Society submits are exempt from disclosure. The other, larger files consist of the remainder of the documents which the Law Society holds. The Society has no difficulty if any or all of the documents in those folders are disclosed to Mr Hassett. Finally I enclose a copy of the relevant Investigations Committee minutes"

By letter dated 2 April 2009 I requested that the Society immediately release the information to Mr Hassett which was not in dispute. Mr Hassett informs me that he received the information on 24 April 2009.

When writing to the Society on 2 April 2009, I returned the folders which contained the information which the Society was willing to release. Mr Hassett subsequently criticised me for doing so, saying that I should have copied or "logged/listed the documents for the obvious purpose of resolving any possible conflict should that later occur". I disagreed with this criticism.

Issues for determination

On my understanding, the Society no longer maintains, under s 13 of the Act, that it could not identify the information responsive to the request. In any event, by letter dated 3 April 2009 the Society assured me that I had been provided "with all the documents (the Society) possessed in respect of Mr Hassett".

The Society has also not claimed that information in the blue folders is exempt under s 30 of the Act. I assume that is because the information relates to the professional or business affairs of the individuals concerned.

I am satisfied that the only issue which remains for my determination is whether the information is exempt under s 29 of the Act.

Section 29 of the Act

Section 29 of the Act relevantly provides:

"(1) Information is exempt information if it is contained in a record of such a nature that the record would be privileged from production in legal proceedings on the ground of legal professional privilege."

(2) Subsection (1) does not apply in respect of a record solely because it was created or received by an Australian legal practitioner.”

Legal professional privilege is a rule of substantive law which enables a person to resist the giving of information or the production of documents to a third party which would reveal confidential communications between the person and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings: *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49, per Gleeson CJ *et al* at para. 9. *Waterford v The Commonwealth of Australia* [1987] HCA 25 confirmed that legal professional privilege extends to confidential professional communications between government agencies and their legal representatives if made with the requisite purpose.

Once it is established that a legal practitioner is acting in a relevant legal context, a confidential communication will attract privilege even if it contains extraneous matter so long as it was prepared for the dominant purpose of giving or receiving legal advice or the provision of legal services.

Section 29 does not itself provide for any public interest test to override the exemption, with the result that there is no right to information under s 29 on the ground that it is in the public interest.

In that regard I note the observation in *Grant v Downs* (1976) 135 CLR 674 at 685 that the rationale of legal professional privilege is *“that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline”*.

The Society’s position

Whilst, the Society claims that all the information is exempt under s 29 of the Act, it has not provided me with any evidence to support that claim.

In Case 700-0808048 dated 18 December 2008, a copy of which is published on my website, I relevantly observed:

“... the application of exemption provisions frequently requires evidence... If evidence necessary to make out a claim for exemption is not provided, there is no prospect of me upholding that claim.”

I received 4 blue folders from the Society, marked as follows:

1. Hassett re [information deleted]
2. Hassett re [information deleted]
3. Hassett re [information deleted]
4. Hassett re [information deleted]

I will consider the information contained in each of the folders, in turn.

Folder 1 - Hassett re [\[information deleted\]](#)

On inspection, there are documents in this folder which were not created for the dominant purpose of a legal practitioner giving or the Society receiving legal advice about Mr Hassett's complaints. The documents relate to the payment of costs to legal practitioners employed by the Society (distinguished from the actual advice those legal practitioners gave to the Society) or deal with routine matters concerning legal services. Those documents cannot be the subject of legal professional privilege under s 29 of the Act.

Of more difficulty, there are communications in the folder between the Society and Mr D J Gunson SC. The Society has not provided me with any evidence that it sought legal advice from Mr Gunson about Mr Hassett's complaints. The communications reveal that Mr Gunson wrote to the Society as the then President of the Society and later as a "Case Manager for review". Legal professional privilege will only apply if the legal practitioner received or created the communication in that capacity for the purpose of the client obtaining legal advice or legal services. On the material before me, I am not satisfied that Mr Gunson was acting as a legal adviser to the Society. I am not therefore satisfied that the communications are exempt under s 29 of the Act.

I am, however, satisfied that the following communications were made for the dominant purpose of a legal practitioner giving or the Society receiving legal advice about Mr Hassett's complaints, with the result that they are in my view exempt from production under s 29 of the Act:

1. Letter from the Society to Hand Ogilvie & Breheny dated 17 May 2004
2. Letter from Hand Ogilvie & Breheny to the Society dated 7 June 2004
3. Letter from the Society to Hand Ogilvie & Breheny dated 1 July 2004
4. Letter from Hand Ogilvie & Breheny to the Society dated 23 August 2004
5. Letter from Hand Ogilvie & Breheny to the Society dated 23 April 2007
6. Letter from Terry McGuire Barrister to the Society dated 27 May 2008
7. Email from Mr Hagan to Luke Rheinberger dated 29 May 2008

For the reasons given in the first two paragraphs under this heading I am not satisfied that the remaining documents in the folder are exempt.

These documents consist of:

8. Letter from Gunson Williams to the Society dated 12 May 2004
9. Tax Invoice from Hand Ogilvie & Breheny to the Society dated 7 June 2004
10. Payment Advice from Hand Ogilvie & Breheny to the Society dated 7 June 2004
11. Tax Invoice from Hand Ogilvie & Breheny to the Society dated 23 August 2004
12. Payment Advice from Hand Ogilvie & Breheny to the Society dated 23 August 2004
13. Letter from the Society to Gunson Williams dated 24 August 2004
14. Handwritten response from Gunson Williams to the Society dated 24 August 2004
15. Letter from the Society to Gunson Williams dated 4 October 2005
16. Letter from Gunson Williams to the Society dated 16 November 2005
17. Memorandum from the Society to David Gunson SC dated 4 May 2006

18. Handwritten response from Mr Gunson to the Society dated 4 May 2006
19. Memorandum from the Society to David Gunson SC dated 28 March 2007
20. Letter from Gunson Williams to the Society dated 3 April 2007
21. Letter from the Society to Hand Ogilvie & Breheny dated 4 April 2007
22. Tax Invoice from Hand Ogilvie & Breheny to the Society dated 24 April 2007
23. Letter from the Society to T J McGuire dated 18 December 2007
24. Email from Terry McGuire to Mr Hagan dated 12 May 2008
25. Letter from Terry McGuire to the Society dated 27 May 2008
26. Account from Terry McGuire to the Society dated 27 May 2008.

Folder 2 - Hassett re [information deleted]

I am satisfied that the following communications in this folder were made for the dominant purpose of a legal practitioner giving or the Society receiving legal advice, with the result that they are exempt from production under s 29 of the Act:

27. Letter from the Society to Murdoch Clarke dated 17 May 2004
28. Letter from Murdoch Clarke to the Society dated 20 May 2004
29. Letter from the Society to Murdoch Clarke dated 1 July 2004
30. Letter from Murdoch Clarke to the Society dated 2 July 2004
31. Letter from the Society to Murdoch Clarke dated 13 September 2004
32. Letter from Murdoch Clarke to the Society dated 20 September 2004
33. Letter from the Society to C J Gunsen dated 7 March 2006
34. Letter from Chris Gunson to the Society dated 7 March 2006
35. Letter from Chris Gunson to the Society dated 8 March 2006
36. Letter from the Society to Chris Gunsen dated 11 April 2006
37. Memorandum from Chris Gunson to the Society dated 21 April 2006
38. Letter from the Society to Chris Gunsen dated 2 June 2006
39. Letter (and attachment) from Chris Gunson to the Society dated 11 July 2006
40. Memorandum from the Society to Luke Rheinberger dated 12 July 2006
41. Letter from Chris Gunson to the Society dated 25 July 2006
42. Email from Neil Readett to the Society dated 23 November 2006
43. Letter from the Society to T J McGuire dated 18 December 2007
44. Letter from Terry McGuire to the Society dated 27 May 2008
45. Advice from Terry McGuire to the Society dated 27 May 2008

However, on the reasoning set out with respect to Folder 1 I am not satisfied that the following documents in the folder are exempt -

46. Letter from Gunson Williams to the Society dated 12 May 2004
47. Tax Invoice from Murdoch Clarke to the Society dated 20 May 2004
48. Letter from the Society to Gunson Williams dated 25 May 2004
49. Letter from Gunson Williams to the Society dated 27 May 2004
50. Letter from the Society to Gunson Williams dated 28 June 2004
51. Memo from Mr Gunson to the Society dated 30 June 2004
52. Email from Mr Hagan to Gunson Williams dated 5 October 2004
53. Letter from the Society to [information deleted] dated 5 October 2004
54. Letter from the Society to Gunson Williams dated 4 October 2005
55. Letter from Gunson Williams to the Society dated 16 November 2005

56. Letter from the Society to Gunson Williams dated 27 January 2006
57. Letter from Chris Gunson to the Society dated 21 April 2006
58. Tax Invoice from Chris Gunson to the Society dated 21 April 2006
59. Tax Invoice from Chris Gunson to the Society dated 11 July 2006
60. Email from the Society to Luke Rheinberger dated 26 July 2006
61. Letter from Mr Hassett to Mr Zeeman dated 15 February 2008

Folder 3 - Hassett re [\[information deleted\]](#)

I am satisfied that the following communications in this folder were made for the dominant purpose of a legal practitioner giving or the Society receiving legal advice, with the result that they are exempt from production under s 29 of the Act:

62. Letter from the Society to Wallace Wilkinson & Webster dated 17 May 2004
63. Letter from Wallace Wilkinson & Webster to the Society dated 26 May 2004
64. Letter from the Society to T J McGuire dated 18 December 2007
65. Letter and opinion from Terry McGuire to the Society dated 27 May 2008

However, for the reasons given with respect to Folder 1, I am not satisfied that the following documents in the folder are exempt -

66. Letter from Gunson Williams to the Society dated 12 May 2004
67. Tax Invoice from Wallace Wilkinson & Webster dated 25 May 2004
68. Account from Terry McGuire to the Society dated 27 May 2008

Folder 4 - Hassett re [\[information deleted\]](#)

I am satisfied that the following communications in this folder were made for the dominant purpose of a legal practitioner giving or the Society receiving legal advice, with the result that they are exempt from production under s 29 of the Act:

69. Letter from the Society to T J McGuire dated 16 June 2008
70. Letter to the Society from Terry McGuire dated 20 June 2008
71. Email from G A Richardson to the Society dated 20 June 2008

However, for the reasons given with respect to Folder 1, I am not satisfied that the following document is exempt -

72. Account from Terry McGuire to the Society dated 20 June 2008

Conclusion

I determine for the preceding reasons that Mr Hassett is entitled to the information contained in:

- Folder 1 – Documents 8-26
- Folder 2 – Documents 46-61
- Folder 3 – Documents 66-68
- Folder 4 – Document 72

The Society should now implement this decision in accordance with s 48 (7) of the Act, by providing Mr Hassett with a copy of the information.

This case brings no credit on the Society. As the organisation which represents the legal profession in this State, one might have hoped that it would act more diligently in its application of legislation that is central to the delivery of good public administration. I note that the Society failed to make a decision on Mr Hassett's request in time, giving rise to a deemed refusal. It subsequently failed to expeditiously provide me with the information needed to carry out the review. Only at the time of delivering that information to me did it identify that it was willing for a large part of the information to go to Mr Hassett. Even then, it was necessary for me to prompt the Society into providing that particular information to Mr Hassett, when it could plainly have volunteered that information to him a long time before. Finally, it turns out on analysis of the information that is left that a good deal of it, such as correspondence about costs, is unarguably not covered by legal professional privilege.

In my view, Mr Hassett is justifiably aggrieved by the manner in which the Society has handled his request.

DATED: 28 MAY 2009

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SIMON ALLSTON
OMBUDSMAN