

Decision D0072008 - Published in note form only

***Re Ross and Department of the Premier and Cabinet* [2008] WAICmr 7**

Date of Decision: 7 March 2008

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

The complainant applied to the Department of the Premier and Cabinet ('the agency') under the *Freedom of Information Act 1992* ('the FOI Act') for access to documents containing certain legal advice. The agency identified two documents as coming within the ambit of the complainant's application and refused access to both on the ground they were exempt under clause 7(1) of Schedule 1 to the FOI Act. The agency confirmed its decision on internal review and the complainant applied to the A/Information Commissioner ('the A/Commissioner') for external review of that decision, claiming that any legal professional privilege attached to the documents had been waived by the agency.

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.

The A/Commissioner obtained the originals of the disputed documents from the agency. After examining each of those documents, the A/Commissioner's Senior Legal Officer advised the complainant 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 Western Australia 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.

The complainant made further submissions to the A/Commissioner to the effect that the decision in *Bowden* was made in error and should not be followed. The complainant requested that, if the A/Commissioner determined that *Bowden's* case ought to be followed, the A/Commissioner exercise his discretion, under s.78(2) of the FOI Act, to refer the question of waiver to the Supreme Court to determine on a question of law. The complainant declined to reconsider his complaint in light of the decision of the Supreme Court in *Bowden's* case and in view of the A/Commissioner's decision made on 5 February 2008 in *Re Boddington Resources Pty Ltd, Trovex Pty Ltd and Moutier Pty Ltd and Department of Industry and Resources* [2008] WAICmr 4, which related to a similar matter and addressed submissions similar to those made by the complainant.

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.

In view of the fact that *Bowden's* case arose from an appeal to the Supreme Court on a question of law from the former A/Information Commissioner, the A/Commissioner declined to grant the complainant's request to refer the question of waiver to the Supreme Court under s.78. The A/Commissioner confirmed the agency's decision to refuse access to the disputed documents pursuant to clause 7(1) of Schedule 1 to the FOI Act.