

Decision D0212008 - Published in note form only

***Re Stapleton and Attorney General* [2008] WAICmr 21**

Date of Decision: 6 June 2008

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

In February 2008, the complainant applied under the *Freedom of Information Act 1992* ('the FOI Act') to the Attorney General - who is an 'agency' for the purposes of the FOI Act - for access to an opinion given to the agency by the agency's legal adviser, the Solicitor General. The agency refused the complainant access to that document on the ground that it was privileged and, thus, exempt under clause 7(1) (legal professional privilege) of Schedule 1 to the FOI Act. Since internal review is not available for a Minister's decision, the complainant applied directly to the A/Information Commissioner for external review of the agency's decision.

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.

Following the receipt of the complaint, the A/Commissioner obtained the original of the disputed document from the agency. Shortly afterwards, the A/Commissioner's Legal Officer advised the complainant that, in her opinion, the disputed document was *prima facie* exempt under clause 7(1). The complainant was also advised that, following the decision of the Supreme Court of WA 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.

In response, the complainant's legal advisers submitted, among other things, that the agency had waived its right to claim privilege and that a case still to be determined by the High Court of Australia was relevant to the particular circumstances of this case and to the question of waiver. The complainant also noted that the A/Commissioner had the discretion to refer the question of waiver to the Supreme Court on a question of law, pursuant to s.78 of the FOI Act.

Having examined the disputed document, the A/Commissioner accepted that it was a confidential communication between the agency and an appropriately qualified and independent legal adviser which was prepared for the dominant purpose of the agency's obtaining legal advice. Accordingly, the A/Commissioner was satisfied that the disputed document 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 upon him. 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 document. The A/Commissioner declined to refer that question to the Supreme Court under s.78 and confirmed the agency's decision to refuse access to the disputed document pursuant to clause 7(1) of Schedule 1 to the FOI Act.