

**JOHNSON AND SGIC**

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

**File Ref: 96111  
Decision Ref: D05196**

Participants:

**Terence Hurley Johnson**  
Complainant  
  
- and -  
  
**State Government Insurance Commission**  
Respondent

**DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - clause 7 - legal professional privilege - notes made by agent of legal adviser - workers' compensation proceedings.

*Freedom of Information Act 1992 (WA)* Schedule 1 clause 7.  
*Workers' Compensation and Rehabilitation Act 1981 (WA)*

*Johnson and State Government Insurance Commission* (Information Commissioner, WA, 2 May 1995, unreported).  
*Trade Practices Commission v Sterling* (1979) 36 FLR 244.

## 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

11th September 1996

## 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 documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant has made a number of access applications to the agency. The background to those applications is referred to in my decision in *Re Johnson and State Government Insurance Commission* (22 May 1995, unreported). The circumstances relevant to this application are as follows.
3. In 1994, as a result of a workers' compensation claim lodged by the complainant against the agency, his former employer, a hearing was held in the WorkCover Conciliation and Review Directorate ('the Directorate'). Pursuant to the provisions of the *Workers' Compensation and Rehabilitation Act 1981*, legal representatives were not permitted to appear on behalf of the parties at the hearing. Accordingly, the agency was represented by an advocate who was instructed by the agency's legal advisers to appear on behalf of the agency at the hearing.
4. By letter to the agency dated 22 April 1996, the complainant requested access under the FOI Act to all documents that were in the possession of the advocate who appeared on behalf of the agency at the hearing. Following further correspondence between the agency and the complainant, the agency provided a list of the documents held and the complainant identified those to which he sought access. Subsequently, the agency identified additional documents and the complainant was granted access to a number of documents. However, the agency grouped the remainder of the documents into four categories and refused the complainant access to all of the documents within those four categories on the ground that they are exempt under clause 7 of Schedule 1 to the FOI Act.
5. On 4 July 1996, the complainant sought internal review of the agency's decision to refuse access to the documents. On 16 July 1996, Mr V Evans, the Managing Director and principal officer of the agency, varied the agency's initial decision and granted the complainant access to one additional document. However, in respect of the remainder of the documents, Mr Evans confirmed the initial decision that those documents are exempt under clause 7.
6. On 24 July 1996, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

## REVIEW BY THE INFORMATION COMMISSIONER

7. On 25 July 1996, I notified the agency that I had received this complaint and required the production to me of the documents in dispute, together with the file maintained by the agency in respect of this matter. After examining those documents and considering the agency's reasons for its decision, on 8 August 1996, I provided the parties with my preliminary view of this matter and my reasons for that view.
8. It was my preliminary view that the documents within the four categories described by the agency would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, it was my preliminary view that those documents are exempt under clause 7 of Schedule 1 to the FOI Act.
9. Subsequently, the complainant withdrew his complaint with respect to the documents in categories 1, 2 and 4 as described in my preliminary view. However, he did not withdraw his complaint with respect to the "category 3" documents. Those documents are the subject of this determination.

## THE DISPUTED DOCUMENTS

10. There are 6 documents in dispute in this matter. Those documents are numbered 46, 55, 57, 58, 69 and 72 on the agency's schedule. They consist of notes made by the advocate relating to the complainant's workers' compensation claim in preparation for, or subsequent to, the hearing at which he represented the agency, and 2 facsimile cover sheets from the advocate to the legal advisers of the agency enclosing some of those notes for consideration by the legal advisers.

## THE EXEMPTION

11. Clause 7 of Schedule 1 to the FOI Act 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)."*

12. Legal professional privilege applies to, *inter alia*, any confidential communication between a client and his or her professional legal adviser acting in a professional capacity and with a view to obtaining or giving legal advice or assistance, notwithstanding that the communication is made through agents of the party and the solicitor, or an agent of either of them, and whether or not the document is in fact so used for that purpose: *Trade Practices Commission v Sterling* (1979) 36 FLR 244.
13. The agency claims that the disputed documents are exempt under clause 7 as they are notes made by the advocate in preparation for, or subsequent to, the hearing. The agency claims that, as the advocate was engaged by the agency's legal advisers to represent the agency, communications between the advocate, as the agent of both the legal advisers and the agency, created for the sole purpose of litigation or for submission to the agency's legal advisers in the course of litigation, are privileged.
14. However, the complainant claims that documents held by an agent of the agency should not be subject to legal professional privilege. The complainant claims that it is incorrect to say that the advocate was an agent of both the agency and the agency's legal advisers. In support of this the complainant refers to the fact that the account for the services of the advocate was paid direct to the advocate by the agency.
15. In addition, following his consideration of my preliminary view, the complainant submitted that the main purpose of the amendments to the *Workers' Compensation and Rehabilitation Act 1981* was to exclude legal practitioners and establish a dispute resolution body. Accordingly, the complainant submitted that the Directorate is not a litigious body and that the hearing at the Directorate was for the purpose of dispute resolution, not litigation. Further, the complainant maintains that the advocate is not a legal practitioner. Accordingly, the complainant submits that the disputed documents are not privileged and are not exempt under clause 7.
16. Inquiries by my Investigations Officer establish that, at the time of the hearing in the Directorate, the agency's legal advisers had the conduct of the complainant's workers' compensation claim on behalf of the agency. However, as legal representatives were not permitted to appear on behalf of the parties at the hearing, the agency's legal advisers instructed an advocate to appear at the hearing on behalf of the agency. Further, throughout the course of the hearing, the agency's legal advisers provided instructions and assistance to the advocate.
17. Further, I understand that the disputed documents were prepared in the course of the hearing in order to obtain instructions and legal advice from the legal advisers, and were forwarded to the legal advisers for that purpose by the advocate during the hearing.

## Consideration

18. I am satisfied, based on the information before me, that the advocate was, for the purpose of representing the agency at the hearing, acting as an agent of the legal advisers and that the advocate had the conduct of the hearing in accordance with instructions given by the legal advisers. In those circumstances, I consider that the fact that the advocate is not a legal practitioner does not determine whether a claim for privilege can be made with respect to the disputed documents.
19. In the case of a record made by a legal adviser of a client or an agent of that legal adviser, and in accordance with the decision of *Trade Practices Commission v Sterling*, it is not necessary for the document to have been created for the sole purpose of litigation in order for it to be able to be subject to a claim of privilege. It is sufficient for the document to have been created solely in order for a legal adviser to provide legal advice or assistance to the client, even if the document is not in fact so used.
20. I am satisfied that the disputed documents were created by the agent of the legal advisers as a record of the hearing solely to enable the legal adviser to give legal advice and assistance to the client, the agency, in respect of the workers' compensation claim made by the complainant against the agency, and the dispute arising from it. Accordingly, I am satisfied that the disputed documents would be privileged from production in legal proceedings on the ground of legal professional privilege. I find the disputed documents are exempt under clause 7 of Schedule 1 to the FOI Act.

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