

WOODFORD AND HEALTH

OFFICE OF THE INFORMATION COMMISSIONER (WA)

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

COMPLAINT No: F0221998

DECISION No: D0091998

PARTIES: Michael James WOODFORD

Complainant

HEALTH DEPARTMENT OF WESTERN AUSTRALIA

Respondent

No. of documents in dispute: 1

Exemption clause(s): Clause 7

Mr Woodford ('the complainant') is a former employee of the Health Department of Western Australia ('the agency'). In 1997, following various complaints made by the complainant against officers of the agency, the principal officer of the agency decided to refer the matters of complaint to independent counsel for legal advice. Subsequently, the agency received advice on those matters from Mr Michael Buss QC in the form of an opinion with several documents attached to it ('the disputed document').

The agency offered a copy of the disputed document to the complainant, subject to the complainant signing an undertaking containing certain conditions. However, the complainant did not sign the undertaking. Instead, on 25 November 1997, he sought a copy of the disputed document pursuant to his right of access under the *Freedom of Information Act 1992* ('the FOI Act'). By letter dated 8 December 1997, the principal officer of the agency refused access to the document on the ground that it is exempt under clause 7 of Schedule 1 to the FOI Act.

As the decision on access was made by the principal officer of the agency, internal review was not available in respect of that decision. Thereafter, by letter dated 11 February 1998, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

I obtained a copy of the disputed document and directed a member of my staff to make further inquiries with the agency and the complainant. The complainant submitted that legal professional privilege did not apply to the disputed document because it was not legal advice but a report on certain facts and he indicated his willingness to accept access to an edited copy of the document with any legal advice deleted. The complainant also submitted that the agency had waived any privilege in the document by its offer to provide him with a copy, subject to the signing of an undertaking containing certain conditions.

After considering the material before me, on 2 April 1998, I informed the parties in writing of my preliminary view of this complaint, including detailed reasons. It was my preliminary view that the disputed document, together with its attachments, would be privileged from production in legal proceedings on the ground of legal professional privilege and that the privilege in that document had not been waived by the agency. It was also my preliminary view that it was not practicable to edit the disputed document in the manner proposed by the complainant.

On 15 April 1998, I received a written submission from the complainant in response to my preliminary view. However, that submission has not dissuaded me from my preliminary view that the disputed document is exempt under clause 7 of Schedule 1 to the FOI Act. A summary of those reasons follows, together with my reasons for not accepting the arguments raised in the complainant's subsequent submission.

CLAUSE 7 – LEGAL PROFESSIONAL PRIVILEGE

Clause 7 provides that matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.

I have discussed the scope and meaning of clause 7 of Schedule 1 to the FOI Act in a number of decisions, most recently in *Re Morrissey and Insurance Commission of Western Australia* (16 December 1997, unreported, D03597). There I stated that 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. In *Grant v Downs* (1976) 11 ALR 577, at page 588, the majority of the High Court (Stephen, Mason and Murphy JJ) stated “*For this and the reasons which we have expressed earlier we consider that the sole purpose test should now be adopted as the criterion of legal professional privilege*”.

In determining whether a document was created for the ‘sole purpose’ of giving or receiving legal advice it is necessary to enquire into the purpose for bringing the document into existence. This is a question of fact. In dealing with this complaint I have had access to the correspondence requesting the opinion and I am satisfied that the instruction to Mr Buss QC was specifically for legal advice to be provided to the agency in respect of the complaints made by the complainant to the agency. Having examined the disputed document I am satisfied that it contains factual information and legal advice all of which attracts legal professional privilege.

Although the disputed document is referred to variously as “a report” and “advice”, I do not consider that the descriptions given to it detract from its purpose which, in my view, is the provision of legal advice to the agency. I am also satisfied that the documents attached to the legal advice are privileged. In the case of *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 141 ALR 545, the High Court held by a majority (McHugh, Gummow, Gaudron and Kirby JJ) that legal professional privilege may attach to copy documents where the original is not privileged, if the copy documents were made solely for the purpose of obtaining legal advice.

WAIVER

Waiver occurs when 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. Waiver may be express or implied. Express waiver involves the intentional disclosure of protected material to another person: *Goldberg v Ng* (1995) 132 ALR 57. The meaning of implied waiver was described by Mason and Brennan JJ in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 (at page 487-8):

“An implied waiver occurs when, by reason of some conduct on the privilege holder’s part, it becomes unfair to maintain the privilege. The holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication...Hence, the implied waiver inquiry is at bottom focused on the fairness of imputing such a waiver.”

In considering the complainant’s latest submission that the agency has waived its privilege in the disputed document by its conditional offer to provide the complainant with a copy of the opinion, I note that there is no evidence before me of any disclosure of the contents of the disputed document. Neither is there any evidence that the action of the agency results in it being unfair to maintain the privilege or that the complainant has been misled by that action. In my view, the conditional offer of the agency to provide the complainant with a copy of the opinion does not amount to a waiver of the privilege that attaches to the document.

The agency provided copies of the disputed document to other agencies for the purpose of their own investigations into the complaints made by the complainant. In my decision in *Re Walker and Town of Mosman Park* (27 May 1997, unreported, D01697), I considered in detail, whether such an action could constitute a waiver of privilege. For similar reasons to those given in *Re Walker*, I conclude that the privilege held by the agency in the disputed document has not been waived by the provision of copies of the document to those other agencies.

In his latest submission, the complainant also contended that I should take into account the requirements in the Code of Ethics applicable to all agencies in Western Australia, for openness about decisions and reasons for decisions made by agencies. However, clause 7 of Schedule 1 to the FOI Act is not subject to a public interest test, in which case the Code of Ethics might be relevant. Further, s.76(4) of the FOI Act provides that, if it is established that a document is an exempt document, I do not have the power to make a decision to the effect that access is to be given to that document.

Finally, I have considered whether it is practicable to delete exempt matter from the disputed document and to provide the complainant with access to an edited copy of it, pursuant to the provisions of s.24 of the FOI Act. In my view, the whole of the disputed document is exempt and edited access is not an option. Therefore, I find that the disputed document is exempt under clause 7 of Schedule 1 to the FOI Act. I confirm the decision of the agency to refuse access to that document.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER
17 April 1998