

**Decision D0232017 – Published in note form only**

***Re Donovan and Curtin University of Technology [2017] WAICmr 23***

**Date of Decision: 29 December 2017**

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

On 20 December 2016, Professor Robert Donovan (**the complainant**) applied to Curtin University of Technology (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents relating to a complaint against him.

By notice of decision dated 23 February 2017, the agency decided to refuse the complainant access to documents of the kind requested because they are exempt under clause 7(1) of Schedule 1 to the FOI Act. The complainant applied for internal review of the agency's decision. By letter dated 21 March 2017, the agency confirmed its decision.

On 30 March 2017, the complainant applied to the Information Commissioner for external review of the agency's decision to refuse access to documents. Following receipt of the complaint, the former Information Commissioner obtained a copy of the disputed documents from the agency together with the agency's FOI file maintained in respect of the complainant's access application.

On 23 October 2017, the Acting Information Commissioner (**the A/Commissioner**) advised the parties in writing that it was her preliminary view that certain of the disputed documents were exempt under clause 7(1); and that other disputed documents may be subject to legal professional privilege. However, the A/Commissioner considered the agency had not provided sufficient information to allow her to determine whether those other disputed documents are exempt. Therefore, the agency was requested to provide any further written submissions on which it relied to establish that the other disputed documents were exempt under clause 7(1).

In light of the A/Commissioner's view, the complainant was invited to reconsider his complaint or to provide the A/Commissioner with further submissions. The complainant withdrew his complaint in respect of the disputed documents the A/Commissioner considered were exempt under clause 7(1) of Schedule 1 to the FOI Act.

The agency accepted the A/Commissioner's preliminary view with respect to two of the documents and released copies of those documents to the complainant. However, it maintained its claim for exemption for the balance of the documents and provided the A/Commissioner with further submissions to support its claim.

Accordingly, there are 17 documents in dispute in this matter, which consist of handwritten file notes, emails and correspondence between the agency and various third parties, including officers of the agency (**the disputed documents**).

Clause 7(1) provides that matter is exempt if it would be privileged from production in legal proceedings on the grounds of legal professional privilege. 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 agency's further submissions did not add anything material to support its claim for exemption. The agency gave little further information as to why the disputed documents are exempt under clause 7(1).

In *AW v Rayney* [2010] WASCA 161 at [82], it was observed that the person claiming legal professional privilege must point to the nature of the information or document itself or to evidence describing the circumstances in which the information was obtained or the document was brought into existence. In other words, in the circumstances of this matter, the agency must establish the facts giving rise to the privilege.

Although that decision related to legal professional privilege in discovery, the A/Commissioner considered that the observation that the party asserting privilege must set out the facts relied upon as giving rise to privilege equally applies when an agency refuses access to documents requested under the FOI Act on the grounds of legal professional privilege, as is the case here.

The A/Commissioner considered all of the material before her, including the agency's further submissions but was not dissuaded from her preliminary view. Based on the material before her, including her examination of the disputed documents, the A/Commissioner was not satisfied that the disputed documents consist of confidential communications between the agency and a legal adviser of the agency made for the dominant purpose of giving or receiving legal advice, including representation in proceedings in a court. Accordingly, the A/Commissioner was not satisfied that the disputed documents would be privileged from production in legal proceedings on the ground of legal professional privilege and found that the disputed documents are not exempt under clause 7(1). The A/Commissioner set aside the agency's decision.