

Decision D0272009 - Published in note form only

***Re Wilson and Shire of Kalamunda* [2009] WAICmr 27**

Date of Decision: 14 October 2009

Freedom of Information Act 1992: Schedule 1, Clause 7(1)

The complainant applied to the Shire of Kalamunda ('the agency') for access to correspondence between the agency and its legal adviser, concerning a specific property within the boundaries of the agency.

The agency identified one document as coming within the ambit of the complainant's application and refused access to that document on the ground that it is exempt under clause 7(1) of Schedule 1 to the *Freedom of Information Act 1992* ('the FOI Act').

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.

The agency confirmed its decision on internal review and the complainant applied to the Information Commissioner for external review of that decision.

The complainant made submissions to the Commissioner claiming that privilege could not attach to the disputed document because the provision of legal advice was not the dominant purpose of the communication; and that in any event, the communication needs to have been prepared for the dominant purpose of providing legal advice and for use in existing or anticipated legal proceedings in order to be exempt under clause 7(1). The complainant also submitted that it was in the public interest for the disputed document to be disclosed and that any privilege attached to the document had been waived by the agency.

The Commissioner obtained the original of the disputed document from the agency and made further inquiries with the agency before providing the parties with a letter setting out his preliminary view of the matter. The Commissioner's preliminary view was that the disputed document is a confidential communication between the agency and its legal adviser which was made for the dominant purpose of giving legal advice to the agency. The Commissioner did not accept the complainant's submission that the test for legal professional privilege in Australia further requires that the relevant communication was brought into existence for use in legal proceedings.

The Commissioner noted that, as the exemption in clause 7 is not limited by a public interest test, the question of whether disclosure of the disputed document is in the

public interest does not arise for his consideration. The Commissioner also noted that, following the decision of the Supreme Court of Western Australia in *Department of Housing and Works and Bowden* [2005] WASC 123, no question of waiver of legal professional privilege could be determined by the Information Commissioner.

Following the receipt of the Commissioner's letter, the complainant made further submissions to the Commissioner. However, having considered those submissions, the Commissioner was not dissuaded from his preliminary view. The Commissioner was satisfied that the disputed document would be privileged from production on the ground of legal professional privilege and confirmed the agency's decision to refuse access to it pursuant to clause 7(1) of Schedule 1 to the FOI Act.