

SANFEAD AND JUSTICE

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

**File Ref: 95119
Decision Ref: D01796**

Participants:

Terence John Sanfead
Complainant

- and -

Ministry of Justice
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to a claim for damages against former employer - clause 7 - legal professional privilege - whether documents are confidential communications between a legal adviser and client for the sole purpose of giving or receiving legal advice - whether documents were brought into existence for the sole purpose of use in existing or anticipated litigation involving the agency.

Freedom of Information Act 1992 (WA) ss. 72(1)(b), 75(1), 76(3), 102(3); Schedule 1 clauses 3(1), 6, 7.
Rules of the Supreme Court 1971 (WA) Order 26 Rule 1

Sanfead v Rovell Drilling Pty Ltd, Hill 50 Gold Mine NL and Metana Minerals NL (Supreme Court of Western Australia, 29 November 1995, unreported).

Re Sanfead and State Government Insurance Commission (Information Commissioner, WA, 17 January 1996, unreported).

Re Read and Public Service Commission (Information Commissioner, WA, 16 February 1994, unreported).

Re Mineralogy Pty Ltd and Department of Resources Development (Information Commissioner, WA, 5 January 1996, unreported).

Grant v Downs (1976) 135 CLR 674.

Baker v Campbell (1983) 153 CLR 52.

Wheeler v Le Marchant (1881) 17 Ch D 675.

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

Nickmar Pty Ltd v Preservatrice Skandi Insurance Ltd (1985) 3 NSWLR 44.

Key International Drilling Co v TNT Bulk Ships (1989) WAR 280.

Hooker Corporation Ltd v Darling Harbour Authority (1987) 9 NSWLR 538.

Propend Finance Pty Ltd and Others v Commissioner of Australian Federal Police and Others (1995) 128 ALR 657.

Water Authority of Western Australia v AIL Holdings Pty Ltd (1992) 7 WAR 135.

DECISION

The decision of the agency is varied. In substitution, it is decided that:

- (i) the documents identified at paragraphs 18, 20 and 28 of the attached Reasons for Decision are exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*; and
- (ii) the documents identified at paragraphs 26 and 31 of the attached Reasons for Decision are not exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

20th March 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 Mr Sanfead ('the complainant') access to certain documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The background to this complaint is as follows. In 1986 the complainant was seriously injured in an industrial accident. Although the complainant received worker's compensation payments for his injuries, he was unable to resume employment. In 1990 the complainant instituted proceedings in the District Court of Western Australia in which he alleged that his former employer, Rovell Drilling Pty Ltd, was negligent and he sought damages in respect of his injuries allegedly attributed to that negligence. Two other parties were subsequently joined as defendants to that action.
3. In April 1994, the District Court determined the matter in favour of the three defendants and the complainant (the plaintiff in that matter) received no compensation for his disabilities. The complainant thereafter appealed against the decision of the District Court to the Supreme Court of Western Australia. That appeal was heard by the Supreme Court of Western Australia on 11 August 1995, and the judgment of the Supreme Court was delivered on 29 November 1995. The Supreme Court upheld the complainant's appeal: (see *Sanfead v Rovell Drilling Pty Ltd and Ors* (Supreme Court of Western Australia, 29 November 1995, unreported) ('*Sanfead v Rovell Drilling*').
4. The complainant's former employer was insured with the State Government Insurance Commission ('the SGIC'). The SGIC's legal adviser - commencing at the time the complainant first applied for worker's compensation, throughout the litigation before the District Court and finally to the appeal before the Supreme Court - was the Crown Solicitor's Office ('the CSO'). Although initially separately represented, during the course of the proceedings in the District Court, it was agreed between the defendants that they should be jointly represented and all three defendants were thereafter represented by Counsel instructed by the CSO.
5. After filing his appeal with the Supreme Court, on 12 April 1995, the complainant applied to the SGIC under the FOI Act for access to his entire file which involved in excess of 850 documents. The SGIC granted the complainant access to the majority of those documents but refused access to 164 documents on the ground that those documents were exempt, either in full or in part, under one or more of clauses 3(1), 6 and 7 of Schedule 1 to the FOI Act. The decision of the SGIC was the subject of my decision in *Re Sanfead and State Government Insurance Commission* (17 January 1996, unreported).

6. On 28 April 1995, the complainant applied to the agency under the FOI Act for access to the entire file held by the CSO relating to his accident and subsequent court actions. The complainant's access application was in identical terms to his access application of 12 April 1995 to the SGIC.
7. On 14 June 1995, the agency sought from the complainant an extension of time in order for it to deal with his access application which involved several hundred documents. No extension was granted and the agency did not make a decision upon the complainant's access application within the statutory period of 45 days. On 16 June 1995, the complainant applied to the agency for internal review. The agency again sought an extension of time from the complainant but this was refused and, on 4 July 1995, the complainant applied to the Information Commissioner for external review of the deemed refusal of the agency to grant access to the requested documents.

REVIEW BY THE INFORMATION COMMISSIONER

8. On 10 July 1995, I notified the agency that I had received this complaint and, pursuant to my powers under ss.75(1) and 72(1)(b) of the FOI Act, required the production to me of the documents in dispute together with the agency's FOI file maintained in respect of the matter. Ordinarily, following the receipt of a complaint for external review, my office would be in possession of a schedule identifying and describing the documents in dispute. However, that is not the case when dealing with deemed refusals of access and it was not the case in this instance. As a result, it has taken some time to properly locate, collate and identify the documents in dispute in a manner that would facilitate my proper determination of the complainant's claims for access and the agency's claims for exemption. This process necessarily meant that it was impracticable for me to make a decision upon this complaint within 30 days as required by s.76(3) of the FOI Act.
9. After the complaint was received by my office, the agency located one file, comprising 5 volumes, and several loose leaf folders, related to the complainant. The files contained almost 900 documents relevant to the complainant's access application. Following its initial assessment of those documents, the agency released a number of them to the complainant. However, the agency refused the complainant access to 629 of the documents on the ground that those documents are exempt under clause 7 of Schedule 1 to the FOI Act.
10. After examining those documents and considering the material provided by the agency, on 26 October 1995, I provided the parties with my preliminary view and reasons for that view. It was my preliminary view that 107 of the 629 documents for which exemption was claimed under clause 7 may not be so exempt. That is, on the material then before me, it was my view that the agency had established that most, but not all, of the documents in dispute were exempt under clause 7 of Schedule 1 to the FOI Act. Subsequently, the agency provided the complainant with access to edited copies of some of the disputed documents consisting of

correspondence or file notes of communications between the CSO and the complainant's solicitors.

11. Notwithstanding the fact that the SGIC had released copies of documents to the complainant that are identical to some of the documents in dispute in this matter, the agency maintains its claim that those documents are exempt under clause 7 and provided a submission in support of that claim. The agency also maintains its claim that other documents provided to the CSO by the third defendant's solicitors as background information are exempt under clause 7. After receiving my preliminary view, despite being afforded the opportunity, the complainant did not provide any submission or further material for my consideration and he did not withdraw his complaint.

THE DISPUTED DOCUMENTS

12. I have examined the disputed documents, or parts of documents, for which an exemption under clause 7 is claimed by the agency. The disputed documents consist of, among other things, correspondence between the CSO and its client, the SGIC; correspondence between the CSO and the legal firms or Counsel representing the second and third defendants involved in the complainant's litigation before the District Court and his appeal to the Supreme Court; confidential communications between the CSO and third parties and confidential communications between the SGIC and third parties which were brought into existence for the sole purpose of preparing for existing or anticipated litigation; and, finally, notes, memoranda, minutes of meetings and other documents that record the substance of communications between officers of the CSO and between the CSO and the SGIC.
13. I am satisfied that the complainant has been informed of the nature of the documents in dispute in this instance. Those documents are listed and described in a revised and expanded schedule prepared by my office and provided to the complainant on 17 November 1995. Many of the documents in dispute in this instance are identical to those that were in dispute in my decision in *Re Sanfead*. The schedule attached to this decision identifies those disputed documents by the numbers assigned to them by the agency followed by, in brackets, the numbers corresponding to the identical documents that were in dispute in *Re Sanfead*. Whilst I have considered and taken into account the arguments of the parties put to me in respect of those documents on this occasion, I am satisfied that the documents found to be exempt under clause 7 in my decision in *Re Sanfead* are, for the reasons given at paragraphs 38-44 of that decision, exempt under clause 7 of Schedule 1 to the FOI Act, on this occasion also. Therefore, I need not deal with those documents any further.
14. I propose to deal with the agency's claim for exemption for the remaining disputed documents in the following order: firstly, the communications between the CSO and its client, the SGIC ('the Group A documents'); secondly, the communications between the CSO and third parties and between the SGIC and third parties ('the Group B documents'); thirdly, the documents released to the

complainant by the SGIC ('the SGIC documents'); and, finally, several documents which I have identified as 'the Bell documents'.

THE EXEMPTION

15. Clause 7 of Schedule 1 to the FOI Act provides:

"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)."*

16. In a number of my formal decisions, I have discussed the principle and application of legal professional privilege, initially in *Re Read and Public Service Commission* (16 February 1994, unreported), at paragraphs 65-66, and most recently in *Re Mineralogy Pty Ltd and Department of Resources Development* (5 January 1996, unreported), at paragraphs 32-34.

17. It is clearly established law in Australia that confidential communications passing between a legal adviser and his or her client need not be given in evidence or otherwise disclosed by the client and, without the client's consent, may not be given in evidence or otherwise disclosed by the legal adviser, if made for the sole purpose of enabling the client to obtain, or the adviser to give, legal advice or for use in existing or anticipated legal proceedings: *Grant v Downs* (1976) 135 CLR 674; *Baker v Campbell* (1983) 153 CLR 52. Confidential communications between a solicitor or client and a third party will also be privileged if they are made for the purpose of actual or anticipated litigation: *Wheeler v Le Marchant* (1881) 17 Ch D 675; *Trade Practices Commission v Sterling* (1979) 36 FLR 244; see also *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44. Confidential communications between the various legal advisers of the client with a view to obtaining legal advice or assistance will also be privileged: *Trade Practices Commission v Sterling*.

The Group A documents

18. Approximately half of the disputed documents, which are identified below, consist of, among other things, correspondence between the CSO and the SGIC in respect of the complainant's claim for worker's compensation, his subsequent litigation before the District Court and appeal to the Supreme Court; file notes,

memoranda and notes of discussions between officers of the CSO in respect of those matters; and notes of telephone conversations between officers of the CSO and the SGIC in respect of those matters. The documents concerned are identified by the agency as follows:

87/12500-Vol 1: 0001, 0003, 0006, 0011, 0014, 0022, 0041, 0042, 0051, 0052, 0053, 0058, 0063, 0065, 0066, 0094, 0116, 0117, 0118, 0126, 0146, 0150, 0152, 0159, 0163, 0165, 0172, 0173, 0179, 0187, 0188, 0192, 0193, 0199, 0202, 0204, 0206, 0213, 0227, 0234, 0238, 0240, 0250, 0259, 0265, 0270, 0276, 0278, 0279, 0282, 0283, 0287, 0289, 0293, 0302, 0307, 0316, 0317, 0318, 0323, 0326, 0330, 0334, 0342, 0347, 0349, 0353, 0354, 0355, 0356, 0357, 0363, 0370, 0372, 0374, 0375, 0376, 0378, 0384, 0385, 0389, 0391, 0393, 0395, 0396, 0397, 0402, 0403, 0423, 0424 and 0425.

87/12500-Vol 2: 0045.

87/12500-Vol 4: 0003, 0024, 0042, 0043, 0150, 0151 and 0164.

87/12500-Vol 5: 0001, 0004, 0005, 0006, 0007, 0013, 0016, 0019, 0027, 0029, 0057, 0058, 0068, 0090, 0094, 0102, 0103, 0105, 0106, 0108, 0111, 0112, 0114, 0118, 0119, 0122, 0130, 0131, 0132, 0133, 0134, 0135, 0136, 0137, 0140, 0141, 0143, 0144, 0145, 0146, 0151, 0156, 0162, 0164, 0180, 0186, 0187, 0194 and 0195.

Part file 87/12500-01: 51A.

Manila Folder (exempt docs): 0070, 0075, 006, 0077, 0079, 0091.

Case documents (Exhibit 2) : 0009, 0010

19. Having inspected those documents and considered the submissions in respect of them, in my view, those documents were clearly made for the sole purpose of enabling the client to obtain, or the legal adviser to give, legal advice or for use in existing or anticipated legal proceedings and, in accordance with the rule in *Grant v Downs*, or in the latter case, in accordance with the authority of *Trade Practices Commission v Sterling*, would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that those documents are exempt under clause 7 of Schedule 1 to the FOI Act.

The Group B documents

20. The disputed documents which fall into Group B comprise, among other things, confidential communications between the CSO and third parties, and between the SGIC and third parties, which were brought into existence for use in, or during the progress of, the complainant's litigation before the District Court and his subsequent appeal to the Supreme Court. Those documents include confidential correspondence between the CSO and the legal firms representing the second and third defendants to the complainant's litigation; confidential communications from either the CSO or the SGIC to insurance investigators relating to the

complainant's litigation before the District Court; and confidential communications between the CSO and Counsel representing the first, second and third defendants, including documents provided to Counsel in the brief prepared for Counsel to advise and appear at the hearing before the District Court. The documents which comprise Group B are:

87/12500-Vol 1: 0004, 0007, 0008, 0009, 0012, 0013, 0015, 0016, 0018, 0020, 0023, 0024, 0025, 0026, 0027, 0028, 0029, 0031, 0034, 0036, 0054, 0055, 0056, 0059, 0060, 0064, 0066, 0067, 0068, 0070, 0076, 0077, 0078, 0082, 0088, 0091, 0092, 0095, 0109, 0112, 0113, 0115, 0120, 0124, 0125, 0127, 0137, 0140, 0145, 0147, 0154, 0158, 0162, 0169, 0170, 0176, 0178, 0180, 0182, 0183, 0185, 0186, 0189, 0195, 0196, 0198, 0200, 0203, 0207, 0208 and 0210.

87/12500-Vol 2: 0002.

87/12500-Vol 4: 0052, 0121, 0136, 0138, 0139, 0155, 0191 and 0192.

87/12500-Vol 5: 0003, 0011, 0012, 0015, 0017, 0020, 0021, 0022, 0025, 0031, 0032, 0037, 0038, 0039, 0040, 0041, 0050, 0051, 0052, 0053, 0055, 0056, 0070, 0076, 0081, 0082, 0085, 0086, 0090, 0093, 0095, 0097, 0098, 0121, 0123, 0135, 0138, 0139, 0142, 0149, 0152, 0155, 0156, 0157, 0158, 0163, 0165, 0168, 0169, 0170, 0171, 0172, 0179, 0181, 0183, 0184, 0185, 0189, 0190 and 0196.

Part file 87/12500-01: 01, 09, 10, 31, 49/50, 51.

Case documents (Exhibit 2) : 0008, 0012, 0017, 0018, 0019, 0044, 0045, 0060, 0063 and 0064.

MoJ Ring Binder -Documents "O", 1, 2, 24, 25, 27, 28 (in part), 29, 30, 39, 40, 41, 57, 75, 76.

21. In my view, some of those documents are correctly identified as confidential communications between the various legal advisers of each of the defendants for the sole purpose of obtaining and giving legal advice. Others are properly identified as confidential communications between the CSO and third parties and between the SGIC and third parties which were made or prepared when the complainant's litigation before the District Court was reasonably anticipated or had commenced, for the purposes of, and use in, that litigation. I consider those documents would therefore be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find they are exempt under clause 7 of Schedule 1 to the FOI Act.

The SGIC documents

22. The agency also claims that a number of documents, copies of which were released to the complainant by the SGIC following his FOI application to that agency, are exempt under clause 7 of Schedule 1 to the FOI Act, because the documents were released by mistake and, therefore, there was no intentional waiver of privilege in respect of those documents by the SGIC. The agency referred me to the cases of *Key International Drilling Co v TNT Bulk Ships*

(1989) WAR 280 and *Hooker Corporation Ltd v Darling Harbour Authority* (1987) 9 NSWLR 538 in support of its claims in that regard.

23. During the hearing of the complainant's appeal in *Sanfead v Rovell Drilling* the complainant filed with the Supreme Court a motion for leave to adduce fresh evidence. That fresh evidence included copies of two witness statements which were released to the complainant by the SGIC, following his FOI application to that agency. The first defendant opposed the complainant's motion for leave to adduce the witness statements as fresh evidence, on the ground that there had been no decision by SGIC to waive privilege with respect to the two witness statements released to the complainant by the SGIC. Mr G Halnan, the SGIC officer who dealt with the complainant's FOI application to that agency, filed an affidavit with the Supreme Court about the matter.
24. The reasons for judgment of the Supreme Court in *Sanfead v Rovell Drilling* reveal that the Court accepted the first defendant's submission that the two witness statements were the subject of a previous claim of privilege by the first defendant during the conduct of the complainant's litigation before the District Court; that a mistake had made by Mr Halnan; and, further, that there had been no deliberate decision to waive or abandon privilege in respect of the two documents concerned. Rowland J., at page 4 of his reasons for judgment, accepted that the two witness statements fell within the description of the documents for which the first defendant had previously claimed privilege during the conduct of the complainant's litigation before the District Court. His Honour stated that the abandonment or waiver of privilege would normally require a deliberate act with knowledge that privilege was being waived or abandoned. His Honour decided that, in this instance, the accidental or inadvertent act of releasing the documents in question to the complainant by the SGIC, following Mr Halnan's mistake, could not, on the authority of the *Key International* case, be regarded as either an abandonment or waiver of privilege.
25. Because the Supreme Court accepted that the two witness statements referred to above were mistakenly released to the complainant by the SGIC, and because the Court decided that privilege had neither been waived nor abandoned in respect of those two documents, the agency claims that privilege has not been waived or abandoned in respect of the other documents released to the complainant by the SGIC. The documents to which that claim for exemption relates are:

87/12500 - Vol 1: 0147, 0148, 0256, 0257, 0258 and 0296

87/12500 - Vol 2: 0024 and 0027

87/12500 - Vol 4: 0007, 0017, 0025, 0030, 0033, 0041, 0046, 0052, 0054, 0055, 0064, 0069, 0081, 0106, 0107, 0108, 0110, 0129, 0139, 0143, 0145, 0159, 0160, 0161, 0162 0163, 0165 and 0183

87/12500 - Vol 5: 0003

Part file 87/12500-01: 10, 49, 50 and 51

MoJ Ring Binder: 28, 30 and 75

Case documents (Exhibit 2) : 000008 and 000060.

26. My investigations officer has obtained and examined copies of the lists of discoverable documents filed in the District Court by the first defendant in compliance with Order 26, Rule 1 of the *Rules of the Supreme Court 1971*. He informed me that the first defendant gave discovery of the following documents during the conduct of the complainant's litigation before the District Court:

87/12500 - Vol 1: 0256, 0257, 0258 and 0296; **87/12500 - Vol 4:** 0017, 0041, 0046, 0052, 0054, 0055, 0064, 0106, 0107, 0108, 0110, 0159, 0160, 0162, 0163, 0165 and 0183; **Part file 87/12500-01:** 10; **MoJ Ring Binder:** 75; and

Case documents (Exhibit 2) : 000008

27. Given that the first defendant did not claim privilege for the documents referred to above during the conduct of the complainant's litigation before the District Court, and as the SGIC has since released copies of the identical documents to the complainant, following his FOI application to that agency, I reject the agency's claim that the documents identified above would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that those documents are not exempt under clause 7 of Schedule 1 to the FOI Act.

28. During the conduct of the complainant's litigation before the District Court, the first defendant objected to the production of a number of documents on the ground that those documents would be privileged from production in legal proceedings on the ground of legal professional privilege. However, as a result of the oversight by the SGIC, several documents for which the first defendant had previously claimed privilege, were released to the complainant. Copies of those documents were also held by the agency. Those documents are as follows:

87/12500 - Vol 2: 0024 and 0027

87/12500 - Vol 4: 0007, 0025, 0030, 0033, 0069, 0081, 0129, 0139, 0143, 0145 and 0161

87/12500 - Vol 5: 0003

Part file 87/12500-01: 49, 50 and 51

MoJ Ring Binder: 28 and 30

Case documents (Exhibit 2) : 000008

29. The documents identified in paragraph 28 above are documents of the kind described in the first defendant's list of discoverable documents filed in the District Court for which privilege was claimed. They include investigation reports, witness statements and correspondence between the first defendant and

the insurers of the first defendant, the SGIC; correspondence between the CSO and solicitors for the third defendant; and correspondence, memoranda, notes and instructions provided by officers of the SGIC to the CSO, each of which came into existence or were made when the complainant's litigation in the District Court was anticipated or had commenced.

30. Based upon my examination of those documents and my consideration of the material before me, I accept that those documents were brought into existence for the sole purpose of giving or receiving legal advice or for use in existing or anticipated legal proceedings between the complainant and the first defendant and, in ordinary circumstances, I accept that they would attract legal professional privilege. After considering the claims of the agency, and taking into account the reasons for judgment of Rowland J., in *Sanfead v Rovell Drilling*, I accept that the accidental or inadvertent act of releasing the documents referred to in paragraph 28 above, to the complainant by the SGIC is not to be regarded as either an abandonment or waiver of privilege. In my view, those documents would be privileged from production in legal proceedings on the ground of legal professional privilege and, accordingly, I find that they are exempt under clause 7 of Schedule 1 to the FOI Act.

The Bell documents

31. The remaining documents for which exemption is claimed under clause 7 consist of documents numbered 0098 (mistakenly numbered 0093 in the schedule provided to the complainant), 0099, 0100, 0103 and 0104 from volume 1 of the agency's file 87/12500, copies of some of which were also contained on the ring binder file.
32. Documents 0103, 0104, 0099, 0100 and 0098 were provided to the CSO by the third defendant's solicitors in respect of the District Court action. Document 0103 is a copy of a letter dated 22 April 1992 to the Medical Defence Association of WA ('the MDA') enclosing a copy of document 0104. An edited copy of the document 0103 had already been released to the complainant by the agency with the name, address and certain other information relating to its author deleted. Document 0104 (copy of document 62 in the ring binder file) is a copy of a draft letter dated 22 April 1992 from Mr Bell to the Medical Board of Western Australia. Document 0099 (copy of document 65 in the ring binder file) is a copy of a letter dated 13 May 1992 from the MDA's solicitors to Mr Bell, enclosing document 0100 (copy of document 66 in the ring binder file). Document 0100 is a copy of an undated draft letter to the Medical Board of Western Australia. Document 0098 (copy of document 67 in the ring binder file) is a letter dated 14 May 1992 from Mr Bell to the Medical Board of Western Australia.
33. The agency submits that the Bell documents were specifically created by the solicitors for the third defendant and provided to the CSO for the sole purpose of use in the ongoing litigation involved with the complainant's District Court action. The agency claims that, in those circumstances, the copy documents

would be privileged from production in legal proceedings and are exempt under clause 7. The agency referred me to the decision in *Propend Finance Pty Ltd and Others v Commissioner of Australian Federal Police and Others* (1995) 128 ALR 657 as authority for the proposition that the copy documents provided to the CSO by the solicitors for the third defendant for the sole purpose of use in existing litigation are privileged documents, even though the original documents may not have been privileged.

34. In *Propend Finance* the Court considered several issues, among them the question of whether a copy of an otherwise non-privileged original document, made solely for a privileged purpose, is privileged. When the Full Federal Court considered that question, each of the three judges came to similar, but not identical, conclusions. Each of the judges recognised that there is no single, clear approach in Australia.
35. Beaumont J., concluded, at page 671, that:

"...the fact that a document is a copy does not mean that it cannot be privileged, even if the original is not; but, on the other hand, in such a case, the circumstance that the copy was brought into existence solely for the requisite purpose should not always mean that the copy is privileged. Rather, in both situations, a broader enquiry is, in my opinion, called for; that is, in the particular circumstances in which the document came into existence, should it be treated as, in truth, part of the substantive process of the seeking or the obtaining of legal advice or of preparing for litigation?"

36. Hill J., at page 689, noted that:

*"...a copy of a document made by a client, where the document itself is not privileged, will not attract the benefit of legal professional privilege merely because it is handed to a solicitor. At the very least, for the copy to attract privilege it must be made for a purpose of the type preferred to in *Grant v Downs*".*

37. His Honour concluded, at page 690, that copies of documents otherwise not subject to legal professional privilege are themselves subject to such privilege only where the copies are made for the sole purpose of obtaining advice upon matters contained in or concerning the original, and in circumstances where to compel production of a copy would or could operate to reveal the subject matter upon which advice was sought.
38. Lindgren J. considered whether privilege must be accorded to copies of non-privileged documents made solely for a privileged purpose, in order that clients may be effectively legally advised and effectively represented in litigation, and concluded that it need not. In his view, the public policy which supports the existence of legal professional privilege is satisfied if copy documents stand in the same position in relation to privilege as the original. If the original is privileged, so is a copy of it, even though the copy was not made solely for a privileged

purpose, and, if the original is non-privileged, so is a copy of it, even though the copy was made for a privileged purpose.

39. However, His Honour said, at page 696:

"...in my view special circumstances touching a particular copy document may require that its privilege status be determined by something more than an application of general principle".

It was his view, at pages 697-98 that, "[w]hether the non-privileged original or a copy of it is in issue, privilege will be attracted if and only if inspection would reveal a communication or line of thought which, consistently with the rationale referred to in the joint judgment in *Grant v Downs*, is privileged from disclosure."

40. The essence of the *Propend Finance* case appears to me to be that, as a general rule, a photocopy of a document which is not subject to legal professional privilege is also not privileged, but that in some circumstances such a copy may be privileged. Those circumstances are where the copy was brought into existence solely for a privileged purpose (for example, submission to legal advisers for the purposes of obtaining legal advice) and its disclosure would reveal something of the subject matter upon which advice was sought or a communication or line of thought which is privileged from disclosure, or that in the particular circumstances of its creation it should be treated as part of the substantive process of seeking or giving legal advice or preparing for litigation.
41. This issue has also been considered by the Supreme Court of Western Australia. In *Water Authority of Western Australia v AIL Holdings Pty Ltd* (1992) 7 WAR 135, Acting Master Adams held that a photocopy of a document should not be accorded a privileged status not enjoyed by the original. The Acting Master in that case was of the view that to consider only the purpose for which the photocopies were reproduced would lead to the anomalous (and, in the Acting Master's view, erroneous) conclusion of granting privilege to documents which were not themselves privileged. With respect, I agree with that view.
42. In my view, the purpose for which two of the originals of the Bell documents were created was for reference to the MDA for advice from that Association before Mr Bell responded to the complainant's complaint about him to the Medical Board of Western Australia. As a result of that approach, it appears that he received a response from the MDA's legal advisers. However, there is before me no evidence of a solicitor/client relationship between Mr Bell and the MDA, Mr Bell and the MDA's legal advisers or Mr Bell and the Medical Board of Western Australia and, clearly, none of the original documents was or recorded a confidential communication between a client and his professional adviser for the sole purpose of seeking or giving legal advice or in reference to litigation. Those documents were created some 12 months before the copy documents were passed to the CSO, and were in relation to the Medical Board inquiry not litigation. Therefore, none of the originals of those documents would, in my

view, be privileged from production in legal proceedings on the ground of legal professional privilege.

43. The question is whether the copies of those documents would be so privileged. Following the authority of *Water Authority of Western Australia and AIL Holdings Pty Ltd*, it is my view that the copies of those documents do not attract a privilege that the originals do not. Therefore, it is my view that those documents would not be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that the Bell documents are not exempt under clause 7 of Schedule 1 to the FOI Act.

SCHEDULE

MoJ File 87/12500 - Vol 1:

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0002 (359), 0004 (357), 0005 (205), 0007 (355), 0012 (348), 0014 (346), 0015 (345), 0016 (344), 0018 (341), 0021 (338), 0027 (328), 0034 (318), 0036 (316), 0040 (311), 0045 (306), 0051 (295), 0056 (289), 0062-63 (268), 0065 (256), 0067 (251), 0068 (250), 0072 (236), 0073 (235), 0083 (195), 0084 (194), 0085 (193), 0086 (190), 0089 (185), 0090 (182), 0091 (180), 0093 (178), 0101 (167), 0111 (147), 0113 (145), 0115 (145), 0116 (136), 0124 (131), 0128 (127), 0130 (122), 0144 (100), 0146 (92).

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0002 (460), 0026 (490), 0030 (481), 0043 (480), 0067 (478), 0070 (476), 0084 (470), 0089 (468), 0091 (464), 0099 (462-63), 0100 (473), 0101 (472), 0107 (456), 0109 (454), 0110 (453), 0126 (457), 0128 (447), 0129 (446), 0182 (439), 0196A(428), 0196B (453), 0196C (454).

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40 (81), 44 (92).

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000087 (81), 000088 (92), 000089 (100), 000090 (122), 000092 (251), 000093 (256), 000094 (318), 000095 382), 000097 (394), 000098 (405).
