

Langford and Mundaring

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

**File Ref: F0091999
Decision Ref: D0151999**

Participants:

Nicholas John Langford
Complainant

- and -

Shire of Mundaring
First Respondent

- and -

A
Second Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access - correspondence between agency and its legal advisers – clause 7 – legal professional privilege – privileged communications – whether attachments privileged – whether legal professional privilege in copies when originals may not be privileged.

FREEDOM OF INFORMATION – refusal of access – letters of complaint to agency – clause 3(1) – personal information about third parties – public interest – typed summaries.

Freedom of Information Act 1992 (WA) s.102(3), Schedule 1 clauses 3(1), 3(2), 3(6), 7;
Dog Act 1976

Re Guyt and Health Department of Western Australia [1994] WAICmr 5;
Re Nazaroff and Department of Conservation and Land Management [1995] WAICmr 8;
Re Rehman and Medical Board of Western Australia [1995] WAICmr 24;
Re Karlsson and Department for Family and Children's Services [1999] WAICmr 1;
Grant v Downs (1976) 11 ALR 577 p 588;
Trade Practices Commission v Sterling (1979) 36 FLR 244;
Commissioner, Australian Federal Police v Propend Finance Pty Ltd (1997) 141 ALR 545;

DECISION

The decision of the agency is confirmed. Documents 33-40, 42-44 and 46-54 and the attachments to them are exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*, and Documents 55-60 are exempt under clause 3(1).

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

3 June 1999

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Shire of Mundaring ('the agency') to refuse Mr Langford ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant has been involved in a dispute over an alleged attack upon a dog by one of his dogs that resulted in the agency initiating an investigation into the incident in 1998. Although the agency considered that it had enough evidence to prosecute the complainant under the provisions of the *Dog Act 1976*, for various reasons, the agency did not pursue the case against the complainant.
3. By letter dated 8 December 1998, the complainant lodged an application with the agency seeking access under the *Freedom of Information Act 1992* ('the FOI Act') to documents concerning the complaints against him and the inquiries conducted by the agency into those matters.
4. In a notice of decision dated 20 January 1999, the agency informed the complainant that it had identified 60 documents as coming within the ambit of his access application and had decided to grant access to edited copies of 32 of those documents. The agency claims that the matter deleted from those 32 documents is exempt under clause 3(1) of Schedule 1 to the FOI Act.
5. The agency refused access to other documents (numbered 33-54 on the agency's schedule) on the ground that those documents are exempt under clause 7 of Schedule 1 to the FOI Act. The agency also decided that 6 documents, numbered 55 to 60 on the schedule, were exempt under clause 3(1) of Schedule 1 to the FOI Act. However, in keeping with the spirit of the FOI Act, the agency provided the complainant with a typed summary of the contents of each of those documents in order to give him as much information as possible.
6. The principal officer of the agency made the decision on access. Accordingly, internal review was not available. Therefore, on 27 January 1999, the complainant lodged a complainant with the Information Commissioner seeking external review of the agency's decision with respect to the documents numbered 33 to 60.

REVIEW BY THE INFORMATION COMMISSIONER

7. I obtained the documents in dispute from the agency and inquiries were made with the parties to determine whether this complaint could be resolved by conciliation. During the course of those inquiries, the agency agreed to release

one other document to the complainant. However, attempts to settle the balance of this complaint by conciliation were not successful.

8. In the course of my dealing with this complaint, a third party sought to be joined as a party to the complaint and that person was so joined.
9. On 29 April 1999, 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 most, but not all, of the documents for which exemption was claimed under clause 7 may be exempt under that clause. However, it was my preliminary view that 2 documents (numbered 41 and 45 on the agency's schedule), and the attachments to Documents 43 and 45 (with minor deletions) may not be exempt under clause 7. It was also my preliminary view that 6 documents may be exempt under clause 3(1).
10. The agency withdrew its claims for exemption for Documents 41 and 45 and provided the complainant with access to copies of those documents. The agency also withdrew its claims in relation to the attachment to Document 43, being a solicitor's bill of costs, and agreed to its disclosure in an edited form as outlined in my preliminary view. Therefore, those documents are no longer in dispute and I have not dealt with them in my reasons for decision.
11. The agency advanced a new claim for the attachment to Document 45 based on clause 3(1). However, my office obtained the consent of the person named in that document to its release, and the agency subsequently released it to the complainant. Therefore, that document is no longer in dispute between the parties and I have not dealt with it in my reasons for decision.
12. The complainant provided a further written submission for my consideration and I have taken his submission into account in making my final decision in respect of this matter.

THE DISPUTED DOCUMENTS

13. There are 26 documents, some with attachments, remaining in dispute between the parties. Of those, 20 consist of correspondence between the agency and its legal adviser, a number of which have attachments. The agency claims that those documents and their attachments are exempt under clause 7. The remaining 6 documents are handwritten letters to the agency. The agency claims that those documents are exempt under clause 3(1). In these reasons for decision, I refer to the disputed documents by the reference number allocated to each document by the agency in its notice of decision to the complainant.

THE EXEMPTIONS

(a) Clause 7 – Legal professional privilege

14. Clause 7 of Schedule 1 to the FOI Act 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)."*

15. I have discussed the scope and meaning of clause 7 of Schedule 1 to the FOI Act in a number of decisions, initially in *Re Guyt and Health Department of Western Australia* [1994] WAICmr 5; *Re Nazaroff and Conservation and Land Management* [1995] WAICmr 8; *Re Rehman and Medical Board of Western Australia* [1995] WAICmr 24 and most recently in *Re Karlsson and Department for Family and Children's Services* [1999] WAICmr 1. I have stated in all those decisions that it is clearly established law in Australia that confidential communications passing between a solicitor and his or her client will be privileged from production in legal proceedings if made for the sole purpose of giving or receiving legal advice or for use in existing or anticipated legal proceedings. In *Grant v Downs* (1976) 11 ALR 577, at page 588, the majority of the High Court (Stephen, Mason and Murphy JJ) stated “[f]or this and the reasons which we have expressed earlier we consider that the sole purpose test should now be adopted as the criterion of legal professional privilege.”
16. 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. Legal professional privilege also extends to “[n]otes, memoranda, notes or other documents made by the client or the legal adviser of the client of communications which are themselves privileged, or containing a record of those communications, or relate to information sought by the client's legal adviser to enable him to advise the client...”: *Trade Practices Commission v Sterling* at page 246.
17. The rationale behind the doctrine of legal professional privilege is to promote the public interest in the effective administration of justice through full and frank disclosure by clients to their legal advisers. The principle of legal professional privilege is borne out of the weighing up of competing public interests. Therefore, no further balancing of public interests needs to occur which is one of the reasons why the exemption in clause 7 is not limited by a public interest test.

The complainant's submission

18. The complainant submits that appendices to documents which may attract legal professional privilege are themselves not privileged and that a claim for

exemption under clause 7 only applies to those documents containing requests for legal advice and the advice received as a result of those requests.

19. In addition, in a submission dated 23 February 1999, the complainant referred to the judgement of Gaudron J in *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 141 ALR 545, whom he claimed granted privilege to only “copy documents provided solely to a lawyer and made solely for the purpose of obtaining legal advice for use in legal proceedings.” The complainant submits that, therefore, if a document was not created in the first instance for the sole purpose of giving or receiving legal advice, then that document cannot be the subject of legal professional privilege.

Documents 33-40, 42-44 and 46-54

20. I have examined Documents 33-40, 42-44 and 46-54 and I am satisfied that those documents are confidential communications between the agency and its legal advisers, made for the sole purpose of giving or receiving legal advice. In my view, those documents would be privileged from production in legal proceedings on the ground of legal professional privilege. Therefore, I find that they are exempt under clause 7.

The attachments to the disputed documents

21. A number of the disputed documents have attachments to them which have been described to the complainant, to the extent that they can be described without revealing exempt matter, in a schedule of documents prepared by my office and provided to him under cover of a letter dated 18 February 1999.
22. It is accepted that, to attract privilege, documents must have been created for the “sole purpose” of giving or receiving legal advice or for contemplated or pending litigation. The sole purpose test has been defined in *Grant v Downs*. Therefore the issue which I must consider is whether the attachments to the disputed documents meet the requirements of the “sole purpose test”. Some of the attachments are documents which are themselves clearly privileged documents. However, others are copies of documents the originals of some of which may not in themselves be privileged.

The 2nd and 3rd attachments to Document 36

23. The second attachment to Document 36 appears to me to be privileged on the basis that it contains a note of legal advice given to the agency by its legal advisers with reference to litigation then on foot. The third attachment to Document 36 appears to me to be a copy of a privileged document as it is a letter which was transmitted by facsimile from an officer of the agency to the agency’s legal advisers with respect to litigation then on foot. In my view both attachments are exempt under clause 7.

The attachments to Documents 37, 38, 42, 47, 52 and the 2nd attachment to Document 51 and the 2nd attachment to Document 53

24. The attachments to Documents 37, 38, 42, 47 and 52 and the second attachment to Document 51 and the second attachment to Document 53 are all draft documents prepared by the solicitors and sent to the agency for its consideration and comments before being finalised. They are all, in my view, clearly documents created for the sole purpose of giving the agency legal advice and would clearly be privileged from production in legal proceedings on the ground of legal professional privilege. I find, therefore, that those attachments are exempt under clause 7 of Schedule 1 to the FOI Act.

The attachment to Document 49

25. The attachment to Document 49 is a letter from the agency's legal advisers transmitted to, and received by, the agency by facsimile – Document 49 being the original of that letter – and clearly is itself a confidential communication between the agency and its legal advisers for the sole purpose of giving the agency legal advice and is clearly privileged. I find that the attachment to Document 49 is exempt under clause 7.

The attachments to Documents 35, 39, 44, 46, 48, 50, and the 1st and 4th attachments to Document 36, the 1st attachment to Document 51 and the 1st attachment to Document 53

26. I consider that the attachments to Documents 35, 39, 44, 46, 48 and 50 and the first and fourth attachments to Document 36, the first attachment to Document 51 and the first attachment to Document 53 are copies of documents the originals of which would not be subject to legal professional privilege. The question then is whether the copies made by the legal advisers and sent to the agency can be privileged even though they are copies of documents which are not privileged.
27. Until recently, there has been conflicting authority as to whether privilege should apply to a copy document where the original would not be privileged. However, that conflict has now been resolved by the decision of the High Court of Australia in *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 141 ALR 545. In that case a majority of five judges held that, if a copy document is created for a privileged purpose, the copy will be privileged even if the original is not. Submission by a client to a lawyer, or a lawyer to a client, in order to facilitate the giving or receiving of legal advice is a privileged purpose, and a copy created for that purpose will attract the privilege. It was also considered that it is communications, rather than documents, to which the privilege attaches and that the submission of a copy in that way is properly characterised a privileged communication.

28. In that case, Gaudron J stated at page 22 that:

“...a document which is brought into existence solely for the purpose of obtaining legal advice or solely for use in litigation and which is then provided to a lawyer for that purpose is, itself, a communication with the lawyer and, in accordance with the decision of this Court in Grant v Downs, a privileged communication. Equally, a copy of a document made solely for the purpose of obtaining legal advice or solely for use in legal proceedings is, when provided to a lawyer for that purpose, a communication to the lawyer. Save that it is likely to be more accurate, the provision of a copy document in those circumstances is no different from the oral communication, in the same circumstances, of the material contained in the original document. And the latter is unequivocally a privileged communication.

The consideration that the provision to a lawyer of a copy document is, itself, a communication different only in form from the oral communication of the contents of the original document leads me to conclude that privilege attaches to a copy document which is provided to a lawyer if the copy was made solely for the purpose of obtaining legal advice or solely for use in legal proceedings.

It does not seem to me absurd or contrary to common sense for privilege to attach to copy documents provided to a lawyer and made solely for the purpose of obtaining legal advice or solely for use in legal proceedings. If the original is not privileged, it is susceptible to whatever compulsory processes are available to secure its production; and the fact that it may be easier to obtain a copy from a solicitor than it is to obtain the original by compulsory process is no reason to cut down or abrogate legal principle, especially one of such fundamental importance to the administration of justice as legal professional privilege. Indeed, if it were held that privilege does not attach to a copy document made solely for the purpose of obtaining legal advice or solely for use in legal proceedings and provided to a lawyer for that purpose, it might well encourage less than thorough investigative methods on the part of law enforcement agencies, with the obvious risks that that entails for the administration of justice.”

29. Therefore, it is my understanding that a copy of a document may attract privilege if the copy was made for the purpose of obtaining legal advice irrespective of the fact that the original would not attract privilege as the original was not created for the sole purpose of obtaining legal advice. McHugh J stated in *Propend* at page 26 that :

“This point, however trite it may seem, is fundamental to the determination of the present appeal. Much of the confusion present in the case law arises from a failure to apply it. Legal professional privilege is concerned with communications, either oral, written or recorded, and not with documents per se.”

30. Although it is my view that the originals of those documents would not be privileged, it appears to me from the covering letter to which each is attached that the copies were all created for the purpose of enabling the solicitors to give legal advice to, and receive instructions from, the agency. Therefore, I am of the view that they were created solely for a privileged purpose and would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that the attachments to Documents 35, 39, 44, 46, 48 and 50 and the 1st and 4th attachments to Document 36, the 1st attachment to Document 51 and the 1st attachment to Document 53 are exempt under clause 7.

The attachments to Document 54

31. The bundle of attachments to Document 54 is made up of copies of a number of different kinds of documents, some of which are clearly privileged documents (for example, witness statements); others of which it is not clear are privileged; and others of which are copies of documents the originals of which were clearly not privileged documents. As all of those attachments were submitted by the agency to its solicitors for the purpose of enabling the solicitors to give the agency legal advice, it is my view that all of those copy documents were created for a privileged purpose and would, therefore, be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that all of the attachments to Document 54 are exempt under clause 7.

(b) Clause 3 – Personal information

32. Clause 3(1) provides:

“3. *Personal information*

Exemption

(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).”

33. In the Glossary to the FOI Act, “personal information” is defined as follows:

"personal information" means information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead -

(a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or

(b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample;”

34. In my view, the purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom personal information may be contained in documents held by State and local government agencies. The definition of “personal information” in the Glossary in the FOI Act makes it clear that any information or opinion about a person from which that person can be identified is, on the face of it, exempt matter under clause 3(1).
35. I have examined Documents 55-60. I am satisfied that those documents contain information from which the identity of a person other than the complainant could reasonably be ascertained. In addition, the documents are all handwritten. Taking into account their contents and the fact that they are handwritten, I am satisfied that those documents contain “personal information” as defined in the FOI Act and are, therefore, exempt under clause 3(1), unless one or more of the limits on exemption applies.

The limits on exemption

36. Clause 3(2) provides that matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant. Although the documents contain some personal information about the complainant, that information is inextricably interwoven with personal information about other people. In my view, it is not possible to give the complainant access to the information about him without also giving him access to information about other people. In those circumstances, the disclosure of the documents is not an option and the limit on exemption does not apply.
37. In my view, none of the limits on exemption in clauses 3(3)-3(5) applies. The only limit that may apply is the limit on exemption in clause 3(6). Clause 3(6) provides that matter is not exempt if its disclosure would, on balance, be in the public interest. Pursuant to s.102(3) of the FOI Act, the onus is on the complainant to establish that disclosure would, on balance, be in the public interest.

Public interest

38. I recognise that there is a strong public interest in maintaining personal privacy and that that public interest may only be displaced by some other stronger public interest that requires the disclosure of personal information about an individual.
39. I also recognise that there is a public interest in persons such as the complainant being informed of complaints made against them that are recorded in the documents of State and local government agencies; of the action taken by agencies in respect of those complaints; and of the outcome of any inquiries into them. However, I consider that the latter public interest has been satisfied to a large extent by the agency, as far as the agency can do so in the circumstances, by it providing the complainant with a summary of the allegations against him.

40. I do not consider that the public interest requires the complainant to be given access to the actual documents of complaints, providing the summary prepared by the agency accurately reflects the substance of the allegation made against him. In this instance, I am satisfied that it does and that the documents to which access has been granted adequately explain the action taken by the agency in respect of those complaints.

41. The complainant has not identified any other public interests that I should take into account in the balancing process, and I am satisfied that none exists. Therefore, in balancing the competing interests, I am not persuaded that the public interest in maintaining personal privacy is outweighed by any other public interest. Accordingly, I find that Documents 55-60 are exempt under clause 3(1) of Schedule 1 to the FOI Act.
