

**ASHTON AND JUSTICE**

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

**File Ref: 95211  
Decision Ref: D01196**

Participants:

**Ronda Gay Ashton**  
Complainant

- and -

**Ministry of Justice**  
Respondent

**DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - clause 7 - legal professional privilege - legal advice given by Crown Solicitor's Office to agency - confidential communications between a legal adviser and an agency for the sole purpose of giving legal advice - section 26 - documents in the possession of an agency but which cannot be found - sufficiency of searches - role of the Information Commissioner.

*Freedom of Information Act 1992 (WA)* ss. 26, 72(1)(B), 75(1), 76(1), Schedule 1 clause 7.

*Grant v Downs* (1976) 135 CLR 674.

*Baker v Campbell* (1983) 153 CLR 52.

*Attorney-General (NT) v Kearney* (1985) 158 CLR 500.

*Attorney-General (NT) v Maurice* (1986) 161 CLR 475.

*Waterford v Commonwealth of Australia* (1987) 163 CLR 54.

*Trade Practices Commission v Sterling* (1979) 36 FLR 244.

## DECISION

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

B. KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

2 February 1996

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Ministry of Justice ('the agency') to refuse Mrs Ashton ('the complainant') access to certain documents of the agency because they are exempt documents under the *Freedom of Information Act 1992* ('the FOI Act'), and to refuse access to other documents because they do not exist or cannot be found.
2. In September 1990, the complainant contacted the Equal Opportunity Commission and lodged a complaint. Between September and December 1990, that complaint was investigated by the Commissioner for Equal Opportunity ('the Commissioner') and attempts were made at conciliation. As conciliation was unsuccessful, the Commissioner exercised her powers and referred the matter to the Equal Opportunity Tribunal ('the Tribunal') for a formal inquiry. The Tribunal was provided with a report prepared by the Commissioner to which were attached certain other documents concerning the complainant. In July 1992, the Tribunal handed down its decision, by a majority dismissing the complainant's complaint.
3. As a result of certain issues that arose during the hearing of her complaint, the complainant wrote to the then Attorney General. The Attorney General sought legal advice in respect of those matters. On 23 June 1995, the complainant lodged an access application under the FOI Act with the Attorney General seeking access to documents relating to the hearing of her complaint by the Tribunal. The Attorney General partially transferred the complainant's access application to the agency and the agency provided the complainant with a notice of decision on 10 August 1995.
4. The agency granted the complainant access to some documents; decided that the FOI Act did not apply to other documents that were publicly available; decided not to provide the complainant with copies of documents that had been provided by the Attorney General; and refused access to others on the ground that those documents were exempt under clause 7 of Schedule 1 to the FOI Act.
5. The complainant sought internal review of the agency's decision on 15 September 1995. On 27 September 1995, Mr Peter Nella, Manager, Records Management Branch of the agency, confirmed the agency's initial decision. By an undated letter received on 20 November 1995, the complainant applied to the Information Commissioner for external review of the agency's decision. Although the complainant purported to also seek external review of the decision made by the Attorney General, a separate agency for the purposes of the FOI Act, on 10 August 1995, that part of her complaint was not accepted as it was lodged outside the statutory period of 60 days, and the complainant did not demonstrate good cause that I should exercise my discretion to accept it.

## **REVIEW BY THE INFORMATION COMMISSIONER**

6. On 23 November 1995, I notified the agency that I had received this complaint. Pursuant to my powers under ss.75(1) and 72(1)(b) of the FOI Act, I obtained copies of the disputed documents and the agency's FOI file maintained in respect of this matter. In the course of my dealing with this complaint, and after consultation with my office, the agency released four additional documents to the complainant.
7. After examining the disputed documents and considering the submissions of the parties, I formed the preliminary view that the disputed documents are exempt under clause 7 of Schedule 1 to the FOI Act. At a meeting with one of my investigations officers on 13 December 1995, the parties were advised of my preliminary view and reasons for that view. At that meeting the complainant also informed my officer that she considered that the agency had not identified all the documents in its possession which fall within the ambit of her access application. Following further inquiries in respect of that matter, in my letter of 21 December 1995, I also informed the complainant that it was my preliminary view that the agency's searches to locate all documents within the ambit of her access application had been, in all the circumstances, reasonable, and that I did not require further searches to be undertaken.
8. The complainant responded to my preliminary view on 8 January 1996, indicating her continuing dissatisfaction and seeking to pursue her complaint to me. Accordingly, I have determined this complaint on the basis that there are two matters in dispute, namely, the exempt status or otherwise of the disputed documents and the sufficiency of the searches conducted by the agency.

## **THE DISPUTED DOCUMENTS**

9. There are 16 documents in dispute between the parties. Those documents have been described in a schedule provided to the complainant by the agency. They consist of requests by the Attorney General for legal advice from the Crown Solicitor's Office, legal advice from the Crown Solicitor's Office, copies of handwritten notes relating to the advice provided, lawyer's working notes, drafts of documents and internal memoranda between various legal advisers relating to the request for legal advice.

## **THE EXEMPTION**

10. The agency claims that the disputed documents are all exempt under clause 7 of Schedule 1 to the FOI Act. Clause 7 provides:

"7. ***Legal professional privilege***

***Exemption***

- (1) *Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.*

***Limit on exemption***

- (2) *Matter that appears in an internal manual of an agency is not exempt matter under subclause (1)."*

11. In a number of my previous formal decisions, I have discussed the principle and application of legal professional privilege. The nature and scope of legal professional privilege at common law has been the subject of consideration by the High Court in a number of cases, in particular *Grant v Downs* (1976) 135 CLR 674, *Baker v Campbell* (1983) 153 CLR 52, *Attorney-General (NT) v Kearney* (1985) 158 CLR 500, *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, and *Waterford v Commonwealth of Australia* (1987) 163 CLR 54.
12. 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, for the sole purpose of obtaining or giving legal advice or assistance. A claim for privilege is not limited, in the case of such communications, to communications which have been made for the purpose of existing or contemplated litigation: *Trade Practices Commission v Sterling* (1979) 36 FLR 244. Further, an agency is entitled to claim privilege for advice obtained from salaried legal officers who are employed within the agency as legal advisers, where the legal advice is given within the professional relationship between the legal officer and the client, and the advice is independent in character: *Attorney-General (NT) v Kearney* (*op cit*); *Waterford v Commonwealth* (*op cit*).
13. I have examined the disputed documents. I am satisfied that those documents are confidential communications between the then Attorney General and legal advisers in the Crown Solicitor's Office, or their agents, brought into existence for the sole purpose of seeking and giving legal advice. In my opinion, each of the disputed documents would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that the disputed documents are exempt under clause 7 of Schedule 1 to the FOI Act.

**Sufficiency of searches conducted by the agency**

14. During the process of dealing with this complaint, the complainant raised the issue of certain documents which did not appear on the schedule prepared by the agency and which, in the view of the complainant, should have appeared on that schedule. Those documents consist of a covering letter and statutory

declarations and supporting documentation which comprise the substance of the complaint made by the complainant to the then Attorney General in 1994.

15. The agency did not deal with the question of “missing” documents as that issue did not arise until this matter came to my office as a complaint. Although there is no notification from the agency in the form prescribed by s.26 of the FOI Act (which deals with the requirements of agencies when requested documents either do not exist or cannot be found), the agency’s notice of decision dated 10 August 1995 contains an explanation of the searches conducted by the agency and identifies the files and documents located as a result of those searches.
16. I am empowered by s.76(1) of the FOI Act to review any decision made by the agency and to decide any matter in relation to an access application that could have been decided by the agency. In my view, that power includes the ability to raise and deal with a “sufficiency of search” issue, even if that issue was not raised initially by the complainant with the agency. To deal with a complaint against a decision of an agency to refuse access on the basis that documents either do not exist or cannot be found, I consider there are two questions that must be answered. Firstly, are there reasonable grounds to believe that the requested document exists or should exist? Secondly, in circumstances in which the first question is answered in the affirmative, were the searches conducted by the agency to locate the document reasonable in all the circumstances?
17. Whilst I do not consider that it is my function to physically search for the requested documents on behalf of an access applicant, nor to examine in detail the agency's record-keeping system, if I am satisfied that the requested documents exist, or might exist in an agency, it is my responsibility to inquire into the adequacy of the searches conducted by an agency, to require further searches if necessary and to satisfy myself that the agency has acted reasonably, pursuant to its obligations under the FOI Act.

**Are there reasonable grounds to believe the requested documents exist?**

18. The complainant submits that she provided the then Attorney General with a lever arch file containing, *inter alia*, statutory declarations supporting her complaint concerning the conduct of the proceedings before the Tribunal. The complainant believes that copies of the documents she provided to the Attorney General in 1994 would have been retained on files somewhere in either the agency or in the office of the Attorney General. She claims to have received confirmation from the electorate office of the Attorney General that the documents were received and passed to the Crown Solicitor’s Office.
19. The complainant offered no evidence that copies of her documents were made by the agency, other than her belief that, as in her view they were pertinent to her complaint, the agency would have made and retained copies of them. In response to my inquiries in respect of that matter, I was informed that the agency undertook a search of its computerised database, using the complainant’s name as a search prompt. As a result of that search four files were identified as

containing documents which may have been within the ambit of the access application. The first file was identified as being a file of the Director of Public Prosecutions and not held by the Ministry of Justice and to which the Ministry of Justice was not entitled access. I was informed that the second file was physically searched by the agency's freedom of information coordinator, who concluded that there were no documents on that file that came within the ambit of the access application. That file was also searched by one of the agency's legal officers, who confirmed in writing to me that there were no documents on that file within the ambit of the application.

20. The remaining two files identified by the agency as relevant to the access application were dealt with and all the documents on those files were described in the schedule attached to the agency's notice of decision dated 10 August 1995. The agency found no record of having received any statutory declarations from the complainant and indicated that, had it located any such documents, they would have been released to the complainant.
21. There is evidence in the disputed documents themselves that the lever arch file supplied by the complainant to the Attorney General was referred by the Attorney General to the Crown Solicitor with the request for advice in respect of the complaint. There is also an indication in the documents themselves that the file was accompanied by a request that it be returned to the Attorney General in due course; that it was returned to the Attorney General by the Crown Solicitor's Office in due course; and that it was returned by the Attorney General to the complainant. It is not disputed by the complainant that her lever arch file and all the documents contained therein, other than the complainant's covering letter, were subsequently returned to her.
22. There is no evidence before me that copies of any of the documents contained in the lever arch file were made either by the Attorney General or any of her staff, or the Crown Solicitor's Office. Nor is there any evidence that any of those parties had any need to make or retain copies of those documents or would normally have done so. Further, in response to my inquiry, the Director of Public Prosecutions has informed me that his file does not contain copies of the complainant's letters of 3 and 12 December 1994 to the Attorney General, nor a statutory declaration and supporting documentation relating to the conduct of proceedings before the Equal Opportunity Tribunal.
23. Accordingly, I am not satisfied that copies of those documents do exist or ever existed, nor that they should exist, either in the agency or any other agency. In any event, I am satisfied that the searches conducted by the agency have been, in all the circumstances, reasonable. I find, therefore, that those documents the complainant claims to be missing either do not exist or cannot be found.

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