



**Report under the  
*Government Information (Public Access) Act 2009***

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<b>Applicant:</b>	<b>Mr Raymond Law</b>
<b>Agency:</b>	<b>Wollondilly Shire Council</b>
<b>OIC reference:</b>	<b>11-302</b>
<b>Date received:</b>	<b>16 September 2011</b>
<b>Date of this report:</b>	<b>30 April 2012</b>

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### **Summary of report**

1. Mr Law made an access application under the *Government Information (Public Access) Act 2009 (GIPA Act)* to Wollondilly Shire Council (**Council**) for [a consultant's] Report into the Street Sweeping Tender (the **Report**).
2. In its notice of decision of 8 September 2011, Council refused to provide access to the Report because of a conclusive presumption of an overriding public interest against disclosure of information that is the subject of legal professional privilege under clause 5 of schedule 1 to the GIPA Act.
3. We have considered submissions made to us by Council and Mr Law regarding whether the Report is subject to legal professional privilege. In our view, Council has made valid arguments regarding the applicability of clause 5 of schedule 1 to the Report. However, based on the evidence submitted to us, we cannot definitively state whether the Report attracts legal professional privilege because we are not entirely satisfied that the dominant purpose for the creation of the information contained within the Report was for Council to obtain legal advice and/or for use in litigation. We are unable to test the evidence that has been provided to us by the parties, and as such we can neither uphold nor recommend against Council's decision that there is a conclusive presumption of an overriding public interest against disclosure of the Report under clause 5(1) of schedule 1 of the GIPA Act.

### **Our review**

4. On 24 August 2011, Council received an application from Mr Law requesting access to the Report.

5. In its notice of decision dated 8 September 2011, Council decided to refuse access to the Report because of a conclusive presumption of an overriding public interest against disclosure of information that is subject to legal professional privilege under clause 5 of schedule 1 to the GIPA Act.

6. In its notice of decision, under the heading 'Review Rights', Council stated that:

Under clause 5(2) of Schedule 1 of the *GIPAA*, this decision is not reviewable.

Council's decision not to waive privilege over the report under clause 5(2) of schedule 1 to the GIPA Act is not a reviewable decision. However, under section 80(d) of the GIPA Act, an applicant is entitled to an internal review and/or external review by the OIC and/or Administrative Decisions Tribunal of Council's decision that there is a conclusive presumption of an overriding public interest against disclosure of the Report under clause 5(1) of schedule 1 to the GIPA Act.

7. On 16 September 2011, we received Mr Law's request for external review of Council's decision, which is a reviewable decision under section 80(d) of the GIPA Act.

8. As part of our review process, we have:

- a. discussed this review with Mr Law and Council;
- b. requested and received submissions from Council; and
- c. reviewed an unredacted copy of the Report.

9. Our report addresses the following issue:

- a. whether Council correctly applied clause 5 of schedule 1 to the GIPA Act.

## **B Conclusive presumption of overriding public interest against disclosure**

10. If information falls within the scope of one of the clauses of schedule 1 to the GIPA Act, then it is conclusively presumed that it is not in the public interest to release this information. This means that when an agency identifies that information is of a kind listed under any of the clauses of schedule 1 to the GIPA Act, the agency is not required to balance the public interest considerations for and against disclosure before refusing access to the information.

### **Legal professional privilege - schedule 1 clause 5**

11. Clause 5(1) of schedule 1 to the GIPA Act states that it is conclusively presumed that there is an overriding public interest against disclosure of information:

that would be privileged from production in legal proceedings on the ground of client legal privilege (legal professional privilege), unless the person in whose favour the privilege exists has waived the privilege.

12. This means that in order for an agency to rely on clause 5 of schedule 1 to the GIPA Act, the information must be of a kind that would not be required to be disclosed in legal proceedings in NSW because it is information that attracts legal professional privilege and the agency has not waived, either expressly or impliedly, that privilege.
13. Also, under clause 5(2) of schedule 1 to the GIPA Act, an agency must consider whether it is appropriate to waive privilege. An agency's decision about whether it will waive privilege in order to disclose the information requested in an access application is not a reviewable decision under the GIPA Act. However, if privilege has previously been waived, either expressly or impliedly, by an agency, then clause 5 of schedule 1 to the GIPA Act will not apply.

### **What is legal professional privilege?**

14. Legal professional privilege protects confidential communications between a lawyer and a client made for the dominant purpose of the lawyer providing legal advice or professional legal services to the client or for use in current or anticipated litigation.
15. The test in relation to legal professional privilege under clause 5 of schedule 1 to the GIPA Act is the test in the *Evidence Act 1995* (NSW) (**Evidence Act**). There are two main categories of client legal privilege under the Evidence Act:
  - a. privilege in relation to legal advice; and
  - b. privilege in relation to litigation.
16. Under sections 118 and 119 of the Evidence Act, the essential elements of demonstrating this privilege are:
  - a. the existence of a client and lawyer relationship;
  - b. the confidential nature of the communication or document; and
  - c. the communication or document was brought into existence for the dominant purpose of either:
    - i. enabling the client to obtain, or the lawyer to give, legal advice or provide legal services; or
    - ii. for use in existing or anticipated litigation.
17. The existence and maintenance of privilege must always be considered in light of all the facts and circumstances that apply to the information.
18. In Council's notice of decision, Council claimed that the Report is the subject of legal professional privilege and as such, there is a conclusive presumption of an overriding public interest against disclosure of the Report under clause 5 of schedule 1 to the GIPA Act.

19. In order for legal professional privilege to attach to the Report, each element of legal professional privilege must be satisfied. The issues to be considered in this matter are:
  - a. whether the Report was prepared for the dominant purpose of legal advice or legal services or for use in existing or anticipated litigation; and
  - b. if the Report is subject to legal professional privilege, whether that privilege was waived, either expressly or impliedly, by Council or [the consultant] before the access application was received.

### **Dominant purpose**

20. Whether legal professional privilege attaches to information depends on the purpose for which the communication in the document was created. In accordance with the 'dominant purpose' test, if information contained in a record held by a government agency has been brought into existence for more than one purpose, the information contained in that record will only be privileged if the main purpose of its creation was to obtain legal advice or services or for use in current or anticipated litigation. Therefore, it is the purpose of the creation of the record containing the information, not the content of the record, that must be considered. For example, a report produced for the dominant purpose of obtaining legal advice but which also contains an evaluation of a particular procedure will be privileged. However, if a report was created primarily to evaluate particular internal procedures of an organisation, the report is not likely to be privileged.
21. In this case, the issue is whether the Report was created for the dominant purpose of providing legal advice or legal services to Council or for use in existing or anticipated litigation.
22. The purpose for which a document is created is a question of fact which must be determined in light of all the facts and circumstances.
23. The onus is on Council to prove that clause 5 of schedule 1 to the GIPA Act applies to the Report under section 97 of the GIPA Act. The following chronology provided to us by Council is relevant to understand the purpose for which the Report came into existence:

Council accepted a tender from Raymond & Susan Law (**Law**) at its ordinary meeting on 15 June 2009 (**June Council Meeting**).

On 17 June 2009, Council received a written complaint from an unsuccessful tenderer...regarding the Council's decision to accept the tender of Law.

As its ordinary meeting on 16 November 2009 Council resolved to rescind its decision at the June Council Meeting to accept the tender of Law and to decline to accept any of the tenders.

In January 2010 Council received a letter from [lawyers] representing Law seeking relief from the Council and threatening legal proceedings against Council.

Legal advice was subsequently obtained by Council in relation to the claim by [the lawyers].

Council then affirmed that a contract with Law had been formed as a result of the June Council Meeting, at its ordinary meeting on 19 July 2010.

24. In *AWB Ltd v Cole No. 5 [2006] FCA 1234*, Justice Young held that professional communications between AWB and its lawyers concerning internal and external investigations were capable of attracting legal professional privilege in circumstances where they were part of a “continuum” of advice provided to AWB by its lawyers (at [57]). Justice Young held that factual investigations by lawyers cannot be separated from the ultimate advice given by lawyers as a result of their factual investigations. His Honour accepted the lawyers’ retainers as evidence of the scope of the professional relationship, and the lawyers’ understanding that he or she was giving legal advice.
25. Council, in its letter to us of 2 November 2011, outlined that in response to the legal action threatened by [the lawyers], Council sought and received legal advice which led Council to affirm that a contract with Mr Law had been formed. In light of Council having received legal advice regarding anticipated litigation by Mr Law, it appears that Council then engaged [a consultant] to conduct the investigation into Council’s tender process. We have not, however, reviewed the terms of engagement of, or instructions to, [the consultant].
26. Mr Law submitted to us, among other things, that the Report was prepared for the dominant purpose of investigating and clarifying the conduct of staff and the processes they used not to seek legal advice and not for the purpose of litigation.
27. In line with Mr Law’s submission, we have identified that there are multiple purposes for which Council required the Report. We are not entirely satisfied that the dominant purpose of the Report was for obtaining legal advice or and/or for use in anticipated litigation. However, as we are unable to test the evidence provided to us by Council and Mr Law, we cannot definitively state whether the Report is the subject of legal professional privilege, and as such whether clause 5 of schedule 1 to the GIPA Act applies.

### **Waiver of privilege**

28. In its notice of decision, Council advised that as required under clause 5(2) of schedule 1 to the GIPA Act, it had considered whether in the circumstances of this matter it is appropriate to waive privilege. Council decided not to waive privilege over the Report. An agency’s decision not to waive privilege is not a reviewable decision under the GIPA Act.
29. However, in light of submissions made to us by Mr Law, if the Report is subject to legal professional privilege, then the issue arises whether privilege over the Report has previously been waived by Council and/or [the consultant].
30. Even if the Report was privileged, privilege will be lost if there has been a waiver of that privilege, either express or implied, and clause 5 to schedule 1 of the GIPA Act will not apply.
31. Section 122 of the Evidence Act provides that privilege will be lost if:

- (a) the client or party knowingly and voluntarily disclosed the substance of the evidence to another person; or
  - (b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.
32. Mr Law submitted to us, among other things, that any privilege attached to the Report had been waived by Council because:
- ...on a number of occasions we were informed by both [the consultant] and the General Manager of some of the content in the report, such as:
- The report was very favourable toward us
  - We had not received natural justice
  - The staff members involved had a disproportionate amount of communication with the complainant
  - [The consultant] agreed with the findings of the Barrister's report (March/April 2010)
  - That the report commissioned by staff as part of their process was wrong
  - That Council had received incorrect legal advice
  - That a third person was also to be held accountable
  - That the tendering process was flawed
  - That the reason for staff behaviours was not due to corrupt conduct but rather due to a level of incompetence and/or a lack of knowledge
33. In this case, we are unable to test whether or not privilege in the Report (if it is privileged) has been waived.

### **Our recommendations**

34. In our view, Council has made valid arguments regarding the applicability of clause 5 of schedule 1 to the Report. However, based on the evidence submitted to us, we cannot definitively state whether the Report attracts legal professional privilege because we are not entirely satisfied that the dominant purpose for the creation of the information contained within the Report was for Council to obtain legal advice and/or for use in litigation. We are unable to test the evidence that has been provided to us by the parties, and as such we can neither uphold or recommend against Council's decision that there is a conclusive presumption of an overriding public interest against disclosure of the Report under clause 5(1) of schedule 1 of the GIPA Act.
35. Should Mr Law wish to test whether legal professional privilege applies to the Report, or whether privilege has been waived, Mr Law may apply to the Administrative Decisions Tribunal for a review of Council's decision that there is a conclusive presumption of an overriding public interest against disclosure of the Report under clause 5(1) to schedule 1 of the GIPA Act.

## Review rights

36. Our recommendations are not binding and are not reviewable under the GIPA Act. However a person who is dissatisfied with a reviewable decision of an agency may apply to the Administrative Decisions Tribunal (**ADT**) for a review of that decision.
37. If Mr Law is aggrieved by Council's decision, Mr Law may apply to the ADT for a review of Council's decision.
38. An application for ADT review can be made up to 20 working days from the date of this report. After this date, the ADT can only review the decision if it agrees to extend this deadline. The ADT's contact details are:

Administrative Decisions Tribunal  
Level 10, 86 Goulburn Street,  
Sydney, NSW, 2000  
Telephone (02) 9377 5711  
Facsimile (02) 9377 5723  
TTY (02) 9377 5859  
Internet <http://www.lawlink.nsw.gov.au/adt>  
e-mail [ag\\_adt@agd.nsw.gov.au](mailto:ag_adt@agd.nsw.gov.au)

## Closing our file

39. If you have any questions about this report please contact the Information and Privacy Commission on 1800 472 679.

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