

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

**File Ref: F1151999
Decision Ref: D0431999**

Participants: **Paul Gregory Nield**
Complainant

- and -

Shire of Serpentine-Jarrahdale
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – clause 3(1) - personal information about third parties – access to edited copies of documents – deletion of personal information about third parties – public interest factors for and against disclosure – clause 7 – legal professional privilege – confidential communications between agency and legal adviser.

Freedom of Information Act 1992 (WA) ss.102(3), 110; Schedule 1 clauses 3; 7; Schedule 2, Glossary.

Grant v Downs (1976) 11 ALR 577

DECISION

The decision of the agency is confirmed. Documents 1 and 8 are exempt under clause 7, and the matter deleted from Documents 2, 4, 6, 10 and 14 under clause 3, of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

7 December 1999

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Shire of Serpentine-Jarrahdale ('the agency') to refuse Mr Nield ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. I understand that, some time ago, the agency gave permission for the complainant to operate a business that allowed the dumping of building rubble on his property. In the course of operating that business, it appears that some asbestos was dumped on the complainant's property by one or other of the trucks dumping its contents on the complainant's property. Since that occurrence, the complainant has been attempting to persuade the agency to bear the costs of the removal of the asbestos. The agency is of the view that the costs of removal are the responsibility of the complainant and the parties are unable to agree on that point.
3. On 21 December 1998, the complainant made an access application to the agency seeking access to various documents concerning himself, his business and the contamination of his property and a neighbouring property allegedly caused by the asbestos dumping. The agency identified 7 documents that fell within the ambit of the access application. The agency granted the complainant access to 6 of those documents but refused access to 1 on the ground that it is exempt under clause 7 of Schedule 1 to the FOI Act. The agency also made available to the complainant, outside the FOI Act, the minutes of the annual electors' meeting held on 2 December 1998.
4. In respect of other documents referred to in the complainant's access application, the agency informed him either that he was in possession of the particular document or that the particular documents did not exist. After receiving the agency's notice of decision dated 4 January 1999, the complainant wrote to the agency on 11 January 1999 and again on 20 January 1999 seeking access to a tape recording and requesting access to all correspondence relating to his property that had not been included in his earlier FOI request. The complainant also sought answers from the agency to certain questions concerning the tape recording and purported to include those within the scope of his initial access application.
5. On 8 February 1999, the agency informed the complainant that it would either make a copy of the particular tape recording available to him or he could listen to the recording under supervision in the agency. The agency also informed him that it had supplied him with all documents relating to himself and his property. It is my understanding that the complainant did not collect the documents from the agency until 4 May 1999, almost three months after its decision on access. Thereafter, on 6 May 1999, the complainant applied to the agency for internal

review of its decision on access. The basis for seeking internal review was the complainant's belief that all of the documents requested by him had not been supplied.

6. Although the request for internal review was lodged after the statutory period of 30 days had expired, the agency accepted that request and conducted an internal review. On 21 May 1999, the agency informed the complainant that no additional documents had been found and it described the searches and inquiries that had been undertaken. In that letter the agency responded to the complainant's concerns about the charges that he was required to pay for access and informed him that its estimate of charges amounting to \$32.20 was calculated in accordance with the FOI Act and regulations.
7. On 16 July 1999, the complainant lodged an application with the Information Commissioner seeking external review of the agency's decision. In that application the complainant disputed the agency's claim that it had supplied him with access to all of the information requested. Based on that statement, my review proceeded on the basis that the complaint concerned the sufficiency of the searches conducted by the agency to locate the documents requested by the complainant.

REVIEW BY THE INFORMATION COMMISSIONER

8. In the course of my dealing with this complaint, the complainant described a number of specific documents that he alleged had not been identified or supplied by the agency. My Investigations Officer made inquiries into the issues raised by the complainant. Following discussions between my office and the agency, the agency agreed to make a number of additional documents available to the complainant. However, the agency identified 16 other documents to which it refused the complainant access, either in full or in part, on the grounds that those documents were exempt under various clauses in Schedule 1 to the FOI Act.
9. Another issue raised by the complainant was an allegation that someone had tampered with a copy of the tape recording given to him by the agency, and he also expressed his general dissatisfaction with the manner in which the agency had dealt with his access application.
10. On 27 October 1999, after considering 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 2 of the documents identified by the agency fell outside the ambit of the complainant's access application; some of the documents identified by the agency may be exempt for various reasons; and others may not be exempt. I also informed the complainant that I did not consider that the agency could be criticised for the way in which it dealt with his application and that the charges for access imposed by the agency had been calculated according to the FOI Act and regulations and appeared to be reasonable.

11. In respect of the issue concerning the alleged tampering with a tape recording, the agency explained to my office that a cassette tape had been used to record a particular meeting without the officer concerned realising that it already contained a record of a previous meeting. As a result, the tape appeared to have been altered in some way. The agency made no attempt to conceal the fact that this had occurred and, in my view, the explanation offered by the agency for the apparent distortion of part of the tape recording appeared reasonable. Therefore, on the basis of the material before me, I informed the complainant that it was my opinion that the circumstances did not appear to constitute an offence under s.110 of the FOI Act. The complainant has been informed of the appropriate action to take if he is in the possession of evidence to the contrary.
12. After receiving the letter containing my preliminary view, the agency released 2 of the disputed documents in full to the complainant and granted access to an edited copy of a third.
13. I received a further submission in writing from the complainant. He withdrew his complaint in respect of the documents described and numbered 3, 5, 7, 15 and 16 in the agency's letters to him. He made no submissions in respect of Document 9, which, in my preliminary view, fell outside the ambit of his access application. Although I was also of the preliminary view that Document 12 was outside the ambit of his access application, the complainant did not withdraw his complaint in respect of that document. Nonetheless, I am satisfied that Documents 9 and 12 are outside the ambit of the complainant's access application for the reasons given to him in my preliminary view letter and I shall not deal with them any further.

THE DISPUTED DOCUMENTS

14. There are 7 documents remaining in dispute. I refer to them by the number assigned to each of those documents in the agency's letters to the complainant dated 13 and 18 October 1999. The disputed documents are as follows:

- | | |
|-------------|--|
| Document 1 | Letter dated 31 January 1997 from the agency to a third party. |
| Document 2 | Internal memorandum of the Department of Environmental Protection dated 17 January 1997. |
| Document 4 | Letter dated 26 January 1997 from a third party to the agency. |
| Document 6 | Facsimile transmission dated 13 February 1997 from Health Department to the agency. |
| Document 8 | Letter dated 25 February 1997 from the agency to a third party. |
| Document 10 | Laboratory report cover sheet dated 7 August 1997 sent from a third party to the Waters and Rivers Commission. |

Document 14 Letter dated 30 January 1997 from agency to a third party.

THE EXEMPTIONS

(a) Clause 7 – Legal professional privilege

15. The agency claims that Document 1 and Document 8 are exempt under clause 7 of Schedule 1 to the FOI Act. Clause 7 of Schedule 1 to the FOI Act provides that matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.
16. Legal professional privilege traditionally protects confidential communications between a client and his or her legal adviser for the sole purpose of seeking or giving 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 577.
17. The complainant submits that, if officers of the agency have sent misleading information to its legal adviser calculated to produce a particular result, then he is entitled to have access to those documents. However, there is nothing before me to support that contention by the complainant. In any event, provided that a documents falls within the class of documents protected by the exemption in clause 7, then it is exempt and, except in limited circumstances which do not apply in this instance, there is no scope for me to otherwise determine that access should be given to that document.
18. Document 1 and Document 8 are communications between the agency and its legal adviser. Having inspected their contents, I am satisfied that those documents are confidential communications between the agency and its legal adviser made for the sole purpose of seeking or giving legal advice. Therefore, I consider that those documents would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that Document 1 and Document 8 are exempt under clause 7 of Schedule 1 to the FOI Act.

(b) Clause 3 – Personal information

19. The agency claims that the matter deleted from Documents 2, 4, 6, 10 and 14 is exempt under clause 3(1). Clause 3, so far as is relevant provides:

“3. Personal information

Exemption

(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).

...

Limits on exemption

...

(6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.*”

20. The term “personal information” is defined in the Glossary in the FOI Act to mean:

“information or an opinion , whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead -

(a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or

(b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample”.

21. I have examined Documents 2, 4, 6, 10 and 14. The matter deleted from those documents by the agency includes names, addresses, telephone numbers and other personal and business information that would clearly identify third parties. I consider that that information is personal information as defined in the FOI Act, and that it is, on its face, exempt under clause 3(1) of Schedule 1 to the FOI Act.
22. Clause 3(1) is subject to the limits on exemption in clauses 3(2)-3(6). In the circumstances of this matter, the only limit that may apply is the limit on exemption in clause 3(6) which provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Pursuant to s.102(3) of the FOI act, the complainant bears the onus of persuading me that the disclosure of personal information about third parties would be in the public interest.

The complainant’s submission

23. The complainant submits, firstly, that the matter deleted from the disputed documents is not personal information. However, that claim is mere conjecture by the complainant since he has not been given access to the matter in dispute and he can only speculate about the nature of the information. As I have indicated in paragraph 21 above, I am satisfied that the disputed matter is personal information as defined in the FOI Act about third parties.
24. In order to persuade me that disclosure of personal information would be in the public interest, the complainant provided me with copies of two laboratory reports dated 13 August 1998 and 29 October 1999, that contain the results of various tests on water samples conducted by Analytical Reference Laboratory (WA) Pty Ltd for two clients. The complainant submits that those reports show that the level of Organo-chlorine in ground water increased 100% between the testing dates. The complainant submits that there is, therefore, a public interest in the disclosure of the disputed matter.

25. I have examined the laboratory reports given to me by the complainant. However, I do not agree with the complainant's interpretation of the testing results. Each laboratory report relates to different clients and there is nothing in those documents to suggest that the particular water samples were taken from the same area or the same water source, or that they relate to either the complainant's property or his neighbour's property. Further, there is nothing before me to establish a connection between the test results and the disputed documents.

Public interest

26. I consider there to be a very strong public interest in the protection of personal privacy. That public interest is recognised in the FOI Act by the clause 3 exemption. I am of the view that the public interest in the personal privacy of individuals requires a particularly strong countervailing public interest to override it.
27. I recognise that there is a public interest in general health issues and also in maintaining a clean environment. Accordingly, there is a public interest, in my view, in the disclosure of information that would inform and educate the public about such matters. However, the disputed information in Documents 2, 4, 6, 10, 14 and 15 is not information of that kind.
28. I recognise a public interest in people being able to exercise their rights of access under the FOI Act and in being informed of information about them which is held by government agencies. I also recognise a public interest in the accountability of State and local government agencies for the decisions that they make and for the manner in which those agencies discharge their public functions.
29. Based on the material before me, I consider that the latter public interests have been satisfied, to a large extent, by the documents and information to which the complainant has been granted access. In balancing the competing interests, I consider that, in this instance, the public interest in protecting the privacy of third parties is not outweighed by any other countervailing interests. Accordingly, I find that the matter deleted from Documents 2, 4, 6, 10 and 14 is exempt under clause 3(1).
