

<b>DECISION SUMMARY ISSUED BY THE INFORMATION COMMISSIONER (WA)</b>	
<b>Decision title and citation: <i>Re Reynolds and Ministry of Justice (Crown Solicitor's Office)</i> [2001] WAICmr 7</b>	
<b>COMPLAINT No:</b> F2102000	<b>DECISION No:</b> D0072001
<b>PARTIES:</b> <b>Peter Gilbert REYNOLDS</b>	Complainant
<b>MINISTRY OF JUSTICE (CROWN SOLICITOR'S OFFICE)</b>	Respondent
<b>No. of documents in dispute:</b> 1	<b>Exemption clause(s):</b> Clause 7

In 1995, Global Dance Foundation Incorporated ('GDF') entered into an agreement with the Western Australian Tourism Commission ('the WATC') to stage the World Dance Congress, in Perth, Western Australia in 1997, and obtained funds for that purpose from the WATC. At the date of the agreement, Mr Reynolds ('the complainant') was Chairman of GDF and a director of Cedar Developments Pty Ltd ('Cedar'), a company incorporated for the purpose of, among other things, organising the World Dance Congress. The proposal to hold the World Dance Congress in Perth did not eventuate and, on 12 March 1998, the Crown Solicitor's Office ('the CSO'), acting on behalf of the WATC, issued an originating summons seeking pre-access discovery of documents from the complainant, GDF and Cedar. In the course of those proceedings, the WATC, on the advice of the CSO, instructed a firm of auditors, Ernst & Young, to inspect the discovered documents and to perform an audit based on those documents.

On 27 June 2000, the complainant applied to the WATC for access under the *Freedom of Information Act 1992* ('the FOI Act') to various documents including the audit report prepared by Ernst & Young. The WATC transferred the access application to the CSO under s.15(1) of the FOI Act. The CSO is part of the Ministry of Justice ('the agency') and the access application was dealt with by the CSO on behalf of the agency. The CSO granted the complainant access to some documents, but refused him access to the audit report on the ground that it was exempt under clause 7(1) of the FOI Act. The decision of the CSO was confirmed following an internal review. On 27 December 2000, the complainant lodged a complaint with the Information Commissioner seeking external review of the CSO's decision.

### **Review by the Information Commissioner**

I obtained the audit report prepared by Ernst and Young ('the disputed document') from the CSO and further information in support of the claim for exemption. After considering the material before me, on 19 January 2001, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the disputed document may be exempt under clause 7 of Schedule 1 to the FOI Act. The complainant responded in writing and submitted that there was a public interest in the disclosure of the disputed document. However, I am not dissuaded from my preliminary view that the disputed document is exempt. A summary of my reasons follows.

### **Clause 7 – Legal professional privilege**

Clause 7(1) 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 from disclosure confidential communications between a client and his or her legal adviser which are made or brought into existence either 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 339. Although the rule is most commonly applied to communications between client and legal adviser, a communication of this class includes a communication between the lawyer and an agent of the client and a report to the client from the agent.

The CSO submitted that the disputed document falls within two of the classes of privileged documents mentioned by Lockhart J in *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at pages 245-6 (without accepting that those categories are exclusive or exhaustive). The relevant categories are as follows:

- “(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.*”

I have examined the disputed document and the material provided to me by the CSO to support the claim for exemption. On the basis of that information, I consider that the disputed document is a confidential communication made to the WATC by Ernst & Young at the specific request of the WATC’s legal advisers, the CSO, for the dominant purpose of enabling the CSO to give legal advice to the WATC with reference to litigation that had commenced.

In my view, the disputed document clearly falls within category (f) as described by Lockhart J in *Sterling’s* case, referred to above. I consider that the disputed document would be privileged from production in legal proceedings on the ground of legal professional privilege.

### **The complainant’s submission**

The complainant submitted that disclosure of the disputed document is in the public interest because it would, among other things, demonstrate that he, GDF and Cedar were innocent of any wrongdoing associated with the failure of the proposal to stage the World Dance Congress.

However, the exemption provided for by clause 7 is not limited by a “public interest test”. Therefore, in accordance with s.76(4) of the FOI Act, once I am satisfied that a document is an exempt document, I do not have power to make a decision to the effect that access is to be given to that document. Legal professional privilege is the privilege of the client, in this case, the WATC. Once legal professional privilege has been claimed by an agency in relation to a document to which access is sought under the FOI Act, it may be waived only at the discretion of the client.

Therefore, I find the disputed document exempt under clause 7 of Schedule 1 to the FOI Act and confirm the decision of the CSO to refuse access to it.

**B. KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER**

23 January 2001