

MORRISSEY AND LEGAL AID

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

**File Ref: F0891998
Decision Ref: D0251998**

Participants:

Leo Francis Morrissey
Complainant

- and -

Legal Aid Commission
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – files notes and correspondence – clause 7 – legal professional privilege – confidential communications between a third party and a legal adviser – whether for the purpose of litigation.

Freedom of Information Act 1992 (WA) s. 43(2); Schedule 1 clause 7.

Grant v Downs (1976) 11 ALR 575

Trade Practices Commission v Sterling (1979) 36 FLR 244

DECISION

The decision of the agency is confirmed. Documents 12, 13, 14, 18 and 28 and the last two lines of text in Document 11 and the third to eighth lines inclusive in Document 17 are exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*.

D A WOOKEY
A/INFORMATION COMMISSIONER

13 October 1998

REASONS FOR DECISION

1. This matter is an application for external review by the Information Commissioner arising out of a decision of the Legal Aid Commission ('the agency') to refuse Mr Morrissey ('the complainant') access to five documents and parts of two documents, requested under the *Freedom of Information Act 1992* ('the FOI Act').
2. In June 1997, in the Court of Petty Sessions in Fremantle, the complainant was convicted of assault. The conviction resulted from an incident that occurred at the Fremantle office of the Legal Aid Commission in February 1997. Mr Boland, the Manager of the agency's Fremantle office, was a witness to the incident and gave evidence at the hearing of the charge against the complainant.
3. Subsequently, the complainant filed in the Supreme Court of Western Australia an appeal against his conviction. Mr Boland became aware of the complainant's appeal and made certain enquiries with the Crown Solicitor's Office ('the CSO') in respect of that appeal.
4. By letter dated 12 April 1998, the complainant applied to the agency under the FOI Act for access to various documents associated with a long-standing dispute between the complainant and the agency. The documents requested included certain documents relating to the incident at the Fremantle office of the agency in February 1997. The agency decided to grant the complainant access to most of the requested documents. However, the agency also refused access to twenty eight documents, either in full or in part, on the basis that those documents and parts of documents are subject to legal professional privilege and, therefore, exempt under clause 7 of Schedule 1 to the FOI Act.
5. By letter dated 12 May 1998, the complainant applied for internal review of the agency's decision. However, the agency failed to give the complainant a notice of decision within the fifteen days prescribed by the FOI Act. Therefore, by virtue of section 43(2) of the FOI Act, the agency was taken to have decided to confirm the original decision.
6. On 18 June 1998, the complainant lodged a complaint with the Information Commissioner, seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

7. The agency produced the disputed documents to the Information Commissioner. Following a series of discussions between each of the parties and this office, the number of documents in dispute between the parties was reduced to eight. On 25 August 1998, after considering the contents of those documents and other material before her, the Information Commissioner informed the parties in writing of her preliminary view of this complaint, and the reasons for that view.

8. The preliminary view was that four of the documents in dispute and parts of three others may be exempt under clause 7 of Schedule 1 to the FOI Act, and that one other document may not be exempt. The agency subsequently released a full copy of one of the documents and an edited copy of another to the complainant. A further written submission was also received from the agency in respect of the documents still in dispute. The complainant also provided additional material for consideration, including a late submission by his representative.

THE DISPUTED DOCUMENTS

9. There are seven documents remaining in dispute between the parties, five in full and parts of two others. The complainant does not seek matter that would identify third parties and, therefore, the names of individual officers of the CSO appearing in the documents are not in dispute. I refer to the documents remaining in dispute ('the disputed documents') by the numbers assigned to them by the agency, and they are described briefly as follows.

Document No.	Description	Disputed Matter
11	Handwritten file note of telephone conversation with CSO, dated 1 October 1997	The last two lines.
12	Copy letter dated 3 October 1997 from agency to CSO	All
13	Letter dated 11 November 1997 from CSO to agency	All
14	Handwritten file note of telephone conversation with CSO, dated 14 November 1997	All
17	Handwritten file note of telephone conversation with CSO, dated 4 December 1997	Lines 3 to 8 inclusive
18	Copy letter dated 8 December 1997 from agency to CSO	All
28	Handwritten file note of telephone conversation with CSO, dated 2 April 1998	All

10. All the documents appear either to be or to record communications between Mr Boland of the agency and various officers of the CSO, which was representing the Western Australian Police Service in the complainant's appeal. The agency claims that all the documents and parts of documents are exempt under clause 7 of Schedule 1 to the FOI Act.

THE EXEMPTION – CLAUSE 7 (LEGAL PROFESSIONAL PRIVILEGE)

11. Clause 7 of Schedule 1 to the FOI Act provides that matter (excluding that appearing in an internal manual of an agency) is exempt if it would be privileged from production in legal proceedings on the ground of legal professional privilege.
12. Legal professional privilege traditionally protects confidential communications between a client and his or her legal adviser for the sole purpose of giving or receiving legal advice. That must be the sole purpose of the communication; it is not sufficient that it is one purpose, or even the dominant purpose, of the communication: *Grant v Downs* (1976) 11 ALR 575. The rule has also been extended to cover, *inter alia*, other confidential communications for that purpose, including those between a lawyer and the client's agent and between a salaried legal officer and a government agency.
13. In *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 247, Lockhart J listed a number of categories of communications that are protected by legal professional privilege. Most relevant to this matter, his Honour included in that list the following:

“(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 ...”
14. Such third party communications, therefore, may be protected by legal professional privilege if it can be shown that the communication was made, or document brought into existence, when litigation either was anticipated or had commenced, and the communication was made, or document brought into existence, for the purpose of obtaining advice as to that litigation or for the purposes of the litigation.
15. At the time the communications were made between Mr Boland and the CSO, litigation had commenced. Neither Mr Boland nor the agency was a party to the litigation. The communications between Mr Boland and the CSO were, therefore, communications between a third party and the legal representative of a party to litigation. However, in the Commissioner's preliminary view, whilst it appeared that some of the communications may have been made for the purposes of the litigation, others appeared to have been made merely for the purpose of keeping the agency informed of the progress of the appeal, as a matter of courtesy to an interested party. Communications of the latter kind would not be subject to legal professional privilege.

The claims

16. After being informed of the Commissioner's preliminary view, the agency released some further matter to the complainant and, in respect of the remainder, provided a submission containing further information concerning the circumstances and purpose of the various communications. As I cannot reproduce that information here without disclosing the substance of privileged communications, I am precluded from detailing the further information. For that reason also, the agency's final submission was not provided to the complainant. However, I do not consider that to have caused any disadvantage to the complainant as the question in issue was identified in the letters informing each party of the Commissioner's preliminary view and both were given ample opportunity to provide submissions in respect of it. In respect of each document as it is dealt with below, I refer to that information as fully as I am able in giving my reasons.
17. On behalf of the complainant it is submitted, essentially, that the agency was not the client of the CSO and, therefore, because they were not in a legal adviser/client relationship, communications between them could not be privileged. As I have indicated above, that submission does not address the issue that I consider to be determinative in this case. The complainant's representative also made some submissions concerning documents created by a third party and submitted to a solicitor for consideration. However, only two of the documents (Documents 12 and 18) are documents that were sent to the CSO. They are letters from the agency to the CSO and are themselves communications between the agency and the CSO. The remainder of the documents are file notes of verbal communications between the agency and the CSO. They are all clearly communications between a third party and the legal adviser of a client involved in litigation then on foot. They are all, in my view, confidential communications of that nature. As I have said, the question, therefore, is whether those communications were made solely for the purposes of the litigation.
18. Much was made by the representative of the complainant of advice given to the complainant by Crown Counsel that, as the agency was interested in the outcome of the complainant's appeal, officers of the CSO, as a matter of courtesy, kept the agency informed as to the progress of the appeal. As I understand the point the complainant is seeking to make, the submission is that, if that is the case, then the communications were not for the sole purpose of giving or seeking legal advice or for the purposes of the litigation, and therefore are not communications of a kind which may be privileged. However, Crown Counsel, in his letter to the complainant, also indicated that it had, on occasion, "*... been appropriate for this Office to obtain further information from [the agency] as to matters relevant to the issues raised by [the complainant] in your appeal.*"
19. The complainant also made the rather curious submission that, because Crown Counsel advised him that "*[a]n appeal to the Supreme Court from a decision of a Court of Petty Sessions will ordinarily be determined on the basis of the evidence which was before the Court of Petty Sessions*" and that "*[t]his evidence will comprise the transcript of oral evidence given by witnesses and*

any exhibits tendered in the course of evidence” then there can be nothing a former witness could add and no legitimate function of such correspondence “other than to contrive a privileged scenario and therefore no privilege attracts [sic] to such a document ...”. It does not follow that, if no new evidence is to be adduced, no relevant information can be obtained from a third party for the purpose of the preparation of a case in litigation. Clearly, the CSO in proceedings may legitimately communicate with a witness for the Crown in the earlier proceedings in order to clarify information previously given or seek further information to assist in the preparation of the case.

Document 11

20. Document 11 is a note of a telephone conversation between an officer of the agency and officers of the CSO. The complainant has been given access to an edited copy of the document and the only matter remaining in dispute is the last two lines of the document. Having considered the disputed matter itself and the agency’s explanation of the substance of the conversation it records, I consider that it is a note of a conversation in the course of which the CSO requested that an officer of the agency provide certain information pertinent to the appeal in order to assist the CSO in the preparation of its case opposing the appeal, and the agency agreed to provide it.
21. I am, therefore, satisfied that those two lines are a note of a confidential communication between a third party and the CSO for the purposes of the CSO’s preparation of its case for the litigation, and would, on that basis, be privileged from production on the ground of legal professional privilege. Accordingly, I find the two lines deleted from Document 11 exempt under clause 7 of Schedule 1 to the FOI Act.

Documents 12, 13 and 18

22. Documents 12 and 18 are copies of letters from the agency to the CSO and Document 13 is a letter from the CSO to the agency. I am satisfied that they were all confidential communications between the agency and the CSO for the sole purpose of the CSO’s preparation for the litigation. As they are confidential communications between a third party and a legal adviser for the sole purpose of litigation then on foot, it is my view that they would be privileged from production in legal proceedings on the ground of legal professional privilege. Therefore, I find Documents 12, 13 and 18 exempt under clause 7 of Schedule 1 to the FOI Act.

Document 14

23. Document 14 is a note of a telephone conversation between an officer of the agency and an officer of the CSO. It appears to relate to Document 13 and to clarify the information contained in that document. The information contained in it relates directly to the CSO’s preparation of its response to the appeal. Therefore, I consider that it would be privileged from production in legal proceedings on the

ground of legal professional privilege. Accordingly, I find Document 14 exempt under clause 7 of Schedule 1 to the FOI Act.

Document 17

24. Document 17 records a telephone conversation between an officer of the agency and an officer of the CSO. Initially, the agency claimed exemption for the whole of the document. The Commissioner's preliminary view was that the second to fifth lines only may be exempt. Following discussions with my office, the agency no longer claims exemption for the whole of the document but maintains a claim for exemption under clause 7 for the third (excluding the line on which the date is written) to eighth lines inclusive. In my view the other lines of the text record communications between the parties for the purpose of keeping the agency informed of the progress of the matter, and not for the purposes of the litigation, and the agency no longer maintains its claims for exemption for those lines.
25. Having considered the contents of the disputed matter (lines 3-8) and the agency's explanation of the substance of the conversation recorded in the deleted matter, it is my view that it is a note of a confidential communication between the agency and the CSO directly related to, and for the purpose of, the litigation. Therefore, I consider that at least that part of the document would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find the third to eighth lines of Document 17 exempt under clause 7 of Schedule 1 to the FOI Act.

Document 28

26. Document 28 is a brief note of a telephone conversation between an officer of the agency and an officer of the CSO. The purpose or extent of the communication is not apparent on the face of the document. The agency has explained more fully the substance of the conversation and its purpose and that the information was provided by an officer of the agency at the specific request of the CSO in order to assist with its preparation of the appeal. Although I cannot detail the agency's explanation in this regard without also revealing the substance of a privileged communication, I am satisfied that the document is a note of a confidential communication between the legal representative of a party to litigation then on foot and a third party with a view to obtaining information or evidence to be used in the litigation. Therefore, in my opinion, the document would be privileged from production in legal proceedings on the ground of legal professional privilege, and I find Document 28 exempt under clause 7 of Schedule 1 to the FOI Act.
