

***Re Hobday and State Solicitor's Office* [2018] WAICmr 4**

**Date of Decision: 28 June 2018**

***Freedom of Information Act 1992 (WA): Schedule 1, clause 7(1)***

**Background**

On 24 January 2017 the State Solicitor's Office (**the agency**) received an access application from Andrew Hobday (**the complainant**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for documents, including all information and details concerning his correspondence with the Attorney General and the agency between 1998 and 2006 regarding his lead poisoning, consideration for ex gratia payment, alleged misconduct by other officers in various departments and other matters.

On 12 April 2017 the agency decided to give the complainant access to edited copies of some documents. The complainant applied for internal review of the agency's decision.

On 17 May 2017 the agency varied the initial decision and identified documents (**the disputed documents**) that were previously excluded from the scope of the access application and decided that they were all within scope and subject to legal professional privilege (**LPP**). The agency decided to refuse the complainant access to the disputed documents on the ground that they were exempt under clause 7(1) of Schedule 1 to the FOI Act (**clause 7(1)**).

Clause 7(1) provides that matter is exempt if it would be privileged from production in legal proceedings on the ground of LPP. LPP protects from disclosure confidential communications between a client and their lawyer, made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in proceedings in a court (see: *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 168 ALR 123 (**Esso**))

On 22 May 2017 the complainant applied to my office for external review of the agency's decision to refuse access to the disputed documents. The agency provided my office with a copy of the disputed documents together with its FOI file maintained in respect of the access application. My officer communicated with the parties in writing and received further submissions from both parties and also met with the parties separately with a view to resolving the matter by conciliation.

As the matter was not resolved, on 7 June 2018 my officer informed the parties in writing that having inspected the disputed documents it was her preliminary view that they were all exempt under clause 7(1) (**preliminary view**). The complainant was invited to accept the officer's preliminary view or to provide further submissions.

The complainant did not accept the preliminary view and made further submissions. In summary, the complainant submitted that the disputed documents were not the subject of an exemption under clause 7(1), as the legal advice provided by the agency was:

- not given in contemplation of legal proceedings as any potential legal claim by him was statute barred; and
- based on information he says was fabricated and it was therefore illegal and improper legal advice.

In addition, the complainant submitted that even if LPP did apply then given his particular circumstances it should be overridden by the public interest in the disclosure of the documents.

## Consideration

I note that in *Temwood Holdings Pty Ltd v Western Australian Planning Commission & Anor* [2003] WASCA 112 (**Temwood**) Justice Wheeler stated at [4] that, ‘the wording of [clause 7(1)] is concerned with whether matter would be privileged from production ... notwithstanding that there may be no legal proceedings in existence. There is therefore a question of a somewhat hypothetical or abstract nature for the Information Commissioner to determine’ (cited with approval in *Re Duggan and Department of Agriculture and Food* [2011] WAICmr 31 (**Duggan**) at [27]).

The construction of clause 7(1) was expressly considered by Justice McKechnie in *Department of Housing and Works v Bowden* [2005] WASC 123 (**Bowden**) and that construction has been consistently applied by previous Information Commissioners in several decisions including *Duggan*. I consider myself bound by the Supreme Court’s decision in *Bowden* and accordingly once I decide that particular documents are on their face the subject of legal professional privilege then that is all that is required to establish the exemption under clause 7(1) (see: *Re Wells and Legal Profession Complaints Committee* [2018] WAICmr 3).

The issue of improper purpose in relation to clause 7(1) was considered in great detail in *Duggan*. I accept that I am not bound by a decision of a previous Information Commissioner. However, in my view there is no valid reason in this matter to depart from *Duggan*, particularly where *Bowden* was considered and applied (see: *Duggan* at [40]).

In response to the complainant’s first submission, based on my plain reading of clause 7(1), which is consistent with *Temwood*, I do not accept that clause 7(1) requires legal proceedings to be in existence for the exemption to apply.

In response to the complainant’s second submission, an examination by me of each disputed document (which on its face would attract LPP) with a view to establishing whether or not it was made to further an illegal purpose, fraud or other improper conduct, is beyond the scope of clause 7(1). My role is limited to determining if a document is prima facie privileged from production in legal proceedings and therefore exempt under clause 7(1) (see: *Bowden* at [16], [19], [25] and [28]).

Further, contrary to the complainant’s submission, clause 7(1) is not subject to any specific public interest qualification, nor does the FOI Act contain a general ‘public interest override’ clause (compared to, for example, section 50(4) of the Victorian *Freedom of Information Act 1982*). Accordingly I do not have power to consider the public interest in this particular matter.

I have considered all of the material before me, including all of the complainant’s submissions, and I am not dissuaded from the preliminary view. Based on all the material before me, including my examination of the disputed documents and applying *Bowden* and *Duggan*, I am satisfied that, when applying *Esso*, the disputed documents would be privileged from production in legal proceedings on the ground of LPP.

I find that that the material facts underlying my reasons are as set out in the preliminary view and above. For the reasons given in both the preliminary view and set out above I am satisfied that the disputed documents are exempt under clause 7(1).

## Decision

The agency’s decision is confirmed. I find that the disputed documents are exempt under clause 7(1) of Schedule 1 to the FOI Act.

Lisa Ward

