

DECISION SUMMARY ISSUED BY THE INFORMATION COMMISSIONER (WA)

Decision title and citation: Re Winzer and Insurance Commission of Western Australia [2001] WAICmr 5

COMPLAINT No: F1542000

DECISION No: D0052001

PARTIES: Neil Robert WINZER

Complainant

INSURANCE COMMISSION OF WESTERN AUSTRALIA

Respondent

No. of documents in dispute: 3

Exemption clause(s): Clause 7

This complaint arises from a decision made by the Insurance Commission of Western Australia ('the agency') to refuse Mr Winzer ('the complainant') access to documents requested by the complainant through his agent, the Hon L M Ravlich MLC, under the *Freedom of Information Act 1992* ('the FOI Act').

The complainant is an employee of the Department of Transport. On 5 March 1999, he lodged a workers' compensation claim in respect of an alleged disability arising out of his employment. The agency is the insurer of the Department of Transport. The agency initially commissioned reports from a third party, Western Assessors, in respect of the complainant's alleged disability and, subsequently, referred the claim to its solicitor to determine the extent, if any, of the Department's liability. On 19 May 2000, after obtaining legal advice, the agency commissioned further reports from Western Assessors.

Through his agent, the complainant made an application under the FOI Act to various documents, including the reports prepared by Western Assessors. Although he was given access to some documents, he was refused access to 3 documents on the grounds that those documents are exempt under clause 7 of Schedule 1 to the FOI Act. The agency's decision was confirmed following an internal review. On 30 August 2000, a complaint was made to the Information Commissioner seeking external review of the agency's decision.

Review by the Information Commissioner

I obtained the disputed documents from the agency and various inquiries were made with the agency concerning the agency's claim for exemption. On 15 January 2001, after considering the material before me, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the disputed documents may be exempt under clause 7 of Schedule 1 to the FOI Act.

In response, the complainant submitted that he has attempted in good faith to make disclosures in the public interest that preceded his claim for workers' compensation and that, therefore, the principle of legal professional privilege is subordinate to the principle of public interest. The complainant submitted that he had only become caught-up in the workers' compensation system because there is no public interest disclosure legislation in Western Australia and he believes that the compensation system is being used as a tool of suppression. Among other things, the complainant questioned whether the public interest was served by other investigative bodies such as the Anti-Corruption Commission and the Commissioner for Public Sector Standards who have apparently declined to investigate claims that he has allegedly made against his employer.

I have considered the complainant's submission. In my view, the views expressed by the complainant are irrelevant to the question that I must determine which is whether the disputed documents would be privileged from production in legal proceedings on the ground of legal professional privilege and are, therefore, exempt under clause 7 of Schedule 1 to the FOI Act. As the exemption in clause 7 is not limited by a "public interest" test, there is no scope for any consideration of the issues raised by the complainant in his submission. Therefore, I am not dissuaded from my preliminary view that the documents are exempt as claimed by the agency. A summary of my reasons follows.

Clause 7 – Legal professional privilege

Clause 7 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 documents that are confidential communications between a client and his or her legal adviser 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] 74 ALJR 399.

In this instance, the disputed documents are not confidential communications between the agency and its legal advisers. Rather, they are communications between the agency and a third party, Western Assessors. Based on my examination of the disputed documents and the material before me, I accept that those communications were confidential.

Legal professional privilege also extends to communications passing between a party and a third person if they were 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, if 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: *Trade Practices Commission v Sterling* (1979) 36 FCR 244 per Lockhart J at page 246.

The *Workers' Compensation and Rehabilitation Act 1981* ('the Workers' Compensation Act'), governs proceedings for workers' compensation in this State and prescribes a number of steps in the process, including a hearing before a conciliation officer and a hearing before a review officer, and which may ultimately include a hearing in a compensation magistrate's court. I understand that when a claim for workers' compensation is in dispute and has been set down for a conciliation hearing, legal proceedings for the recovery of compensation for a disability under that Act have commenced. At the time the agency's legal adviser requested the preparation of the disputed documents the complainant's claim for compensation was in dispute and had been set down for a hearing before a conciliation officer. Therefore, I consider that the communications the subject of the disputed documents were made with reference to legal proceedings that had commenced.

Alternatively, in the event that it could be argued that proceedings have not yet commenced when a matter is only at the conciliation stage, I consider that legal proceedings in respect of the complainant's compensation claim could reasonably have been anticipated at the time the disputed documents were created. Whether litigation is reasonably anticipated at the relevant time is one of fact to be determined by objective criteria: *Nickmar Pty Ltd v Preservatrice Skandia Insurance Pty Ltd* (1985) 3 NSWLR 44; *Australian Competition and Consumer Commission v Australian Safeways stores Pty Ltd and Ors* [1998] 81 FCR 526. In the latter case it was considered that the concept of anticipated proceedings involves the notion that there is a reasonably probability or likelihood that such proceedings will be commenced. In Western Australia the test has been stated as not necessarily requiring that a probability of litigation be established; there must be merely a reasonable expectation of litigation and that may exist where there is a mere possibility of litigation: *Unioil International Pty Ltd and Others v Deloitte Touche Tohmatsu and Others* (unreported, SCWA Library No. 970291, at p5).

Based on an objective assessment of the facts in this matter, I consider that when a workers' compensation claim is in dispute between the relevant parties, it is more than a mere possibility that proceedings for recovery of compensation will be commenced under the relevant legislation. It is likely that proceedings will be commenced to resolve such a dispute and, on either test, it is, therefore, reasonable to anticipate that legal proceedings may be commenced.

In my opinion, legal proceedings under the Workers' Compensation Act had commenced at the time the agency's legal advisers requested the preparation of the disputed documents. I am satisfied that the disputed documents are confidential communications between a third party and the agency, made for the purpose of use in existing or anticipated legal proceedings and that those documents were prepared at the request of the agency's legal adviser. Therefore, I find that the disputed documents are communications of the kind described by Lockhart J in *Sterling's* case, and would be privileged from production in legal proceedings on the ground of legal professional privilege.

For the reasons that I have given to the parties, which are summarised above, I find that the disputed documents are exempt under clause 7. I confirm the decision of the agency to refuse access to those documents.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

19 January 2001