

**Decision D0112009 – Published in note form only**

***Re Glasson and Department of the Premier and Cabinet [2009] WAICmr 11***

**Date of decision:** 8 May 2009

***Freedom of Information Act 1992: Section 26, clause 7 of Schedule 1***

By email message dated 30 July 2008, Ms Beryl Glasson ('the complainant') applied to the Honourable John Kobelke, the then Minister for Police ('the former Minister'), for access to documents under the FOI Act. In that application, the complainant described various allegations of criminal conduct by named parties and sought access to all documents relating to those allegations, including the investigation of those allegations.

The former Minister's office partially transferred the access application to the Western Australian Police Service under section 15(2) of the FOI Act. However, before the former Minister had completed his dealing with the access application and made a decision on access, a State general election was held. As a result of the subsequent change of Government, and in accordance with established procedure, all unfinished FOI access applications that were with Ministers' offices before the election were transferred to the Department of the Premier and Cabinet ('the agency') for that agency to complete.

On 30 September 2008, the agency made its decision on access. The agency identified eighty documents that fell within the scope of the access application and gave access to seventy seven of those documents. The agency refused access to the remaining three documents ('the disputed documents') on the basis that those documents are subject to legal professional privilege and, therefore, exempt under clause 7 of Schedule 1 to the FOI Act.

The complainant sought internal review of the decision and claimed that additional documents of the kind requested should exist but had not been identified. The complainant also claimed that legal professional privilege did not apply to the disputed documents because "*the case law establishes that professional privilege cannot be claimed in order to hide and/or conceal serious criminal offences to which [the complainant's] complaints relate.*"

On 24 November 2008, the agency confirmed the initial decision. Thereafter, on 5 January 2009, the complainant sought external review by the Information Commissioner of the agency's decision on access. The complainant made submissions to the effect that additional documents should exist and that the disputed documents are not exempt.

The agency produced the disputed documents and its FOI file to the A/Commissioner. After consideration of the material then available to him, the A/Commissioner advised the parties of his preliminary view of the complaint, including his detailed reasons. The A/Commissioner was of the view, for the reasons given, that:

- the disputed documents are exempt under clause 7 of Schedule 1 to the FOI Act; and
- having regard to the details of the searches it had undertaken, the agency had taken all reasonable steps to find documents that fall within the scope of the access application. The A/Commissioner did not require the agency to make any further inquiries or searches.

Accordingly, it was the A/Commissioner's preliminary view that the decision of the agency to refuse access to additional documents of the kind requested pursuant to s. 26 of the FOI Act, on the ground that the documents either do not exist or cannot be found, was justified.

It was the A/Commissioner's view that the disputed documents are, *prima facie*, the subject of legal professional privilege and, thus, exempt under clause 7(1).

It was also the A/Commissioner's view that the decision of His Honour Mr Justice McKechnie in the Supreme Court of Western Australia in *Department of Housing and Works v Bowden* [2005] WASC 123, which dealt with an appeal by the Department of Housing and Works against a decision made by the former A/Information Commissioner in *Re Bowden and Department of Housing and Works* [2004] WAICmr 23, constrains the role of the Information Commissioner where documents held by an agency are *prima facie* privileged from production because of the application of legal professional privilege. Therefore, arguments about whether the privilege is abrogated or limited (perhaps by illegality) or waived are not matters that the A/Commissioner may decide.

In light of the A/Commissioner's preliminary view, the complainant was invited to withdraw her complaint. In the alternative, the complainant was invited to make further submissions to the A/Commissioner in support of her position.

The complainant did not accept the A/Commissioner's preliminary view and made further submissions to the A/Commissioner. The A/Commissioner did not consider it necessary to address those additional submissions on the basis that they were not relevant to the matters for his determination because the additional submissions went to issues which the A/Commissioner does not have power to address or decide.

Having again considered all of the material before him, the A/Commissioner was not dissuaded from his preliminary view.

The A/Commissioner confirmed the agency's decision.