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Date: 3.12.2012

Exhibit number: 167

Crown Solicitor,
State Law Building,
50 Ann Street,
Brisbane, Queensland. 4000.

16 February 1990

MEMORANDUM:

The Honourable the Attorney-General.

I enclose a copy of a Memorandum addressed by me today to the Secretary to Cabinet concerning documentation gathered by Mr. Noel Heiner in his Inquiry into the John Oxley Youth Centre.

The Memorandum speaks for itself and I have forwarded a copy on to the Director-General of the Department of the Attorney-General as well as to Ms. Ruth Matchett, the Acting Director-General of the Department of Family Services and Aboriginal and Islander Affairs.

(K. M. O'Shea)
Crown Solicitor.

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Crown Solicitor,
State Law Building,
50 Ann Street,
Brisbane, Queensland. 4000.

16 February 1990

Mr SP Tait
Acting Secretary to Cabinet
Cabinet Secretariat
Executive Building
100 George Street
BRISBANE Q 4000

Vol 1

Dear Mr. Tait,

I refer to your letter of 13 February 1990 wherein you seek my advice concerning confidentiality of certain documents considered to be part of the official records of Cabinet.

In my telephone conversation on Wednesday with your Mr. Littleboy, I was informed that the documents concerned are presently held by the Cabinet Secretariat, are contained in a sealed box and consist of tape recordings and other documents delivered up to the Department of Family Services and Aboriginal and Islander Affairs by former Stipendiary Magistrate, Mr. Noel Heiner.

Mr. Heiner was, as you are aware, conducting an Inquiry into certain aspects of the operations of the John Oxley Youth Centre upon instructions from the previous Minister.

I have already given to that Department fairly comprehensive advice concerning Mr. Heiner's powers to conduct the Inquiry and the status of the documentation he has generated in doing so.

Your query, as I understand it from my conversation with your Mr. Littleboy, is what options are open to Cabinet so far as retention or disposal of these documents is concerned and could they be obtained by way of subpoena or third party discovery should a writ be issued touching or concerning them.

Cabinet documents have traditionally been regarded as secret and this is reflected in the current Queensland Cabinet Handbook.

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Where a Cabinet document is sought by way of subpoena in connexion with criminal or civil proceedings or a Commission of Inquiry or by way of third party discovery in a civil action, the practice has been that the relevant Department would instruct me to examine the matter with a view to making a claim of privilege from production in the public interest - commonly called "Crown Privilege".

In a civil matter where the Cabinet documents involve current issues, such a claim would normally be upheld if the responsible Minister swears an affidavit in support of the claim.

The matter is also dealt with in the new Cabinet Handbook, and in this connexion the annexure to the letter of the Director-General of the Premier's Department to the Director-General of the Department of the Attorney-General of 4 December 1989 has this to say:-

> "Before responding to requests from the Courts or investigatory bodies, Ministers and Chief Executives must seek the advice of the Premier or Director-General of the Premier's Department.
>
> Claims of confidentiality should only be made by a Minister after consultation with the Premier. Where documents from a past Government are concerned, the Chief Executive must consult the Cabinet Secretary before claiming confidentiality."

A public interest claim does however involve the Court in a balancing exercise between the rights of the State and the rights of the subject, so that in a case where the documents are so old as to be more or less of historical interest only, or where the detriment to the State's interests would be so minimal when compared to the detriment which the subject would suffer if the document could not be admitted in evidence, then the Court could well hold that the public interest demanded that the document be produced, and the Crown Privilege claim would fail.

This is especially so in criminal proceedings where the liberty of the subject is at stake.

The leading case for Australia is Sankey v. Whitlam & Ors. (1978) 142 C.L.R. 1 where certain of the Cabinet documents sought in the subpoena were ordered to be produced despite a Crown Privilege claim by the Commonwealth.

There must however be a pending action, Commission of Inquiry or other civil or criminal proceeding pending before anyone can seek production of documents.

If then, for example, anyone who suspects he or she was defamed in any of the material produced by Mr. Heiner, were

to commence an action against him in respect thereof, the plaintiff would, no doubt, at a fairly early stage in the action, seek an order for third party discovery of the material pursuant to Order 35 Rule 28 of the Rules of the Supreme Court.

The person in whose "possession or power" the documents are, could oppose the making of such an order on several possible grounds, viz. that it was fishing, that it was not necessary that he inspect the document at that stage of the proceedings and that generally it would not be just that an order for production be made.

If it be the case that the documents are in the possession or power of the Crown (and I shall deal more fully with this aspect presently), then a claim of Crown Privilege could also be made. Even if the documents are not in the "possession or power" of the Crown, such a claim could probably still be made.

However, if the documents are not "Cabinet documents", then the claim would have limited chances of success.

The documents under consideration in this case could not be fairly described as Cabinet documents. Notwithstanding the fairly broad definition of these in the Queensland Cabinet Handbook, to be a Cabinet document so as to attract the special protection given by the Courts to such documents under the Crown Privilege rule, they would have had to have come into existence for the purpose of submission to Cabinet. The mere fact that Cabinet has seen a document or listened to a tape in the course of its deliberations does not bring the document or tape within the rule.

Subject to any further instructions on the point the Department of Family Services and Aboriginal and Islander Affairs may care to give, I cannot see how it could be argued that this material was gathered in order to formulate a Cabinet Submission or for the purpose of being placed before Cabinet.

The argument for resisting a third party discovery application on the basis of Crown Privilege would therefore have to be based on the more general basis of the Public Service and Government not being able to function effectively if such evidence and other material were not to be protected from production.

In my opinion, such an argument would, as I said previously, have a very limited chance of success, and whilst it may well be possible to resist third party discovery on one of the other grounds which I mentioned earlier, if the documents sought were sufficiently identified, it would be only the questions of relevance and Crown Privilege which could be argued once a subpoena was issued after the matter had been set down for trial.

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Turning now to the question whether the documents are in the "possession or power" of the Crown, these words have a settled meaning at law. They do not refer simply to mere physical possession but concern the right and power to deal with the document.

I have previously delivered advice to the Acting Director-General of the Department of Family Services and Aboriginal and Islander Affairs to the effect that the documents in question were not "public records" within the meaning of the Libraries and Archives Act 1988. This advice was given on the premise that Mr. Heiner was engaged to prepare a report and that whilst his report once produced might have been a public record in terms of Section 5(2) of the Libraries and Archives Act 1988, the documents and papers produced by Mr. Heiner prior to the submission of his report were not public records.

Having reviewed this matter further, and in light of the circumstance that Mr. Heiner has now delivered up to the Crown the documents, I think that the better view is that the documents are within the possession or power of the Crown and accordingly are public records within the meaning of the Libraries and Archives Act 1988.

The overwhelming difficulty in relation to this matter is that the precise terms of engagement of Mr. Heiner remain vague but at the very least, he must have been acting as a consultant or agent of the Crown and in those circumstances, it would appear that the documents prepared during the course of his consultancy or period of agency were prepared for and are held on behalf of the Crown.

Whilst it is not directly on the point, the position in a normal solicitor and client relationship is instructive. In Halsbury's Laws of England (4th Edition), the following is stated concerning the ownership and use of documents in the solicitor and client situation:-

> "Documents coming into existence in the course of business transacted under a retainer, and either prepared for the benefit of the client or received by the solicitor as agent for the client belong to the client. However, documents prepared by the solicitor for his own protection or benefit and letters written by the client to the solicitor belong to the solicitor."

After considering the matter further, I am of the view that notwithstanding that Mr. Heiner was primarily engaged to prepare a report, the Crown would be entitled to claim possession to the documents brought into existence by Mr. Heiner in the course of undertaking his Inquiry. This is particularly so in relation to statements or transcripts of evidence upon which his final report was to be based.

Even if the arrangement with Mr. Heiner was that he was to retain legal possession of all preparatory papers, it may

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well be that as he has given up possession of those papers, both in a legal and physical sense, that the Crown, by accepting custody, is now in legal possession of the documents and in such circumstances would be considered to hold such documents within its possession or power at this point in time.

Once it is concluded that the documents are more than likely in the possession or power of the Crown, it seems that in accordance with Section 5(2) of the Libraries and Archives Act 1988, the documents fall within the definition of "public records". In that case, Section 55 of the Libraries and Archives Act 1988 is relevant in that the documents may only be disposed of by depositing them with the Queensland State Archives, or by obtaining the consent of the State Archivist to the disposal of the documents or after receiving notice in writing of an intention to dispose of the documents, the State Archivist has not within a period of two months exercised his power to take possession of the documentation.

In reaching the foregoing conclusions, I acknowledge the difficulty that this may cause in that there may be potentially defamatory material contained in the documents now held.. However, that cannot affect the legal position in terms of the operation of the Libraries and Archives Act 1988 and there is no doubt that the Act binds the Crown and accordingly must be complied with.

One other consequence of the foregoing conclusion is that the files now held by private solicitors who are or have in the past undertaken work on behalf of the Crown may also contain public documents and accordingly would be subject to the provisions of the Libraries and Archives Act 1988.

Yours faithfully,

(K. M. O'Shea)
Crown Solicitor.

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