

**DECISION SUMMARY ISSUED BY THE INFORMATION COMMISSIONER (WA)**

**Decision title and citation: *Re Nield and Shire of Serpentine-Jarrahdale* [2001] WAICmr 40**

**COMPLAINT No:** F2001107

**DECISION No:** D0402001

**PARTIES:** Paul Gregory NIELD

Complainant

SHIRE OF SERPENTINE-JARRAHDAL

Respondent

**No. of documents in dispute:** 3

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

On 11 May 2001, Mr Nield ('the complainant') made an application to the Shire of Serpentine-Jarrahdale ('the agency') for access under the *Freedom of Information Act 1992* ('the FOI Act') to various documents relating to a long-standing and on-going dispute that he has with the agency.

The agency granted the complainant access to some of the requested documents, but refused access to three documents on the ground that they are exempt under clause 7 of Schedule 1 to the FOI Act. The agency also refused access, under s.26 of the FOI Act, to a document described by the complainant as a "filtering sheet" because that document did not exist in the agency. The agency's decision was confirmed following an internal review. On 24 August 2001, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

When he applied for external review, the complainant claimed that any privilege that may have applied to the documents claimed to be exempt under clause 7 had been waived by the agency, because it had provided copies of those documents to the Parliamentary Commissioner for Administrative Investigations ('the Ombudsman') and to the Executive Director of the Department of Local Government ('the Executive Director').

#### **Review by the Information Commissioner**

The complainant identified a number of procedural issues and other matters in his letter of complaint. Inquiries were made into all aspects of this complaint but attempts to resolve it by conciliation were unsuccessful. The agency was invited to respond to the complainant's claim that privilege had been waived in respect of the disputed documents. The agency submitted that privilege had not been waived and claimed that parts of those documents may be exempt under clauses 3 and 6. However, nothing further has been received from the agency on that point.

After making inquiries and considering the material then before me, on 30 October 2001, I informed the parties, in writing, of my preliminary view, including my reasons. It was my preliminary view that the disputed documents may not be exempt under clause 7 because I considered that the agency had waived privilege with respect to those documents. In respect of the document described as a "filtering sheet", following inquiries with the Environmental Protection Agency, I was satisfied that the filtering sheet had never been in the possession of the agency and that its decision to refuse access under s.26 of the FOI Act appeared justified. I dealt with the extraneous matters raised by the complainant by separate letter.

The agency did not respond to my preliminary view. The complainant responded, in writing. In the absence of any response from the agency, I am not dissuaded from my preliminary view. A summary of my reasons follows.

#### **The disputed documents**

The disputed documents consist of three letters, one dated 3 October 2000 and two dated 4 October 2000, sent to the agency by its legal advisers. Attached to one of those letters is an unsigned and undated draft statement.

#### **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. Legal professional privilege applies to, among other things, confidential communications between a client and his or her legal adviser, made 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 399. I have examined the disputed documents. I am satisfied that they are confidential

communications between the agency and its legal advisers, made for the dominant purpose of giving legal advice. Accordingly, I consider that, in ordinary circumstances, the disputed documents would be privileged from production in legal proceedings on the ground of legal professional privilege.

### **Waiver of legal professional privilege**

Waiver occurs where the party entitled to privilege performs an act that is inconsistent with preserving the confidence protected by the privilege. A person entitled to claim privilege can waive the privilege directly through intentionally disclosing protected material: *Attorney-General (NT) v Maurice* (1986) CLR 475. The consequence of waiver, where it occurs, is that the person becomes subject to the normal requirements of disclosure of the communication.

The agency initially claimed that the act of providing copies of the disputed documents to the Ombudsman did not constitute a waiver of the privilege that attached to those documents, because the Ombudsman was, in effect, a “third party” to which the legal advice was supplied, in order to advise him of the actions of the agency; only for completeness of his records and as an act of courtesy extended to an investigating agency that previously dealt with a complaint against the agency. The agency also claimed that the act of providing one of the disputed documents to the Executive Director did not constitute a waiver of the privilege that attached to that document, because it did so as part of its continuing obligations to keep the Department of Local Government apprised of any developments relating to the complainant’s on-going dispute with the agency and that it was provided in confidence to that Department, as a “third party”.

I made inquiries into those claims. The Ombudsman’s office advised me that the file in respect of the complainant’s complaint against the agency was closed in May 1997 and that, in October 2000, (the date of the disputed documents) the Ombudsman was not investigating any complaints against the agency. The Department of Local Government advised me that it was not conducting any inquiries in relation to the agency in October 2000, and had no current interest in the subject matter. Nothing has been put before me by the agency to establish that it was under any statutory obligation to forward documents of any kind to that Department.

The relevant Minutes of the Council of the agency record that Council resolved, in circumstances where it was under no obligation to do so, to provide copies of the disputed documents to the Ombudsman and to the Executive Director, for their information. It is clear that the disclosure of the disputed documents to the Ombudsman and to the Executive Director was a direct result of a deliberate, intentional and voluntary decision of the Council of the agency and that the decision to provide the disputed documents to the Ombudsman and the Executive Director was for the express purpose of explaining the background to, and the reasons for, the Council’s decisions in relation to the complainant.

I am satisfied that the disputed documents were disclosed to the Ombudsman and to the Executive Director for the express purpose of explaining to both the decisions taken by Council in relation to the complainant. In those circumstances, I consider that the disclosure of the disputed documents was clearly an intentional act by the agency, amounting to express waiver of the privilege that attached to the disputed documents. I am also satisfied that the Minutes of the Council of the agency dated 23 October 2000, at items C069/10/00 and C070/10/00, contain a record of almost all the legal advice provided to the agency. For these reasons, I consider that the agency has effectively waived the privilege that would otherwise attach to the disputed documents. Accordingly, I find that the disputed documents are not exempt under clause 7.

### **Personal Information**

There is some information in the disputed documents about certain properties that would identify the owners of those properties. However, I do not consider that the information in question is personal information, as defined in the FOI Act, about the property owners. In my view, it is information about the property, not the owner and, to my knowledge it is information that is on the public record. Accordingly, I do not consider that there are any grounds for exemption for that information under clause 3(1) of the FOI Act.

Finally, with regard to the filtering sheets, for the reasons given in my letter dated 24 October 2001, I am satisfied that those sheets are not in the possession of the agency and they are, therefore, not documents of the agency. I confirm the agency’s decision to refuse access to those documents under s.26 of the FOI Act

B. KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER  
9 November 2001