

ALLEN AND SGIC

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

**File Ref: 95018
Decision Ref: D04495**

Participants:

Monika Marais Allen
Complainant

- and -

State Government Insurance Commission
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - letter 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 - documents recording substance of legal advice given by agency's legal adviser - document containing report of insurance assessor obtained and prepared for "sole purpose" of use in existing or anticipated litigation.

FREEDOM OF INFORMATION - clause 3 - personal information about third parties - public interest factors for and against disclosure.

Freedom of Information Act 1992 (WA) ss. 68(1), 72(1)(b), 75(1), 102(3); Schedule 1 clauses 3(1), 3(6), 7, 8(2); Glossary in Schedule 2.

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 Michael and Attorney General (Information Commissioner, WA, 14 September 1995, unreported).

Grant v Downs (1976) 135 CLR 674.

Baker v Campbell (1983) 153 CLR 52.

Nickmar Pty Ltd and Another v Preservatrice Skandia Insurance Ltd (1985) 3 NSWLR 44.

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

Waterford v The Commonwealth (1987) 163 CLR 54.

DECISION

The decision of the agency is confirmed. Documents 174 and 175 and the paragraphs deleted from page 2 and page 4 of Document 196, are exempt matter under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*, and the names deleted from lines 7 and 9 on page 4 of Document 196 are exempt matter under clause 3 of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

24th 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 Ms Allen ('the complainant') access to various documents requested by her under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 7 October 1994, the complainant applied to the agency under the FOI Act for access to all the documents and written information relating to two work related accidents in which she was involved. At the time of the access application, the complainant was the plaintiff in a common law action for negligence arising from a work related accident. The agency is the insurer of the defendant to that action, and had the conduct of the matter on behalf of the defendant.
3. On 6 January 1995, Mr D Williams, Manager, Government Insurance Division of the agency, granted the complainant access to a number of documents identified as being within the ambit of the complainant's access application, but denied access to other documents, on the basis that those documents are exempt under clauses 3(1), 7 and 8(2) of Schedule 1 to the FOI Act.
4. On 18 January 1995, the complainant applied to the agency for an internal review of the initial decision, and, on 20 January 1995, Mr V Evans, the Principal Officer of the agency, confirmed the initial decision of the agency. On 31 January 1995, the complainant applied to the Information Commissioner for external review of the decision of the agency.

REVIEW BY THE INFORMATION COMMISSIONER

5. On 9 February 1995, in accordance with my obligation under s.68(1) of the FOI Act, I notified the agency that I had formally accepted this complaint for review. I also required, pursuant to my authority under ss.75(1) and 72(1)(b) of the FOI Act, production to me by the agency of the documents in dispute together with the agency's FOI file maintained in respect of this matter. On 10 February 1995, those documents were delivered to my office.
6. On 7 March 1995, a preliminary conference was held between the parties. Following that meeting, the complainant confirmed that her complaint was in respect of the decision of the agency to refuse access to three documents only, being the Documents numbered 174, 175 and 196 on the agency's schedule of documents previously provided to the complainant by the agency. Both parties subsequently provided me with further submissions in support of their respective claims.

7. After examining the documents in dispute and considering the submissions of both parties, I provided both parties with my preliminary view of the claims for exemption with respect to those documents and the reasons for that view, on 15 September 1995. It was my preliminary view that Documents 174 and 175 and certain matter in Document 196 may be exempt under clause 7 of Schedule 1 to the FOI Act. Further, it was also my preliminary view that other matter contained in Document 196 may be exempt under clause 3(1), but other matter edited from that document may not be exempt under the FOI Act.
8. Following receipt of my preliminary view, the agency released further information from Document 196 to the complainant but maintained its claims for exemption under clause 7 of Schedule 1 to the FOI Act in relation to the whole of Documents 174 and 175 and for one paragraph on page 2 and one paragraph on page 4 of Document 196, and under clause 3(1) for certain other matter on page 4 of Document 196. The complainant was invited to reconsider her complaint in light of my preliminary view. However, she did not withdraw her complaint nor did she make any further submissions in respect of the matter remaining in dispute.

THE DISPUTED DOCUMENTS

9. There are three documents remaining in dispute between the parties, namely Documents 174, 175 and 196 on the agency's schedule of documents. Those documents are described as follows.

Document	Description
174	Letter dated 3 March 1992, from Assistant Crown Solicitor to Managing Director of agency.
175	Report from insurance assessors dated 16 April 1992, with statutory declaration dated 26 March 1992 attached.
196	Internal memorandum of agency dated 2 November 1992, from Settlements Investigation Officer to Manager, Health segment of the agency.

THE EXEMPTIONS

(a) Clause 7 - Legal professional privilege

10. The agency claims that matter consisting of all of Documents 174 and 175 and the paragraphs deleted from page 2 and page 4 of Document 196, is exempt matter under clause 7 of Schedule 1 to the FOI Act. Clause 7 provides:

"7. 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)."*

11. It is my understanding that the documents in dispute came into existence as a result of the complainant's claim for compensation in respect of the injuries she suffered whilst employed by the Health Department, which is insured by the agency. The Crown Solicitor's Office initially acted as legal advisers to the agency which had the conduct of the complainant's compensation claims on behalf of the Health Department.
12. In a number of my previous formal decisions, I have discussed the principle and application of legal professional privilege, initially in *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; and more recently in *Re Michael and Attorney General* (14 September 1995, unreported), at paragraphs 23-29.
13. It is clearly established law in Australia that confidential communications passing between a client and his or her legal adviser for the sole purpose of giving or receiving legal advice 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: *Grant v Downs* (1976) 135 CLR 674.
14. The test to be applied in order to decide whether a document attracts legal professional privilege is the "sole purpose" test. This requires a consideration of whether the document was brought into existence for the sole purpose of giving or receiving legal advice or for use in existing or anticipated legal proceedings: *Grant v Downs*, (*op. cit.*); *Baker v Campbell* (1983) 153 CLR 52.
15. The rule is most often applied to confidential communications between a client and his or her lawyer for either of those purposes. However, the principle extends to communications between a third party and the client or a lawyer, where those communications are made or brought into existence for the sole purpose of use in existing or anticipated litigation: *Nickmar Pty Ltd and Another v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44; *Trade Practices Commission v Sterling* (1979) 36 FLR 244.

16. I have examined the disputed documents. Document 174 is a letter from the Crown Solicitor's Office to the Managing Director of the agency, providing legal advice upon aspects of the complainant's claim for compensation. From my examination of Document 174, I am satisfied that it is a confidential communication between the agency's legal advisers and the Managing Director of the agency and I am also satisfied that the communication was made for the purpose of providing legal advice to the agency for use in existing legal proceedings. In my view, Document 174 would be exempt from production in legal proceedings on the ground of legal professional privilege. Therefore, I find Document 174 to be exempt under clause 7 of Schedule 1 to the FOI Act.
17. Document 175 is a report of an insurance assessor employed by the agency following a request from the Crown Solicitor's Office for the further investigation of a number of issues related to the complainant's claim for compensation. It contains, *inter alia*, a summary of the investigation work undertaken, a statutory declaration from a witness obtained by the assessors in the course of their investigation and a request for further instructions. From my examination of that document, I am satisfied that it is a confidential communication between a third party and the agency, which was made for submission to the agency's legal adviser for the sole purpose of use in existing or anticipated legal proceedings and that it was prepared at the request of the agency's legal adviser. Accordingly, I am of the view that Document 175 would be privileged from production in legal proceedings on the ground of legal professional privilege. Therefore, I find that Document 175 is exempt under clause 7 of Schedule 1 to the FOI Act.
18. Document 196 contains a summary of the complainant's claims and records discussions with and instructions to solicitors for the agency. The complainant's common law action was settled on 15 June 1995, and, following receipt of my preliminary view, the agency waived its claim of privilege with respect to certain matter in Document 196. However, the agency maintains its claims under clause 7 for one paragraph on page 2 and one paragraph on page 4 of Document 196. The matter on page 2 of Document 196 for which exemption is claimed under clause 7 is the last paragraph on that page. That paragraph contains a record of instructions given by the agency to its legal advisers. The matter on page 4 for which exemption is claimed under clause 7, is the first paragraph under the heading "CONCLUSION". That paragraph contains a record of legal advice provided by the agency's legal advisers to the agency, as to their assessment of the complainant's compensation claim.
19. The parts of Document 196 for which the agency has maintained its claims for exemption which record the instructions given by the agency to its legal advisers and the legal advice provided to the agency with respect to the case, would, in my view, be privileged from production in legal proceedings on the ground of legal professional privilege, as those parts of the document record a communication which is, of itself, privileged: *Trade Practices Commission v Sterling, op cit*, at p.246. Therefore, I find that matter to be exempt under clause 7 of Schedule 1 to the FOI Act.

20. In my view, information capable of attracting legal professional privilege may appear in documents of an agency and, where that occurs and it is practicable to sever matter that is exempt under clause 7 from non-exempt matter, an access applicant should be provided with access to an edited copy of the document in accordance with the spirit and intent of the FOI Act: *Waterford v The Commonwealth* (1987) 163 CLR 54. I am satisfied that on this occasion, the matter which the agency has deleted is matter which is exempt under clause 7, and which is capable of being severed from the disputed documents.
21. Finally, the agency also claimed that the matter within Document 175 was exempt pursuant to clause 3 and clause 8(2) of Schedule 1 to the FOI Act. However, as I have found that the matter is exempt under clause 7, I do not need to consider those exemptions.

(a) **Clause 3 - Personal information**

22. The agency also claims that certain other matter deleted from lines 7 and 9 on page 4 of Document 196 is exempt matter under clause 3(1) of Schedule 1 to the FOI Act. 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

- (2)...
- (3)...
- (4)...
- (5)...

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

23. In the Glossary in the FOI Act, "**personal information**" is defined as meaning *"...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."*

24. The matter deleted from page 4 consists of the names of two people unconnected with the complainant's compensation case. In the context of the information contained in Document 196, I consider that the deleted matter constitutes personal information about third parties that is, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act. The exemption provided by clause 3 is subject to a number of limitations. In the circumstances of this complaint, the only relevant limitation is that 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.
25. The onus of persuading me that the disclosure of personal information about third parties would, on balance, be in the public interest, is on the complainant under s.102(3) of the FOI Act. The exemption in clause 3 protects the privacy of third parties and I recognise that there is a public interest in maintaining personal privacy. In my view, that public interest can only be displaced by strong and convincing arguments. However, in this instance, and despite being invited to do so, the complainant made no submissions to me in an attempt to persuade me that disclosure of the exempt matter would, on balance, be in the public interest.
26. Therefore, I find the names of third parties deleted from lines 7 and 9 on page 4 of Document 196 to be exempt matter under clause 3(1) of Schedule 1 to the FOI Act.
