

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

**File Ref: F2001101
Decision Ref: D0082002**

Participants:

**Harry Cohen
Betty Rose Cohen
Margaret Anne Levy**
Complainants

- and -

**Department of Consumer and
Employment Protection
(formerly Ministry of Fair Trading)**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to a claim against Real Estate and Business Agents Fidelity Guarantee Fund – clause 3(1) – personal information – deletion of exempt matter – clause 5(1)(b) – whether disclosure could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case – clause 7 – legal professional privilege

Freedom of Information Act 1992 (WA) s.10; Schedule 1 clauses 3(1), 5(1)(b) and 7

Real Estate and Business Agents Act 1978

Re Real Estate and Business Agents Supervisory Board; Ex parte Cohen (1999) 21 WAR 158

Re Cohen and Real Estate and Business Agents Supervisory Board [2000] WAICmr 42

Police Force of Western Australia v Kelly and Another (1996) 17 WAR 9

Police Force of Western Australia v Winterton (Unreported, Supreme Court of WA, Library No. 970646, 27 November 1997)

Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550

Esso Australia Resources Ltd v The Commissioner of Taxation [1999] 74 ALJR 339

Trade Practices Commission v Sterling (1979) 36 FLR 244

Attorney General (NT) v Kearney (1985) 158 CLR 500

Waterford v Commonwealth (1987) 153 CLR 54

Secretary of State for Trade and Industry v Baker [1998] Ch 256

Ex parte Harry Cohen and Ors (Unreported, Supreme Court of WA, Library No. 980668, 17 November 1998)

Commissioner of Australian Federal Police and Anor v Propend Finance Pty Ltd and Ors (1997) 188 CLR 501

Cohen, Cohen, Levy and Ors v The Real Estate and Business Agents Supervisory Board, 21 September 2000 (Unreported: Reasons for Decision – Inquiry No. 30 of 1999).

DECISION

The decision of the agency is varied. It is decided that:

- Documents 21, 24-33, 35-45, 49-51, 53-59, 61-69, 72-79, 109, 112, 118, 125, 146, 148, 149, 155, 156, 158, 161, 166, 169, 170, 172, 173, 180-182, 204, 207, 216, 230, 233, 238, 242, 270, 271, 274, 276, 278, 281-285, 287, 291-294, 297, 298, 310, 320, 325, 328, 330, 331, 337-340, 348, 349, 363, 366-368, 370-372 (Item 2.7) and 378 are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act;
- Documents 7, 8, 46-48, 86, 88-90, 92, 93, 95, 100, 103-106, 110, 111, 114, 119-124, 126-129, 132, 134-136, 138, 139, 142, 151-154, 157, 159, 165, 174, 183, 186, 187, 190-195, 200, 202, 203, 205, 206, 208, 209, 211-214, 217-224, 226, 227, 229, 234, 237, 241, 245, 247, 248, 250, 252, 256-258, 263-265, 275, 280, 286, 288-290, 296, 303, 324, 329, 334 and 380; Items 2.9-2.14 and Items 3.9-3.10 in Set A and all of the documents in Set B are exempt under clause 7 of Schedule 1 to the FOI Act; and,
- Documents 1-6, 15-20, 22, 34, 52, 60, 80, 82, 87, 96, 97, 101, 102, 107, 113, 130, 131, 133, 137, 140, 147, 150, 176-179, 184, 188, 189, 196-199, 215, 235, 239, 243, 244, 246, 249, 255, 262, 266-269, 272, 273, 277, 279, 295, 305-309, 311, 312, 314-319, 321-323, 326, 327, 332, 333, 335, 336, 342-344, 347, 350, 359-361, 365, 369, 376, 379, 381-383 are not exempt.

B KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

22 February 2002

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Department of Consumer and Employment Protection ('the agency') (formerly the Ministry of Fair Trading) to refuse Mr and Mrs Cohen and Ms Levy ('the complainants') access to documents requested by them under the *Freedom of Information Act 1992* ('the FOI Act').
2. In November 1997, the complainants' solicitors notified the Real Estate and Business Agents Supervisory Board ('the Board') of a number of claims against the Fidelity Guarantee Fund ('the Fund') established under the *Real Estate and Business Agents Act 1978* ('the REBA Act'). The complainants' claims against the Fund arose out of alleged fraudulent conduct by a former Director of the now bankrupt real estate firm, Ideal Realty Pty Ltd. Between 1991 and 1997, Ideal Realty had managed various properties on behalf of the complainants. After obtaining legal advice from Counsel, the Board disallowed several of the complainants' claims against the Fund. The Board's decision was taken on review by prerogative writ to the Full Court of the Supreme Court of Western Australia. The Full Court overruled the Board's decision: see *Re Real Estate and Business Agents Supervisory Board; Ex parte Cohen* [1999] 21 WAR 158.
3. In August 1999, following the decision of the Supreme Court, the Board gave directions to the parties as to the conduct of its hearing to settle the complainants' claims and, among other things, directed that those claims be divided into five groups. In September 2000, the Board decided that most, but not all, of the claims against the Fund were valid and awarded compensation to the complainants. However, the Board decided that some of claims had not been substantiated and those were disallowed. Subsequently, the complainants lodged an appeal with the District Court of Western Australia.
4. On 4 May 2001, the complainants' solicitors made an application to the agency, on behalf of the complainants, seeking access under the FOI Act to various documents relating to their claims against the Fund. A similar application was also made to the Board. That access application was the subject of my decision in *Re Cohen and Real Estate and Business Agents Supervisory Board* [2001] WAICmr 42.
5. On 22 May 2001, the Acting Manager, Real Estate Branch decided, without identifying any of the requested documents, that they all related to an investigation conducted by the agency and refused access on the grounds that the requested documents were exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. On 6 June 2001, the complainants sought internal review of that decision. On 18 June 2001, the Director, Business Services Branch informed the complainants' solicitors that the requested documents were held on 12 investigation files and in 8 binder files, which included trust account ledgers, bank statements and receipt books.
6. The Director stated that her initial assessment of the files had indicated that most of the requested documents were exempt under one or more of clauses 3(1), 4, 5(1)(b) and 7 of Schedule 1 to the FOI Act and that other documents appeared to be documents of a court. The complainants were informed that the agency considered the work involved

in conducting an internal review would divert a substantial and unreasonable portion of the agency's resources and invited the complainants to narrow the scope of their request.

7. On 10 August 2001, the complainants' solicitors lodged a complaint with the Information Commissioner, seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

8. I decided to accept this complaint even though a proper internal review had not been undertaken by the agency. I consider that the agency's initial reasons for decision did not comply with the requirements of s.30 of the FOI Act. Although the complainants' access application was potentially broad in scope, it was not apparent to me, and it should not have been apparent to the agency, from the nature of the documents as described in the access application, that they would all be exempt. Accordingly, I do not consider that access could be refused under s.23(2) of the FOI Act.
9. Further, the agency's decision following internal review was, effectively, to refuse access based on s.20 of the FOI Act. It may be the case that the agency could have relied on s.20 of the FOI Act in the first instance, but it did not do so. However, even if it was appropriate for the agency to rely on s.20 at the internal review stage, it seems to me that the agency offered no help to the complainants to change the application to reduce the amount of work involved to deal with it, other than to ask the complainants to narrow the scope of the request. However, that offer of assistance, such as it was, was made on the 19 June 2001, the day before the agency was required to make its decision on the internal review. Clearly, in my view, the agency's handling of the access application was superficial and perfunctory and I decided that the intervention of my office was warranted.
10. I obtained the requested documents from the agency. Directions were issued to the agency and a schedule of documents prepared. The schedule listed and described 383 documents. In addition, other documents held in two sets of lever arch files, Set A and Set B, were listed on the schedule. Set A consisted of 4 lever arch folders containing Instructions and Brief to Counsel. Those documents relate to the initial legal advice sought by, and given to, the Board by Counsel in connection with the complainants' claims against the Fund. Set B consisted of 3 lever arch files containing Instructions to Counsel. The documents in Set B were described by the agency as Instructions and Brief to Counsel to advise and to appear on the return of the complainants' application for a Writ of Certiorari and a Writ of Mandamus against the Board. A copy of the schedule was given to the complainants.
11. A number of meetings and discussions were held with the parties in an attempt to reduce the number of documents in dispute. On 27 November 2001, after examining the disputed documents, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that some of the documents produced to me by the agency were outside the scope of the complainants' access application, some may be exempt under clause 5(1)(b) and clause 7, but that others may not be exempt. I invited the parties to reconsider their respective positions in light of my preliminary view.

12. Subsequently, the agency gave the complainants access to 5 documents (Documents 108, 116, 117, 175 and 302) and made written submissions in support of its claims for exemption for others. A copy of the agency's submissions was given to the complainants' solicitors.
13. The complainants withdrew their complaint for the documents, which fell outside the scope of their access application (Documents 9-14, 23, 70, 71, 81, 83-85, 91, 94, 98, 99, 115, 141, 143-145, 160, 162-164, 167, 168, 171, 185, 201, 210, 225, 228, 231, 232, 236, 240, 251, 253, 254, 259-261, 299-301, 304, 313, 341, 345, 346, 351-358, 362, 364, 373-375 and 377). The complainants' solicitors made written submissions in support of their rights of access to the balance of the disputed documents. Following further discussions, the complainants withdrew their complaint in respect of some of the documents from Set A, being those documents which their solicitors had previously provided to the agency.
14. My Senior Legal Officer reviewed the documents in Set A. Document 101 on the schedule of disputed documents is an affidavit sworn by a Legal Officer of the agency on 2 December 1998, which relates to the review of the Board's decision by the Full Court of the Supreme Court of Western Australia. I am satisfied that the documents described as Items 1, 2.6, 2.7, 2.9-2.14, 3.1-3.14.9, 6, 6.1 and 7 in Document 101 are the only documents from Set A, which had not been previously provided to the agency by the complainants' solicitors. Accordingly, only the documents listed as Items 1, 2.6, 2.7, 2.9-2.14, 3.1-3.14.9, 6, 6.1 and 7 in Set A are in dispute in this matter. For the purposes of this decision, I refer to the disputed documents in Set A by reference to their respective numbers as described in Document 101.

THE DISPUTED DOCUMENTS

15. Of the 383 documents described in the schedule given to the parties, 311 remain in dispute. In addition, some documents in Set A (44 in total) and all of Set B are also in dispute. The first two folders of Set B are identical. They consist of the Brief to Counsel, which I treat as one document. The third folder of Set B contains 5 documents, which did not form part of the Brief to Counsel. For convenience, I have decided to deal with all of the disputed documents in two groups, according to the agency's claims for exemption. Group 1 consists of those documents, which are claimed to be exempt under clause 5(1)(b). Group 2 consists of those documents, which are claimed to be exempt under clause 7.

THE EXEMPTIONS

(a) Clause 5(1)(b)

Group 1 (Documents 15-22, 24-45, 48-59, 63-69, 72-79, 87, 96, 97, 101, 102, 107, 109, 111-113, 118-122, 125, 130, 131, 133, 137, 140, 146-150, 155, 156, 158, 161, 166, 169, 173, 176-179, 181, 182, 184, 188, 189, 235, 239, 244-246, 249, 255, 262, 266-274, 276, 277, 279, 292, 294-295, 305-312, 314-323, 325-328, 332-333, 335-337, 339, 340, 342-344, 347-350, 359-361, 363, 365-369, 371, 372, 376, 378, 379, 381-383; Items 1, 2.6, 2.7, 2.9-2.14, 3.1-3.14.9, 6, 6.1 and 7 in Set A and all of Set B).

16. Clause 5(1)(b) provides that matter is exempt matter if its disclosure could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted.
17. The exemption in clause 5(1)(b) applies if disclosure of a document could reasonably be expected to reveal the fact of a particular investigation of a particular incident involving certain people. The exemption can apply regardless of the state of knowledge an access applicant has about a particular investigation or the stage the investigation has reached. For the purposes of the exemption in clause 5(1)(b), a document may “reveal” an investigation, if it reveals the fact of a particular investigation of a particular incident involving certain people and it is unnecessary that the document reveal the content of the investigation: see *Police Force of Western Australia v Kelly and Another* (1997) 17 WAR 9; *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550; *Police Force of Western Australia v Winterton* (unreported, Supreme Court of Western Australia, Library No. 970646, 27 November 1997).
18. Accordingly, if disclosure of a document could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular instance, regardless of what other material might reveal it, and regardless of how much an applicant may already know about the investigation or its subject matter, the document will be exempt under clause 5(1)(b).

The agency’s submission

19. The agency submits that the Board’s determination of a claim against the Fund, which is made under s.117 of the REBA Act, necessarily involves an investigation of matters relevant to the claim, but also to matters concerned with possible disciplinary action against one or more real estate or business agents licensed under the REBA Act. The agency claims that a central part of such an investigation involves a consideration of whether or not a licensed agent has committed a defalcation under the REBA Act, which is an investigation of any contravention or possible contravention of the law, within the terms of clause 5(1)(b).
20. The agency submits that an investigation of the merits of a claim against the Fund does not lose its character as an investigation of any contravention or possible contravention of the law merely because the investigation also includes a consideration of whether a licensed agent has committed a defalcation. The agency contends that any document, which reveals that there was an investigation of a claim against the Fund, will be exempt under clause 5(1)(b) of Schedule 1 of the FOI Act, whether or not an applicant is aware of the investigation.

The complainants’ submission

21. The complainants acknowledge that, to make a successful claim against the Fund, it is necessary to establish that there had been a defalcation by a licensee and that the term “defalcation” in the REBA Act includes criminal or fraudulent conduct.

22. However, the complainants claim that an investigation by the Board to settle a claim against the Fund is not an investigation for the purposes of clause 5(1)(b) of the FOI Act. The complainants submit that the determination of a claim against the Fund involves an investigation into the merits of the claim and nothing more. They contend that, despite necessarily showing fraudulent or criminal conduct, an investigation to settle a claim against the Fund does not involve an investigation of any contravention or a possible contravention of the law and should not be characterised as such an investigation for the purposes of clause 5(1)(b).
23. The complainants claim that the Registrar of the Board did not conduct investigations under s.13 of the REBA Act. Rather, an inspector or inspectors conducted such investigations when a direction was given by the Registrar to do so. The complainants submit that, if there had been an investigation to determine whether there had been a defalcation by a licensee under the REBA Act, the agency should have produced to me a direction under s.13 of the REBA Act because, without such a direction, an inspector could not have commenced or carried out an investigation of that kind.

Consideration

24. As I understand it, the complainants submit that it is necessary to properly characterise an investigation to determine whether or not it is covered by the terms of the exemption in clause 5(1)(b). Even if an investigation conducted for one purpose, such as to settle a claim against the fund tends to reveal fraudulent or criminal conduct, it is the submission of the complainants that such an investigation should not be characterised as an investigation of any contravention or possible contravention of the law, as required by clause 5(1)(b).
25. However, I do not consider that the exemption clause is limited in that way. In my view, it is possible that, in the course of an investigation commenced for one purpose, new information might be discovered, which would lead investigators down a different path and for an altogether different purpose, disciplinary or criminal, or a parallel investigation might commence. In my view, providing both investigations concern any contravention or possible contravention of the law, the exemption in clause 5(1)(b) can apply. In my view, the law relating to clause 5(1)(b) is quite clear. A document will be exempt under clause 5(1)(b) if its disclosure could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case, whether or not any proceedings, disciplinary or criminal have resulted from that investigation.
26. I consider it immaterial that the investigation, which would be revealed by the disclosure of a document, be the initial investigation or some other investigation. As long as disclosure could reasonably be expected to reveal the fact of an investigation into any contravention or possible contravention of the law and something about the content of the investigation, the document or documents will be exempt. To determine whether or not disclosure would have that effect, each document must be examined.
27. I have examined all of the disputed documents. In my opinion, a number of the Group 2 documents are exempt under clause 5(1)(b) rather than under clause 7, because of the nature of the information recorded in those documents. Specifically, Documents 61, 62, 170, 172, 180, 204, 207, 216, 230, 233, 238, 242, 278, 281-285, 287, 291, 293,

297, 298, 330, 331, 338 and 370 are in that category. However, I am unable to describe those documents in any detail without breaching my duty under s.74(1) of the FOI Act not to disclose exempt matter.

28. The REBA Act regulates and supervises the licensing of real estate agents, business agents, or persons who are both real estate and business agents. Among other things, it establishes the Board whose functions include the administration of the licensing and registration scheme established under the Act. It provides for the investigation into complaints and the detection of breaches of the REBA Act. Part VI deals with the operation of trust accounts and Part VIII deals with the establishment of the Fund and also with claims against the Fund. Section 84(1) of the REBA Act provides that a person who contravenes or does not observe any of the provisions of Part VI of the REBA Act commits an offence.
29. Document 25 is dated 23 March 1998 and is a direction made under s.13 of the REBA Act signed by the Registrar. It directs officers of the agency to investigate the complaints made by the complainants, and by other third parties, which relate to alleged breaches of the licensing and trust account provisions of the REBA Act. Some of the Group 1 documents, and Documents 61, 62, 278, 281-285, 287, 291, 293, 297, 298, 330, 331 and 338 from Group 2, relate to the REBA investigations. I am satisfied that the investigation into alleged breaches of the REBA Act was an investigation into a contravention or possible contravention of the law, namely, the REBA Act and I am satisfied that disclosure of those documents would reveal the investigation in the sense in which that term is used in clause 5(1)(b). Accordingly, I find Documents 21, 24-33, 35-38, 40-43, 50-51, 53-59, 61-69, 72-79, 146, 270, 271, 274, 276, 278, 281-285, 287, 291, 292, 293, 294, 297, 298, 310, 320, 325, 330, 331, 338, 340, 348, 363, 372 and 378 exempt under clause 5(1)(b).
30. The complainants' letter to the Board dated 11 November 1997, which contains their claims against the Fund, also contains allegations of breaches of the REBA Act. In addition, that letter also indicates that the complainants had referred certain material, including a statutory declaration and two files of documents, to the police for investigation. Some of the Group 1 documents, and Documents 170, 172, 180, 204, 207, 216, 230, 233, 238 and 242 from Group 2 relate to the police investigation, which I understand was a parallel investigation into possible offences under the *Criminal Code*. Clearly, the police investigation was an investigation of any contravention or possible contravention of the law. I am satisfied that disclosure of Documents 39, 44, 45, 49, 109, 112, 118, 125, 148, 149, 155, 156, 158, 161, 166, 169, 170, 172, 173, 180-182, 204, 207, 216, 230, 233, 238, 242, 328, 337, 339, 349, 366-368, 370 and 371 could reasonably be expected to reveal that investigation. Accordingly, I find those documents exempt under clause 5(1)(b).
31. However, some of the Group 1 documents are, in my opinion, purely administrative in nature. For example, Documents 15-20 and Document 96, consist of correspondence from officers of the agency to officers of the Supreme Court of Western Australia, in relation to the complainants' application for a Writ of Certiorari and a Writ of Mandamus, against the Board (CIV 2075 of 1998). Documents 101 and 137 are affidavits filed with the Supreme Court and served on the complainants' solicitors, in relation to those legal proceedings. Other administrative documents include various notices to produce documents to the Board, computer printouts of company details and

hand-written notes. Further, the documents comprising Set A and Set B consist primarily of Briefs to Counsel. In my opinion, the agency has not established a *prima facie* claim for exemption under clause 5(1)(b) for any of those documents and, in my opinion, none of the documents in Set A or Set B on their face, could reasonably be expected to reveal an investigation into any contravention or possible contravention of the law if it were to be disclosed.

32. Having examined Documents 15-20, 22, 34, 48, 52, 87, 96, 97, 101, 102, 107, 111, 113, 119, 120-122, 130, 131, 133, 137, 140, 147, 150, 176-179, 184, 188, 189, 235, 239, 244-246, 249, 255, 262, 266-269, 272, 273, 277, 279, 295, 305-309, 311, 312, 314-319, 321-323, 326, 327, 332, 333, 335, 336, 342-344, 347, 350, 359-361, 365, 369, 376, 379, 381-383; Items 1, 2.6, 2.9-2.14, 3.1-3.14.9, 6, 6.1 and 7 from Set A and the documents in Set B, I do not consider that disclosure of any of those documents could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law. Accordingly, I find that none is exempt under clause 5(1)(b).

Limits on exemption - clause 5(4)

33. The complainants also submit that disclosure of the Group 1 documents and the documents referred to in paragraph 27 would, on balance, be in the public interest under clause 5(4)(b) and made submissions to me in support of that claim. However, in my view, none of the documents which I have found are exempt under clause 5(1)(b), contains information of the kind referred to in clause 5(4)(a)(i)-(iii) and, accordingly, the limit on exemption does not apply.

(b) Clause 7

Group 2 (Documents 1-8, 15-20, 46, 47, 60-62, 80, 82, 86-90, 92, 93, 95, 97, 100, 103-106, 110, 114, 122-124, 126-130, 132, 134-136, 138-140, 142, 146, 147, 150-154, 157, 159, 165-166, 170, 172, 174, 176-180, 183-184, 186-200, 202-209, 211-224, 226, 227, 229, 230, 233-235, 237, 238, 241-244, 247-250, 252, 256-258, 262-298, 303, 308-312, 314-327, 329-331, 334-336, 338, 343, 344, 347, 350, 359-361, 365, 369, 370, 376 and 379-383).

34. Clause 7 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 a client and his or her legal adviser which are made or brought into existence either 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] 74 ALJR 339. However, legal professional privilege also applies to various other classes of documents, including notes, memoranda, minutes or other documents made by the client or the legal adviser of communications which are themselves privileged, or contain 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: *Trade Practices Commission v Sterling* (1979) 36 FLR 244.

35. An agency is also entitled to claim privilege in respect of advice obtained from salaried legal officers who are employed within government as legal advisers, where the advice given is within the professional relationship between the legal officer and the client and the advice is independent in character: *Attorney General (NT) v Kearney* (1985) 158 CLR 500; *Waterford v Commonwealth* (1987) 153 CLR 54.
36. I have examined the Group 2 documents. In my opinion most, but not all, of the documents in that group consist of correspondence to and from Counsel assisting the Board and Counsel's instructing solicitors; legal advice and reports provided to officers of the Board by salaried legal officers employed by the agency; correspondence between the agency and the Crown Solicitor's Office made for the dominant purpose of seeking and receiving legal advice; notes made by officers of the Board recording matters discussed during meetings with and advice received from legal advisers and Counsel assisting the Board. I consider that those kinds of documents would be privileged from production in legal proceedings on the ground of legal professional privilege.
37. Further, some of the Group 1 documents fall within the terms of the exemption in clause 7 rather than clause 5(1)(b) as claimed by the agency. Specifically, Documents 48, 111, 119, 120 121 and 245; Items 2.9-2.14; Items 3.9 and 3.10 in Set A and all of the documents in Set B are in that category. Documents 48 and 111 are files notes of discussions between a legal officer of the agency, the Board and Counsel; Documents 119 and 120 are memoranda from a legal officer to the Board; Document 121 is a copy of Document 120; and Document 245 is a letter from the agency to the Crown Solicitor's Office seeking legal advice. The documents comprising Set A and Set B consist primarily of Briefs to Counsel. I consider that those kinds of documents would be privileged from production in legal proceedings on the ground of legal professional privilege.
38. I am satisfied that a *prima facie* claim for exemption under clause 7 exists for the documents described in paragraph 37 above and for most, but not all of the Group 2 documents. Those documents are either confidential communications between the Board and its legal advisers; between officers of the Board and Counsel which were made for the dominant purpose of giving or seeking legal advice, or they are documents of the kind described in *Sterling's* case which are also protected by legal professional privilege. However, the complainants made a number of submissions and claimed that the Group 2 documents would not be privileged from production in legal proceedings on the grounds of legal professional privilege. I deal with each of those arguments in turn.

The complainants' submissions

39. Firstly, the complainants submit that the legal advice obtained by the agency was obtained for a statutory purpose. I was referred to the case of *Secretary of State for Trade and Industry v Baker* [1998] Ch 256, as being relevant to a determination of whether documents prepared for a statutory purpose may be subject to legal professional privilege.

40. In *Baker's* case, the particular document under consideration was a report, which the administrators of a bank were required to submit to the English Secretary of State, pursuant to their statutory duty under s.7(3) of the *Company Directors Disqualification Act 1986*. None of the Group 2 documents or the Group 1 documents referred to in paragraph 37, is a document of that kind. I agree with the agency that none of the documents was required, by statute, to be produced to the Board. In my opinion, they merely assisted the Board in the exercise of its statutory functions, but the REBA Act did not require their production. Accordingly, I do not consider that *Baker's* case is relevant in this matter.
41. Secondly, the complainants submit that the formulation of the test by Lockhart J in *Sterling's* case is no longer the law. However, I do not accept that submission. In my opinion, the decision of the High Court in the *Esso* case merely changed the test for legal professional privilege from the "sole purpose" test in *Grant v Downs* (1976) 135 CLR 674 to the dominant purpose test. However, the High Court neither considered nor overruled the decision in *Sterling's* case.
42. Thirdly, the complainants submit that the Board was acting in a quasi-judicial capacity and its dominant purpose in seeking legal advice was the performance of its statutory functions, including its determination of their claims against the Fund and they submit that in making that decision, the Board was performing a quasi-judicial function, which is inconsistent with the existence of legal professional privilege. They submit that, in those circumstances, the documents do not satisfy the dominant purpose test in *Esso*. It is my understanding that the dominant purpose test relates to the purpose for which the documents were created or brought into existence and is not related to the purpose, dominant or otherwise of the body requesting or creating the documents. Therefore, I do not accept this submission.
43. Fourthly, the complainants submit that the Board is not a litigant or a person obtaining legal advice, but is an administrative tribunal invested with a particular statutory role and it was performing a quasi-judicial function associated with that role. The complainants submit, therefore, that the claim of legal professional privilege should be rejected. However, in an unreported decision of the Supreme Court in *Ex Parte Harry Cohen and Ors* of 17 November 1998 (Supreme Court of WA, Lib No: 980668), Scott J said that, whilst the Board was not an ordinary adversarial party in the litigation then on foot, he was, nonetheless, of the view that the Board was in a position where it was entitled to claim privilege for legal advice sought and obtained by it and he held that legal professional privilege attached to the opinion of Counsel obtained by the Board. I respectfully agree.
44. Fifthly, the complainants submit that a tribunal acting quasi-judicially cannot obtain legal advice and then not disclose that legal advice to a party appearing before it, because that would fail to afford procedural fairness to the party concerned. The complainants submit that the decision in *Re Real Estate and Business Agents Supervisory Board; Ex parte Cohen* supports their claims in this regard.
45. However, in my opinion, Malcolm CJ did not express the view that the Board was required to disclose the substance of its legal advice to the complainants. In that case, His Honour said at p.185, referring to the judgment of McHugh J in *Giannarelli v Wraith (No.2)* (1990) 170 CLR 592) "...there is nothing in the judgment of McHugh

which suggest that in the present circumstances, the Board was bound to provide either the brief to counsel or counsel's opinion...[W]hile the Board was not bound to disclose the opinion, it was bound to give the complainants the opportunity to answer any points made in the opinion which were adverse to their claims." Accordingly, I reject the complainants' submission that procedural fairness required the Board to disclose to them the substance of legal advice it had obtained from Counsel.

46. Finally, the complainants submit that six of the disputed documents in Set A (Items 2.9-2.14 and Items 3.9 and 3.10) were used by the Board for the purpose of obtaining legal advice in relation to their claims against the Fund and that the actions of the Board in providing those six documents to Counsel amounted to a waiver of privilege, because the conduct of the Board was inconsistent with the maintenance of privilege: *Mann v Carnell* [1999] 168 ALR 86.
47. It is the submission of the complainants that those six documents, which consist of earlier legal advice obtained by the Board on matters entirely unrelated to the complainants' claims, were provided to Counsel to assist him to provide legal advice to the Board and, on the basis of legal advice received, the Board rejected the complainants' claims against the Fund without giving the complainants a chance to respond. The complainants claim that the disclosure of legal advice in that manner is clearly inconsistent with the maintenance of confidentiality, which the privilege is intended to protect. They also submit that the onus is on the agency to establish a claim for privilege and that it is not for the complainants to defeat such a claim if no evidence has been adduced in support of it.
48. In my opinion, the Brief to counsel, and the solicitor's copies of that Brief, attract legal professional privilege. The decision of the High Court in *Commissioner of Australian Federal Police and Anor v Propend Finance Pty Ltd and Ors* (1997) 188 CLR 501 makes it clear that copies of documents made or communicated for the dominant purpose of obtaining legal advice or for use in litigation (i.e. through their inclusion in a brief to Counsel) attract legal professional privilege. The question of whether the copies of the six legal opinions provided to Counsel are also protected by legal professional privilege depends on whether the documents were communicated to Counsel for a privileged purpose.
49. Having examined the disputed documents, including the Board's instructions to Counsel, I am satisfied that the six disputed documents (legal opinions) were communicated to Counsel for a privileged purpose, being the express purpose of obtaining legal advice in relation to the complainants' claim against the Fund. As the communication to Counsel was made for a privileged purpose, I do not consider that any question of waiver arises from the actions of the Board. Accordingly, I find that the six legal opinions contained in Set A, (Items 2.9-2.14 and Items 3.9-3.10), are exempt under clause 7 of Schedule 1 to the FOI Act.
50. I have also examined the documents in the first two folders of Set B. The first two folders contain the agency's Instructions and Brief to Counsel to Advise and Appear on the return of the complainants' Writs. I am satisfied that the documents contained in the first two folders of Set B were provided to Counsel representing the Board for a privileged purpose and, accordingly, I am satisfied that they would be privileged from production in legal proceedings on the ground of legal professional privilege.

Accordingly, I find those documents exempt under clause 7 of Schedule 1 to the FOI Act.

51. I have also examined the documents in the third folder of Set B. Those documents are reports to the Board, prepared by a legal officer of the agency, which were clearly made or brought into existence for the dominant purpose of giving legal advice to the Board in relation to the complainants' claims against the Fund. I am satisfied that those documents would also be privileged from production in legal proceedings on the grounds of legal professional privilege. Accordingly, I find them exempt under clause 7.
52. Having examined the Group 2 documents, I am satisfied that Documents 7, 8, 46, 47, 86, 88-90, 92, 93, 95, 100, 103-106, 110, 114, 122-124, 126-129, 132, 134-136, 138, 139, 142, 151-154, 157, 159, 165, 174, 183, 186, 187, 190-195, 200, 202, 203, 205, 206, 208, 209, 211-214, 217-224, 226, 227, 229, 234, 237, 241, 247, 248, 250, 252, 256-258, 263-265, 275, 280, 286, 288-290, 296, 303, 324, 329, 334 and 380, Documents 48, 111, 119, 120, 121, 245 from Group 1, consist of confidential communications between a legal adviser and client made for the dominant purpose of giving or receiving legal advice, or for use in existing or anticipated legal proceedings. I consider that those documents satisfy the dominant purpose test in *Esso* and would be privileged from production in legal proceedings on the grounds of legal professional privilege. Accordingly, I find those documents exempt under clause 7.
53. However, in my view, some of the Group 2 documents would not be privileged. I am aware that, during the course of legal proceedings in the Supreme Court (CIV 2075 of 1998), the Board did not claim privilege for Documents 1-6 and it gave the complainants discovery of those particular documents. Accordingly, in my view, those documents are not exempt under clause 7.
54. Other Group 2 documents are, in my opinion, purely administrative in nature and would not be privileged from production in legal proceedings on the grounds of legal professional privilege. The administrative documents consist of correspondence and facsimile transmissions from the agency to the Supreme Court, which deals with listing dates; file notes of such matters; record of telephone call with complainants' solicitors; letter to complainants' solicitors; correspondence; facsimile cover sheets; administrative documents of the Board requiring the production of documents; letters to other agencies and to law firms; briefing notes to the then Minister; correspondence to the Chief Executive Officer of the agency; draft questions and draft witness summonses; and records of interview of witnesses containing personal information about the complainants.
55. In my view, the administrative documents referred to in paragraph 54 above, being Documents 15-20, 60, 80, 82, 87, 97, 130, 140, 147, 150, 176-179, 184, 188, 189, 196-199, 215, 235, 243, 244, 249, 262, 266-269, 272, 273, 277, 279, 295, 308, 309, 311, 312, 314-319, 321-323, 326, 327, 335, 336, 343, 344, 347, 350, 359-361, 365, 369, 376, 379 and 381-383 would not be privileged from production in legal proceedings on the grounds of legal professional privilege. None of those documents is a confidential communication between a solicitor and client made for the dominant purpose of giving or receiving legal advice, or for use in existing or anticipated legal proceedings. Accordingly, I find that those documents are not exempt under clause 7.

56. As I have already found that Documents 61, 62, 146, 166, 170, 172, 180, 204, 207, 216, 230, 233, 238, 242, 270, 271, 274, 276, 278, 281-285, 287, 291-294, 297, 298, 310, 320, 325, 330, 331, 338 and 370 are exempt under clause 5(1)(b), it is unnecessary for me to consider the agency's claim for exemption for those particular documents under clause 7.

Personal Information

57. Some of the disputed documents, which I have found are not exempt, contain personal information about third parties, including names, addresses and telephone numbers. Taking into account the context in which that information appears in the documents, I am satisfied that it consists of exempt matter under clause 3(1) of Schedule 1 to the FOI Act and I so find. However, I also consider that it would be practicable for the agency to delete the personal information described above from Documents 295, 314, 315, 317, 318, 319, 323, 333, 365 and 369.

Agency discretion to disclose exempt matter

58. Finally, it is apparent to me that the facts, which led to the REBA investigation and to the police investigation and the substance of those investigations are, to some extent, already in the public domain having been published in the decision of the Supreme Court in *Ex parte Cohen* and the decision of the Board in *Cohen, Cohen, Levy and Ors v The Real Estate and Business Agents Supervisory Board*, 21 September 2000 (Unreported: Reasons for Decision – Inquiry No. 30 of 1999). Further, in *Ex parte Cohen*, His Honour, Chief Justice Malcolm, referred to a particular document and its contents form part of the transcript of proceedings and the subsequent reported judgment of the Supreme Court. The particular document is one of the documents in dispute in this matter and its contents have therefore, been disclosed.
59. Clearly, in those circumstances, disclosure of that particular document and of some others would be unlikely to cause any harm to the public interest. This is not a case where there is a sensitive and ongoing police investigation (although I understand some matters remain open), which requires confidentiality. In my view, this is clearly an instance where the agency could have properly exercised its discretion under s.3(3) of the FOI Act and released some of the disputed documents to the complainants. I do not consider that the use of technical exemptions to refuse access, in circumstances where there would be no harm to the public interest, accords with the spirit and intent of the FOI Act, especially when the documents themselves are relatively innocuous as some are in this matter.
