

**GEARY AND FAMILY/CHILDREN**

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

**File Ref: 95172  
Decision Ref: D00896**

Participants:

**Jennifer Lee Geary and Terence Wigley**  
Complainants

- and -

**Department of Family and Children's  
Services**  
Respondent

**John Kevin Geary and Janet Geary**  
Complainants

- and -

**Department of Family and Children's  
Services**  
Respondent

**DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - documents of an agency - clause 3(1) - memoranda - correspondence - briefing notes - personal information about third parties - public interest factors for and against disclosure of personal information.

FREEDOM OF INFORMATION - Clause 7 - legal professional privilege - record of legal advice given by agency's legal adviser - instructions to legal adviser - information obtained by agency for purpose of litigation - salaried legal officers.

*Freedom of Information Act 1992 (WA)* ss.68(1), 72(1)(b),74(2), 75(1), 102(3); Schedule 1 clauses 3(1), 5(1)(c), 6, 7.

*Re Geary and Wigley and Ministry of Justice* (Information Commissioner, WA, 29 August 1995, unreported).

*Grant v Downs* (1976) 135 CLR 674.

*Baker v Campbell* (1983) 153 CLR 52.

*Trade Practices Commission v Sterling* (1979) 36 FLR 244.

*Attorney-General (NT) v Kearney* (1985) 158 CLR 500.

*Waterford v The Commonwealth* (1987) 163 CLR 54.

## DECISION

The decision of the agency is varied. In substitution it is decided that Document 28 is exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*, and the remaining documents described in paragraph 9 of this decision, are exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

18th January 1996

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Department of Family and Children's Services ('the agency') to refuse Ms Geary and Mr Wigley ('the first complainants') and Mr Geary and Mrs Geary ('the second complainants') access to certain documents requested under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 16 June 1995, the first complainants lodged an access application with the agency seeking access under the FOI Act to documents containing personal information about themselves and about members of their family. On 20 June 1995, the second complainants who are the parents of Ms Geary, lodged an almost identical access application with the agency and, on 16 July 1995, the second complainants authorised Ms Geary to act as an agent in respect of their access application.
3. On 31 July 1995, as the access applications concerned the same documents, the agency provided the first and second complainants with a notice of decision in respect of both access applications. The agency refused access to documents and parts of documents on the ground that they are exempt under clauses 3(1), 6 and 7 of Schedule 1 to the FOI Act.
4. The first and second complainants sought internal review of that decision on 6 August 1995. On 21 August 1995, Ms Sandie van Soelen, Assistant Director, Protection and Care of the agency, confirmed the initial decision that the requested documents are exempt under clauses 3(1), 6, and 7, and also under clause 5(1)(c) of Schedule 1 to the FOI Act. The agency also refused access to a transcript of court proceedings on the ground that the transcript was available through other means.
5. On 22 August 1995, the first and second complainants applied to the Information Commissioner for external review of the agency's decision to refuse them access to the requested documents.

### REVIEW BY THE INFORMATION COMMISSIONER

6. On 11 September 1995, in accordance with my statutory obligation under s.68(1) of the FOI Act, I notified the agency that I had received these complaints. Pursuant to my powers under ss.75(1) and 72(1)(b) of the FOI Act, I sought the production to me of the documents in dispute and the agency's FOI file maintained in respect of this matter. Those documents were delivered to my office on 19 September 1995, together with additional information that I had requested from the agency.

7. On 22 December 1995, after examining the disputed documents and considering submissions, I provided the parties with my preliminary view and reasons for that view. It was my preliminary view that some of the disputed documents contain matter that is personal information about third parties other than the complainants and it is, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act. It was also my preliminary view that the agency's claims for exemption under clause 7 are, in the main, correct.
8. After receiving my preliminary view, the agency released certain additional matter to the complainants. The complainants responded to my preliminary view on 5 January 1996 and provided additional submissions for my consideration, including submissions concerning their claims for access to the transcript of court proceedings. However, as I dealt with the issue of access by the complainants to the court transcript in my decision in *Re Geary and Wigley and Ministry of Justice* (29 August 1995, unreported), I do not intend to deal with the part of these complaints that concern that matter.

### THE DISPUTED DOCUMENTS

9. There are 32 documents remaining in dispute between the parties. Those documents and the exemptions claimed by the agency consist of the following:

Document	Description	Exemption
1	Internal electronic memorandum dated 17/10/94, between legal officers.	Clause 7
2	File note dated 8/12/94 by Legal Officer.	Clause 7
3	File note dated 22/12/94 by Legal Officer.	Clause 7
4	File note dated 30/12/94 by Legal Officer.	Clause 7
5	Letter dated 5/1/95 from Acting Principal Legal Officer to Counsel, including hand-written notation.	Clause 7
6	Copy of Document 5 sent to third party' solicitor.	Clause 7
7	Facsimile message dated 10/1/95 to solicitors from Legal Section.	Clause 7
8	Letter dated 11/1/95 to solicitors from Acting Principal Legal Officer.	Clause 7
9	Letter dated 12/1/95 to solicitors from Acting Principal Legal Officer.	Clause 7
10	Letter dated 12/1/95 from Acting Principal Legal Officer to Counsel.	Clause 7
11	Facsimile message dated 13/1/95 from Legal Section to Counsel.	Clause 7

12	Letter dated 2/2/95 from solicitors to Principal Legal Officer.	Clause 7
13	Facsimile letter dated 6/2/95 from solicitors to Principal Legal Officer.	Clause 7
14	Letter dated 7/2/95 from Acting Principal Legal Officer to Counsel.	Clause 7
15	Letter dated 8/2/95 from Counsel to Acting Principal Legal Officer.	Clause 7
16	Facsimile message dated 9/2/95 from Acting Principal Legal Officer to solicitors.	Clause 7
17	Letter dated 22/2/95 from Counsel to Acting Principal Legal Officer.	Clause 7
18	Facsimile message dated 24/2/95 from Acting Principal Legal Officer to solicitors.	Clause 7
19	Facsimile message dated 24/2/95 from Acting Principal Legal Officer to solicitors.	Clause 7
20	File note, undated, of Principal Legal Officer.	Clause 7
21	Facsimile message dated 28/4/95 from Legal Officer to Counsel.	Clause 7
22	Facsimile message dated 28/4/95 from Counsel to Legal Officer.	Clause 7
23	Facsimile message dated 2/5/95 from Counsel to Legal Officer.	Clause 7
24	Internal memorandum dated 15/5/95 from Legal Officer to Manager, Finance and Budgeting.	Clause 7
25	Internal facsimile message dated 12/5/95 from Scarborough branch of the agency to Legal Section.	Clause 7
26	Letter and facsimile cover sheet dated 19/5/95 from Counsel to Legal Section.	Clause 7
27	Memorandum dated 31/3/95 from Clinical Psychologist to Counsel.	Clause 7
28	Memorandum dated 29/3/95 from Clinical Psychologist.	Clause 3
29	Memorandum dated 31/3/95 from Clinical Psychologist to Counsel.	Clause 7
30	Facsimile message dated 24/2/95 to Legal Officer.	Clause 7
31	File note dated 14/9/90 by Legal Officer.	Clause 7
32	File note dated 19/2/91 by Legal Officer.	Clause 7

## THE EXEMPTIONS

### (a) Clause 7 - Legal Professional privilege

10. Clause 7 in Schedule 1 to the FOI Act provides:

**"7. 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)."*

11. In a number of my formal decisions, I have discussed the principle and application of legal professional privilege. It is clearly established law in Australia that confidential communications passing between a legal adviser and his or her client need not be given in evidence or otherwise disclosed by the client and, without the client's consent, may not be given in evidence or otherwise disclosed by the legal adviser, if made for the sole purpose of enabling the client to obtain, or the adviser to give, 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.
12. Legal professional privilege applies to, *inter alia*, any communication between a client and his or her professional legal adviser acting in a professional capacity and with a view to obtaining or giving legal advice or assistance, or for use in existing or contemplated litigation. The principle also extends to confidential communications between a third party and the client or a lawyer, where those communications are made or brought into existence for the sole purpose of use in existing or anticipated litigation: *Trade Practices Commission v Sterling* (1979) 36 FLR 244. Further, an agency is entitled to claim privilege for advice obtained from salaried legal officers who are employed within the agency as legal advisers, where the legal advice is given 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) 163 CLR 54.
13. I have examined each of the disputed documents. I am satisfied from my examination, that the documents for which exemption is claimed under clause 7 of Schedule 1 to the FOI Act are confidential communications between the agency and its salaried legal advisers or the Legal Section of the agency and legal advisers briefed by the agency, made for the purpose of giving or receiving legal

advice. Therefore, I am satisfied that those documents would be privileged from production in legal proceedings on the ground of legal professional privilege.

14. The first and second complainants sought to persuade me that natural justice required that they be given access to the disputed documents and provided me with three pages of quotes on the law of evidence taken from a text book "Cross on Evidence" (1979) by Gobbo, Byrne and Heydon. However, the exemption in clause 7, unlike many exemptions in Schedule 1 to the FOI Act, is not limited by a public interest test. That means that there is no scope for me to consider whether there are any competing public interests that are sufficient to displace the public interest embodied in clause 7, namely, that the administration of justice is facilitated by keeping secret the communications between a client and his or her solicitor: see *Grant v Downs, op cit*, at 685 per Stephen, Mason and Murphy JJ.
15. Accordingly, I find that Documents 1-27 and 29-32 are exempt under clause 7 of Schedule 1 to the FOI Act.

**(b) Clause 3 - Personal information**

16. The agency claims that Document 28 is exempt under clause 3(1) of Schedule 1 to the FOI Act. Clause 3, so far as is relevant, provides;

**"3. Personal information**

***Exemption***

*(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead)."*

17. In the Glossary in Schedule 2 to the FOI Act, "**personal information**" is defined as meaning "*...information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead-*
  - (a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or*
  - (b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample."*
18. I have previously expressed the view in a number of my formal decisions that the purpose of the exemption in clause 3 is to protect the privacy of individuals. That exemption is a recognition by Parliament of the fact that all government agencies collect and hold a vast amount of important and sensitive private information about individual citizens and that information of that kind should not generally be accessible by other persons without good cause.

19. If a document only contains personal information about an access applicant, there is generally no problem with an agency making that information available to the person. However, when personal information about an access applicant is inextricably interwoven with personal information about third parties, difficulties often arise in deciding questions of access and balance between competing rights.
20. In this instance, I am satisfied from my examination of Document 28, that it contains some references to the first and second complainants. However, the majority of information in that document, in my view, is personal information about third parties other than the first and second complainants, that is *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act. The onus of persuading me that the disclosure of exempt matter would, on balance, be in the public interest, lies on the first and second complainants under s.102(3) of the FOI Act.
21. The submission from the first and second complainants as to the public interest factors in favour of disclosure of the matter consisted of the claim that they were being denied natural justice and their belief that they were entitled to access personal information about themselves.
22. I recognise that there is a public interest in the first and second complainants being able to exercise their rights of access under the FOI Act. Section 21 of the FOI Act requires me, when deciding whether it is in the public interest for matter to be disclosed, to consider the fact that the matter is personal information about the complainants, as a factor in favour of disclosure. I have considered that factor. However, as I said before, the majority of the information in Document 28 concerns third parties and only a small amount consists of personal information about the first and second complainants.
23. I also recognise that there is a public interest in maintaining the privacy of third parties. Although I am unable to describe in detail the nature of the private interests which would be revealed by the disclosure of the disputed documents without breaching my duty under s.74(2) of the FOI Act, I am of the view that the private interests of the third parties are sufficiently strong to outweigh the public interest in the disclosure of the documents. Therefore, I find that disclosure would not, on balance, be in the public interest. Accordingly, I find that Document 28 is exempt under clause 3(1) of Schedule 1 to the FOI Act.

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