

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

**File Ref: F2003178  
Decision Ref: D0052004**

Participants:

**Leslie John Reid**  
Complainant

- and -

**Workers' Compensation and  
Rehabilitation Commission**  
Respondent

### **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – legal advice contained in report – clause 7 – legal professional privilege – whether waiver of privilege – whether disclosure for a specific and limited purpose – clause 7(2) – whether limit on the exemption applies.

*Freedom of Information Act 1992 (WA)*: section 39(3)(a); section 95; Schedule 1, clauses 7(1) and 7(2).

*Workers' Compensation and Rehabilitation Act 1992 (WA)*: section 5(1); section 36.

*Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 201 CLR 49

*Trade Practices Commission v Sterling* [1979] 36 FLR 244

*Goldberg v Ng* (1995) 185 CLR 83

*Mann v Carnell* (1999) 201 CLR 1

*Lovegrove Turf Services Pty Ltd & Another v Minister for Education* [2003] WASC 213

## DECISION

The decision of the agency to refuse access to the matter remaining in dispute following conciliation is confirmed. The disputed information, as described in paragraph 11, is exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*.

D A WOOKEY  
A/INFORMATION COMMISSIONER

30 January 2004

## REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Workers' Compensation and Rehabilitation Commission ('the agency') to refuse Mr Reid ('the complainant') access to certain information requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

## BACKGROUND

2. The agency is a body corporate established under the *Workers' Compensation and Rehabilitation Act 1981* ('the WCR Act'), which operates under the name of WorkCover Western Australia, WorkCover WA or WorkCover. The primary role of the agency is to administer the WCR Act and related legislation. The Minister for Consumer and Employment Protection ('the Minister') has powers conferred on him by the WCR Act, including the power to direct the agency in respect of its functions.
3. In August 2003, the complainant applied to the agency, under the FOI Act, for access to certain documents. The agency refused the complainant access to the requested documents on the basis that they were exempt under clauses 3(1) or 6(1) of Schedule 1 to the FOI Act. Since that decision was made by the Executive Director of the agency, who is the agency's principal officer for the purposes of the FOI Act, no internal review was available to the complainant, pursuant to section 39(3)(a) of the FOI Act. Accordingly, on 18 October 2003, the complainant made a complaint to the Information Commissioner seeking external review of the agency's decision.

## REVIEW BY THE INFORMATION COMMISSIONER

4. The former Information Commissioner obtained the requested documents and the agency's FOI file relevant to this matter. My office consulted a large number of third parties. On 25 November 2003, once it became evident that the complaint could not be conciliated, I informed the parties, in writing, of my preliminary view of this complaint including my reasons, on the basis of the material before me. It was my preliminary view that none of the documents was exempt as claimed.
5. In light of my preliminary view, the agency gave the complainant access to all of the requested documents with the exception of certain information in one document, which the agency claims is exempt under clause 7(1) of Schedule 1 to the FOI Act. The complainant was advised by my office of the agency's claim that certain information is exempt under clause 7(1) and invited to provide me with submissions in relation to that claim. Thereafter, the complainant confirmed that he wished to pursue his complaint in respect of that information and he provided me with submissions in relation to the clause 7(1) exemption claim. The complainant also claimed that the agency had failed to give him access to other documents that came within the scope of his access application.

## THE SCOPE OF THE ACCESS APPLICATION

6. The complainant applied to the agency on 21 August 2003 for access to, among other things, the following:

- “1) COPY OF REGISTER OF DOCTORS FOR M.A.P.
- 2) FREQUENCY OF THOSE DOCTORS ON M.A.P.”

7. The agency responded, in writing, on 22 August 2003, confirming that the complainant was seeking access to the following:

- “1. A copy of the Register of doctors for the Medical Assessment Panel.
2. The frequency of attendance for each of these doctors on the Medical Assessment Panel.”

8. Thereafter, all discussions and communications between the agency, the complainant and this office proceeded on the basis that the complainant was seeking access to documents relating to medical assessment panels. In the course of my dealing with this matter, the agency gave the complainant access to the documents held by it relevant to this part of the complainant’s access application. Following the receipt of my preliminary view, the complainant advised my Senior Legal Officer that the agency had overlooked part of his access application, since it had not provided him with access to relevant documents and information concerning the Industrial Diseases Medical Panels (‘IDM Panels’).

9. IDM Panels are constituted under Part 111, section 36 of the WCR Act for the purpose of hearing matters relating to specified industrial diseases. Section 5(1) of the WCR Act defines ‘medical assessment panel’ as “...a medical assessment panel constituted under Part VII”. Such panels are formed for the purpose of determining medical questions relating to the nature or extent of a disability or whether a disability is permanent or temporary.

10. I consider that the terms of the complainant’s access application are unambiguous and that nothing in his application or any of his ensuing communications to the agency or this office indicates that he had intended to include documents or information concerning the IDM Panels within the scope of his access application. In my view, such documents do not come within the scope of the access application and, if the complainant still seeks access to those documents, he should make a new access application to the agency.

## THE DISPUTED INFORMATION

11. The disputed information is composed of pages 25 to 26 (except for the last paragraph on page 26) and pages 30 to 31 of an attachment to a document entitled “*Report to the Minister for Consumer and Employment Protection on the Review of Statutory Authority: Workers’ Compensation and Rehabilitation Commission*” (‘the Report’). The Report, dated 6 August 2002, was prepared

by Mr Tony Cooke, Associate Professor at Curtin University of Technology, for the purpose of advising the Minister.

## **THE EXEMPTION**

### **Clause 7 – Legal professional privilege**

12. The agency claims that the disputed information is exempt under clause 7(1) of Schedule 1 to the FOI Act. Clause 7 provides:

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

#### ***Limit on exemption***

*(2) Matter that appears in an internal manual of an agency is not exempt matter under subclause (1).”*

13. The law, as it now stands, protects confidential communications between clients and their legal advisers which are 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 agency’s submission***

14. The agency submits that the disputed information is a record of legal advice, contained in a letter sent to the agency by its legal advisers, which was provided to Mr Cooke by the agency on a confidential basis to assist in his writing the Report. The agency submits that the disputed information is confidential and has only been disclosed to Mr Cooke, the Minister and the agency. The Report is marked “Confidential” and refers (on page v) to the fact that Appendix 2, which contains the disputed information, is not a public document and that, should the Minister intend general release of the Report, the agency’s clearance should be obtained.

#### ***The complainant’s submission***

15. The complainant states that the Report is a “*singular document produced by an independent ‘contractor’ to the agency*”; it was publicised in the agency’s annual reports and considerable public monies were spent on its creation. The complainant says that he is not asking for access to the original Report and that the fact that the agency chose to request a legal opinion on certain matters was entirely up to the agency. He submits that whether it was created for the sole purpose, or the dominant purpose, of obtaining legal advice is irrelevant.

16. The complainant further submits that:

*“They could have provided to Mr Cooke a generalised overview of the matter or even withheld it and used other means to get it to relevant parties. They*

*did not, and provided it to him knowing that it was to be published. I believe that this is, on the face of it, an express waiver [sic] of any privilege that might have accrued to these documents.”*

17. The complainant also submits that clause 7(2) of Schedule 1 to the FOI Act precludes the disputed information from being exempt since the Executive Director of the agency has said that “*it has been ‘released to the Workers Compensation and Rehabilitation Commission’*” and, thus, “[b]y any definition this would be an ‘internal manual’”.

### **Consideration**

18. In 1997, the agency obtained certain legal advice in a letter from a firm of solicitors, its legal advisers (‘the 1997 letter’). Part of the legal advice in the 1997 letter was recorded in item 4.5 of the minutes of a meeting of the agency held on 13 April 1999. The agency has confirmed that those minutes are confidential documents. Thereafter, a copy of item 4.5 of those minutes was given by the agency to Mr Cooke for the purpose of assisting him to undertake his review for the Minister, which is now set out in the Report. Once completed, the Report was given to the Minister and read by the agency, but not otherwise disclosed to anyone.
19. Having examined the 1997 letter and the disputed information, I am satisfied that the disputed information is a record of a confidential communication between the agency and its legal advisers, which was made for the dominant purpose of providing legal advice to the agency. I do not accept the complainant’s assertion that this is irrelevant since the purpose for which a communication is made or created is a key element of the test for deciding on questions of privilege. I am also satisfied, from the material before me and the information provided to me by the agency, that the disputed information has been read only by the agency, the Minister and Mr Cooke.
20. In the decision of the Federal Court of Australia in *Trade Practices Commission v Sterling* [1979] 36 FLR 244, Lockhart J listed various categories of documents to which legal professional privilege extends. These include:
- “(d) *Notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications which are themselves privileged, or containing a record of those communications, or relate to information sought by the client’s legal adviser to enable him to advise the client or to conduct litigation on his behalf.*”
21. In my view, the disputed information comes within this category and would, *prima facie*, be privileged from production in legal proceedings on the ground of legal professional privilege.
22. The complainant submits that the agency has waived its right to claim privilege in the disputed information because it was provided to Mr Cooke and

published in the Report. The agency claims that the disputed information was disclosed for a specific and limited purpose and did not amount to waiver of the privilege.

23. Waiver occurs when the holder of the privilege (the client) performs an act that is inconsistent with preserving the confidence protected by the privilege. The consequences of waiver are that the client becomes subject to the normal requirements of disclosure of the communication: see *Goldberg v Ng* (1995) 185 CLR 83 at pp.95 and 106.

24. A waiver of privilege may be express or implied, in the sense that it is deliberate or inadvertent. Express waiver is the intentional disclosure of privileged material to persons outside the privileged relationship of client and legal adviser. Following the decision of the High Court of Australia in *Mann v Carnell* (1999) 201 CLR 1, the Supreme Court of Western Australia in *Lovegrove Turf Services Pty Ltd & Another v Minister for Education* [2003] WASC 213 at [15], after a careful analysis of the relevant cases, adopted the following as the test to be applied in determining whether there has been an implied waiver of privilege:

*“Waiver at common law occurs where the party entitled to the privilege performs an act which is inconsistent with the maintenance of the confidentiality, assessment of such inconsistency being informed, where necessary, by considerations of fairness: though the assessment is not by reference to some overriding principle of fairness operating at large.”*

25. Both express and implied waiver may involve a general or a limited waiver of privilege. In *Mann v Carnell* at [30] – [32], the High Court held that waiver is not established merely by voluntary disclosure to a third party, for example, for a limited and specific purpose. In that case, a disclosure to a member of the Legislative Assembly by the Chief Minister of the Australian Capital Territory (‘the ACT’) of legal advice obtained by the ACT in relation to certain litigation, did not amount to waiver, since such conduct was not inconsistent with the confidentiality which the privilege served to protect.

26. I consider that the present case is one in which the agency has made an express disclosure of privileged information for a limited and specific purpose. I accept that the disclosure was made for the specific and limited purpose of advising the Minister in relation to a review of the agency for which the Minister was responsible.

27. In my view, the circumstances do not indicate any intention on the agency’s part to waive the privilege that attaches to the disputed information. That information was given to Mr Cooke for the purpose of his report to the Minister and Mr Cooke was required to, and did, keep the information confidential. The final report is marked “confidential” and includes a specific reference on page v to the fact that the disputed information, among other information, is not in the public domain and that the clearance of the agency should be sought prior to any general release of the Report.

28. Accordingly, I do not consider that the disclosure of the disputed information to the Minister and Mr Cooke amounted to a waiver of the privilege in this case on the ground that such conduct was not inconsistent with confidentiality protected by the privilege. There is also an argument that, in these particular circumstances, given the role of the Minister referred to in paragraph 2 above, the Minister and the agency are both the ‘client’ for the purpose of privilege. However, given the view I have expressed above, I do not consider that I need deal with that question.

***Limit on exemption***

29. With regard to the complainant’s submission that the limit on the exemption, set out in clause 7(2), applies in this case, section 95 of the FOI Act provides as follows:

*“A reference in this Act to an “internal manual”, in relation to an agency, is a reference to –*

- (a) a document containing interpretations, rules, guidelines, statements of policy, practices or precedents;*
- (b) a document containing particulars of any administrative scheme;*
- (c) a document containing a statement of the manner, or intended manner, of administration of any written law or administrative scheme;*
- (d) a document describing the procedures to be followed in investigating any contravention or possible contravention of any written law or administrative scheme; or*
- (e) any other document of a similar kind,*

*(other than a written law) that is used by the agency in connection with the performance of such of its functions as affect or are likely to affect rights, privileges or other benefits, or obligations, penalties or other detriments, to which members of the public are or may become entitled, eligible, liable or subject.”*

30. Having examined the attachment containing the disputed information and the Report, I am satisfied that neither is an “internal manual” as defined in section 95 of the FOI Act and that, accordingly, the limit on the exemption in clause 7(2) is not applicable in this case.

**Finding**

31. I find that the disputed information is exempt under clause 7(1) of Schedule 1 to the FOI Act.

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