

Clause 7

Legal Professional Privilege

This is a plain English guide to the application of the exemption in clause 7 of the FOI Act. An agency can refuse access to exempt matter or an exempt document. The word “matter” refers to a piece of information. It can be a whole page or part of a page, or a single word or figure on a page. Parts of a page can be exempt when other parts are not. Exemptions are not mandatory; agencies have discretion to disclose documents that may be technically exempt where that may properly be done.

What is legal professional privilege	Legal professional privilege is a rule of law that protects the confidentiality of communications made between a lawyer and his or her client. The privilege belongs to the client and may only be waived by the client.
Purpose	The exemption in clause 7 protects information that would be privileged from production in legal proceedings on the ground of legal professional privilege.
Criteria	<p>Legal professional privilege protects confidential communications between a lawyer and his or her client made for the dominant purpose of -</p> <ul style="list-style-type: none"> ◆ seeking or giving legal advice or professional legal assistance; or ◆ use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication.
Other communications that are also protected	Legal professional privilege also protects confidential communications between the client or the client’s lawyers (including communications through employees or agents) and third parties made for the dominant purpose of use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication.
Examples of documents that may be privileged	<ul style="list-style-type: none"> ◆ letters to lawyers seeking legal advice and letters from lawyers providing legal advice. ◆ file notes or memoranda made by the client or the client’s lawyer which relate to the legal advice sought. ◆ drafts of documents subsequently filed in court. ◆ statements of witnesses obtained by lawyers or their agents, for the dominant purpose of use in legal proceedings. ◆ documents created in response to requests by the client’s lawyer to enable him or her to advise the client or to conduct litigation on behalf of the client.

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Examples of documents that may not be protected by legal professional privilege

- ◆ letters from a client’s lawyer to another party to court proceedings.
- ◆ a lawyer’s bill of costs (except to the extent that the bill records prior communications which attract the privilege).
- ◆ witness statements or other investigative material which would have been created for administrative purposes in any event, irrespective of possible legal proceedings.

Lawyers employed by government agencies

Communications between salaried lawyers employed by government agencies and their employers may be protected by legal professional privilege, provided the lawyer is consulted in a professional capacity to give independent legal advice or professional legal assistance.

Lawyers employed by government agencies perform administrative functions as well as legal functions and communications relating to administrative functions do not attract legal professional privilege.

Privileged copies of unprivileged documents

Legal professional privilege may attach to a copy document, the original of which does not itself attract legal professional privilege, providing the dominant purpose of creating the copy is one of the privileged purposes previously mentioned. For example, copy documents attached to a brief to counsel or a letter to a solicitor seeking legal advice, would ordinarily attract legal professional privilege, even if the original document would not.

Waiver

Since the decision of the Supreme Court of Western Australia in *Department of Housing and Works v Bowden* [2005] WASC 123, questions of waiver do not arise under clause 7 of Schedule 1 to the FOI Act.

(See note on page 4)

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Clause 7 of Schedule 1 to the FOI Act is in the following terms:

"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)."*

There is no "public interest" test attached to the exemption in clause 7. In effect, this means that when the Information Commissioner is conducting an external review of a complaint involving a denial of access, if the Information Commissioner is satisfied that a document is, on its face, exempt under clause 7, the Information Commissioner does not have the power to make a decision to the effect that access is to be given to the document, even if there are strong public interest arguments to do so.

Warning

Legal professional privilege is a difficult area of the law. The information in this guide does not attempt to deal with all of the complex issues that can arise in applying that law. It merely draws attention to some of the general issues most frequently encountered in determining whether the privilege applies to documents requested under the FOI Act.

Further reading

- *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67 - re dominant purpose test.
- *Goldberg v Ng* (1995) 185 CLR 83; *Mann v Carnell* [1999] HCA 66 - re waiver.
- *Waterford v Commonwealth of Australia* (1987) 163 CLR 54 - general principles and regarding lawyers employed by government agencies.
- *Trade Practices Commission v Sterling* (1979) 36 FLR 244 - general principles and examples.
- *Department of Housing and Works v Bowden* [2005] WASC 123

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Decisions of the Information Commissioner

The following decisions of the Information Commissioner are included as a further guide to the application of the exemption in clause 7. The full decision and reasons can be found on the Information Commissioner's web site at <<http://www.foi.wa.gov.au>>. All decisions of the Information Commissioner involving a consideration of the exemption in clause 7 can be found at that source.

Re Sanfead and State Government Insurance Commission [1996] WAICmr 7— Various documents relating to the complainant's workers' compensation claim were found to be privileged including correspondence between the agency and the Crown Solicitor's Office, notes, memoranda, minutes of meetings and records of telephone discussions between the parties.

Re K, L and F and Department for Family and Children's Services [1996] WAICmr 19 - Legal advice from the agency's own salaried legal officers was clearly privileged, as was information recording communications made between those legal officers and other legal officers who were briefed to represent the agency in an application for wardship.

Re Johnson and State Government Insurance Commission [1996] WAICmr 28 - Solicitors' bills of costs which did not disclose privileged communications and computer records of monies paid which did not reproduce information contained in privileged documents were not exempt under clause 7. Parts of those documents that enable the legal advice or instructions to be inferred are exempt, but could be deleted.

Decisions of the Supreme Court

The scope and meaning of the exemption in clause 7 has been determined by the Supreme Court of Western Australia in *Department of Housing and Works v Bowden* [2005] WASC 123. In that case, McKechnie J dealt with an appeal by the Department of Housing and Works against a decision made by the former A/Information Commissioner ('the former A/Commissioner'). In *Re Bowden*, the former A/Commissioner decided that the Department of Housing and Works had impliedly waived its right to claim privilege for certain of the documents in question in that matter. However, the Supreme Court set aside the decision in *Re Bowden* and the relevant documents were found by McKechnie J to be exempt under clause 7(1).

At paragraphs 16 – 28 of that decision, McKechnie J said:

"[16] In general, it is only necessary for a decision-maker, including the Commissioner, to decide whether, on its face, or after information has been received, if necessary, a document is prima facie privileged from production in legal proceedings.

[17] Whether privilege has been waived may involve subtle questions of law ...

[18] Parliament could not have intended that these questions should be resolved at every level of an FOI request by persons untrained in the law and in a vacuum without the matrix of extant legal proceedings to resolve the question of waiver.

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[19] A finding that a document is prima facie the subject of legal professional privilege is a finding that the matter would be privileged from production in legal proceedings on that ground. It may be that in specific legal proceedings, following inquiry, a court might hold that the privilege had been waived. Such a finding of waiver does not derogate from the proposition that legal professional privilege once attached to a document and attached at the time of the FOI request.

...

[22] With respect, the difficulty ... in the approach of the Commissioner in the present case, is that conclusions were reached by hypothesising about legal proceedings. In the facts of this case, and no doubt in many other cases, there is no litigation. Without knowing the effect on a litigant as party to a proceeding, it is impossible to measure the effect of fairness, or more correctly unfairness, on a failure to disclose some part of legal professional advice. In my opinion, it is for this reason that the High Court in *Mann v Carnell* were at pains to confine the impact of fairness to legal proceedings. It is only in legal proceedings that a judgment can be made, inter alia, about considerations of fairness. Such considerations of fairness cannot operate at large: *Mann v Carnell* at [29].

...

[25] In my opinion, Parliament did not intend that decision-makers under the FOI [sic] should be required to go through the factual permutations that may operate to resolve questions of waiver of privilege, especially when the exercise is hypothetical because there are no legal proceedings. If it appears, prima facie, that a matter would be privileged from production in legal proceedings on the ground of legal professional privilege then it is exempt matter.

...

[28] I therefore hold that the Commissioner was wrong in proceeding to determine the question of waiver. Once she had concluded that the documents were prima facie privileged in legal proceedings, then it followed that the three documents were exempt matter and access was not permitted."

Finally, at paragraphs 46 and 47 of that decision, His Honour also said:

"For these ancillary reasons, I hold that once a document is determined, prima facie, to be the subject of legal professional privilege, questions of waiver do not arise under the FOI Act.

I conclude the question of waiver is one that is only able to be answered in legal proceedings when the fairness of maintaining the privilege to the detriment of a litigant is able to be judged and balanced in the absence of legal proceedings, there is nothing to balance and fairness does not operate at large."

Disclaimer

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