

Request for advice given by Queen's Counsel

Legislation	Official Information Act 1982, s 9(2)(h)
Agency	Minister of Justice
Ombudsman	Sir Brian Elwood
Case number(s)	W41915
Date	August 1999

Request for advice given by Queen's Counsel—whether information subject to legal professional privilege—purpose for which information was brought into existence—whether other considerations warranting disclosure in the public interest

This investigation involved a request to the Minister of Justice for a copy of certain advice that had been provided by a Queen's Counsel commissioned by the Minister to make a 'factual inquiry' into certain matters and to advise whether grounds for taking action under specified legislation existed.

The principal issue revolved around whether the advice given was a communication from a professional legal adviser retained in that capacity for the purpose of providing confidential legal advice. It could be argued that Counsel had been commissioned because of his specialist investigative skills and to provide executive advice.

In the former case, legal professional privilege would apply. In the latter, it would not. This is because the test for whether privilege applies to communications between solicitor and client relates to the purpose, and not simply the fact, of the document having been produced by a professional legal adviser.

A succinct statement is given in *Re Merit Finance and Investment Group* [1993] 1 NZLR 152, where the Court after a review of the conflicting authorities states:

The essential questions in any consideration of whether or not a document is privileged is, was it brought into existence for the purpose of 'getting or giving confidential legal advice or assistance'?

Because the correspondence from the Minister and the response by Queen's Counsel had both referred to a 'factual inquiry', it was necessary not only to inspect the information at issue, but

also the relevant correspondence, as well as to arrange for consultation to be undertaken with the Queen's Counsel concerned. It was concluded that the advice from the Queen's Counsel was brought into existence for the purposes of or in the course of professional communications between solicitor and client for the purpose of getting or giving confidential legal advice. Accordingly, the information was subject to legal professional privilege.

The view was formed that it was necessary to withhold the information in terms of section 9(2)(h). No other considerations were identified in terms of section 9(1) that outweighed that need.

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