

Decision D0192007 - Published in note form only

Re: Addisons and Department of Racing, Gaming and Liquor [2007] WAICmr 19

Date of Decision: 4 December 2007

Freedom of Information Act 1992: Clause 7; section 26

The complainant applied to the Department of Racing, Gaming and Liquor ('the agency') for access to certain documents (including internal documents, transcripts and notes of meetings) relating to any advice sought by, amongst others, the agency, the Minister for Racing and Gaming and the Attorney General of Western Australia in relation to the application of the Commonwealth Constitution and/or the *Trade Practices Act 1974* to the *Betting and Racing Legislation Amendment Bill 2006*.

The agency initially identified ten documents of the kind requested and refused the complainant access to all ten documents, on the ground that they were exempt under clause 7(1) of Schedule 1 to the *Freedom of Information Act 1992* ('the FOI Act').

The complainant applied to the former A/Information Commissioner ('the former Commissioner') for external review of the agency's decision. In its letter of complaint to the former Commissioner, the complainant expressed concern about the adequacy of the agency's searches for the requested documents. The complainant held the view that the agency had not identified all of the requested documents and it provided information to the former Commissioner in support of its claims in that regard. The complainant asked the former Commissioner to inquire into the adequacy of the agency's searches, as part of the external review process.

The former Commissioner obtained the originals of the ten documents from the agency, examined the agency's FOI file and made further inquiries with the agency about the initial searches. The agency was required to undertake further searches for documents of the kind described by the complainant. As a result, the agency identified four additional document of the kind described by the complainant, one of which was a published newspaper article available to the complainant outside the FOI process. The agency claimed exemption for the other three documents under clause 7.

Following those additional searches, the A/Commissioner advised the complainant that he was satisfied that the agency had identified all relevant documents falling within the scope of its access application. The A/Commissioner further advised the complainant that, in his view, with the exception of one document, Document 7, the remaining disputed documents were exempt under clause 7. The A/Commissioner invited the complainant and the agency to re-consider their respective positions and provide further information and/or submissions to him in support of their respective claims.

The agency accepted the A/Commissioner's view and gave the complainant access to a copy of Document 7. The complainant did not reply within the time allowed.

Twelve documents remain in dispute. They consist of confidential communications between officers of the agency and the officers of the State Solicitor's Office or the Parliamentary Counsel's Office.

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.

Having examined the disputed documents, the A/Commissioner accepted that they are confidential communications between the agency and its legal advisers which were prepared for the dominant purpose of seeking and giving legal advice. The A/Commissioner was satisfied that the disputed documents would be privileged from production on the ground of legal professional privilege and confirmed the agency's decision to refuse access to them pursuant to clause 7(1) of Schedule 1 to the FOI Act.

In addition, on the information before him, the A/Commissioner decided that the agency had taken all reasonable steps to find documents of the kind described by the complainant in its application for external review but that documents of that kind did not exist.