

**OFFICE OF THE INFORMATION  
COMMISSIONER (W.A.)**

**File Ref: F2016295  
Decision Ref: D0112017**

Participants:

**Derek Gascoine**  
Complainant

- and -

**Shire of Chittering**  
Agency

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – documents relating to an application for a clay pit – clause 7(1) – legal professional privilege – whether documents are privileged from production in legal proceedings - waiver.

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

*Commissioner of Australian Federal Police and Another v Propend Finance Pty Ltd and Others* [1997] 188 CLR 501

*Department of Housing and Works v Bowden* [2005] WASC 123

*Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 168 ALR 123

*Trade Practices Commission v Sterling* (1979) 36 FLR 244

## DECISION

The agency's decision is confirmed. I find that the disputed documents are exempt under clause 7(1) of Schedule 1 to the *Freedom of Information Act 1992* (WA).

Sven Bluemmel  
INFORMATION COMMISSIONER

23 May 2017

## REASONS FOR DECISION

1. This complaint arises from a decision made by the Shire of Chittering (**the agency**) to refuse Derek Gascoine (**the complainant**) access to documents under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**).

### BACKGROUND

2. On 27 June 2016, the complainant applied to the agency under the FOI Act for access to:

*The application by [a third party] for a clay pit on [a particular lot]. Particularly legal opinions, instructions for legal opinions and correspondence relating to those opinions.*

3. By notice of decision dated 22 July 2016, the agency advised the complainant of its decision to give access to some documents and to refuse access to other documents. The application by the third party for a clay pit and attachments to that application formed part of a council agenda report for the 20 July 2016 council meeting and are available on the agency's website. Accordingly, the agency provided those documents to the complainant outside of the FOI process.
4. The agency claimed that 'legal opinions, instructions for legal opinions and correspondence relating to those opinions' consisted of communications between the agency and its insurance legal services; and the agency and its solicitors. The agency refused access to those documents under clause 7(1) of Schedule 1 to the FOI Act on the basis that they would be privileged from production in legal proceedings on the ground of legal professional privilege.
5. On 10 August 2016, the complainant applied for internal review of the agency's decision to refuse access to those documents for which it claimed exemption under clause 7(1) of Schedule 1 to the FOI Act. By letter dated 22 August 2016, the agency confirmed its decision.
6. By letter dated 16 October 2016, the complainant applied to me for external review of the agency's decision.

### REVIEW BY THE INFORMATION COMMISSIONER

7. Following receipt of the complaint, the agency produced to me a copy of its FOI file maintained in respect of the access application, together with a copy of the disputed documents.
8. By letter dated 24 January 2017, my A/Investigations Officer provided the complainant with his initial view of the matter that the documents were exempt under clause 7(1) and invited him to withdraw his complaint or, if he wished to pursue the complaint, to provide further submissions by 7 February 2017.
9. My A/Investigations Officer received no response from the complainant by the requested date. He contacted the complainant by telephone and by email. On 15 February 2017 the complainant replied by email stating that he wished to pursue his

complaint and provided further information as to why he believed the disputed documents are not exempt under clause 7(1) of Schedule 1 to the FOI Act.

10. On 16 March 2017, after considering the claims made by the complainant that there was a previous agreement to provide the documents, the agency confirmed that it maintained its claims for exemption.
11. On 12 April 2017, after considering the information before me, I provided the parties with my preliminary view of the matter. It was my preliminary view that the disputed documents are exempt under clause 7(1) of Schedule 1 to the FOI Act.
12. By email dated 15 April 2017 the complainant provided me with additional information in support of his claims that the disputed documents are not exempt.

### THE DISPUTED DOCUMENTS

13. The scope of the complaint is limited to the agency's decision to refuse access to documents under clause 7(1) of Schedule 1 to the FOI Act; that is, 'legal opinions, instructions for legal opinions and correspondence relating to those opinions' (**the disputed documents**).

### CLAUSE 7(1) – LEGAL PROFESSIONAL PRIVILEGE

14. Clause 7(1) provides as follows:

#### 7. *Legal professional privilege*

(1) *Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.*

15. 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: *Eso Australia Resources Ltd v The Commissioner of Taxation* (1999) 168 ALR 123.
16. The privilege is concerned with confidential communications and seeks to promote communication with a legal adviser, not to protect the content of a particular document. In *Commissioner of Australian Federal Police and Another v Propend Finance Pty Ltd and Others* [1997] 188 CLR 501 (**Propend**), Toohey J observed, at page 525:

*[P]rivilege does not attach to a piece of paper. It attaches to a communication, written or oral, and it is the communication that is at issue. While it is natural to speak of legal professional privilege in terms of documents, it is the nature of the communication within the document that determines whether or not the privilege attaches.*
17. Although legal professional privilege is most commonly applied to communications between clients and their legal advisers, it also extends to other classes of documents.

18. In the Federal Court of Australia decision *Trade Practices Commission v Sterling* (1979) 36 FLR 244 Lockhart J held that the privilege extends to, among others, the following category of documents:
- (a) *Any communication between a party and his professional legal adviser if it is confidential and made to or by the professional adviser in his professional capacity and with a view to obtaining or giving legal advice or assistance; notwithstanding that the communication is made through agents of the party and the solicitor or the agent of either of them ...*
19. Further, where an original document is not subject to legal professional privilege, a copy of that document may be subject to legal professional privilege if the copy was made for the purpose of obtaining legal advice or for use in legal proceedings: see *Propend*.

### **The complainant's submissions**

20. The complainant's submissions are set out in his letters to me dated 16 October 2016, and 15 April 2017 and his email to my A/Investigations Officer dated 15 February 2017 and his email dated 15 April 2017. In summary the complainant submits as follows:
- The complainant was a member of the committee formed to assist the council in matters relating to the mining of minerals in the shire and subsequently, after that committee had been disbanded, he was a member of a group who could advise the council on such matters.
  - The agency had sought legal advice as to whether it could proceed with an application for extractive industry planning approval over land where some of the Certificate of Title holders had refused to consent to that application.
  - At a meeting between the complainant's representative and the agency on 10 May 2016, the substance of the agency's legal opinion was fully described and discussed.
  - This confirmed previous telephone advice from the agency to the complainant's representative.
  - The complainant provided his own, independently obtained, legal advice to the agency. As a result of the discussion at the meeting on 10 May 2016, the complainant expected the agency to provide its legal advice to him after he had sent his to the agency. The agency refused to do so.
  - There was an agreement at the meeting that members would share their respective documents to further the understanding of the possible legal situation relating to the licence application.
  - The complainant and a third party are long standing residents of the agency, who have acted as advisers to the agency in mining and associated matters for many years.

- The agency provided the complainant's legal advice to the individual who had made the application, and published the complainant's opinion on its website.
- The agency's solicitors wrote to the complainant on 22 June 2016 advising that he did not need to see the legal advice as he had already been told what it contained.
- The above points amount to a waiver of the exemption of legal professional privilege and the agency is obliged to provide its legal opinion to the complainant.
- The request for documents is about an agreement that was made at the meeting on 10 May 2016, that members would share their respective documents. It is different from the question of waiver of privilege discussed in *Department of Housing and Works v Bowden* [2005] WASC 123 (**Bowden**).

### The agency's submissions

21. In its notice of decision dated 22 July 2016, the agency submits:

*Document collections 1 and 2 contain legal opinions from both the [agency's]'s solicitors and insurance service providers. The [agency] was and is still in a difficult position. The likelihood of legal action pertaining to the outcome of the council's determination at the 20 May 2016 council meeting is high. Mr Gascoine and others have warned council that legal action would be taken if the clay pit application was approved and it is the [agency's] opinion that [a third party] and [a third party] will also instigate legal action if the application was refused.*

*As the clay pit application was refused by council at the 20 July 2016 council meeting the [agency] considers the probability that [a third party] and [a third party] will take further legal action is high.*

22. In its internal review decision dated 22 August 2016, the agency submits:

*[T]he clay pit application was refused by council at the 20 July 2016 council meeting. The [agency] has since received formal notification that a review of the council's decision to refuse the application has been lodged with the State Administrative Tribunal. As a result, the [agency] considers that there is a risk of further legal action from third parties regarding the application and/or matters pertaining to property rights.*

*I do not agree with your claim that legal privilege has been dissolved by [agency] officers discussing the matter with your representative or by providing correspondence from [a third party] regarding the matter. The full content of communications between [agency] staff and its solicitors was not divulged. However, to ensure your enquiries were appropriately addressed, the [agency] took all practical steps to provide you with an outline of the [agency's] legal opinion.*

## Consideration

23. I have examined all of the material before me. In my view the disputed documents consist of confidential communications between clients and their legal advisers, made for the dominant purpose of giving or obtaining legal advice. Accordingly, in my view the disputed documents are the subject of legal professional privilege.
24. In the complainant's requests for both internal and external review and his submissions to this office, he does not dispute that the disputed documents are, or were at some point, legally privileged. Rather, he asserts that any legal professional privilege attached to the disputed documents has been waived by the agency.
25. The scope and meaning of the exemption in clause 7 has been considered by the Supreme Court of Western Australia in *Bowden* at [16]-[31]:

*In general, it is only necessary for a decision-maker, including the Commissioner, to decide whether, on its face, or after information has been received, if necessary, a document is prima facie privileged from production in legal proceedings.*

...

*In my opinion, Parliament did not intend that decision-makers under the FOI should be required to go through the factual permutations that may operate to resolve questions of waiver of privilege, especially when the exercise is hypothetical because there are no legal proceedings. If it appears, prima facie, that a matter would be privileged from production in legal proceedings on the ground of legal professional privilege then it is exempt matter.*

...

*I therefore hold that the Commissioner was wrong in proceeding to determine the question of waiver. Once she had concluded that the documents were prima facie privileged in legal proceedings, then it followed that the three documents were exempt matter and access was not permitted.*

26. McKechnie J concluded at [46]-[47]:
  46. *For these ancillary reasons, I hold that once a document is determined, prima facie, to be the subject of legal professional privilege, questions of waiver do not arise under the FOI Act.*
  47. *I conclude the question of waiver is one that is only able to be answered in legal proceedings when the fairness of maintaining the privilege to the detriment of a litigant is able to be judged and balanced. In the absence of legal proceedings, there is nothing to balance and fairness does not operate at large.*
27. Applying *Bowden*, once I decide that information is, on its face, the subject of legal professional privilege, then that is all that is required to establish the exemption under clause 7(1). In my view, where legal professional privilege attaches to information held

by an agency, *Bowden* has the effect of constraining my role to that of deciding whether that information is, on its face, privileged from production in legal proceedings.

28. In light of *Bowden*, it is not within my jurisdiction to consider whether or not the agency discussed the substance of its legal advice with the complainant and/or his representative or whether or not the agency gave an undertaking to provide the complainant with the legal advice, therefore waiving its privilege. That is irrelevant to determining whether or not the disputed documents are the subject of legal professional privilege. I am of the view that the disputed documents would on their face be privileged from production in legal proceedings on the grounds of legal professional privilege, I consider the documents are exempt under clause 7(1) of Schedule 1 to the FOI Act and the question of waiver of legal professional privilege does not arise for my consideration.

## CONCLUSION

29. For the reasons given in this decision, it is my decision that the disputed documents are exempt under clause 7(1) of Schedule 1 to the FOI Act as claimed by the agency.

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