

JOHNSON AND SGIC

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

**File Ref: 96047
Decision Ref: D02896**

Participants:

Terence Hurley Johnson
Complainant

- and -

**State Government Insurance
Commission**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - solicitors' bills of costs - internal documents - computer summaries of claims payments - clause 7 - legal professional privilege - whether bills of costs reveal nature or substance of instructions or advice - clause 12 - contempt of court.

Freedom of Information Act 1992 (WA) ss. 3(3), 23(1), 24, 72(1)(b), 75(1); Schedule 1 clauses 7, 12.

Grant v Downs (1976) 135 CLR 674.

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

Packer v Deputy Commissioner of Taxation (1985) 55 ALR 252.

Lake Cumbeline Pty Ltd and Others v Effem Foods Pty Ltd trading as Uncle Ben's of Australia (1994) 126 ALR 58.

Re Skopalj and Transport Accident Commission (1989) 4 VAR 16.

Chant v Brown 9 Hare 791.

Turton v Barber (1874) 17 Eq.329.

Ainsworth v Wilding [1900] 2 Ch. 315.

"Daily Express" (1908) (Limited) v Mountain (1916) 32 TLR 592.

DECISION

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

- (i) those parts of Documents 1, 2, 3, 6, 7 and 8 which are described in paragraph 28 of the attached reasons for decision are exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*;
- (ii) those parts of Documents 4, 5, and 9 which are described in paragraph 22 of the attached reasons are outside the ambit of the access application and this complaint; and
- (iii) that the documents are not otherwise exempt and access to edited copies with those parts deleted is to be given.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

17th May 1996

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the State Government Insurance Commission ('the agency') to refuse Mr Johnson ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 11 February 1996, the complainant sought access under the FOI Act to, *inter alia*, documents of the agency detailing the legal costs incurred by the agency in relation to his workers' compensation claim. The request included documents containing information about costs already paid, as well as those outstanding and any costs which may have accrued but for which accounts had not yet been received by the agency.
3. On 6 March 1996, the agency refused the complainant access to all documents containing the information sought on the ground that those documents are exempt under clause 7 of Schedule 1 to the FOI Act. The complainant applied for internal review of the agency's decision and, on 21 March 1996, the agency confirmed its initial decision. On 25 March 1996, the complainant applied to the Information Commissioner for external review of that decision.

REVIEW BY THE INFORMATION COMMISSIONER

4. On 28 March 1996, the Acting Information Commissioner notified the agency that a complaint had been made and, pursuant to s.75(1) and s.72(1)(b) of the FOI Act, the Acting Information Commissioner sought the production to her of the disputed documents together with the agency's FOI file maintained in respect of this matter.
5. On 4 April 1996, the Acting Information Commissioner advised the parties that, in her preliminary view, save for certain specified parts of those documents, the disputed documents were not exempt under clause 7 as claimed. Thereafter, the agency provided a further submission in support of its claim that those documents are exempt under clause 7 of Schedule 1 to the FOI Act.

THE DISPUTED DOCUMENTS

6. There are 9 documents in dispute between the parties. Those documents are described as follows:

Document	Date	Description
1	5/4/95	Disbursement account to agency from legal advisers.

2	8/5/95	Disbursement account to agency from legal advisers.
3	24/5/95	Account to agency from legal advisers.
4	20/10/95	Agency computer print-out summary of claim payments, including handwritten notes.
5	25/10/95	Agency computer print-out summary of claim payments.
6	25/10/95	Account to agency from legal advisers.
7	30/11/95	Account to agency from legal advisers.
8	14/2/96	Account to agency from legal advisers
9	14/2/96	Agency computer print-out summary of claim payments.

THE EXEMPTION

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

"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)."*

8. It is clearly established law in Australia that confidential communications passing between a client and his or her legal adviser 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: *Grant v Downs* (1976) 135 CLR 674. 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.
9. The disputed documents are described by the agency as solicitors' bills of cost. The agency submits that a solicitor's bill of costs is a document that is covered by legal professional privilege and, hence, exempt under clause 7. In respect of the "claim payment summaries" the agency contends that the information contained in those documents reproduces information contained in privileged documents

(the bills of costs) and is therefore also privileged. Therefore, the agency claims that all of the disputed documents would be privileged from production in legal proceedings on the ground of legal professional privilege.

10. I have examined the disputed documents. I concur with the agency's description of those documents. The question for my determination is whether the absolute privilege from disclosure under the FOI Act that is afforded to documents ordinarily protected by legal professional privilege includes the solicitors' bills of cost and the internal documents identified.
11. So far as I have been able to ascertain, the question of whether or not solicitors' bills of costs are protected by legal professional privilege has not been decided in Australia. The only guidance I have discovered is to be found in the comments of the Full Court of the Supreme Court of Queensland and, in particular, the comment of Andrews SPJ, in *Packer v Deputy Commissioner of Taxation* (1985) 55 ALR 252, at 248, quoted in paragraph 17 below. That comment, as was submitted by the agency, has been subsequently adopted in at least two further decisions, those being *Lake Cumbeline Pty Ltd and Others v Effem Foods Pty Ltd trading as Uncle Ben's of Australia* (1994) 126 ALR 58, and *Re Skopalj and Transport Accident Commission* (1989) 4 VAR 16.
12. The agency referred me to a line of English authority in support of the proposition that a solicitor's bill of costs is covered by legal professional privilege: *Chant v Brown* 9 Hare 791; *Turton v Barber* (1874) 17 Eq.329; *Ainsworth v Wilding* [1900] 2 Ch.315; and "*Daily Express*" (1908) (*Limited*) v *Mountain* (1916) 32 TLR 592. The agency submitted that that line of authority was referred to with approval by the Court exercising Federal jurisdiction in the *Packer* case referred to above. The agency submitted that in the *Packer* decision itself the principle that a bill of costs is privileged was maintained. That case concerned the question of whether a solicitor's trust account was privileged, rather than whether or not a bill of costs was privileged. The agency argued that the comment of Andrews SPJ in that matter was the only statement to the effect that a bill of costs, in certain circumstances, is not privileged, and the comment should be read in the context of the matter decided in that case.
13. The agency submitted that a bill of costs records the history of the transaction and is therefore privileged and that, even if details of the history of the matter were deleted from the documents, what remained, that is the amount charged, would be privileged. It was submitted that the case of *Lake Cumbeline* is distinguishable on its facts and that, therefore, the comment of Tamberlin J should not be relied upon as authority that a solicitor's bill of costs may not be privileged. In that case the question was whether privilege attaching to documents underlying a solicitor's memoranda of fees had been waived by disclosure of the memoranda.

14. I have read the English cases to which I was referred by the agency. I agree that *Chant v Brown* and *Turton v Barber* have been relied upon in England as authority that a solicitor's bill of costs is protected by legal professional privilege. Those cases were followed and applied in *Ainsworth v Wilding*, although there are indications in that decision that, in at least that case, the bill of costs under consideration contained considerably more detail than the documents before me for consideration.
15. In "*Daily Express*" (1908) (*Limited*) v *Mountain* the judgment of the lower court in refusing to order the production of a solicitor's bill of costs was held to be right and the appeal dismissed, subject to the Court's opinion that the respondent's offer to provide to the plaintiff particulars of the amount of the bill of costs showing, from the dates and items, how the amount was made up, but without disclosing any confidential matter, being accepted. Once again, that indicates to me that the document in question in that matter contained rather more detail than those with which I am presently concerned. I accept the agency's submission that the authorities ought to be confined to their own facts.
16. The decision in *Packer* suggests to me that solicitors' bills of costs may be, but are not necessarily, privileged depending upon the particular circumstances of the case. McPherson J and Shepherdson J expressed no concluded view as to whether or not a solicitor's bill of costs is necessarily privileged. McPherson J at 252, said "...a bill of costs would ordinarily disclose indirectly and more often directly instructions given by a client to his solicitor" and, at 253, referred to "...a general or "blanket" privilege from disclosure similar to that which the authorities **suggest** attaches to a bill of costs" (my emphasis). Shepherdson J, at 259, said that "...a bill of costs relating to actual or contemplated litigation is, **as a general rule**, privileged..." (my emphasis).
17. However, Andrews SPJ said, at page 248:

"In my view there is nothing in particular to set aside a bill of costs as forming some special category of record of privileged information. Even bills of costs may on careful scrutiny in particular cases be shown not to contain privileged information. Consideration of individual cases demonstrates that bills of costs frequently contain a history of matters in respect of which solicitors have been consulted by clients which discloses the nature of advice sought or given."

Andrews SPJ referred to the English authorities as expressing the view that a bill of costs came within the rule as to privilege insofar as "...it contained the history of the transactions to which it related and was valuable because it recorded the events in chronological order" (*ibid.*). His Honour went on to say, however, that he was "...of the opinion that if a bill of costs does not contain such details it is not per se protected by legal professional privilege" (*ibid.*).

18. In *Re Skopalj*, the Victorian Administrative Appeals Tribunal, constituted by Deputy President Galvin, after considering the authorities, decided that a number of solicitors' bills of costs which contained no significant information concerning the litigation involved were not exempt under the Victorian equivalent of clause 7.
19. In *Lake Cumbeline*, Tamberlin J, although not required to decide whether or not they were privileged, considered that the memoranda of solicitor's costs in that matter did not disclose the nature or content of privileged material and, at page 68, His Honour said:

“Disclosure of the memoranda of fees and other documents does not in any way disclose the nature or contents of the advice or communications between the applicants and their legal advisers. The memoranda of fees simply set out the dates and refer to the action taken in respect of which a charge is made. The memoranda of fees were brought into existence, on their face, not solely for the purpose of obtaining legal advice or for use in legal proceedings, but for the purpose of recording and raising charges in respect of work which had already been completed. It is evident that the documents were made or brought into existence for a purpose different from, or beyond, the obtaining of legal advice or use in legal proceedings.”

His Honour cited with approval the comment of Andrews SPJ in *Packer*. His Honour also made the point, at page 68, that the earlier cases referred to in the *Packer* case concerned detailed bills “...which would disclose indirectly and sometimes more directly instructions given by a client to his solicitor”

20. I respectfully agree with the comments of Tamberlin J in that case. Clearly, the rule protects confidential communications between a solicitor and client for the sole purpose of giving or receiving legal advice or for use in contemplated or actual litigation. In those circumstances, instructions given by the client and advice received by the client from the solicitor will attract privilege. Confidential communications which are not for that sole purpose will not attract the privilege. Neither, in my opinion, will documents which do not disclose communications of that kind attract the privilege. In my view, the documents in question in this matter - other than those parts specified at paragraph 28 below - do not disclose information of that kind.

The computer summaries

21. Documents 4, 5 and 9 are print-outs of computer records of certain monies paid out by the agency. The agency claimed in its notice of decision that those documents are exempt because they reproduce information contained in privileged documents, those being the bills of costs. In my view, they are not - and do not record - confidential communications between a client and his or her solicitor. I do not accept that they reproduce privileged information contained in the bills of costs. They are merely a computer record of certain monies paid out by the agency, the payee and, in very general terms, the purpose of the payment.

They show only the movement of monies. They would not, in my opinion, be privileged from production in legal proceedings and, therefore, are not exempt under clause 7.

22. As the complainant seeks only matter concerning himself in the documents, there are several entries in Documents 4, 5 and 9 which, in my view, are outside the ambit of the complainant's access application. I consider that those entries may be deleted from the documents, and access to edited copies given, as the complainant does not seek access to them and they are not, therefore, in dispute between the parties. Those parts of the documents that should be deleted, therefore, prior to the complainant being given access to edited copies are: the entries alongside items 13 and 15 in Document 4; the final item in Document 5; and items 6 and 8 on the folio of Document 9 which bears the "time" entry of 14.29.52 in the top right hand corner; item 2 on the folio of Document 9 which bears the "time" entry of 14.29.46 in the top right hand corner; and items 4 and 5 on the folio of Document 9 which bears the "time" entry of 14.29.12 in the top right hand corner.

The bills of costs

23. Documents 1, 2, 3, 6, 7 and 8 are bills of costs addressed to the agency from its legal advisers. They set out the dates and refer to the action taken on each date in respect of which the charges have been made. They do not, in my view, detail in any substantial way the work undertaken by the solicitors on behalf of the agency, nor do they, in my opinion, reveal anything of the instructions given to, or the advice received from, the solicitors. However, I am, reluctantly, prepared to accept the agency's argument that it may be possible to infer the nature of some instructions and advice from the itemisation of some of the particular actions taken. It is my view, however, that that matter may be easily deleted and access to edited copies of the documents given.
24. The FOI Act gives every person a right of access to documents held by State and local government agencies. Pursuant to s.23(1) of the FOI Act, an agency may refuse access to an exempt document. "*Exempt document*" in the Glossary means a document that contains exempt matter. "*Exempt matter*" means matter that is exempt under Schedule 1. Further, s.23 is subject to the obligation upon agencies in s.24, to delete exempt matter where practicable, and to provide an applicant with access to an edited copy of a requested document. If a document is, potentially, an exempt document because it contains exempt matter an agency may claim the exemption; exercise its discretion under s.3(3) and disclose that document; or delete the exempt matter so that the document is no longer exempt and release it in edited form in order to give effect to the rights of access under the FOI Act.

25. Section 24 of the FOI Act requires that, if it is practicable to do so, and the applicant would wish it to be done, an agency must give access to an edited copy of a document with exempt matter deleted. In my opinion, if exempt matter is deleted from a document, so that the edited copy does not contain exempt matter, then what remains -that is, the edited document - is not exempt. The authorities suggest to me that a solicitor's bill of costs which contains only the amount or amounts charged would not be privileged from production in legal proceedings and would not, therefore, be exempt under clause 7.
26. The agency submitted that *"...to disclose the amount of each of the bills of costs may indirectly reveal instructions given by the client (the SGIC) or the advice or assistance given by the solicitors in respect of the litigation to which the bills of costs relate."* The agency went on to submit that:
- "The amount of a bill can indicate the nature of the instructions given by the client and, more directly, the amount of work which was done by the solicitors in respect of the matter. This is a confidential communication between a solicitor and client in respect of legal advice obtained and comes within the basic principle of legal professional privilege laid down by the High Court in Baker v Campbell (1983) 59 ALJR 749."*
27. I do not accept that the amount alone of a solicitor's bill can indicate the nature of the instructions given by the client, nor that it could in any way reveal the advice or assistance given by the solicitors. I reject that argument.
28. Accordingly, I find that Documents 1, 2, 3, 6, 7 and 8 are not exempt under clause 7, other than the matter listed immediately below, which I find is exempt under clause 7.

Document	Exempt matter
1	The first two entries under the heading "Description".
2	The first entry under the heading "Description".
3	All the text, other than the dates, entered alongside the items numbered 2, 3, 4, 5, 6 and 7.
6	All the text, other than the dates, entered alongside the items numbered 1, 2, 3, 4, 5, 6, 7 and 8.
7	All the text, other than the dates, entered alongside the numbers 1, 2 and 3.
8	All of the text, other than the date, entered alongside the number 1.

Clause 12

29. The agency also referred to clause 12 of Schedule 1 to the FOI Act and suggested that to give the complainant access to the documents could be argued to be an abuse of process as the complainant's worker's compensation claim is subject to appeal and is, therefore, *sub judice*. The agency did not develop this argument at all and I am not persuaded by it. I do not consider that the agency has gone any way to establishing that the documents are exempt under clause 12 and I find accordingly.
