

Decision D0402011 - Published in note form only

***Re Biber and Department of Transport* [2011] WAICmr 40**

Date of Decision: 17 November 2011

Freedom of Information Act 1992: sections 70(3), 70(4), 74 and 102(1); Schedule 1, clause 7(1).

In April 2011, the complainant applied to the agency under the *Freedom of Information Act 1992* ('the FOI Act') for access to documents containing a request for legal advice from the State Solicitor's Office ("the SSO"), and the response received from the SSO. The agency refused the access request under clause 7(1) of Schedule 1 to the FOI Act because the documents contained matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.

In May 2011 the agency confirmed its decision to refuse access on internal review and the complainant applied to the Information Commissioner for external review of the decision. On receipt of the complaint, the agency produced the two documents in dispute and its FOI file to the Commissioner.

The agency was invited to consider waiving privilege on one document but it was not prepared to do so.

On 12 October 2011, the Commissioner provided the parties with his preliminary view of the complaint, which was that the agency's decision to refuse access to documents was justified under clause 7(1) of Schedule 1 to the FOI Act. *Prima facie* the disputed documents were documents created by the agency and its legal advisors for the dominant purpose of requesting and providing legal advice.

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 his initial view. The complainant responded by asking that further discussions take place between his lawyer and the SSO in order to conciliate the matter.

After reviewing all of the material, including the disputed documents, and considering the complainant's further submissions, the Commissioner determined, pursuant to ss.70(3) and 70(4) of the FOI Act, that the parties had been given reasonable opportunity to make submissions and that further attempts at conciliation were unlikely to resolve the matter.

On the information before him, the Commissioner was satisfied that the disputed documents consisted of confidential communications between the agency and a legal adviser made for the dominant purpose of providing legal advice to the agency and, accordingly, those documents would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly the Commissioner considered that the disputed documents were exempt under clause 7(1) of Schedule 1 to the FOI Act and confirmed the agency's decision to refuse access to them.