IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-485-1203

UNDER	the Human Rights Act 1993, the New Zealand Bill of Rights Act 1990, the Judicature Act 1908, the Judicature Amendment Act 1972, the United Nations International Covenant on Civil and Political Rights and the United Nations Convention on the Rights of the Child
IN THE MATTER OF	an appeal of a decision of the Human Rights Review Tribunal
BETWEEN	JAMES ROBERT REID Appellant
AND	CROWN LAW OFFICE Second Respondent
AND	PRIVACY COMMISSIONER Third Respondent

Hearing: 23 March 2009

Counsel: Appellant in person
K Muller and D M Consedine for second respondent
K Evans for third respondent

Judgment: 21 April 2009

RESERVED JUDGMENT OF DOBSON J

Context and scope of present appeal

[1] This is an appeal from a decision of the Human Rights Review Tribunal (the Tribunal) upholding claims to legal professional privilege as a ground for resisting

disclosure of personal information. It arises in a somewhat complicated factual context.

[2] The appellant (Mr Reid) has been a frequent litigant on his own behalf in the last 15 or so years. The areas of personal concern, causing him to commence a variety of proceedings, appear to have been the circumstances of his dismissal from the New Zealand Fire Service (the Fire Service), and challenges to proceedings in relation to the custody of his son.

[3] In late 1998, the Crown Law Office initiated proceedings in the name of the Attorney-General, seeking to have Mr Reid declared a vexatious litigant on the basis of his pursuit of 18 sets of proceedings bearing in some way on his employment, and eight sets of family-related proceedings. These vexatious litigant proceedings were subsequently discontinued in May 2002 after on-going dialogue between Mr Reid and various solicitors at the Crown Law Office, intended to clarify Mr Reid's intentions with various proceedings then extant. The outcome of that dialogue was that it was no longer considered necessary in the public interest to pursue a finding that Mr Reid be declared a vexatious litigant.

[4] On 11 February 2006, Mr Reid wrote to the Crown Law Office requesting a copy of any records indicating that the Fire Service had referred the prospect of vexatious litigant proceedings to the Crown Law Office for consideration. Mr Reid also sought "all other documentation pertaining to the Attorney-General's application including 'extensive consideration and advice'". The Crown Law Office accepted this as an information access request to which principle 6 of the Privacy Act 1993 (the Act) would apply.

[5] On 18 February 2006, Mr Reid wrote to the Fire Service requesting copies of all documents pertaining to its referral of the prospect of vexatious litigant proceedings to the Crown Law Office. That was similarly treated as an information access request, to which principle 6 of the Act would apply.

[6] Both the Crown Law Office and the Fire Service resisted the request, at least in respect of the vast majority of the documents held by each of them, in reliance on

s 29(1)(f) of the Act. That section recognises, as a reason for refusing such requests, that disclosure of the information would breach legal professional privilege. Mr Reid did not accept that this ground for refusing the request should apply, and pursued the matter, first before the Privacy Commissioner. When she upheld the stance taken, Mr Reid pursued an appeal before the Tribunal. The Tribunal conducted hearings on the matter on 29 February and 8 April 2008. As the matter was argued, the Tribunal considered it appropriate to consider for itself the documents in issue. With Mr Reid's concurrence, it considered the documents, and conducted a part of its hearing in Mr Reid's absence, to hear submissions as to the application of legal professional privilege to some of the documents involved.

[7] Although the Privacy Commissioner had generally upheld the approach adopted by the Crown Law Office and the Fire Service, it did propose a different stance in respect of a small number of Crown Law Office documents that represented notes of telephone discussions or meetings between Crown Law Office solicitors and Mr Reid. Ultimately, the Tribunal did not find it necessary to distinguish this small number of documents, and upheld privilege in them. I will refer to this separate group of documents as "the disputed CLO file notes".

[8] Mr Reid then commenced both the present appeal, and judicial review proceedings to challenge the Tribunal's decision. The judicial review aspect was never separately pleaded and was struck out by Gendall J on 8 October 2008. In addition, the Privacy Commissioner moved to be struck out on the basis that she could not be a respondent to Mr Reid's appeal. Although Clifford J on 16 July 2008 accepted that as the correct jurisdictional position, it was eventually agreed that the continued involvement of the Privacy Commissioner was appropriate, to assist the Court in the same way as had occurred on the arguments before the Tribunal.

[9] In addition, Mr Reid gave a clear indication of his intention to discontinue the appeal as against the Fire Service (in formal terms, originally joined as first respondent in the name of the New Zealand Fire Service Commission). In reliance on Mr Reid's indication, Clifford J ordered the discontinuance of the appeal against the Fire Service on 22 September 2008. Somewhat equivocally, Mr Reid suggested during the argument of the appeal that the Fire Service should not have been

removed. However, he acknowledged that the Fire Service was somewhat more robust in perusing costs' entitlements against him than the Crown Law Office, and he accepted he did not want to be exposed to any risk of another adverse costs' award in favour of the Fire Service. In common with the review of the position undertaken by Wild J on 21 January 2009, I continue to treat the appeal against the Fire Service as discontinued from 22 September 2008.

[10] For the Privacy Commissioner, Mrs Evans advanced arguments on the appeal in support of an obligation to partly disclose the disputed CLO file notes. For the Crown Law Office, Ms Muller objected to this issue being raised on the appeal when previous notice had not been given of it, and the submissions for the Privacy Commissioner were only filed after those on behalf of the Crown Law Office. I was not prepared to exclude the issue, but recognised the prospect of prejudice to the Crown Law Office from the sequence in which the issues had been raised. Accordingly, I directed that the disputed CLO file notes should be provided to me on a confidential basis, and that Ms Muller, and subsequently Mr Reid, ought to have an opportunity of filing supplementary submissions dealing with the points raised on behalf of the Privacy Commissioner. I will deal separately with the disputed CLO file notes towards the end of the judgment.

Arguments in support of appeal

[11] Dealing first with access to the documents generally, the grounds for the appeal and Mr Reid's submissions as supplemented in his oral argument can, to the extent there was any potentially arguable point, be distilled under the five following headings:

a) Where the client whose privilege is in issue in litigation is acting in the public interest, then that circumstance should be a recognised exception to the usual public policy or other justifications for upholding litigation privilege.

b) The Tribunal's decision wrongly identified the Fire Service as the client, when the Crown Law Office's only client was the Attorney-General.

c) The Tribunal was incompetent, improperly influenced by a desire to protect lawyers and/or government, and had a pre-conceived notion of the sanctity to be attributed to "counsel's file".

d) Channelling through lawyers documents that would not be excepted from the obligations to disclose as personal information if they were not so directed to lawyers amounts to "laundering of documents", and the client should not be able to invoke privilege in those circumstances.

e) An incidental criticism of the prejudice suffered by Mr Reid in challenging the withholding of personal information was that he had to assess the prospects of challenge without a list of documents that would have been required to be produced in the vexatious litigant proceedings, if they had continued.

[12] As to the first argument raising some notion of a public interest exception where it was the public interest that motivated pursuit of the proceedings, this was said to be relevant here, where proceedings to have a litigant declared vexatious under s 88B of the Judicature Act 1908 are pursued "in the public interest". Mr Reid submitted this ought to be a circumstance in which compliance with obligations to provide personal information to a citizen should be seen as overriding the usual rules as to privilege that apply to the way all litigation is conducted. However, there is nothing in either the scheme or terms of the Act, or in the principles on which the law in relation to privilege is founded, to support such a notion.

[13] There is a long-standing principle on which litigation privilege rests. Once litigation is in contemplation as a serious or realistic prospect, documents prepared with a dominant purpose of assisting that party's case in the litigation are protected from disclosure: *Guardian Royal Assurance of New Zealand Ltd v Stuart* [1985]

1 NZLR 596, s 56 of the Evidence Act 2006. This allows full and frank exchanges of views, testing of positions and facilitation of better conditions for the preparation of a party's case in litigation than would be the case if the product of all work designed to assist the party in the litigation was constrained by the prospect of disclosure to opposing parties: *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC) at [37]-[43]. This rationale means that the protection of privilege is cast more widely once litigation is in prospect, than is the case in non-litigious communications between a solicitor and client: *Konia v Morley* [1976] 1 NZLR 455 (CA) at 458; *McGechan on Procedure* at HR8.31.07.

[14] The fact that the litigation is being pursued in the public interest, rather than for financial reasons or to vindicate some private right, cannot make a material difference to the rationale for the privilege. Litigation pursued in the public interest is still entitled to whatever advantages are inherent in its preparation being aided by the availability of privilege in just the same way as the circumstances of preparation of any other party's case in any litigation. This is implicit, for instance, in the recognition that privilege applies equally to criminal proceedings (inevitably pursued in the public interest) as to all civil proceedings: *B v Auckland District Law Society* at [44].

[15] All agencies subjected to the obligations imposed by the freedom of information principle are equally entitled to have the scope of exceptions recognised in s 29 of the Act applied in their favour. Mr Reid could not suggest any basis on which documents arising in the course of litigation which might be categorised as "in the public interest" should be treated any differently, and there is no rational basis for considering such an argument.

[16] The second of Mr Reid's arguments, described in [11]b) above was based on the well-established proposition that solicitors do not have standing to claim privilege in their own right. The privilege is always that of the client: *B v Auckland District Law Society* at [45]. The practitioner can only claim privilege on behalf of the client, and it is entirely the client's prerogative to waive that privilege if the client sees fit. Here, Mr Reid characterised the analysis of the claims to privilege as wrongly treating the Fire Service as the client of the Crown Law Office, when the

Crown Law Office's only relevant client in the matter was the Attorney-General. Mr Reid cited an exchange between the Chair of the Tribunal, Mr Hindle, and Crown Counsel in respect of one particular document, where Crown Counsel observed:

> But that's actually not the Attorney's privilege there, that would be the Fire Service's privilege and we just happen to have a copy of that document because they provided it to us. (Transcript of hearing on 8 April 2008, p 6)

[17] Mr Reid claimed as a success in his argument before the Tribunal, recognition of the point that the Fire Service had no privilege in the relevant documents in its own right. A contrary view had been suggested by the Privacy Commissioner, on the basis that the Fire Service was a client of the Crown Law Office. However, that does not establish an error in the Tribunal's analysis of the scope of privilege able to be claimed in the case. I accept Ms Muller's submission, on a fuller reading of all the materials, that it was clearly the position of the Crown Law Office throughout that the Fire Service was not a client of the Crown Law Office, and had not been at any relevant stage. Claims for litigation privilege were advanced on the basis that the Attorney-General was the client, and the Fire Service a third party, and that is indeed reflected in the terms of the Tribunal's decision:

> Of course it was the Attorney-General and the plaintiff who were parties to the s 88A [now s 88B] proceedings, but we have no doubt that the Fire Service information was (and is) privileged nonetheless. It is comprised of communications between the Attorney-General and the Fire Service (a third party) for the purpose of litigation that was either pending or under-way at the relevant times. [22]

[18] Indeed, the passage from p 6 of the transcript of the hearing on 8 April 2008 quoted in [16] above is preceded by an observation by Crown Counsel, which provides the context for the observation criticised by Mr Reid. Crown Counsel had immediately before that said:

> I think that we would have taken the view that that was privileged communication with a legal adviser and between a legal adviser and a third party.

In other words, the Fire Service was a third party, not a client.

[19] Mr Reid's concern is that when the Fire Service was not the client of Crown Law Office, in the context of litigation the Crown Law Office was conducting for the

Attorney-General, then there must be an error in approach in treating the Fire Service's contribution to exchanges about the Attorney-General's litigation as if the Fire Service was also the client. However, where litigation is the purpose for such communications, the scope of the privilege is recognised as going beyond communications between solicitor and client and, for the purpose of preparing their case, extends to third parties with whom either the solicitor or the client has dealings: *Crisford v Haszard* [2000] 2 NZLR 729 (CA) at [18]. It would subvert this recognised scope of privilege if copies of documents retained in the hands of a third party, where those same documents are privileged in the hands of the solicitor, are not able to be withheld from disclosure when a demand is made of the third party.

[20] Accordingly, Mr Reid cannot make out an error in the Tribunal reasoning by suggesting that the Tribunal treated the Fire Service as the client of the Crown Law Office. Rather the recognition of privilege for Fire Service documents rests on their status as a third party consulted by the solicitor for the Attorney-General in the course of preparing litigation on his behalf.

[21] Mr Reid's third group of arguments (see [11]c) above) constituted an *ad hominem* attack on the Tribunal, and in particular its Chair. Mr Reid chose to interpret a range of comments from the Tribunal in the course of the hearing as reflecting a wish to protect government agencies, and potentially lawyers in general. I am satisfied that all of those observations were no more than a reasonable testing of positions. The operative test of the correctness of the Tribunal's decision is an analysis of the reasons provided in its decision. With respect, I find the decision to be carefully reasoned and to apply an entirely conventional approach to the assessment of the scope of privilege that could be claimed in the circumstances.

[22] Having inspected all the information for which privilege was claimed by both the Fire Service and Crown Law Office, the Tribunal dealt first with the Fire Service information. It was satisfied, both by reference to common law principles of the scope of litigation privilege and also by the definition of privilege in s 56 of the Evidence Act 2006, that all the documents produced to the Tribunal by the Fire Service fell within s 29(1)(f) of the Act. This was recognised as giving the Fire Service proper reason to withhold the information from the plaintiff.

[23] In considering the information withheld by the Crown Law Office, the Tribunal considered a number of arguments that have not been repeated on this further appeal. It analysed and dismissed arguments that, to the extent information held by Crown Law Office was a matter of policy advice, it could not be privileged. Perhaps predictably, the Tribunal found that none of the information held fell within the rubric of policy advice. The Tribunal also rejected an argument that there had been waiver of privilege. There was also an argument, some flavour of which remained on appeal, to the effect that the proceedings had been concluded so long ago that the claim for privilege should be treated as having been overtaken by history. I agree with the Tribunal's rejection of that notion, given the guiding principle that a document "once privileged, is always privileged": *B v Auckland District Law Society* at [44].

[24] Mr Reid criticised comments made by the Chair of the Tribunal suggesting preconceptions about an automatic entitlement to privilege for "counsel's file". Mr Reid's point was that, without a specific analysis of what was contained in a particular file, such an approach affords protection on an unreasoned basis, when he was entitled to have a document by document analysis undertaken, irrespective of where those documents were physically located.

[25] It is perhaps not an adequate answer to Mr Reid on this point to observe that litigation lawyers routinely resort to the rubric of "counsel's file" as a shorthand reference to papers, all of which are inevitably privileged because they have been brought into existence in the course of preparation for litigation. The entitlement to use the shorthand phrase obviously depends on those using it respecting the rationale that lies behind it: ie that counsel's file will not be a repository for documents other than those which are inarguably entitled to protection from disclosure on the basis of litigation privilege. It is a valid shorthand expression, subject to that implicit expectation. In the present case, it is clear that the Tribunal was not in any way diverted by use of the expression. Instead, members of the Tribunal considered all the documents on their merits. Therefore there is nothing in Mr Reid's concern that use of the shorthand phrase "counsel's file" in any way adversely impacts the analysis undertaken.

[26] The fourth group of Mr Reid's complaints were to the effect that the Fire Service and the Crown Law Office had somehow colluded in channelling through lawyers documents that would not be excepted from the disclosure obligations, if they had not been directed to lawyers. He characterised this as laundering of documents, and said that in such circumstances the client should not be able to invoke privilege. Posing as an outsider, confronted with difficulties in challenging "the establishment", Mr Reid criticised the lawyers for using the concepts of privilege in a way that they were so nebulous that they could have been created by Lewis Carroll, in that they meant whatever the lawyers wanted them to mean.

[27] However colourfully it was put, this point could not avail Mr Reid in challenging the reasoning of the Tribunal. There is, of course, a well-recognised exception to the entitlement for a client to claim privilege, in circumstances where the documents are in any way involved in a fraud. This is now reflected in s 67 of the Evidence Act 2006. That is an answer to any legitimate concern that privilege is used to shield improper or fraudulent conduct. Mr Reid could not advance any rational basis for treating the correspondence between the Fire Service and Crown Law Office as in any way contrived so as to generate privilege. The Crown Law Office's task legitimately extended to liaison with the Fire Service as the opposing party to a very large number of proceedings involving Mr Reid, so the lines of communication on the subjects covered were entirely conventional and reasonable ones.

[28] Finally, Mr Reid raised a criticism that went to process rather than the correctness of the Tribunal's reasoning, when he criticised the Fire Service and the Crown Law Office for not producing a list of those documents recognised as containing personal information about Mr Reid, but which those organisations were withholding from disclosure in reliance on s 29(1)(f) of the Act. Mr Reid did not appear to involve the Tribunal in this criticism. Conceptually, it could have been argued that the Tribunal was wrong, as a matter of process, not to direct assistance for him in running his case, by requiring the production of lists. Even if it were formulated in these terms, this argument does not amount to one that can affect the correctness of the Tribunal's substantive decision. As Mrs Evans pointed out, there is nothing in the Act that goes anywhere near creating an expectation that an

organisation will produce a list, of the type required to be produced by parties to litigation in the discovery process, when acknowledging a request for access to personal information and advancing reasons for the extent of any documents withheld.

[29] Mr Reid's expectation that such organisations should be required to respond in the same way as if they were parties to litigation is misconceived. As it is, the burden of responding to requests for personal information is obviously not insubstantial. The statute does not suggest any circumstances in which those obligations should be expanded to require the production of a list. I was not persuaded that Mr Reid's position, even in the relatively unusual circumstances here, was prejudiced to an extent that such an obligation should have been imposed.

[30] Accordingly, with the exception of the disputed CLO file notes, there are no grounds for upsetting the Tribunal's decision. I accordingly dismiss the appeal as argued by Mr Reid.

Disputed CLO file notes

[31] Separate consideration is required in respect of the disputed CLO file notes.

[32] The argument between Mrs Evans and Ms Muller on the disputed CLO file notes revealed both a material difference on emphasis as to the law and a different perception in the factual sense of the character of the disputed CLO file notes.

[33] It was common ground that privilege cannot be claimed for what is no more than a factual record of a communication from an opposing party in litigation: *Kennedy v Lyall* (1883) 23 Ch D 387. Accordingly, if, say, a telephone conversation between the legal adviser for one party and the opposing party is recorded, and then transcribed, privilege cannot be claimed for the transcribed text of the conversation. Mrs Evans argued that the same approach applies to what is a relatively common practice for a solicitor when participating in such a conversation to take a contemporaneous note of the main points traversed in such a conversation. Obviously that will be less than verbatim, but on Mrs Evans' analysis will

nonetheless often be no more than a record of what has been said by and to the opposing party, albeit in abbreviated form. The Privacy Commissioner argues that such notes are not excepted under s 29(1)(f) because, to the extent a note is no more than a record of what was said, privilege cannot be claimed for it. In the present case, the Privacy Commissioner's analysis was that the majority of the disputed CLO file notes were no more than a factual record of what was said in conversations between various solicitors at the Crown Law Office and Mr Reid. To the extent there was the addition of any comment or advice, or a view about the factual matters traversed that was taken by the Crown Law Office personnel, Mrs Evans accepted that those parts should be redacted so that disclosure was not required of any parts of the file notes that in any way reflected the preparation of the case by the Crown Law Office.

[34] The difference in emphasis from this approach argued for by Ms Muller was that as soon as the record of the conversation was less than a verbatim transcript of what was said, then the note of the conversation inevitably reflected some component of skill or judgement by the note-taker, reflecting what was perceived to be important (reflected in what was included) and distinguishing that from the less important (which would not be mentioned, or not dealt with fully). Thus, as soon as any note was less than a full verbatim record of what had been said, it would reflect the input of legal advice or judgement, so that the client is entitled to assert privilege over such documents produced on behalf of the client by the solicitor in the course of preparing the case.

[35] Both counsel referred to the Court of Appeal decision in *Crisford v Haszard* [2000] 2 NZLR 729. That case did involve the transcript of a surreptitiously recorded telephone conversation between the defendant and a non-party whom the defendant thought might be a witness for him, but who had arranged to record the conversation to assist the plaintiff's solicitors. Consistently with the rationale for privilege as discussed above, the Court of Appeal confirmed the High Court decision that the transcript was not privileged because it constituted no more than a verbatim record of what one party had said to someone else. Of relevance to the present situation are the terms in which the Court of Appeal distinguished a verbatim record from a note or summary of such a conversation. A verbatim transcript left:

> …no room for arguing that it has the stamp of the plaintiff's agent's opinions and impressions of the conversation. [25]

[36] The Court treated the authorities as tending to "the conclusion that privilege from production and inspection is not available unless the document which is obtained betrays the advice or views of the solicitor or client or agent obtaining the document" (see [26]). The Court of Appeal implicitly endorsed the approach that Potter J had taken in the High Court, distinguishing the verbatim transcript from a note of the conversation on the basis that the latter:

> …would have the imprimatur of her own recollection and emphasis and, created for the purpose of the litigation, would have attracted privilege. [8]

[37] Ms Muller also referred to the United Kingdom decision in *Grant v Southwestern and County Properties Ltd* [1975] 1 Ch 185 in which there was again an obiter recognition of the distinction between a verbatim tape-recording of a conversation and a summary of the note-taker's recollection of a conversation with the other party to the litigation (see p 199). Consistently, the point is that the note of the conversation has to be prepared in a way that puts the imprimatur or stamp of the preparer on its contents, reflecting the purpose of its preparation as assisting in the litigation.

[38] Ms Muller reviewed Australian authorities dealing with claims to privilege in respect of notes of discussions between a solicitor and the opposing party. She relied on the approach of the New South Wales Court of Appeal in *Sugden v Sugden* (2007) 70 NSWLR 301; [2007] NSWCA 312, suggesting the approach was consistent with that taken by the New Zealand Court of Appeal in *Crisford*. After recognising that communications between parties to litigation are not, without more, to be treated as confidential for the purposes of claims to privilege, the *Sugden* decision continued:

> But it does not follow that the solicitor's document recording a communication with an opposing party or the opposing party's legal representative is not privileged. Whether it is or not depends on the question of whether the document is, even though the communication that it records was not, confidential within the statutory definition. [64]

[39] In the context being considered, the requirement for some confidentiality related to the need for some element of selectivity or judgement being applied by the person making the note. In that sense, the *Sugden* decision, which considered the scope of privilege in terms of the New South Wales Evidence Act 1995, is again consistent with the base principle that the privilege will exist to protect the confidentiality of some element of preparation of the case for the relevant party. It is not privileged merely because it is made by the solicitor for a party, but because its content reflects some part, however small, of the preparation of the party's case.

[40] In reliance on these cases, the argument for the Crown Law Office was that the only safe approach to the scope of privilege in such circumstances is to recognise that once the note is less than a verbatim record, it must be taken to involve some element of judgement in what is recorded. This would lead to recognition that disclosure of the content would risk revealing some part of the preparation of that party's case. Ms Muller's argument was that the composition of such documents will inevitably involve elements of recollection, choice of wording, selection of content, and emphasis on the part of the author giving it a different character or quality to that of the underlying communication. Because a reviewer of the documents testing their entitlement to privilege will not have been involved at the time, it is arguably impossible to assess the extent of selectivity or judgement involved in its preparation, leading inevitably to the recognition that its collation of the content of the conversation gives rise to an entitlement to claim privilege.

[41] Mrs Evans recognised that such file notes may often include the author's impression of the conversation they record. Her proposal was that the parts of such records that reflect an impression of the conversation, as well as those reflecting any tactical considerations, comments on what was said, or anything going to the provision of advice, can be protected by redaction. Ms Muller's rejoinder was that impressions of the author may go beyond comments that make it clear on their terms that they are an impression, and extend to unspoken selection as to topics recorded and the terms in which they are expressed.

[42] This dividing line is to be determined in accordance with the principle governing the recognition of litigation privilege. Those producing a record in

summary form, be it a file note, informal email or in other forms, where the purpose of doing so is to assist in the preparation of the case for a litigant, should have the confidence of knowing that any component that reflects or hints at work done or the priorities in preparation of the litigant's case will remain confidential, and need not be shared with the opposing parties on discovery. That means that a liberal approach should be adopted to the recognition of notes of communications with opposing parties as being likely to contain material for which privilege can be claimed. However, I am not persuaded that the prospect of such content is a sufficient justification for treating all notes or summaries of communications with the opposing party as being entitled to privilege, as a matter of course. Whilst I accept that an independent reviewer cannot assess the relevance of what may have been omitted, or what might be signalled, for instance by the priority in which topics are dealt with, a liberal approach to recognising whether the author has placed his or her "stamp" on what is otherwise a factual record is a task that can realistically be undertaken.

[43] Having considered the disputed CLO file notes, the Tribunal accepted the Crown Law Office argument, deciding the point in the following terms:

> [34] …[H]aving regard to the information in the documents at issue, we have concluded that they each reflect an element of choice about what was recorded and how the record was expressed. The documents themselves satisfy us that in their preparation there was a sufficient exercise of skill, selection, effort and/or judgement to come within the rationale for legal professional privilege.

[44] However, in the present case it is ironically unhelpful to the argument for the Crown Law Office that their disputed file notes have the appearance of being relatively full, carefully confined to a factual record (except where comments or opinions are advanced in discrete parts of the notes), and were intended as the only permanent record of conversations with Mr Reid that had very recently taken place. The notes appear to reflect care to be thorough and accurate where resort to them might later be made by others within the Crown Law Office as part of dealing with a difficult litigant. I can readily conceive of the many circumstances in which there will be an intermingling of a selective record of what had been discussed, with the consequences of that for the author or the client. However, I concur on this occasion with the Privacy Commissioner's assessment that it is possible to delete those parts of the particular file notes that go beyond a factual record of what had been said, for

the purpose of fulfilling the obligation to give disclosure of material for which privilege cannot be claimed.

[45] With very few exceptions, I concur with the extent of redactions, as I understand them to have been proposed on behalf of the Privacy Commissioner. (It may be that, in the photocopying for me, the extent of highlighting on some of the file notes may not have been clearly identified.) Contemporaneously with the issue of this judgment, I will have the Registry make available to the Crown Law Office and to Mrs Evans further copies of the file notes with the extent of redaction I consider appropriate marked on each of them. In the absence of any application on behalf of the Crown Law Office for leave to appeal this decision under s 124 of the Human Rights Act 1993, compliance with this judgment would then require disclosure by the Crown Law Office to Mr Reid of the notes, except to the extent I have marked redactions on them.

[46] I am very conscious that in concluding this part of the appeal on these terms, I am reaching the opposite conclusion to that reflected in the Tribunal's decision. That was reached after considering all the withheld documents whereas I have only considered these four file notes.

[47] However, I have come to the contrary view because of the importance I attach to the scope of privilege claimed in any circumstance not going beyond the principle that is the rationalisation for recognising privilege in the first place. Once I have taken account of the extent of redactions I propose, it is not possible to recognise any contribution to the preparation of the Attorney-General's case, in the remaining narration of what has been said. The principal skill demonstrated by the terms of the file notes is the diligence of their authors in creating an accurate record of oral dealings with an allegedly vexatious litigant. Again, it is ironic that that context provides a basis that may often not be present, enabling a subsequent reviewer to be confident of the lack of selectivity in the record of the conversations that had occurred.

Summary

[48] The appeal, as argued by Mr Reid in challenging the entitlement of the Crown Law Office to withhold documents containing personal information on the ground that they are privileged, is dismissed.

[49] The discrete argument advanced on behalf of the Privacy Commissioner about the obligation to disclose the disputed CLO file notes, in partially redacted form, is accepted. In the absence of an appeal, I order that the Crown Law Office is to provide Mr Reid with copies of those disputed CLO file notes, redacted to the extent marked up on copies of those file notes that I will provide to counsel for the Crown Law Office and the Privacy Commissioner on distribution of this judgment.

Costs

[50] The modest measure of success on the appeal in relation to the disputed CLO file notes cannot be attributed to Mr Reid. I am grateful to Mrs Evans and Ms Muller for the thorough way in which they argued the appeal, and in particular this issue. As to the cost consequences of this outcome, it is certainly not to be seen as a "success" entitling Mr Reid to an award of costs. Should either the Crown Law Office or the Privacy Commissioner wish to pursue costs on the predominant outcome, which is the dismissal of the balance of the appeal, then I will receive Memoranda.

Dobson J

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