

Decision D0172008 - Published in note form only

Re Midland Brick Company Pty Ltd and WorkSafe WA [2008] WAICmr 17

Date of Decision: 22 May 2008

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

The complainant applied to WorkSafe Western Australia ('the agency'), under the *Freedom of Information Act 1992* ('the FOI Act'), for access to an investigation report prepared by a WorkSafe WA inspector concerning an incident that occurred in 2006 at the workplace of Midland Brick Company Pty Ltd ('the complainant'). The agency refused the complainant access to the report on the ground that it was the subject of legal professional privilege and, consequently, 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 for external review of that decision.

Following the receipt of that application, the A/Commissioner obtained the disputed report from the agency and sought additional information from the agency about the purpose for which that document had been prepared. The agency responded with written submissions and a copy of those submissions was given to the complainant. The complainant then made further submissions to the A/Commissioner.

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.

Having examined the report and carefully considered the information and submissions provided by the parties, the A/Commissioner accepted that the report was a confidential communication between the agency and its in-house counsel which was prepared for the dominant purpose of obtaining legal advice in relation to an alleged contravention of the *Occupational Safety and Health Act 1984*.

The A/Commissioner was also satisfied that the in-house counsel was an appropriately qualified legal adviser, who provided independent legal advice to the agency, such that it is capable of attracting legal professional privilege (see *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54).

Accordingly, the A/Commissioner determined that the report would be privileged from production on the ground of legal professional privilege and confirmed the agency's decision to refuse the complainant access to it pursuant to clause 7(1) of Schedule 1 to the FOI Act.