

## GUGIATTI AND STIRLING

### OFFICE OF THE INFORMATION COMMISSIONER (WA)

#### Decision summary issued pursuant to s.76(8) of the *Freedom of Information Act 1992*

**COMPLAINT No:** 97010

**DECISION No:** D00597

**PARTIES:** Alfred Antonio GUGIATTI

Complainant

City of Stirling

Respondent

**No. of documents in dispute:** 1

**Exemption clause(s) :** 7

By letter dated 19 November 1996, Mr Gugiatti ('the complainant') applied to the City of Stirling ('the agency') for access to documents of the agency described as a legal opinion of Mr W S Martin QC given to the agency on or around 4 November 1996 and various letters and petitions received by the agency in relation to the re-zoning of the complainant's property in Gwelup. The request for access was made pursuant to the *Freedom of Information Act 1992* ('the FOI Act').

The agency identified 29 documents within the ambit of the complainant's access application. The agency granted the complainant access to 28 documents, either in full or in part, and refused access to 1 document, being the legal opinion of Mr Martin. The agency claimed that that document is exempt under clause 7 of Schedule 1 of the FOI Act.

On 20 December 1996, the complainant sought internal review of the agency's decision, but only in respect of that part of the decision to refuse access to the document which the agency claims is exempt under clause 7. By letter dated 3 January 1997, the agency confirmed its initial decision to refuse access to the requested document on the ground that it is exempt under clause 7. By letter dated 13 January 1997, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

I obtained a copy of the disputed document. After considering its contents, on 24 January 1997, I informed the parties in writing of my preliminary view in respect of this complaint, including reasons for that view. It was my preliminary view that the requested document would be privileged from production in legal proceedings on the ground of legal professional privilege. I invited the complainant to reconsider his complaint in light of my preliminary view. The complainant provided a further submission for my consideration. Although the complainant made a further submission to me, there is nothing in the complainant's further submission to dissuade me from my view that the disputed document is exempt under clause 7. My reasons follow.

### **The disputed document**

The disputed document is a legal opinion from Mr Wayne Martin QC, dated 18 October 1996. It is my understanding that that document was created as a result of a request from the agency for legal advice in respect of matters the subject of a dispute between the agency and the complainant. The agency claims that the disputed document is exempt under clause 7 because it was created for the sole purpose of giving or receiving legal advice.

### **The exemption - Clause 7 (Legal professional privilege)**

Clause 7 of Schedule 1 to the FOI Act provides:

***"Legal professional privilege***

***Exemption***

- (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)."*

The common law principle is that confidential communications between a solicitor and his or her client will be privileged from production in legal proceedings if made for the sole purpose of giving or receiving legal advice or for use in existing or anticipated legal proceedings: *Grant v Downs* (1976) 135 CLR 674; *Baker v Campbell* (1983) 153 CLR 52. A claim for privilege is not limited, in the case of such communications, to communications which have been made for the purpose of existing or contemplated litigation: *Trade Practices Commission v Sterling* (1979) 36 FLR 244.

I have examined the disputed document. I am satisfied from my examination of that document that it is a confidential communication between the agency and its legal adviser, made for the sole purpose of giving or receiving legal advice. In my view, that document would be privileged from production in legal proceedings on the ground of legal professional privilege.

In a telephone discussion with my office, the complainant's agent informed me that the complainant agreed to provide Mr Martin with access to documents in his possession, in order that Mr Martin could provide the advice requested by the agency. On that basis, it is the view of the complainant that he should be entitled to be given access to a copy of the legal advice provided to the agency by Mr Martin.

From my examination of the disputed document, it is clear that a solicitor/client relationship existed between Mr Martin and the agency at the time the disputed document was created. Legal professional privilege is the privilege of the client. As the agency is the client in this matter, it is, therefore, the discretion of the agency to waive its privilege and to grant the complainant access to the document, or to claim the exemption and to deny access. However, pursuant to s.76(4) of the FOI Act, if it is established that a document is an exempt document, I do not have power to make a decision to the effect that access is to be given to that document.

In the circumstances as outlined, and for the reasons already given to the parties which are summarised above, I am satisfied that the disputed document would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find the document is exempt under clause 7 of Schedule 1 to the FOI Act.

B. KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER  
21 February 1997