

Decision D0042008 - Published in note form only

Re Boddington Resources Pty Ltd, Trovex Pty Ltd and Moutier Pty Ltd and Department of Industry and Resources [2008] WAICmr 4

Date of Decision: 5 February 2008

Freedom of Information Act 1992: section 78; Schedule 1, clause 7(1)

The complainants applied to the Department of Industry and Resources ('the agency') under the *Freedom of Information Act 1992* ('the FOI Act') for access to certain documents relating to exploration licences for land covered by a Mineral Lease held by a third party. The agency identified 79 documents and gave the complainants access in full or in edited form to 75 documents but refused access to the remainder. The agency confirmed its decision on internal review and the complainants applied to the A/Information Commissioner ('the A/Commissioner') for external review of that decision in relation to three documents for which the agency claimed exemption under clause 7(1) of Schedule 1 to the FOI Act.

Clause 7(1) provides that matter is exempt if it would be privileged from production in legal proceedings on the ground of legal professional privilege. Legal professional privilege applies to confidential communications between clients and their legal advisers made for the dominant purpose of giving or seeking legal advice or for use in existing or anticipated legal proceedings: *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 201 CLR 49.

Following the receipt of that application, the A/Commissioner obtained the originals of the disputed documents from the agency and his Senior Legal Officer, having examined each of those documents, advised the complainants, in writing, that, in his view, the documents were, *prima facie*, exempt under clause 7(1). The Senior Legal Officer also advised that, following the decision of the Supreme Court of WA in *Department of Housing and Works and Bowden* [2005] WASC 123, no question of waiver of legal professional privilege could be determined by the Information Commissioner.

In response, the complainants made further submissions to the A/Commissioner to the effect that *Bowden's* case is not binding on the Information Commissioner or can be distinguished and, in the alternative, is wrong in law and ought not to be followed. The complainants noted that the A/Commissioner had the discretion to refer the question of waiver to the Supreme Court on a question of law, pursuant to s.78 of the FOI Act.

Having examined the disputed documents, the A/Commissioner accepted that they are confidential communications between the agency and its legal adviser which were prepared for the dominant purpose of giving legal advice. Accordingly, the A/Commissioner was satisfied that the disputed documents would be privileged from production on the ground of legal professional privilege. The A/Commissioner was also satisfied that the decision in *Bowden's* case is both directly relevant to the application of clause 7(1) in this matter and, being a decision of the Supreme Court of Western Australia, is binding. Consequently, it is not open to the A/Commissioner to determine whether or not there had been a waiver of privilege in respect of the disputed documents. The A/Commissioner declined to refer that question to the Supreme Court under s.78 and confirmed the agency's decision to refuse access to the disputed documents pursuant to clause 7(1) of Schedule 1 to the FOI Act.