ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 19 OF 2009

BETWEEN

YUNG MEI-CHUN, JESSIE — Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA — Respondent

Coram: Administrative Appeals Board

Date of Hearing: 4 May 2010

Date of Last Submission after the Hearing: 8 October 2010

Date of Handing down Written Decision with Reasons: 12 January 2011

DECISION

Andrew Mak (giving the majority decision) :

1. This is an appeal that concerns the question of the extent of legal professional privilege ("**LPP**") which may be exempted from the provisions of Data Principle 6 and Section 18(1)(b) of the Personal Data (Privacy)

Ordinance Cap 486 ("**Ordinance**"). The appeal is against the decision of the Privacy Commissioner for Personal Data dated 22 May 2009 declining to issue an enforcement notice against Merrill Lynch (Asia Pacific) Limited ("**ML**").

2. The Appellant had before the hearing objected to ML, the party bound by this decision, to be represented by a solicitor. This Board has decided that such objection should not be upheld, for the simple reason that a party bound (by this decision) is treated as a party to this appeal. A party has the right to have legal representation in this type of proceedings and it is only just to do so. Section 18 of the Administrative Appeals Board Ordinance also gives the right of a party to be legally represented.

Background

3. The Appellant was a previous employee of ML. She signed a data collection statement dated 14 May 2007[1] stating that she would have the right to have access to and correction of her personal data as set out in the Ordinance.

4. On 24 September 2007, the Appellant terminated her employment with ML in writing.

5. The Appellant on the same day (24 September 2007) made a data access request ("**DAR**"), by way of email[2], for photocopies of "*all personal data and information maintained in personal files, including report of the recent OGC review* ("**OGC Report**")". "OGC" refers to the Office of General Counsel of ML.

6. By letter dated 2 November 2007[3], ML sent the Appellant a bundle of documents and said it was "*all personal data and information maintained in file*

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[1] Appeal Bundle pages 151-152.

[2] Appeal Bundle page 212. That email was issued at around 9:47 am and addressed to one Oh, Eng Lock and copied to Victor Tan, Jack Li and Octavia Lui, with the subject title "Recent OGC Review". There was another request which related to destruction of certain data collected on 17 August 2007. This matter is not a dispute in this appeal.

[3] Appeal Bundle page 213

as at 24 September 2007".

7. ML further said that the OGC Report was "*prepared by our counsel for the purpose of giving legal advice and therefore, exempt under Section 60 of the PDPO* from *provision in answer to a data access request*".

8. The Appellant disagreed with ML's response to her DAR.

9. She wrote to the Respondent on about 13 November 2007[4] making a complaint against ML. She alleged that the OGC Report was part of her personal and private information and that ML's refusal to provide her with a copy of the OGC review report constituted a "non-compliance of DPP6". Besides, she did not agree that the OGC Report was privileged. This complaint forms the main dispute in the present appeal.

10. Subsequently, on 19 November 2007 and 22 November 2007 respectively, the Appellant by letter (and entitled 2nd Letter in each case)[5] to Mr Rory Buchanan of the Human Resources Department of ML, alleged that a Mr Victor Tan had sent an email to give instructions to effect certain foreign exchange adjustment and she would seek an order from the Labour Tribunal for specific discovery of that email. That email is referred to as Tan's Email below.

11. On about 3 December 2007[6], the Appellant by letter to the Respondent (the "**Letter**") complained that ML, in addition to failing to provide the OGC report, had also failed to include the following emails (collectively refer as the "**Emails**") : -

(a) "*email sent out by Victor Tan on 24 September 2007 regarding the foreign exchange salary adjustments*" ("**Tan's Email**") and

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[4] Appeal Bundle pages 146-148
[5] Appeal Bundle pages 160-161
[6] Appeal Bundle pages 158-159

(b) *"all emails exchanged between the following parties since 17 August 2007 (and) 24 September 2007 regarding the unfair collection of my personal and private legal documents (collectively referred as the "**Email Correspondence**"):-*

i. Edmond Lau;
ii. Oh Eng Lock;
iii. Jennifer Rogers (head of compliance asia pacific);
iv. Victor Tan;
v. Jasmine Tee;
vi. Tony Poon;
vii. Jack Li;
viii. Octavia Lui
ix. Bonnie Hui; and
x. Credit agent – First Advantage".

12. The Respondent carried out an investigation against ML for its suspected breach of the Ordinance. In the course of the investigation, the officers of the Respondent inspected the OGC Report at ML's solicitors' office. Having completed the investigation, the Respondent found that ML had not contravened the requirement of section 19 of the Ordinance by failing to provide the Appellant with a copy of the OGC Report and the Emails.

13. The provisions of the Ordinance that are of relevance to the present appeal are set out below.

14. Section 18(1) of the Ordinance provides that: -

"An individual … may make a request –

(a) to be informed by a data user whether the data user holds personal data of which the individual is the data subject;

(b) if the data user holds such data, to be supplied by the data user with a copy of such data."

15. Section 19(1) of the Ordinance provides that " *a data user shall comply with a data access request not later than 40 days after receiving the request.*"

16. Section 20(3)(f) of the Ordinance provides that a data user may refuse to comply with a data access request if: -

> *"in any other case, compliance with the request may for the time being be refused under this Ordinance, whether by virtue of an exemption under Part VIII or otherwise."*

17. Section 21(1) of the Ordinance provides that: -

> *"Subject to subsection (2), a data user who pursuant to section 20 refuses to comply with a data access request shall, as soon as practicable but, in any case, not later than 40 days after receiving the request, by notice in writing inform the requestor-*
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> *(a) of the refusal;*
> *(b) subject to subsection (2), of the reasons for the refusal; and*
> *(c) where section 20(3)(d) is applicable, of the name and address of the other data user concerned."*

18. Section 60 in Part VIII of the Ordinance, the important provision in this appeal, provides that: -

> *"Personal data are exempt from the provisions of data protection principle 6 and section 18(1)(b) if the data consist of information in respect of which* ***a claim to legal professional privilege could be maintained in law.***"

19. Data Principle 6 under Schedule 1 of the Ordinance provides that :-

> *"Principle 6-access to personal data*

A data subject shall be entitled to

(a) ascertain whether a data user holds personal data of which he is the data subject;

(b) request access to personal data-

i. within a reasonable time;

ii. at a fee, if any, that is not excessive;

iii. in a reasonable manner and

iv. in a form that is intelligible

(c) be given reasons if a request referred to in paragraph (b) is refused;

(d) object to a refusal referred to in paragraph (c);

(e) request the correction of personal data;

(f) be given reasons if a request referred to in paragraph (e) is refused; and

(g) object to a refusal referred to in paragraph (f)."

20. The Appellant's appeal against the Respondent's finding of no contravention of the Ordinance on the part of ML was based on a number of grounds. These are discussed below.

DAR for *"all personal data and information maintained in (her) personal files"*

21. Firstly, in the DAR, the Appellant requested ML to provide copies of *"all personal data and information maintained in (her) personal files, including the report of the recent OGC review"*. However, the Respondent noted that the Appellant did not specify the Emails in her DAR.

22. We agree that this request would have been too general in the context of this case.

23. We note that the Appellant had merely assumed ML had actually kept files containing all the documents relating to her or her personal data.

24. This assumption in the case of ML would appear to be far-fetched. Normally one would have expected one or more personal files be kept for every employee. However it does not mean every document relating to a particular employee must be actually placed inside his or her personal file(s). In the case of computerised storage system, it is not uncommon that folders containing files of personal data are simply scattered around.

25. Indeed it was not explained to this Board by the Appellant of the actual nature of *"personal file(s)"* kept by ML. Human resources department (or its equivalent) might only keep personal files of documents relating to the terms of employment, such as employment contract, leave and overtime record. If so, daily operational documents generated by or related to the particular employee would normally not be placed under the authority of the human resources department.

26. At the hearing the Appellant admitted that she had no idea of the filing system of ML. She did not explain why she assumed the Human Resources Department would always have kept all the documents relating to her personal data, other than those relating to her employment contract. We therefore had no sufficient evidence as to what the personal files the Appellant was actually referring to. Given the context that the dispute between the Appellant and ML was related to her employment, we would accord *"personal files"* its normal meaning, namely, files that were normally kept by the human resources department or its equivalent regarding the Appellant's appointment, terms of her employment, and termination of such employment.

27. We accepted that the Appellant's complaint on the Emails in her letter dated 3 December 2007 was outside the scope of her initial request and complaint made on 24 September 2007.

28. The complainant would have to make a proper request but the question remains as to whether it is always the burden of an employee to identify precisely what he or she requires from her employer.

29. We were referred to a number of previous decisions of the Administrative Appeals Board ("**AAB**").

30. In AAB Appeal No. 24/2001 the data access request was for "*all data held by the data user*". This Board (differently constituted) held that "*it is for the data requestor to identify the data he or she requires and not for the data user to* [do a thorough search and] *prepare a full or consolidated list for the data requestor to pick and choose*".

31. More elaboration should be made here, as the Appellant referred to the form of enforcement notice in AAB No. 24/2001 and urged this Board to follow a similar approach.

32. First of all, each case has to be decided on its own facts. In AAB Appeal No. 24/2001, the Respondent had already conducted thorough investigation and issued an enforcement notice to which the data user did not take issue. The requests made were not confined to those in the "personal files" and the first request was for access to "my personal data both from the Personnel Office and the Department of Nursing and Health Services through the Personnel Office". In the second request, the request was for access to "all data as defined by the Ordinance, which is now held by the data user".

33. As said, the data user appellant in AAB Appeal No. 24/2001 withdrew its objection on the enforcement notice and confined the appeal on principle, namely, the requirement of a thorough search to be conducted by the data user appellant and the compilation of a consolidated list for the purpose of complying with a data access request seeking generally for all personal data. This Board (differently constituted) then decided on the broad principle that it is for the data requestor to identify the data he or she

requires and not for the data user to prepare a full or consolidated list for the data requestor to pick and choose.

34. The Appellant had not referred to and had apparently misunderstood how the enforcement notice in AAB Appeal No. 24/2001 had come about.

35. In AAB Appeal No. 29/2005, this Board (again differently constituted) made the following observation concerning data access request: -

> "20.*以上條例的規定給予上訴人提出查閱資料要求的權利，但上訴人必須在指定表格清楚表明他要查閱的資料。查閱要求並不賦予上訴人權利瀏覽恒生持有的檔案，尋找與他有關的個人資料。...本委員會認爲，只提供查閱文件的範圍是不足夠的，上訴人必須確實表明他要求查閱的是那些資料，否則恒生實在無法依從他的要求。*"
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> (20.*The above provisions of the Ordinance give the appellant the right to make a data access request. However, the appellant* ***must point out clearly what data he required*** *on the prescribed form. A data access request does not grant the appellant right to browse the files held by Hang Seng and search for the personal data relating to him... This Board is of the view that providing merely the scope of the requested document is not sufficient. The appellant must specify exactly what data he requested, otherwise Hang Seng would not be able to comply with his request.*)

36. We agree that an employer is normally not expected to provide services to its employees by keeping all the documents of its employees in a single file. Otherwise this could cause more problems such as leakage of business confidential information. Absent any evidence of bad faith on the part of the management in concealing or tampering with documents, an employer has no duty to compile a personal file when an employee left. All that was required was the making of diligent effort in the light of the scope of the request. Common sense must apply in each case and under proper context.

37. Applying the above approach to the present appeal, we agree that ML, as a data user, had no general duty to prepare a full or consolidated list of documents for the Appellant to consider what she wants to have. To rule otherwise would mean there could be a duty of the employer more onerous than a party to make discovery in litigation. ML was only required to read from the DAR to locate the personal data she requested. If the information was not sufficient for ML to locate the relevant personal data, ML could refuse the DAR pursuant to section 20(3)(b) of the Ordinance.

38. We note that failure to comply with a data access request is a criminal offence under Section 19(1) of the Ordinance. It was thus argued that the data request should be construed strictly in favour of the data user. This was a powerful argument. However, we would prefer not to express any view on this approach. We would expect in other cases, especially in small size companies, another approach may (again depending on its context) be different. There would have to be a reasonable balance between the requirement of a reasonably precise and clear request on the one hand, and prevention of obstructive employers on the other hand.

39. We believe that a plain reading of the request, without more, ML was quite entitled to leave out the (missing) Emails which the Appellant later complained, unless it is proved that the Emails were actually contained in the personal files of the Appellant with ML in the first place.

40. The reason was that in complying with the DAR, ML had to use its own common sense judgment to identify the documents that came within the scope of the DAR. It is not in dispute that ML did within the 40 days statutory limit supply with the Appellant a bundle of documents that qualified as *"all personal data and information maintained in the Appellant's personal files"*, on 2 November 2007.

41. We now come to specific categories of documents under complaint.

Tan's Email

42. Regarding Tan's Email, ML in its reply letter to the Appellant dated 19 December 2007[7] specified that Tan did not give any instruction to effect foreign exchange adjustment to the Appellant's salary. Despite that, ML in that letter provided to the Appellant copies of the email of 24 September 2007 from Mr. Victor Tan to the Appellant but stated expressly that the documents did not fall within the scope of the Appellant's DAR.

43. The Appellant submitted that Tan's Emails are confirmation that Tan had agreed to the foreign exchange adjustments and these are also salary related. We have read Tan's Email on 24 September 2007 (around 6:44 pm)[8] and consider that it probably should have been put into the personal file of the Appellant. This was not done.

44. However, it appears that Tan's Email could be looked at slightly differently and was probably an isolated incident with no deliberate intention for concealment. Unless there is evidence that there was deliberate withholding of the Tan's Email from the Appellant, we believe the Respondent does not have to issue an enforcement notice.

45. The Appellant referred to the disclosure by ML of copies of Tan's email of 24 September 2007 is by itself evidence that ML had kept these emails in her personal file. We do not agree. We appreciate the Appellant might have grievance against her former employer but to assume ML had deliberately withheld the Tan's Email does appear to us to be rather far fetching.

Email Correspondence

46. Regarding the Email Correspondence, ML replied to the Appellant that they did not hold or control any documents regarding the "*unfair*

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[7] Appeal Bundle page 226

[8] at Appeal Bundle page 196

collection" of the Appellant's "*personal and private legal documents*". We found such request which would, if any disclosure of documents were forth coming, also extract an admission of "*unfair(ness)*" on the part of ML. It was no surprise that ML simply answered in the negative. By then the relationship between the Appellant and ML could not be considered to be amicable, and ML's guarded attitude is understandable.

47. The other reason for our decision not to accept bad faith on the part of ML in dealing with the Appellant's request is this. At this stage we believe the Appellant did not provide sufficient evidence to show that Tan's Email and the Email Correspondence were deliberately excluded from her personal files out of bad faith, on the part of ML.

48. We note that the Appellant had repeatedly complained that there might be dishonesty or bad faith on the part of ML. A reason given was that ML had kept back up copies of all emails.

49. With respect, we believe that even if there was a practice of keeping backup copies of all emails, including that related to the Appellant, it does not mean that failure to retrieve all those emails specifically related to the Appellant is necessarily deliberate concealment.

50. If back up copies were kept for every email it means a large volume of emails must have been kept in the files of ML. If one has to impart bad faith on the part of ML on such basis one has to be very skeptical and starts on an assumption that the ML management had a course of conduct of bad faith towards its staff, whether such course of conduct would include the Appellant. This was not so alleged in the present case and no factual foundation has been advanced to support such allegation.

51. We therefore hold that the Appellant's complaint of bad faith about ML's failure to supply both Tan's Email and the Email Correspondence in response to her DAR could not be established.

52. In this regard, we note that the Respondent had relied on the decision in AAB Appeal No. 29/2005 that: -

> *"21.恒生於 2005 年 2 月 15 日已按照第 18(1)條及第 19 條的規定就上訴人的查閱資料要求，回覆上訴人，告知他[資料使用者]並不持有上訴人要求查閱的資料。恒生是在上訴人 2005 年 1 月 24 日提出查閱要求後 40 日內回覆上訴人。上訴人沒有提出任何證據，而本案資料也沒有任何資料，顯示恒生所稱該銀行不持有上訴人要求查閱的資料不屬實。*
> *22.本委員會的結論是恒生已按照私隱條例的規定，處理上訴人的查閱資料要求。"*
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> *(21. On 15 February 2005, Hang Seng, in compliance with the requirements under sections 18(1) and 19, replied to the Appellant that in relation to his data access request Hang Seng did not possess the data which the Appellant requested for. Hang Seng replied to the Appellant within 40 days from the 24 January 2005 when the Appellant made the data access request. The Appellant did not provide any evidence and neither was there any information in this case to show that it was incorrect for Hang Seng to say that they did not possess the data which the Appellant requested for.*
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> *22. The conclusion from this Board is that Hang Seng had complied the requirements under the Ordinance to handle the Appellant's data access request.)*

53. We agree that the facts of AAB No. 29/2005 are not necessarily on all fours with the present case. However, the principle is the same. If there is no or no sufficient evidence of incorrectness of the suggestion, and in the absence of sufficient evidence of bad faith, this Board will not easily hold ML to be in breach of the statutory requirement of a data request.

OGC Report

54. ML's refusal to provide the Appellant with a copy of the OGC Report was because ML said that it is a document evidencing confidential and privileged communications in respect of which LPP could be maintained in law and it is therefore exempt from the provisions of Data Protection Principle 6 and section 18(1)(b) under Section 60 of the Ordinance.

55. ML further explained that the OGC Report was prepared by Mr. Edmund Lau, who was a qualified and practising Hong Kong solicitor employed by ML on a full time basis, apparently at the time of its preparation. ML said that the OGC Report contained a summary of the legal advice from the Office of General Counsel of ML to the management of ML.

56. The Respondent's legal representative, when asked at the hearing, did not insist that the result of the inspection by the Respondent's officers of the OGC Report at the office of the solicitors for ML was necessary sufficient. We therefore asked for inspection of the OGC Report. ML had agreed to comply with this request.

57. In any case should we have to decide the matter we would have ruled that we have the power to inspect the OGC Report for the specific purpose of deciding whether LPP was or can be attached, while allowing the party claiming privilege expressly reserving its rights to claim such privilege before this Board made a decision : Section 21(b) of the Administrative Appeals Board Ordinance Cap 442 provides that the Board may receive and consider any material, whether by way of oral evidence, written statements, documents or otherwise, whether or not such material would be admissible in evidence in civil or criminal proceedings and Section 21(f) provides that the Board may determine the manner in which the material under Section 21(b) shall be received. However, we do not have to decide in the present case whether if ML refuses we would have power to order its inspection before making up our mind whether the OGC Report was indeed protected by LPP. This question did not arise in this appeal.

58. We also note that ML had expressly reserved their rights to claim

privilege and we do not see any factual or legal basis that there was any waiver on the part of ML of its rights.

59. The OGC Report provided to this Board was a 92 pages and paginated document. The main body of the OGC Report was itself expressly marked "Privileged & Confidential Communication From Counsel" and in the form of a 3 pages email (paginated as pages 1 to 3) from Edmund Lau, Vice President of the Investigation & Litigation Counsel, Asia Pacific Region, Office of General Counsel, Merrill Lynch (Asia Pacific) Limited. A number of documents are attached to the main body of the OGC Report.

60. Upon perusal of the OGC Report, there is no doubt in our mind that a claim for LPP could be made that the main body of the OGC Report, namely pages 1 to 3.

In House Lawyer

61. First of all, it is well established that in-house lawyers enjoy the same LPP in English law as external lawyers. See for example *Alfred Crompton Amusement Machines v Customs & Excise Commissioners (No2)* [1972] 2 QB 102. See also paragraph 24/5/11 Hong Kong Civil Procedure, where it was stated that LPP extends to communications with a solicitor in the whole-time service of a party such as commercial enterprise, provided that such communication relates to legal as distinct from administrative matters.

62. In this regard we note that under European Union Competition Law, communication between in-house lawyers and management are not covered by LPP. One of the reasons was that there could be a problem with independence with in-house lawyers. This situation is different from the present case as competition law was directed at investigation by the European Union on commercial activity vis-à-vis other competition or competitors. The independence of the in house lawyers was clearly considered to be a problem in that context. In the present case, not only we are not concerned with European competition law, we do not think there is

any real problem of independence of in house counsel.

63. Secondly, we note that heretheto not only Hong Kong still does not have a statutory competition law regime covering all trades, the right to confidential legal advice is a right which is protected by Article 35 of the Basic Law, and protected even where such advice does not bear on any existing or contemplated court proceedings. Legal advice privilege is protected as a category of LPP. It is not a mere rule of evidence.

"Attachments" ?

64. The only matter that caused us concern is the scope of legal advice privilege. The question is whether the "attachments" to the main body of the report should be separately considered and so there may or may not be privilege attached, **or** should they be considered as just part of the whole report so that privilege would automatically attach? In other words, should the attachments be considered part of the confidential communication between ML and its internal legal adviser?

65. In *Akai Holdings Ltd (In Compulsory Liquidation) v Ernst & Young*, 30 July 2008, HCCL 29/2004 Paragraph 22, Kwan J (as she then was) referred to the following categories of documents where legal advice privilege applies **only** to

(a) communications between a client and his legal adviser,

(b) documents evidencing such communications, and to

(c) documents that were intended to be such communications even if not in fact communicated.

66. It was argued in the Court of Final Appeal that this was too narrow a scope regarding such privilege. Kwan J (as she then was)'s decision was left open in the Court of Appeal and the Court of Final Appeal.

67. See Paragraphs 72 and 103 of *Akai Holdings Ltd (In Compulsory Liquidation) v Ernst & Young* (2009) 12 HKCFAR 649 per Ribeiro PJ :-

> *"72. In dismissing Akai's claim to legal advice privilege on the law as she viewed it, Kwan J did so in a single paragraph of her judgment (para.22) in which she said this :*
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> *" Legal advice privilege has no application to the transcripts of examination, as they are clearly not communications between the client and the lawyer seeking or giving legal advice. This category of privilege applies only to communications between a client and his legal adviser, to documents evidencing such communications, and to documents that were intended to be such communications even if not in fact communicated.* ***The privilege does not extend to preparatory materials, even if prepared for the purpose of being shown to the lawyer or prepared at the lawyer's request, and even if subsequently sent to the lawyer*** *(Three Rivers District Council v. Bank of England (No. 5) [2003] QB 1556 at 1562D to 1563C, 1575H, 1577C to E, 1578E to 1579B and 1580H, paras. 4 to 6, 21, 24, 26 and 31; leave to appeal was refused by the House of Lords, see 1583G; see also Three Rivers District Council v. Bank of England (No. 6), supra. At 642C to 643F, paras.10 to 13)."*
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> *Mr Kosmin says that the approach to legal advice privilege adopted by the English Court of Appeal in Three Rivers District Council v. Bank of England (No.5) [2003] QB 1556 is too narrow on any view. And, he says, Kwan J has taken that approach at its narrowest.*
> ...
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> *103.* ***No decision on legal advice privilege needed***
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> *So there is no need to decide the issue of legal advice privilege. The circumstances do not preclude a decision by us on the issue. But it is preferable not to decide it since there is no need to do so and we do not have the opinion of the Court of Appeal on it. Suffice it to say this for any future case that requires a decision on a legal advice privilege issue. Legal advice privilege, being a category of legal professional privilege, is of course to be approached in a manner appropriate to a fundamental right."*

68. Legal advice privilege thus does not extend to preparatory materials, even if prepared for the purpose of being shown to the lawyer or prepared at the lawyer's request, and even if subsequently sent to the lawyer.

69. *Akai* involved the transcripts and notes of a series of private examinations and interviews conducted pursuant to or under threat of s.221 of the Companies Ordinance, Cap.32. The contest between the parties was whether those transcripts and notes are open to inspection on discovery *in the ordinary civil litigation* in which they confront each other as adversaries. Issues as to confidentiality and LPP are involved.

70. In our view there is no distinction between legal advice privilege claimed or that can be claimed in either court proceedings or in these proceedings under Section 60 of the Personal Data (Privacy) Ordinance Cap 486.

71. In this regard, we would also refer to certain of the general principles of LPP which was set out in the recent case of *Prudential plc and another) v Special Commissioner of Income Tax and another* [2010] 3 WLR 1042 (which was affirmed on appeal on other grounds) :

> (1) LPP is a fundamental right at common law founded on a conclusion that one aspect of the public interest in the administration of justice demands it.
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> (2) It has been classified under two sub-headings, namely legal advice privilege and litigation privilege, which are integral parts of a single privilege or right.
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> (3) It has been decided that the right to claim LPP is a necessary corollary of the right of any person to obtain skilled advice about the law, or when litigation is contemplated to prepare his case, on the basis that what is discussed will never be revealed without his consent. It is thus much more than a rule of evidence and it is a right

of the client and not the adviser.

(4) It is a right that can be claimed outside the context of litigation and thus, for example, in response to a notice served by an investigator, unless the right has been overridden expressly or by necessary implication by Parliament, or it is waived.

(5) There are limited exceptions to the right to LPP.

(6) The right covers not only the advice given but also the information provided by the client in the relevant legal context.

(7) LPP is not, or is no longer, based on any balancing of competing public interests. This is because the courts have for many years regarded LPP as a right that reflects, or gives effect to, the inevitable balance between (a) the public interests against disclosure to promote the administration of justice, and (b) the competing public interests within, and outside, the public interest in promoting the administration of justice that would favour disclosure. So it has been decided that in respect of material covered by LPP the balance must always come down in favour of giving the client the right to refuse disclosure unless Parliament has intervened.

(8) The path taken by the common law in respect of material covered by LPP is therefore different to that taken in respect of other communications where it has been said that candour and confidentiality are essential, necessary or important if an adviser is to be able to give advice and assistance on a properly and fully informed basis, or decision-makers are to be able to reach decisions on such a basis. See Charles J in *Prudential plc and another) v Special Commissioner of Income Tax and another* [2010] 3 WLR 1042 per Charles J at 1049A-C where His Lordship cited the example that the law on the disclosure of confidential communications with doctors, bankers and other professionals, and the law on public interest immunity (" PII"), have taken different paths to that on LPP. In such cases there is no right to refuse disclosure unless it is conferred by statute.

(9) In formulating the common law on LPP, on the one hand, and on

PII and confidentiality on the other, the courts have therefore given different weight and effect to competing aspects of the public interest relating to the proper administration of justice and other matters. In the case of LPP (as opposed to PII), the public interest against disclosure has been given predominance so as to create a right that is exercisable by the client when disclosure is sought for the purposes of litigation and for other purposes.

(10) An aspect of the proper administration of justice and other functions is the exercise of investigatory powers given to promote the public interests supporting the disclosure of information to assist in the proper performance of those functions. Here that function is the proper protection of personal data. But there are many others. In respect of those powers, the privilege against self-incrimination and the right to claim LPP can be expressly removed, modified or addressed by the legislature and if they are not questions can arise as to whether those rights have been removed or modified by necessary implication.

(11) The legal advice to which LPP applies is not confined to telling the client the law; it also includes advice as to what should prudently and sensibly be done in the relevant legal context.

72. Charles J in *Prudential plc and another) v Special Commissioner of Income Tax and another* [2010] 3 WLR 1042 also said that the predominance given to an aspect of the public interest against disclosure in promoting the administration of justice in respect of LPP has founded the following approaches being made or recognised in the cases:

(1) the right should not be undermined or qualified in respect of communications to which it applies because of its importance to the proper administration of justice;

(2) the right should not be extended to other communications because of the impact it has on the disclosure of relevant information and thus on a competing public interest relating to the administration of justice that courts and tribunals should have all relevant material before them; and

(3) the relationship between LPP and the duties of lawyers to the court (and this Board) and their clients in the context of the administration of justice is part of the background of LPP and its development.

73. Point (3) in some respects provides a check or balance in the system if and when an issue arises relating to the disclosure of relevant facts and matters known by the lawyer but which the client refuses to disclose. This can lead to conflict and a lawyer having to cease to act in circumstances which impliedly impart a clear message to the court or tribunal that relevant material has not been disclosed. This has a potential impact on the right of the client to insist on his right to claim LPP, and thus of maintaining the confidentiality of the communications covered by LPP. We have not heard of any difficulty on the part of the legal representatives of ML in this regard.

74. A key feature of the doctrine of LPP is that, to be protected, the communications must be confidential[9]. It has been noted that this characteristic serves as a limitation on the application of the privilege[10]. Thus, it has been decided that the entirety of a lawyer's file is not protected, with documents like trust account ledgers, timesheets, records of objectively observable facts or notes of public proceedings falling outside the doctrine[11]. In addition, privilege does not attach to evidence of transactions such as contracts or conveyances, even where they are provided to a lawyer for advice or for use in litigation[12].

75. We now turn to the question of copies.

76. Certain of the attachments in the OGC report are in our view copies

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[9] *Southern Equities Corporation Ltd v West Australian Government Holdings Ltd* (1993) 10 WAR 1, [22].

[10] R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 28

[11] See, eg, *Bennett v Chief Executive Officer of the Australian Customs Service* (2003) 37 AAR 8; *National Crime Authority v S* (1991) 29 FCR 203; *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475.

[12] *Baker v Campbell* (1983) 153 CLR 52, 86; R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 29.

of unprivileged documents. This was said to have created difficulties. See §3.72 of the 2007 Australian Law Reform Commission Report on "A Review of Legal Professional Privilege and Federal Investigatory Bodies".

77. The majority of the High Court in *Australian Federal Police v Propend Finance* (1997) 188 CLR 501 ("**Propend**") found that privilege could exist in copies of documents made for the purpose of seeking legal advice or pending litigation[13]. Where a copy is made in such circumstances the copy becomes a separate communication in its own right to which the dominant purpose test is applied. This rule therefore protects copies of unprivileged documents that become part of the lawyer's brief for litigation. The decision in *Propend* was based on the idea of protecting the lawyer's file or brief. Where a copy is produced for a 'privileged purpose'— for the purpose of providing legal advice or for litigation—then it should be accorded the protection of confidentiality, even if the original is unprivileged and could be obtained elsewhere.

78. If privilege was denied to a copy of an unprivileged document when the copy is produced solely for the purpose of seeking advice from a solicitor or counsel or for the purpose of use in pending, intended or reasonably apprehended litigation there would be a risk that the confidentiality of solicitor-client communications would be breached. The Australian Law Reform Commission recognised that the way would be open for the execution of search warrants by the emptying out of, and sifting through, solicitors' files and counsels' briefs. That would undermine the adversary system under which most litigation is conducted[14].

79. Similar authorities to *Propend* have however been criticised in England. In *Ventouris v Mountain*, Bingham LJ suggested that the rule was 'ripe for authoritative reconsideration'[15], on the basis that it was hard to justify why copies of documents should be treated any differently from the original.

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[13] *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 509

[14] *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 509. The decision in *Propend* was recently affirmed in *Barnes v Commissioner of Taxation* [2007] FCAFC 88 (22 August 2007).

[15] *Ventouris v Mountain* [1991] 1 WLR 607, 617-619.

80. In a South Australian case[16] prior to *Propend*, Debelle J stated that 'generally speaking, it would be absurd for the copy to be privileged while the original was not'. In the recent case of *Barnes v Commissioner of Taxation*[17], the Full Federal Court applied the principles in *Propend* and noted that the relevant point in time for consideration of whether privilege attached to a document (ie, when determining the purpose for which the copy is made) is when the document was created, not when it is communicated.

81. The Australian Law Reform Commission noted the Australian Taxation Office ("ATO") has submitted that the *Propend* decision has a potentially significant effect on its operations. As documents that are not privileged may become privileged if they are copied and meet the dominant purpose test, the ATO could be 'prevented from obtaining even basic and antecedent documents'. The ATO also pointed to difficulties of the application of *Propend* where the response to a notice was that the original of the document could not be found, as distinct from being destroyed, hence arguably the copy was still within the protection of privilege.

82. We recognised that the law should be clarified so that LPP in general does not apply to a copy of a document where privilege would not have attached to the original document.

83. In our view, Section 60 of the Ordinance should not and does not give a blanket claim to privilege to any pre-existing document obtained by a solicitor for purposes of litigation or legal advice.

84. We note that Dawson J[18] (in the minority) in *Propend* said:

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[16] *JN Taylor Holdings Ltd v Bond* (1991) 57 SASR 21, 34

[17] *Barnes v Commissioner of Taxation* [2007] FCAFC 88

[18] *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 520.

> *"legal professional privilege ... exists in order to preserve the confidential relationship between client and legal adviser, a relationship which is to be fostered and preserved for the better working of the legal system. However, that relationship is not impaired and the interests of justice are best served if the client or his legal adviser on his behalf is compelled to disclose a copy of the document when the original might be compelled without any ground for objection."*

85. In keeping with the approach to the rationale for LPP the Australian Law Reform Commission is of the view that any protection of copies of otherwise unprivileged documents should be limited to situations where the copies would disclose or lead to discovery of confidential advice.

86. We would respectfully agree with such qualification by the Australian Law Reform Commission of the need for protection of copies of unprivileged documents which were produced solely for the purpose of seeking advice from its in house lawyer is applicable in the present case.

87. In particular, we found that the UK authorities, including the *Brown v Bennett*, 2001 WL 1535398, 17 December 2001, Neuberger J (as he then was) that the principle is that **documents which are themselves not privileged can be disclosed by solicitors, unless such disclosure would, or might reasonably be anticipated to, cast light on the advice given by the solicitors or**, we would suggest, **the instructions given by or on behalf of the clients** :-

> *"That is a conclusion which I believe follows from a line of authority which goes back to Lyell v. Kennedy (No. 3) 27 Ch.D.1. The relevant effect of that case was economically explained by Lord Justice Bingham in Ventouris v. Mountain [1991] 1 W.L.R.607 at 615 E in these terms:*
> *"The ratio of the decision is, I think, that where the selection of documents which a solicitor has copied or assembled betrays the trend of the advice which he is giving the client the documents are privileged.*

Mr. Tomlinson for the plaintiff put this forward as an exception to what he claimed was the general rule, that non-privileged documents do not acquire privilege simply by being copied. If the ratio I have given is correct, the authority is consistent with the fundamental principle underlying the privilege."

In other words, as I see it, the principle is that documents which are themselves not privileged can be disclosed by solicitors, ***unless such disclosure would, or might reasonably be anticipated to, cast light on the advice given by the solicitors or, I would suggest, the instructions given by or on behalf of the clients.***

So far as more recent authorities are concerned, I refer first to the decision of the Divisional Court in R. v. Board of Inland Revenue, Ex parte Goldberg [1989] Q.B.267 . That case suggests that the principle in Lyell v. Kennedy (or explained in Ventouris [1991] 1 W.L.R.607 at 615E) does not apply to a copy of an unprivileged document, if that copy was made for the purpose of getting legal advice or instructing counsel (see [1989] Q.B.271 A and 278 G to H). However, the views expressed by the Court of Appeal in Dubai Bank [1989] Ch.98 (and indeed in Ventouris [1991] 1 W.L.R.607 at 618) appear to me to lead to the conclusion that, at least on this line of reasoning, the decision in Goldberg can no longer be regarded as good law.

First, Lord Justice Dillon said that it seemed to him "incredible" that a copy of an unprivileged document could become privileged simply because it was copied for the purpose of obtaining advice (see at [1990] Ch.104). Secondly, Lord Justice Dillon appears to have approved the decision of Mr. Justice Butt in Land Corporation of Canada v. Puleston (1884) Weekly Notes 1. At [1990] Ch.107B , Lord Justice Dillon described that case in this way:

"... [B]efore any dispute had arisen, a diary had been kept by a director of the plaintiff company. By the time discovery was necessary the diary had been lost, but copies had been made of extracts, relevant to the matters in issue for the purpose of obtaining advice. Mr. Justice Butt said that the extracts were properly to be disclosed.

They were copies, albeit prepared for the purposes of instructing counsel and so forth of a document which was itself disclosable in the litigant's hands" (emphasis added).

Thirdly, and perhaps most conclusively on the question of the authority of Goldberg [1989] Q.B.267, Lord Justice Dillon said this at [1990] Ch.108 F :

> *"... [W]ith deference to the Divisional Court in Goldberg's case [1989] Q.B.267 and without considering whether the decision can be supported on alternative grounds not relevant to the present case, I for my part would take the view that the judgment of the Divisional Court goes too far and does not support, on this point, the conclusion which they reached."*

Lord Justice Farquharson took the same view, but considered that the result in Goldberg [1981] Q.B.267 might be justifiable on the basis of the Lyell v. Kennedy grounds (see at [1990] Ch.109 E). Lyell v. Kennedy was also discussed by Lord Justice Dillon at 108 G to H in terms similar to those in the passage I have cited from Bingham LJ's judgment from Ventouris at [1991] 1 W.L.R.615E .

I refer again to Ventouris [1991] 1 W.L.R.607. At 611 F to 612 C Lord Justice Bingham said this in relation to legal professional privilege:

"The plaintiff argues that it does not extend to cover any original document, even if obtained by a party to litigation or his legal adviser for purposes of the litigation, if the document did not come into existence for purposes of the litigation. The defendant argues that the privilege covers any original document obtained by a party to litigation or his legal advisers for purposes of the litigation, whether or not the document came into existence for purposes of the litigation and (therefore) whether or not the document existed before the litigation was contemplated or commenced.

"Approaching the issue as one of pure principle and without regard to authority, I prefer the plaintiff's contention. Our system of civil procedure is founded on

the rule that the interests of justice are best served if parties to litigation are obliged to disclose and produce for the other party's inspection all documents in their possession, custody or power relating to the issues in the action. This is not of course a necessary rule but it is firmly established here. It is not however an absolute rule, as exceptions such as legal professional privilege and public interest immunity demonstrate. Nonetheless, disclosure being generally regarded as beneficial, any exception has to be justified as serving the public interest which gives rise to the exception."

After referring at [1991] 1 W.L.R.616C to E to Chadwick v. Bowman (1886) 16 Q.B.D.561, Lord Justice Bingham then described as "sound" the notion that a copy of an unprivileged document was not immune from production merely because it had been sent to a party's solicitor for advice or had been copied for that purpose – see at [1991] 1 W.L.R.618 D to G.

He also quoted, with approval, at [1991] 1 W.L.R.619 H an observation of Mr. Justice Mason in an Australian case, National Employers Mutual General Insurance Association Ltd. V. Waind [1979] 141 CLR.648 at 654 to this effect:
'"... the argument did not always make clear the distinction between the purpose for which information is obtained and the purpose for which a document regarding information is brought into existence. It is the latter purpose with which the law of professional legal privilege is concerned."
The final passage which I should quote from the judgment of Lord Justice Bingham is at [1991] 1 W.L.R.621 C to D :
"I can see no reason in principle why a pre-existing document obtained by a solicitor for purposes of litigation should be privileged from production and inspection, save perhaps in the Lyell v. Kennedy ... situation which, in an age of indiscriminate photocopying, cannot often occur. I find nothing in anything of the cases which suggests, let alone justifies,

such a result. Such a rule would in my view pose a threat to the administration of justice."

...

However, while the earlier cases are distinguishable on the facts in one way or another from the present case, it seems to me that, ultimately, the approach in these cases is based on the same principles or should be applied in the present case. One starts with the principle that the interests of justice are generally best served by disclosure, unless disclosure is defeated by privilege for the reasons in any of those cases or for the reason in the present case. Having concluded that the interests of justice are best served by disclosure, one then has to ask oneself whether legal professional privilege can be claimed by or on behalf of the lawyer's client in respect of the documents or information concerned. If privilege can be claimed, then, however unattractive the result or however unimportant the benefit of the privilege may seem in the individual case, that is the end of the matter. Privilege normally overrides other interests of justice so far as disclosure is concerned. However, in my view, if the document concerned is inherently not privileged, then its disclosure or information about it can normally only be refused by the lawyer on Lyell v. Kennedy grounds. It seems to me that that principle is equally applicable where the disclosure sought from the client's lawyers is the documents themselves or of information relating to those documents. In other words, I consider that disclosure of documents or of information relating to documents, when reasonably sought for the purpose of litigation, should be subject to the same principles.

The objections to the disclosure sought in Goldberg [1989] Q.B.267, in Dubai Bank [1990] Ch.98, and in Ventouris [1991] 1 W.L.R.607, were the same as the objection raised here, namely, that, by granting the disclosure sought by the applicant, the court would be making an order compliance with which would reveal what documents the client or a third party had given to his legal advisers, and indeed what documents the legal advisers had got. It is true that the documents in

Ventouris and Dubai had been obtained by the lawyer concerned from third parties, but the documents had been obtained by counsel from the solicitors on behalf of the client in Goldberg. Further, it seems clear that in Puleston [1884] Weekly Notes 1, the documents had been obtained by the legal advisers, indeed by counsel, from the clients for the purpose of obtaining legal advice. In my judgment therefore, subject to the Lyell v. Kennedy issue and subject to one other point, the Question can properly be asked of, and answered by, counsel, as it relates to non-privileged documents, and it is not asked for the purpose of finding out what passed between Mr. and Mrs. Brown and their lawyers or between their solicitors and counsel."

88. Our perusal of (pages 4 to 92 of) the OGC Report document attachments shows that :-

(a) Pages 4 to 12 form a single document was clearly material created for the purpose of being shown to the lawyer. It is covered by legal professional privilege.
(b) Pages 13 to 27 is a document apparently prepared by the Appellant herself. This cannot attract legal professional privilege.
(c) Pages 28 to 34 is another document apparently filled in by the Appellant herself. This cannot attract legal professional privilege.
(d) Pages 35 to 92 is a judgment of the Court. This is a document open to the public and cannot attract any legal professional privilege.

89. In our view all the attachments as described as (b) to (d) are materials which must have been supplied by ML, or those acting on their behalf, to their in house lawyer. Those attachments may not be merely preparatory materials, but even if they are not, they do not attract LPP because in the case of categories (b) and (c) they are copies of documents prepared by the Appellant, and in the case of (d), they are copies of public documents to which no confidentiality can attach.

90. In our view, as those documents may not be covered by LPP, they can only be protected from disclosure unless their disclosure would, or might reasonably be anticipated to, cast light on the advice given by the in house lawyer or, the instructions given by or on behalf of the client ie ML.

91. In this regard, given the OGC report was related to a previous litigation involving the Appellant as a party, that report can only be one that would, or might reasonably be anticipated to, cast light on the advice given by the in house lawyer regarding the Appellant as a party to that litigation. See §15(ii) of the submission of ML (through Messrs Deacons & Co) dated 15 June 2010 that

> *"ML's position is very clear throughout Deacon's letter dated 6 January 2009*
>
> *"the OGC Report contained a summary of the OGC's legal advice to the management of (ML) as to what (ML) could do in respect of the discovery of the litigation involving (the Appellant) as a party. Accordingly, the OGC Report is covered by Legal Professional Privilege ...""*

92. Accordingly, the attachments (b) to (d) are protected from disclosure by LPP.

Waiver

93. The Appellant submitted that by agreeing to supply and did supply the OGC Report to the Respondent for inspection, ML had waived its claim to any legal professional privilege.

94. The Appellant relied upon Practice Notes 24/5/7, 24/5/8, 24/5/13, 24/5/14, 24/5/16, 24/5/17, *Rockefeller & Co. Inc v Secretary for Justice & another* CACV 174/2000, and a number of other authorities.

95. We do not believe these authorities assist the Appellant. We would only refer to the *Rockefeller* case below on the question of waiver.

96. *Rockefeller & Co Inc v Secretary for Justice & Another* CACV 174 of 2000 was cited by the Appellant to suggest there was a waiver. The Appellant relies upon a statement of Godfrey VP in *Rockefeller & Co* that *"by giving the document to the SFC with the knowledge that the SFC could use them in a criminal investigation, the plaintiffs waived privilege, notwithstanding the clear terms of the agreement between the SFC and the plaintiffs to the contrary"*.

97. *Rockefeller* was a special case where the plaintiff interviewed an employee in the presence of the plaintiff's legal advisers and as a result of criminal investigations regarding that employee. A writ was issued by the Plaintiff for an injunction against the disclosure in criminal proceedings of a particular document in which LPP was claimed. In that case the Plaintiff disclosed the document to the Securities and Futures Commission ("SFC") who in turn disclosed the same to the ICAC. The ICAC then disclosed the same to the Secretary for Justice. No complaint was made against the SFC nor the ICAC. But the injunction was aimed at disclosure by the Secretary for Justice to the defendant in the criminal proceedings (as unused materials). It was clear that the principle applicable was that a defendant facing a criminal prosecution was entitled to all unused materials. This principle prevails over the right to confidentiality.

98. We note that there was also conflicting authority in *British Coal Corporation v Dennis Rye Ltd (No.2)* [1988] 3 AER 816 that *"where documents which are clearly privileged when made are disclosed by a party to the police in accordance with his public duty to assist in a criminal investigation, and where such disclosure is for the limited purpose of such investigation and any subsequent criminal trial, no waiver of privilege in relation to civil proceedings is made or implied. It is contrary to public policy that assistance with a criminal investigation should lead to loss of legal professional privilege in a civil action"*. Although the Respondent was not a prosecuting authority, we believe the same principle applies and no general waiver of privilege took place by ML in disclosing the OGC Report to the Respondent.

99. In the presence of a specific agreement between ML and the Respondent regarding the disclosure of the OGC Report, ML could not be said to have waived their rights to LPP unless they know that they would pass the information to another authority or third party. Their claim was governed by the terms of the agreement between themselves and the Respondent.

100. It may also be that if ML had committed some criminal offence and the Respondent was under a statutory duty to disclose, the Respondent might be under a duty to make disclosure, and ML could not complain. That appears to be one of the rationale in *Rockefeller*.

101. This is not what happened in the present case. The Respondent did not believe ML had committed any criminal offence at the time of receiving the OGC Report. There was no suggestion nor any evidence that this belief was not genuine.

102. We therefore cannot see any waiver on the part of ML, nor any duty for the Respondent to make disclosure (which duty was not alleged to have been breached either).

103. The Board thus found by majority that ML was entitled to rely on the exemption provision under section 60 of the Ordinance to refuse to provide the Appellant with a copy of the main body of the OGC Report (paginated as pages 1 to 3) in response to her DAR, and also the rest (paginated as pages 13 to 92) of that report.

104. If we are wrong in our view on *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, we would have ruled that the Appellant's appeal should be allowed to the limited extent that only pages 13 to 92 of the OGC Report should be disclosed. However, we still do not think the Respondent should immediately issue an enforcement notice. Our finding was based upon an interpretation of an area of the law which is not simple

or straight forward. Any error made on the part of ML cannot be said to be in bad faith. Thus the order we would have made would be, subject to further submissions, to the effect that unless ML discloses pages 13 to 92 of the OGC Report document within 28 days from the date of this decision, the appeal should be allowed.

Simon Lam :

105. I agree with the legal analysis stated above, but in applying the law to the present case, I take the following view :-

(a) Paragraph 24/5/8 of the Hong Kong Civil Procedure 2011 states as follows (under the heading "Communications privileged although no litigation was contemplated or pending") :
"Letters and other communications passing between a party, or his predecessors in title, and his, or their solicitors are privileged from production, provided they are, and are sworn to be, confidential, and written to, or by, the solicitor in his professional capacity, and ***for the purpose of getting legal advice or assistance*** *for the client ...;* ***but not otherwise*** *... " (Emphasis added).*

(b) In the present case, the OGC report does not seem to provide to ML any "**legal** advice or assistance". It could have been compiled by any private investigator and/or administrator. The fact that the compiler of the report happened to be a lawyer does not convert an otherwise unprivileged document into a privileged one.

(c) The only part of the OGC report which may carry some "legal" connotation is very limited and if necessary, may be redacted from the copy supplied to the Appellant.

106. Since I take the view that the OGC Report proper is not privileged, I take a similar view that its attachments are also not privileged.

Andrew Mak:

Conclusion

107. By majority there will be an order that the Appeal is dismissed. We would like to thank parties for their assistance and submissions.

(Mr Andrew Mak)
Deputy Chairman
Administrative Appeals Board