

Decision D0052020 – Published in note form only

Re National Tertiary Education Industry Union and Murdoch University [2020] WAICmr 5

Date of Decision: 20 May 2020

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

On 21 December 2018, the National Tertiary Education Industry Union (**the complainant**) applied to Murdoch University (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to ‘*The ‘Preliminary Review’ conducted by [a named barrister] on behalf of Murdoch University, and initiated by the Protocol issued to [the named barrister] on 12 July 2018*’.

The agency identified one document within the scope of the application (**the disputed document**) and refused the complainant access to it on the ground that it was exempt under clause 7(1) of Schedule 1 to the FOI Act (**clause 7(1)**).

The complainant applied for internal review of the agency’s decision and, on internal review, the agency confirmed its initial decision. On 17 May 2019, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency’s decision.

Following receipt of the application for external review, the Commissioner obtained the disputed document from the agency, together with the FOI file maintained by the agency in respect of the complainant’s access application.

The Commissioner’s office made inquiries with the agency and considered further material provided by the agency. In an effort to resolve the matter by conciliation, one of the Commissioner’s officers informed the complainant that, in her view, it was likely that the Commissioner would be satisfied, on the material then before the Commissioner, that the disputed document was exempt under clause 7(1). In light of that, the complainant was invited to reconsider whether it wished to continue with this external review or to provide further submissions in support of its claim that the disputed document is not exempt under clause 7(1). The complainant confirmed that it wished to pursue the matter but did not provide further submissions at that stage.

On 16 December 2019, after considering the material then before her, the Commissioner provided the parties with her preliminary view of the matter, which was that the disputed document is exempt under clause 7(1). The complainant did not accept the Commissioner’s preliminary view and provided further submissions. After considering all of the information before her, including the complainant’s further submissions, the Commissioner was not dissuaded from her preliminary view.

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. The grounds upon which a document is subject to legal professional privilege are fairly well settled in Australian common law. In brief, 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. The dominant purpose is not the primary or substantial purpose but rather the ‘ruling, prevailing or most influential purpose’: *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at 416. Even where litigation is not pending or contemplated, privilege can attach to communications between a solicitor or client and a third party, provided that the dominant purpose of those communications being brought into existence was to give or obtain legal advice: *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122.

The agency claimed that the disputed document was created for the dominant purpose of obtaining legal advice from its external legal advisers. The complainant accepted that one of the purposes for the creation of the disputed document was for the facilitation of legal advice but contended that it was not the dominant purpose.

Based on the Commissioner’s examination of the disputed document and consideration of submissions provided by the agency during the external review process – which included correspondence between the agency and its legal advisers that supported the agency’s claims – the Commissioner was satisfied that the dominant purpose of the creation of the disputed document was to give or obtain legal advice. Accordingly, the Commissioner found that the disputed document would be privileged from production in legal proceedings.

The Commissioner acknowledged that the limited amount of information she could provide to the complainant about the material on which her view was based – due to her obligation under section 74 of the FOI Act to not disclose exempt matter – may place the complainant at a disadvantage in endeavouring to make meaningful submissions to her. The Supreme Court in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550, at 556-557, recognised the difficulties faced by complainants and the constraints placed on the Commissioner by such provisions in the FOI Act but took the view that such provisions should be construed strictly according to its tenor.

The complainant also claimed that any privilege attached to the disputed document had been waived by the agency in this case. The Commissioner noted that, following the decision of the Supreme Court in *Department of Housing and Works v Bowden* [2005] WASC 123, the question of waiver of legal professional privilege does not arise under the FOI Act.

Accordingly, the Commissioner found that the disputed document was exempt under clause 7(1) of Schedule 1 to the FOI Act and confirmed the agency’s decision.