

Decision D0132014 – Published in note form only

***Re Jamieson and City of South Perth* [2014] WAICmr 13**

Date of Decision: 3 July 2014

Freedom of Information Act 1992: section 26

This matter arises from a previous matter before the Information Commissioner. In that previous matter the City of South Perth (**the agency**) refused to deal with an access application lodged by Mr Jamieson (**the complainant**) under section 20 of the *Freedom of Information Act 1992* (**the FOI Act**). That matter was resolved by the Commissioner's formal decision in *Re Jamieson and City of South Perth* [2013] WAICmr 22 where it was decided that the agency's decision to refuse to deal with the complainant's access application under section 20 of the FOI Act was not justified.

In accordance with section 76(7) of the FOI Act, the Commissioner's decision is to be regarded as the decision of the agency and to have effect accordingly. Therefore, the agency then dealt with the complainant's access application dated 7 May 2012. In a decision dated 3 January 2014 the agency gave the complainant access to some documents and refused access to other documents on the basis that they are exempt under clause 7(1) of Schedule 1 to the FOI Act. The agency also noted that no further documents within the scope of the complainant's access application exist or could be found, effectively refusing access to such further documents.

Following receipt of the complaint, the Commissioner obtained a complete copy of the FOI file maintained by the agency in relation to the complainant's access application. In addition, the Commissioner obtained copies of the documents to which access had been refused and additional information regarding the searches undertaken by the agency.

On 25 May 2014, after considering the information before her, the A/Commissioner provided the parties with a letter setting out her preliminary view of the complaint. It was the A/Commissioner's preliminary view that the agency's decision to refuse access to documents under clause 7(1) of Schedule 1 to the FOI Act was justified. Clause 7(1) provides that matter is exempt if it would be privileged from production in legal proceedings on the ground of legal professional privilege. Legal professional privilege applies to confidential communications between clients and their legal advisers made for the dominant purpose of giving or seeking legal advice or for use in existing or anticipated legal proceedings: *Esso Australia Resources Ltd v The Commissioner of Taxation* [1999] 201 CLR 49.

In relation to the complainant's claim that privilege had been waived by the agency in this case, the A/Commissioner noted that, following the decision of the Supreme Court of Western Australia in *Department of Housing and Works v Bowden* [2005] WASC 123, no question of waiver of privilege could be determined by the Information Commissioner.

The A/Commissioner was satisfied that the disputed document is a confidential communication between the agency and its legal advisers made for the dominant purpose of seeking or giving legal advice.

In addition, the A/Commissioner was of the preliminary view that the agency's decision to, in effect, refuse access to additional documents under section 26 of the FOI Act was justified. The A/Commissioner was satisfied that the agency had taken all reasonable steps to find the documents the subject of the complainant's access application but that additional documents do not exist.

In light of the A/Commissioner's preliminary view, the complainant was invited to reconsider whether he wished to pursue his complaint or provide the Commissioner with further submissions relevant to the matters for his determination. The complainant accepted the A/Commissioner's view that certain documents were exempt under clause 7(1) of Schedule 1 to the FOI Act, but made further submissions with respect to the agency's decision under section 26 of the FOI Act. As a result, the only issue remaining in dispute is whether the agency's decision to, in effect, refuse access to documents under section 26 of the FOI Act on the basis that those documents cannot be found or do not exist is justified.

The agency provided information detailing all of the searches it had conducted to locate the documents the subject of the complainant's access application. Having reviewed all of the material before him, the Commissioner was not dissuaded from the A/Commissioner's preliminary view.

Accordingly, the Commissioner found that the agency's decision to refuse access to documents under section 26 of the FOI Act was justified and confirmed the agency's decision.