

**Decision D0212011 - Published in note form only**

***Re Amos and WorkCover Western Australia Authority* [2011] WAICmr 21**

**Date of Decision: 24 June 2011**

***Freedom of Information Act 1992***: sections 26, 76(1) and 102(1); Schedule 1, clauses 7(1) and 11(1)(c) and (d)

In October 2009, the complainant applied to the agency under the *Freedom of Information Act 1992* ('the FOI Act') for access to documents containing personal information about him. The agency granted the complainant access in full to the majority of documents it identified as within the scope of his access application; refused access to three documents under clauses 11(1)(c) and (d) of Schedule 1 to the FOI Act (on the ground that disclosure could reasonably be expected to have a substantial adverse effect on the agency's management or assessment of its personnel or conduct of industrial relations); and refused access to other documents under s.26 of the FOI Act (on the ground that they could not be found or do not exist).

The complainant sought internal review of the agency's decision. On internal review, the agency's Chief Executive Officer varied the initial decision by granting access to one document previously claimed to be exempt. In January 2010, the complainant applied to the Information Commissioner for external review of the agency's decision.

In April 2011, one of the Commissioner's officers provided the parties with her initial assessment of the complaint. In her opinion, the agency's decision to refuse access to documents under s.26 of the FOI Act appeared to be justified because the agency had taken all reasonable steps to locate the requested documents and further documents either could not be found or do not exist. It was also that officer's opinion that the agency had not satisfied the onus it bears under s.102(1) of the FOI Act to establish that its decision to refuse access to the two disputed documents under clauses 11(1)(c) and (d) was justified. As the Commissioner is empowered to 'stand in the shoes' of an agency's decision-maker on external review under s.76(1) of the FOI Act, the Commissioner's officer considered that the disputed documents were exempt under clause 7 of Schedule 1 to the FOI Act for the reasons set out in her letter.

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] HCA 67; [1999] 201 CLR 49.

The parties were invited to provide the Commissioner with submissions in response to that letter. In response, the agency withdrew its claims for exemption under clauses 11(1)(c) and (d). The complainant did not withdraw his complaint and made further submissions, claiming that the disputed documents were not privileged and, therefore, were not exempt under clause 7(1).

After examining all of the material, including the disputed documents, and considering the complainant's further submissions, the Commissioner agreed with his officer's opinion.

On the information before him, the Commissioner was satisfied that the disputed documents consist of confidential communications between the agency and a legal adviser made for the dominant purpose of providing legal advice to the agency and, accordingly, that those documents would be privileged from production in legal proceedings on the ground of legal professional privilege. The Commissioner found the disputed documents exempt under clause 7(1) of Schedule 1 to the FOI Act and varied the agency's decision. The Commissioner also found that the agency's decision to rely on s.26 was justified.