

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: F2006271
Decision Ref: D0262006**

Participants:

Stephen Ross Allen
Complainant

- and -

Shire of Greenough
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – privileged communication –
correspondence prepared by an officer of the agency for submission to a legal adviser –
clause 7(1) – legal professional privilege – whether privilege applies

Freedom of Information Act 1992 (WA): s.3(3); s.74(1); s.74(2); s.102(1); Schedule 1,
clause 7(1)

Esso Australia Resources Ltd v The Commissioner of Taxation (1999) 201 CLR 49
Trade Practices Commission v Sterling (1976) 36 FLR 244

DECISION

The decision of the agency is confirmed. The disputed document is exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*.

D A WOOKEY
A/INFORMATION COMMISSIONER

22 December 2006

REASONS FOR DECISION

1. This complaint arises from a decision made by the Shire of Greenough ('the agency') to refuse Mr S R Allen ('the complainant') access to certain documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. In late 1991, the complainant lodged an application for a prospecting licence, Application No. 70/1019, with the then Director General of Mines, in relation to an area of vacant Crown land situated at the Southgate sand dunes, which are located approximately 10 km south of Geraldton.
3. I understand that, following the lodgement of the complainant's application for a prospecting licence, a representative of the then Department of Mines Western Australia ('DOMWA') convened a meeting between representatives of DOMWA, the Department of Land Administration ('DOLA'), the Department of Planning and Urban Development, the Geraldton Mid West Development Authority ('the GMWDA'), the Crown Law Department, the agency and the complainant. The meeting was held at the offices of the DOMWA at 100 Plain Street, East Perth on the morning of 21 October 1991.
4. The minutes of the meeting (a copy of which has been provided to me by the agency) record that the purpose of the meeting was to determine whether the prospecting licence application could be granted to the complainant without interfering with the agency's then proposed use of the Southgate sand dunes as a residential development once rehabilitation of the Southgate sand dunes had been completed.
5. The minutes of the meeting also record that it was resolved, among other things, that an access route through the Southgate sand dunes to the site of the proposed prospecting lease was to be agreed between the complainant, the agency and the GMWDA after a site inspection had been carried out by the complainant and representatives of the agency and the GMWDA. The minutes further record that, once an access route had been decided upon, the complainant, the DOMWA, the GMWDA and DOLA were then each required to undertake certain administrative steps, within a short time frame, because the complainant's application for a prospecting licence was due to be placed before the Warden's Court in Perth in late November 1991. I understand that, shortly after the meeting of 21 October 1991 took place, the complainant incurred certain costs for surveying of the proposed access route through the Southgate sand dunes, in the amount of \$1152.00.
6. On 29 January 1992, the then Minister for Mines refused the complainant's application for a prospecting licence and the Minister also declared the vacant Crown Land comprising the Southgate sand dunes to be exempt from applications for mining tenements, in order to allow for future stabilisation of the Southgate sand dunes.

7. Following that, in mid-July 1992, the complainant applied to the agency, through a community legal centre, for re-imbusement of the costs that he had incurred for the surveying of the proposed access route to the proposed mining tenement. The complainant provided the agency with documentation supporting his request for re-imbusement. After considering the matter and seeking advice about the complainant's request for re-imbusement from its then legal advisers, the law firm Phillips Fox, the agency denied liability for the costs incurred by the complainant and refused his request for re-imbusement of those costs.
8. By letter dated 1 May 2006, the complainant wrote to the Chief Executive Officer ('the CEO') of the agency, renewing his request for re-imbusement of the costs he previously incurred for the surveying of the proposed access route through the Southgate sand dunes.
9. By letter dated 5 May 2006, the CEO of the agency advised the complainant that his request for re-imbusement had been considered and refused by the agency in 1992 and that nothing had emerged since then that would cause the Council of the agency to change its decision in that regard. However, the CEO also advised the complainant that he was prepared to submit his claim for re-imbusement to the Council of the agency and he asked the complainant for any further information the complainant had to justify his claim.
10. By letter dated 18 May 2006, the complainant advised the CEO that there was little he could add to his previous letter. However, the complainant expressed the opinion that had the agency's legal advisers been adequately briefed on the matter and informed of all the circumstances and background events in July 1992 then the advice which was provided to the agency by its former legal advisers would have been different to the advice the agency received in July 1992. By letter dated 8 June 2006, the CEO advised the complainant that he had reviewed the advice previously received from the agency's former legal advisers and, on the basis of that advice, the CEO re-affirmed the agency's decision to deny any liability for the costs that were incurred by the complainant for the surveying of the proposed access route.

The access application

11. By letter dated 21 June 2006, the complainant lodged an access application with the agency under the FOI Act. The complainant applied to the agency for access to a copy of the questions put to the agency's former legal advisers in 1992 as well as a copy of the advice the agency had received from its former legal advisers in 1992 ('the requested documents'). By letter dated 10 July 2006, the CEO of the agency refused the complainant's application for access to the requested documents on the ground that the requested documents were exempt under clause 7 of Schedule 1 to the FOI Act. By letter dated 13 July 2006, the complainant advised the CEO of the agency that he no longer sought access to the legal advice that the agency had previously received from its legal advisers.
12. However, the complainant maintained his request for access to a copy of the agency's correspondence to its legal advisers. In the complainant's view, there

were no sensible grounds for the agency refusing him access to a copy of the agency's correspondence to its legal advisers unless that correspondence contained "...*information that might not be of advantage to the Shires [sic] position.*"

13. By letter dated 17 July 2006, the CEO informed the complainant that, if he did not accept the agency's decision on access, he could apply to the Information Commissioner for an external review of that decision. By letter dated 8 August 2006, the complainant applied to the A/Information Commissioner for external review of the agency's decision to refuse him access to a copy of the agency's July 1992 correspondence to its legal advisers.

REVIEW BY THE A/INFORMATION COMMISSIONER

14. After receiving this complaint, pursuant to my powers under ss.72 and 75 of the FOI Act, I required the agency to produce to me, for my examination, the original of the FOI file maintained by the agency in relation to the complainant's access application and the originals of the documents the subject of the complaint.
15. Under cover of a letter dated 23 August 2006, the CEO of the agency delivered the requested documents to my office, by registered post. Those documents delivered to me by the agency included the following documents:
 - a copy of a facsimile letter dated 9 October 1991, from the then Manager, Unit 1 Mining Registration Unit of DOMWA, notifying all of the relevant parties of the meeting to be held at DOMWA on 21 October 1991;
 - a copy of a letter dated 28 October 1991 from DOMWA to the agency, enclosing a copy of the minutes of the meeting held at DOMWA on 21 October 1991;
 - copies of correspondence and maps relating to the complainant's prospecting licence application, which exchanged between the agency and DOMWA, in the period between late October 1991 and late December 1991;
 - a copy of a letter dated 18 February 1992, from the then Minister for Mines to the agency, advising the agency that the Minister had decided to refuse the complainant's application for a prospecting licence;
 - a copy of a handwritten facsimile transmission, with attachments, dated 24 July 1992, from an officer of the agency to a third party;
 - a letter dated 29 July 1992 from the agency's former legal advisers, Phillips Fox, to the agency; and
 - copies of all of the correspondence exchanged between the agency and the complainant in the period between 1 May 2006 and 17 July 2006, in relation to the complainant's access application.
16. An examination of the documents delivered to me by the agency indicates that the agency did not open a separate FOI file when it received the complainant's access application. In addition, although the agency has produced to me, for my examination, a number of documents relating to the complainant's access

application, including the original of the letter of advice the agency received from its then legal advisers, Phillips Fox, in relation to the complainant's claim for re-imburement, a copy of the correspondence comprising the agency's request for advice from Phillips Fox did not appear to my Senior Legal Officer to be among the documents produced to me by the agency.

17. After examining the documents described in paragraph 15, my Senior Legal Officer made further inquiries with the CEO of the agency. In a telephone conversation between the CEO and my Senior Legal Officer on 1 September 2006, the CEO advised my Senior Legal Officer that the documents that had been produced to me by the agency on 23 August 2006 were all of the documents held by the agency relating to this matter. My Senior Legal Officer informed the CEO that, although there was evidence in other documents that a request for advice had been sent by facsimile on 24 July 1992, there was nothing on the face of the handwritten facsimile of that date to indicate that that document was the request for advice from the agency to its former legal advisers, Phillips Fox, as claimed by the agency.
18. The CEO informed my Senior Legal Officer that the agency did not hold any other documents relating to the matter and that the agency had produced all of the documents in its possession and control relating to the matter to me under cover of its letter dated 23 August 2006. Shortly thereafter, my Senior Legal Officer wrote to the CEO, inviting the agency to consider whether it would be prepared to exercise the discretion available to the agency under s.3(3) of the FOI Act and give the complainant access to a copy of the disputed document, notwithstanding the agency's claim that it was exempt under clause 7 of Schedule 1 to the FOI Act. The CEO subsequently advised my office that the agency would not give the complainant access to the disputed document and that the agency maintained its claim that the disputed document is exempt under clause 7.
19. After considering the matter and examining all of the documents then before him, by letter dated 7 September 2006, my Senior Legal Officer wrote to the parties, advising them of his view of this complaint and his reasons for that view. It was my Senior Legal Officer's view, at that stage of proceedings, that there was then insufficient evidence before me to establish that the disputed document was exempt under clause 7, as claimed by the agency. My Senior Legal Officer invited the agency to reconsider its position in light of his view or to provide me with additional information and submissions in support of its claim for exemption.
20. On 25 September 2006, the CEO of the agency wrote to my Senior Legal Officer advising him that he had spent more than two weeks trying to obtain additional information about the matter and that the agency had contacted "*...the company who have taken over all of the business of what was Phillips Fox*" and had requested that law firm to provide the agency with any information they may have relating to the legal advice provided to the agency by its former legal advisers, Phillips Fox, in July 1992.

21. The CEO advised my Senior Legal Officer that the agency's claim for exemption was based on legal advice and relied on professionals in this area to make recommendations and that, despite endeavouring to do so, the agency was not in a position to provide me with any further details, documents or information relating to the matter. The complainant advised my Senior Legal Officer that he maintained his request for access to the disputed document. Accordingly, this complaint cannot be resolved by conciliation between the parties and has been referred to me for decision.

THE DISPUTED DOCUMENT

22. There is only one document in dispute between the parties. The disputed document consists of a handwritten facsimile letter, dated 24 July 1992. The disputed document was written by a former officer of the agency, whom I am advised left employment with the agency in late 1999. The disputed document is addressed to another person, seeking advice about the complainant's request for re-imburement of the costs incurred by the complainant in relation to the surveying of the proposed access road.

CLAUSE 7 - LEGAL PROFESSIONAL PRIVILEGE

23. Clause 7 of Schedule 1 to the FOI Act provides that matter "*...is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege*". Legal professional privilege protects the confidentiality of certain communications between a legal adviser and client and is the privilege of the client and may only be waived by the client. In *Esso Australia Resources Ltd v The Commissioner of Taxation* [1999] 201 CLR 49, the High Court of Australia altered the common law test for whether a communication attracts privilege.
24. In *Esso Australia* the High Court overruled its earlier decision in *Grant v Downs* (1976) 135 CLR 674 and decided that the "dominant purpose test" and not the "sole purpose test" is now the common law test for legal professional privilege in Australia. In light of the decision in *Esso Australia*, confidential communications between a solicitor and his or her client will be privileged from production in legal proceedings, if made for the dominant purpose of giving or receiving legal advice or for use in existing or anticipated legal proceedings.
25. In *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 247, Lockhart J stated that legal professional privilege also extends to various related classes of documents, including the following:

"(a) Any communication between a party and his professional legal adviser if it is confidential and made to or by the professional adviser in his professional capacity and with a view to obtaining or giving legal advice or assistance; notwithstanding that the communication is made through agents of the party and the solicitor or the agent of either of them...

- (b) *Any document prepared with a view to its being used as a communication of this class, although not in fact so used...*
- (c) *Communications between the various legal advisers of the client, for example between the solicitor and his partner or his city agent with a view to the client obtaining legal advice or assistance...*
- (d) *Notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications which are themselves privileged, or containing a record of those communications, or relate to information sought by the client's legal adviser to enable him to advise the client or to conduct litigation on his behalf...*
- (e) *Communications and documents passing between the party's solicitor and a third party if they are made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence...*
- (f) *Communications passing between the party and a third person (who is not the agent of the solicitor to receive the communication from the party) if they are made with reference to litigation either anticipated or commenced, and at the request or suggestion of the party's solicitor; or, even without any such request or suggestion, they are made for the purpose of being put before the solicitor with the object of obtaining his advice or enabling him to prosecute or defend an action...*
- (g) *Knowledge, information or belief of the client derived from privileged communications made to him by his solicitor or his agent..."*

The agency's claims

26. The agency claims that the disputed document is exempt under clause 7 because it consists of a confidential communication sent to the agency's former legal advisers, Phillips Fox, in July 1992, seeking advice and, accordingly, it would be privileged from production in legal proceedings on the ground of legal professional.

The complainant's submissions

27. The complainant initially submitted to the agency that it had no reasonable grounds for refusing him access to a copy of the disputed document, unless it contained information that might not be of advantage to the agency. In his subsequent correspondence to my office, the complainant submitted that he suspects that the disputed document "...may contain incriminating language sufficient to establish collusion".

Consideration

28. I have examined the disputed document. It consists of a handwritten facsimile letter dated 24 July 1992, from a former officer of the agency to a third person, with several attachments and it refers to various matters in connection with the complainant's claim for re-imbusement. The disputed document is, on its face, a request for advice in relation to the complainant's request for re-imbusement. Having also examined the original of the letter of advice sent to the agency by its then legal advisers, Phillips Fox, dated 29 July 1992, it is clear to me that the advice given in that letter answers the question asked in the disputed document in relation to the complainant's claim for re-imbusement.
29. Based upon my examination of the documents referred to in paragraph 28, I am satisfied that the disputed document was prepared by an officer of the agency with a view to submitting that document to the agency's legal advisers, for the purpose of obtaining legal advice in relation the complainant's claim for re-imbusement. Although it has not been established that the disputed document is the document that was sent to Phillips Fox by the agency, I do not consider that fact to be determinative of whether a claim for privilege can be made with respect to the disputed document.
30. Legal professional privilege applies to, *inter alia*, any confidential communication between a client and his or her professional legal adviser acting in a professional capacity and with a view to obtaining or giving legal advice or assistance, notwithstanding that the communication was made through agents of the party and the solicitor, or an agent of either of them, and whether or not the document is in fact so used: *Trade Practices Commission v Sterling*.

Finding

31. I find that the disputed document is a document prepared by an officer of the agency with a view to its being used as a confidential communication with the agency's former legal advisers for the dominant purpose of seeking legal advice, and - whether or not it was so used - in accordance with the decision in *Trade Practices Commission v Sterling*, the disputed document would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that the disputed document is exempt under clause 7 of Schedule 1 to the FOI Act.

The discretion to disclose exempt matter

32. Pursuant to s.3(3) of the FOI Act, an agency has a discretion to give access to documents, including documents that are technically exempt, where that can properly be done. In this instance, the agency has not been prepared to exercise its discretion on this occasion.
33. It is not apparent to me that any harm could reasonably be expected to follow from the agency choosing to exercise its discretion on this occasion and disclose the document to the complainant. The disputed document relates to the complainant's request for re-imbusement of costs which was refused by the

agency more than fourteen years ago, in July 1992. I understand from the complainant that the limitation period within which he could take legal action in respect of it has expired. In my opinion, no important public interests are likely to be adversely affected by the disclosure of the disputed document in this case - being the request for advice, not the advice given - and, at the very least, giving the complainant access to the disputed document may put to rest his concerns about the nature of the information provided to the agency's former legal advisers by the agency.

34. However, it is for the agency to decide whether or not to exercise its discretion in that regard. I do not have such a discretion. Section 76(4) of the FOI Act expressly prohibits me from making a decision to the effect that access is to be given to a document if it is established that the document is an exempt document. I can deal only with the question of whether the disputed document is exempt under clause 7, as claimed by the agency and, for the reasons set out above, I find that the disputed document is exempt, as claimed.
