

JOHNSON AND SGIC

OFFICE OF THE INFORMATION COMMISSIONER (WA)

Decision summary issued pursuant to s.76(8) of the *Freedom of Information Act 1992*

COMPLAINT No: 96119

DECISION No: D06696

PARTIES: Terence Hurley Johnson

Complainant

State Government Insurance Commission

Respondent

No. of documents in dispute: 2

Exemption clause(s) : Clause 7

By letter dated 22 April 1996, Mr Johnson ('the complainant') sought access under the *Freedom of Information Act 1992* ('the FOI Act') to various documents held by the State Government Insurance Commission ('the agency') relating to investigations made by or on behalf of the agency with respect to him, excluding those to which access had been granted in previous applications made to the agency. The agency granted the complainant full access to 4 documents and access to edited copies of two others. By letter dated 3 July 1996, the complainant sought internal review on the basis that there should be more than 6 documents within the ambit of his access application. However, by letter dated 16 July 1996, the agency confirmed its initial decision and informed the complainant that no other documents existed within the ambit of his access application.

By letter dated 9 August 1996, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision to refuse him access to documents which he claims exist, or should exist, in the agency.

In the course of my dealing with this complaint, and as the result of the complainant clarifying the ambit of his access application, the agency located additional documents in its record-keeping system. Further, although not required by the FOI Act to do so, the agency also obtained copies of documents from third parties in order to satisfy the requests of the complainant.

The agency provided the complainant with access to a number of the additional documents, and the complainant withdrew his complaint with respect to some of the documents. However, the complaint is maintained in respect of the sufficiency of the agency's searches and in respect of two additional documents to which access has been refused under clause 7 of Schedule 1 to the FOI Act.

I obtained copies of those documents and made further inquiries with the agency in respect of the concerns raised by the complainant about the sufficiency of the agency's searches for additional documents. The result of those inquiries and my preliminary view of the agency's claims for exemption under clause 7 were conveyed to the complainant in letters dated 19/9/96, 17/10/96 and 2/12/96. It was my preliminary view that the searches conducted by the agency for additional documents were, in all the circumstances, reasonable, and that the two documents are exempt under clause 7 as claimed.

The complainant remains of the view that the agency has not disclosed all of the documents that fall within the ambit of his access application. Further, the complainant does not accept the agency's claims for exemption under clause 7 in respect of the two documents remaining in dispute. The complainant has been fully informed in writing of my preliminary view, and my reasons for that view. His submissions have not dissuaded me from my preliminary view. A summary of my reasons follows.

Sufficiency of search

I consider that the role of the Information Commissioner is not to search for documents on behalf of complainants, but to ensure that agencies have adhered to their obligations under the FOI Act. When a complainant believes that

documents have not been fully disclosed to him or her, it is my view that my function is to determine whether those documents exist or should exist in an agency, and whether the searches conducted by the agency to locate such documents have been, in all the circumstances, reasonable.

Initially, the agency took a narrow view of the scope of the access application. However, after its reconsideration of that application, additional documents were located and made available to the complainant in part or in full. Further, the agency has obtained copies of documents held by third parties and made those documents available to the complainant, although it was under no obligation to do so.

Based on the material before me, I am not satisfied that other documents exist, or should exist, in the agency. However, I am in any event satisfied that the agency has taken all reasonable steps to locate the documents requested. It appears to me that the agency has complied with its obligations under the FOI Act and has attempted to satisfy the complainant's rights of access. In the circumstances which I have explained in detail to the complainant, I do not consider that there are any grounds for requiring the agency to conduct further searches. Accordingly, I confirm the decision of the agency to refuse access to documents on the ground that it has taken all reasonable steps to locate them and those documents either do not exist or cannot be found.

Clause 7 - Legal professional privilege

The documents to which access has been refused under clause 7 consist of a facsimile message dated 10 April 1995 from the agency to the Director of Public Prosecutions ('the DPP'), and an attachment to that facsimile, being a copy of a letter to the agency from its legal advisers.

The principles applicable to whether a document is privileged from production in legal proceedings on the ground of legal professional privilege are well established in Australia, and I have referred to those principles in a number of my formal decisions. Legal professional privilege applies to, *inter alia*, confidential communications between a client and his or her legal adviser acting in a professional capacity for the sole purpose of obtaining legal advice or assistance or for use in legal proceedings: *Grant v Downs* (1976) 135 CLR 674; *Trade Practices Commission v Sterling* (1979) 36 FLR 244.

Having examined the disputed documents, I am satisfied that the enclosure to the facsimile is a document to which legal professional privilege *prima facie* attaches. With respect to the effect of the disclosure of that document to the DPP, and the claim of privilege raised with respect to both disputed documents, I refer to my decision in *Re Nicholson and Department for Family and Children's Services* (unreported, 7 November 1996, D05996), in which I discussed the application of a claim of legal professional privilege to confidential communications between an agency and the DPP.

At the time of that communication between the agency and the DPP, the DPP was conducting a criminal prosecution against the complainant. The communication between the agency and the DPP was in respect of advice related to that prosecution. In those circumstances, and in accordance with my decision in *Re Nicholson*, I consider that the required solicitor/client relationship arose between the agency and the DPP because the agency held a genuine belief as to the entitlement of the DPP to give legal advice on the relevant matters. Accordingly, I am satisfied that the disputed documents would be privileged from production in legal proceedings on the ground of legal professional privilege.

Therefore, I find that the disputed documents are exempt under clause 7 of Schedule 1 to the FOI Act.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

20th December 1996