

Decision D0042016 – Published in note form only

Re Bowden and Department of Finance [2016] WAICmr 4

Date of Decision: 14 March 2016

Freedom of Information Act 1992 (WA): section 26; Schedule 1, clause 7(1)

On 30 September 2014, Lyle Bowden (**the complainant**) applied to the Department of Finance (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents relating to his claim for the payment of a motor vehicle mileage allowance lodged with the then Department of Housing and Works in 2003.

By decision dated 17 November 2014 the agency identified 51 documents within the scope of the complainant's access application. The agency gave the complainant access in full to five documents and an edited copy of four documents, on the basis that the information deleted is exempt under clause 3(1) of Schedule 1 to the FOI Act (personal information). The agency also refused the complainant access in full to 36 documents, and deleted certain information from three documents, on the basis that those documents and that information (**the disputed matter**) is exempt under clause 7(1) of Schedule 1 to the FOI Act on the grounds of legal professional privilege. The also agency gave the complainant access to one document outside the procedures of the FOI Act and decided that, pursuant to section 6 of the FOI Act, the access procedures under the FOI Act did not apply to one document on the basis that it was already publicly available.

On 16 December 2014 the complainant applied for internal review of the agency's decision to refuse him access to the disputed matter pursuant to clause 7(1) and on the basis that he claimed that the agency had not identified certain further documents within the scope of his access application. By letter dated 16 January 2015 the agency confirmed its initial decision to refuse access to the disputed matter under clause 7(1). The agency also concluded that no further documents within the scope of the complainant's access application could be located and, in effect, the agency decided to refuse the complainant access to further documents under section 26 of the FOI Act.

On 3 March 2015 the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision to refuse him access to the disputed matter under clause 7(1) and on the grounds that he claimed that additional documents should exist within the scope of his access application.

Following receipt of the complaint, the Commissioner obtained the disputed matter from the agency, together with the FOI file maintained by the agency in respect of the complainant's access application. On 4 August 2015, the parties attended a conciliation conference conducted by the Commissioner's office. However, the matter was not resolved at that stage.

Following the conciliation conference, the Commissioner's office made further inquiries and obtained further information from the agency in response to the complainant's claims that further documents exist within the scope of his access application.

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

protects from disclosure confidential communications between clients and their legal advisers, if those communications were made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in proceedings in a court: *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 168 ALR 123. Legal professional privilege also extends to other categories of documents, including documents containing a record of a privileged communication between a client and their legal adviser: *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 246.

Section 26 of the FOI Act provides that an agency may refuse access to a document if the agency is satisfied that all reasonable steps have been taken to find the document, and the agency is satisfied that the document is either in the agency's possession but cannot be found or does not exist. The Commissioner considers that, in dealing with section 26, the following questions must be answered. First, whether there are reasonable grounds to believe that the requested documents exist or should exist and second, whether the requested documents are, or should be, held by the agency. Where those questions are answered in the affirmative, the next question is whether the agency has taken all reasonable steps to find those documents.

On 10 February 2016, after considering the information before him, the Commissioner provided the parties with a letter setting out his preliminary view of the complaint. It was the Commissioner's preliminary view that the disputed matter is exempt under clause 7(1) of Schedule 1 to the FOI Act. The Commissioner considered that the information deleted from one document consisted of a record of a privileged communication between the agency and its legal advisers and would be privileged from production in legal proceedings on the ground of legal professional privilege. The Commissioner was also satisfied that the remainder of the disputed matter consisted of confidential communications between the agency and its legal advisers made for the dominant purpose of giving or seeking legal advice and would be privileged from production in legal proceedings on the ground of legal professional privilege. The Commissioner was also of the preliminary view that the agency's decision to refuse the complainant access to further documents pursuant to section 26 of the FOI Act, on the ground that further documents either do not exist or cannot be found, was justified.

The complainant was invited to reconsider his complaint or to provide the Commissioner with further submissions relevant to the matters for the Commissioner's determination. The complainant made further submissions claiming that the disputed matter would not be privileged from production in legal proceedings on the ground of legal professional privilege.

After considering all of the information before him, including the complainant's further submissions, the Commissioner was not dissuaded from his preliminary view. Accordingly, the Commissioner found that the disputed matter was exempt under clause 7(1) of Schedule 1 to the FOI Act and that the agency's decision to refuse the complainant access to further documents under section 26 of the FOI Act, on the ground that further documents either do not exist or cannot be found, was justified. The Commissioner confirmed the agency's decision.