

## JONES AND LOCAL GOVT

### OFFICE OF THE INFORMATION COMMISSIONER (WA)

#### Decision summary issued pursuant to s.76(8) of the *Freedom of Information Act 1992*

**COMPLAINT No:** 97116

**DECISION No:** D02297

**PARTIES:** Edith Winifred Jones

Complainant

Department of Local Government

Respondent

**No. of documents in dispute:** 1

**Exemption clause(s) :** Clause 7

By letter dated 4 June 1997, Mrs Jones ('the complainant') sought access under the *Freedom of Information Act 1992* ('the FOI Act') to a document held by the Department of Local government ('the agency'). Without identifying the requested document, by letter dated 9 June 1997, the agency refused access pursuant to s.23(2) of the FOI Act, on the ground that the document described by the complainant in her access application would be an exempt document under clause 7 of Schedule 1 to the FOI Act.

By letter dated 11 June 1997, the complainant sought internal review of the agency's decision and informed the agency that any privilege in the requested document had been waived by its disclosure to a third party. The complainant also submitted that the limit on exemption in clause 7(2) applied because the requested document contains information which falls within the description of an "internal manual" in s.95 of the FOI Act. By letter dated on 18 June 1997, the internal reviewer confirmed the initial decision of the agency to refuse access and rejected the complainant's additional claims because there was no evidence to support those assertions. Thereafter, on 29 June 1997, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

### Review by the Information Commissioner

After receiving this complaint I made inquiries with the agency and the complainant. In particular, I asked the complainant to provide me with specific information about the circumstances which gave rise to the alleged waiver of privilege. However, the complainant was unable to provide any probative material to support her claim that privilege in the requested document had been waived.

My inquiries established that the agency held a copy of a document which was similar to the one described in the complainant's access application. That document is a letter dated 10 October 1990 from the then Solicitor General to the agency containing legal advice. Although it does not wholly fit the description of the document requested by the complainant, it is the only document which the agency could identify that may contain information of the kind sought by the complainant.

On 8 August 1997, I informed the parties in writing of my preliminary view of this complaint, including detailed reasons. Based on the material before me, it was my preliminary view that the agency's decision to refuse access pursuant to s.23(2) of the FOI Act may be justified. Further, it was also my preliminary view that the document dated 10 October 1990 produced to me by the agency may be exempt under clause 7 of Schedule 1 to the FOI Act.

On 21 August 1997, the complainant provided a written submission in response to my preliminary view and informed me that she was willing to accept access to an edited copy of the document dated 10 October 1990 with exempt matter deleted. However, the submission from the complainant contained nothing to dissuade me from my preliminary view.

The complainant has been fully informed in writing of the reasons why I consider that the agency's decision to refuse access pursuant to s.23(2) of the FOI Act is justified. Although I do not consider it necessary that I decide the exempt status of the identified document dated 10 October 1990, the complainant has also been fully informed of my reasons for considering that document to be exempt under clause 7 as claimed by the agency, and why I consider that it is not practicable for the agency to give her access to an edited copy of that document. A summary of my reasons follows.

## **Refusal of access - Section 23(2)**

Section 23(2) of the FOI Act provides that an agency may refuse access to requested documents without having identified any or all of them and without specifying the reason why matter in any particular document is claimed to be exempt if it is apparent from the nature of the documents as described in the access application, that all of them are exempt documents and there is no obligation under s.24 of the FOI Act to give access to an edited copy of the documents.

In order for an agency to rely on the provisions of s.23(2) to refuse access there are two requirements that must be established. First, the requested documents must be described in the access application in such a way that it is apparent that all of those documents would be exempt. Second, the agency must be under no obligation to give access to edited copies of those documents. The first requirement necessarily involves a consideration of the nature of an exempt document.

The terms "exempt document" and "exempt matter" are defined in the Glossary in the FOI Act. An "exempt document" is defined as meaning a document that contains exempt matter. "Exempt matter" is defined as matter that is exempt matter under Schedule 1 to the FOI Act.

## **Clause 7 - Legal professional privilege**

Clause 7 provides that matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.

The common law principle is that confidential communications between a solicitor and his or her client will be privileged from production in legal proceedings if the communication is made for the sole purpose of giving or receiving legal advice or for use in existing or anticipated legal proceedings. Further, 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.

In this instance, the complainant sought access to a document which was described by her in her access application as being advice received by the agency concerning a certain matter. Essentially, the kind of information sought by the complainant was legal advice given to the agency by its legal adviser.

Having considered the nature of the document to which the complainant seeks access, I am satisfied that a document of that kind, being a confidential communication between a solicitor and his or her client, would be privileged from production in legal proceedings on the ground of legal professional privilege. In my view, a document of the kind described in the complainant's access application would be, *prima facie*, exempt under clause 7 of Schedule 1 to the FOI Act. Therefore, I am satisfied that the first requirement of s.23(2) has been established.

Given the nature of the document requested by the complainant, I do not consider that it would be practicable to give the complainant access to an edited copy of such a document. Therefore, I consider that the agency is not under any obligation to give the complainant access to an edited copy of its legal advice. Accordingly, I find that the decision of the agency to refuse the complainant access to the document described in her access application, pursuant to s.23(2) of the FOI Act, is justified.

B. KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

29th August 1997