

JOHNSON AND SGIC

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

**File Ref: 95112
Decision Ref: D04095**

Participants:

Terence Hurley Johnson
Complainant

- and -

State Government Insurance Commission
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - letters from legal adviser to agency - clause 7 - legal professional privilege - legal advice given by the agency's legal advisers - confidential communication between a legal adviser and the agency for the sole purpose of giving legal advice.

Freedom of Information Act 1992 (WA) Schedule 1 clauses 6, 7, 11.

Re Johnson and State Government Insurance Commission (Information Commissioner, WA, 29 May 1995, unreported).

Re Read and Public Service Commission (Information Commissioner, WA, 16 February 1994, unreported).

Re Guyt and Health Department of Western Australia (Information Commissioner, WA, 16 March 1994, unreported).

Re Weeks and the Shire of Swan (Information Commissioner, WA, 24 February 1995, unreported).

Re Nazaroff and Department of Conservation and Land Management (Information Commissioner, WA, 24 March 1995, unreported).

Re Waghorn and Christmass and Police Force of Western Australia (Information Commissioner, WA, 22 May 1995, unreported).

Re Rehman and Medical Board of Western Australia (Information Commissioner, WA, 1 August 1995, unreported).

Re "E" and Department for Family and Children's Services (Information Commissioner, WA, 29 August 1995, unreported).

Re Coastal Waters Alliance of Western Australia Incorporated and Department of Environmental Protection and Cockburn Cement Limited (Information Commissioner, WA, 28 September 1995, unreported).

Grant v Downs (1976) 135 CLR 674.

DECISION

The decision of the agency is confirmed. The disputed documents are exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

12th October 1995

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 parts of documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The background to this complaint is referred to in my decision in *Re Johnson and State Government Insurance Commission* (29 May 1995, unreported), at paragraphs 2-5 of that decision. The complainant was formerly employed by the agency in the position of Manager, Government Insurance. On 5 June 1992, he was involved in a vehicle accident on the Mitchell Freeway. That accident and subsequent events were investigated by the agency and the results of that investigation and certain other information were referred to police for further inquiry. Subsequently, the complainant was charged with, and acquitted of, the offence of making a false declaration as to the number of alcoholic drinks he had consumed prior to the accident.
3. On 18 August 1994, the Managing Director of the agency dismissed the complainant from his position with the agency. That dismissal followed consideration by the Board of Commissioners of the agency ('the Board') of various documents and information provided to the Board. On 31 August 1994, the Board endorsed the action taken by the Managing Director. At subsequent meetings of the Board, it received "update" reports from various officers of the agency as to developments following the complainant's dismissal, and advice in relation to future action.
4. The complainant lodged a number of access applications under the FOI Act with the agency seeking access to various documents associated with the decisions of the Board and his dismissal. My decision in *Re Johnson* relates to one of those access applications. On 13 April 1995, the complainant lodged another access application with the agency seeking access to various documents. The agency granted access in full to some documents and access to edited copies of others from which exempt matter was deleted. However, the agency refused access to some documents on the grounds that those documents were exempt under clauses 6, 7 and 11 of Schedule 1 to the FOI Act.
5. On 9 June 1995, the complainant applied to the agency for internal review of its decision. On 13 June 1995, Mr V Evans, Managing Director of the agency confirmed the agency's initial decision that the requested documents were exempt under clauses 6, 7, and 11 of Schedule 1 to the FOI Act. The complainant applied to the Information Commissioner on 16 June 1995 seeking external review of that decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. On 23 June 1995, I notified the parties that I had accepted this complaint. I also obtained copies of the documents in dispute from the agency, together with the agency's file maintained in respect of the complainant's access application. Meetings were held between officers of the agency and my staff and the complainant and my staff in an effort to conciliate this complaint. Those meetings resulted in the agency releasing unedited copies of additional documents to the complainant thereby reducing the scope of the matters remaining in dispute between the parties.
7. On 14 September 1995, I provided the parties with my preliminary view of the agency's claims in relation to the remaining documents. It was my view that the two remaining documents for which the agency claims exemption under clause 7, would be privileged from production in legal proceedings on the ground of legal professional privilege. In light of my preliminary view, the complainant was invited to reconsider his request for access to those documents. However, the complainant did not withdraw his complaint nor did he provide any further submissions. Instead, he indicated that he required a formal decision in this matter.

THE DISPUTED DOCUMENTS

8. The documents remaining in dispute for which the agency claims exemption under clause 7 of Schedule 1 to the FOI Act, consist of two letters attached to Documents 3 and 6 as described in the schedule prepared by the agency, copies of which were provided to this office and to the complainant. The first disputed document is a copy of a letter dated 22 August 1994 from a firm of solicitors to Mr V Evans, Managing Director of the agency. That letter forms part of appendix "D" to Document 3. The second disputed document is a copy of a letter dated 11 November 1994 from the same firm of solicitors to Mr V Evans. That document forms part of appendix "A" to Document 6.

THE EXEMPTION - LEGAL PROFESSIONAL PRIVILEGE

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

"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)."*

10. The exemption in clause 7 is not limited by a "public interest test". As I have said before, in my view, that exemption recognises the public interest in the maintenance of the principle of legal professional privilege as outweighing any other competing public interest.
11. In a number of my previous formal decisions, I have discussed the principle and application of legal professional privilege: *Re Read and Public Service Commission* (16 February 1994, unreported), at paragraphs 65-66; *Re Guyt and Health Department of Western Australia* (16 March 1994, unreported), at paragraphs 11-18; *Re Weeks and the Shire of Swan* (24 February 1995, unreported), at paragraphs 15-20; *Re Nazaroff and Department of Conservation and Land Management* (24 March 1995, unreported), at paragraphs 15-19; *Re Waghorn and Christmass and Police Force of Western Australia* (22 May 1995, unreported), at paragraphs 19-36; in *Re Johnson*, at paragraphs 20-24; *Re Rehman and Medical Board of Western Australia* (1 August 1995, unreported), at paragraphs 59-73; *Re "E" and Department for Family and Children's Services* (29 August 1995, unreported), at paragraphs 22-23, 25 and 26; *Re Coastal Waters Alliance of Western Australia Incorporated and Department of Environmental Protection and Cockburn Cement Limited* (28 September 1995, unreported), at paragraphs 38-59.
12. It is clearly established law in Australia that confidential communications passing between a client and his 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.
13. I have examined the two disputed documents. Each is marked "Private and Confidential" and each is addressed to the Managing Director of the agency from the agency's legal advisers. From my examination of both documents, I am satisfied that each is a confidential communication passing between the agency's legal advisers and the Managing Director of the agency. I am also satisfied, from my examination of the documents that both were created by the agency's legal advisers for the sole purpose of enabling them to give the agency legal advice.
14. Accordingly, I am satisfied that both documents would be privileged from production in legal proceedings on the ground of legal professional privilege. Therefore, I find that the two disputed documents are exempt under clause 7 of Schedule 1 to the FOI Act.
