

DECISION SUMMARY ISSUED BY THE INFORMATION COMMISSIONER (WA)

Decision title and citation: *Re Reed and The University of Western Australia* [2001] WAICmr 30

COMPLAINT No: F2001078

DECISION No: D0302001

PARTIES: William Daly REED

Complainant

THE UNIVERSITY OF WESTERN AUSTRALIA

Respondent

No. of documents in dispute: 2

Exemption clause(s): Clause 7

In early 2001, Professor Reed ('the complainant') applied to The University of Western Australia ('the agency') for access under the *Freedom of Information Act 1992* ('the FOI Act') to various documents relating to a dispute between the agency and him. Due to the volume of documents involved in the request, the agency dealt with his application in stages. In respect of this part of the access application, the agency refused access to a number of the requested documents on the ground that they are exempt under clause 7 of Schedule 1 to the FOI Act.

On 29 June 2001, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision. I obtained the disputed documents from the agency. Inquiries were made with the parties to determine whether this complaint could be resolved by conciliation. Following various consultations between my office and the parties, the agency released additional documents to the complainant and the complainant withdrew his request for access to a number of other documents and parts of documents, which, in my opinion, contain exempt matter. As a result, the scope of this complaint was narrowed to two documents, those numbered 4.15.24 and 4.16.9 on the agency's schedule.

On 9 August 2001, after considering all of 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 Documents 4.15.24 and 4.16.9 may not be exempt under clause 7. The agency responded and provided additional information in support of its claims for exemption for the two disputed documents. Having considered the agency's response, I am not dissuaded from my preliminary view that the disputed documents are not exempt under clause 7 of Schedule 1 to the FOI Act. A summary of my reasons follows.

The disputed documents

Document 4.15.24 is a facsimile cover sheet, dated 10 October 2000, which accompanied a transmission of documents from the agency to its legal adviser. The complainant has withdrawn his request for access to the accompanying documents and only the facsimile cover sheet remains in dispute. Document 4.16.9 is a brief letter dated 27 March 2001 from the agency to its legal adviser, enclosing another document, Document 4.16.5, which has already been released to the complainant.

Clause 7 - Legal professional privilege

Clause 7(1) provides that matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege. Legal professional privilege protects from disclosure confidential communications between a client and his or her legal adviser which are made or brought into existence either for the dominant purpose of giving or seeking legal advice or for use in existing or anticipated legal proceedings: *Esso Australia Resources Ltd v The Commissioner of Taxation* [1999] 74 ALJR 339.

The agency's submission

The agency submits that the disputed documents form part of a chain of correspondence between the agency and its legal advisers, which is evidenced in the documents themselves. The agency states that certain documents were submitted to its legal advisers because the agency was seeking legal advice in respect of its dispute with the complainant. The agency claims that it anticipates the complainant may institute legal proceedings, depending upon the outcome of the dispute between it and the complainant, and that the disputed documents would, therefore, be privileged from production in legal proceedings on the ground of legal professional privilege.

Consideration

I am satisfied that Document 4.15.24 and Document 4.16.9 are confidential communications. However, legal professional privilege will only apply to those documents if they were made or brought into existence for the dominant purpose of giving or receiving legal advice or for use in legal proceedings, including anticipated or pending litigation.

Legal professional privilege does not extend to all written communications between a client and the client's legal advisers. In *Trade Practices Commission v Sterling* (1979) 36 FLR 244 Lockhart J referred, at p.247, to the judgment of Stephen, Mason and Murphy JJ in *Grant v Downs* (1976) 135 CLR 674, in which their Honours stated that courts need "...to scrutinize with care claims for privilege made on the ground now under consideration. It is for the party claiming privilege to show that the documents for which the claim is made are privileged...[I]t should not be thought that the privilege is necessarily or conclusively established by resort to any verbal or formula or ritual".

I have examined the disputed documents, and the documents that accompanied them, in an effort to discern the purpose for which the disputed documents were brought into existence. Nothing on the face of either disputed document indicates that it was made or brought into existence for the purpose, dominant or otherwise, of obtaining legal advice. Further, having considered the contents of the disputed documents, it is not apparent to me that either document would or could be used in legal proceedings reasonably anticipated by the agency.

It appears to me that the disputed documents were made or brought into existence for the purpose of accompanying a transmission of documents from the agency to its legal advisers. I consider them to be nothing more than routine administrative documents passing between the agency and its legal adviser. Based on the test in *Esso*, I do not consider that either document would be privileged from production in legal proceedings on the ground of legal professional privilege. In my view, the fact that the disputed documents were sent to the agency's legal adviser is not sufficient for legal professional privilege to apply to those documents. Rather, it is the communication in the document, rather than the document itself, which may be privileged, but only if it was made or brought into existence for the dominant purpose of giving or receiving legal advice or for use in anticipated legal proceedings.

In my view, neither of the disputed documents was made or brought into existence for the dominant purpose of giving or receiving legal advice or for use in anticipated legal proceedings. The documents themselves suggest otherwise and nothing submitted to me by the agency persuades me that they would be privileged from production in legal proceedings on the ground of legal professional privilege. It follows that the agency has not discharged the onus on it under s.102(1) of the FOI Act to show that its decision was justified.

Accordingly, I find that the disputed documents are not exempt under clause 7 of Schedule 1 to the FOI Act.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER
23 August 2001