

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

**File Ref: F2003216  
Decision Ref: D0102004**

Participants:

**Clinton Shayne O'Neil**  
Complainant  
  
- and -  
  
**Department of Environment**  
Respondent

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

FREEDOM OF INFORMATION – refusal of access – emails and file notes – salaried legal officers – clause 7(1) – legal professional privilege – solicitor/client relationship – privileged communications – advice relating to the exercise of a statutory power.

*Freedom of Information Act 1992 (WA)*: section 3(3); Schedule 1, clause 7(1)  
*Waters and Rivers Commission Act 1995 (WA)*  
*Rights in Water and Irrigation Act 1914 (WA)*, sections 26G, 26GC, 26GD

*Esso Australia Resources Ltd v The Commissioner of Taxation* [1999] 201 CLR 49  
*Attorney General (NT) v Kearney* (1985) 158 CLR 500  
*Waterford v The Commonwealth of Australia* (1987) 163 CLR 54  
*Grant v Downs* (1976) 135 CLR 674  
*Trade Practices Commission v Sterling* [1979] 36 FLR 244

## DECISION

The decision of the agency is confirmed. The disputed documents are exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*.

D A WOOKEY  
A/INFORMATION COMMISSIONER

21 April 2004

## 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 Environment ('the agency') to refuse Mr O'Neil ('the complainant') access to certain documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

### BACKGROUND

2. In December 2002, the complainant's former legal advisers wrote to the Manager, Waters and Rivers Commission ('the WRC'), Swan Goldfields Agricultural Region, on behalf of the complainant and his business partner, advising the WRC that they had obtained all necessary approvals to sink a bore, described as the CVI Marbling Bore ('the Bore'), within the road reserve on the north side of Chittering Road. The complainant's former legal advisers advised the WRC that the complainant and his business partner proposed to extract approximately 394,000kl/a from the aquifer feeding the Bore.
3. At the conclusion of their letter, the complainant's former legal advisers sought advice from the WRC in relation to the complainant's rights and obligations, if any, under the *Waters and Rivers Commission Act 1995* ('the WRC Act') and the *Rights in Water and Irrigation Act 1914* ('the RIWI Act').
4. By letter dated 10 December 2002, the WRC provided the requested advice to the complainant's former legal advisers. However, the WRC also informed them that it had been advised by local landowners that the Bore may cause an impact on local water resources and the WRC also advised the complainant's former legal advisers that, under ss.26GC and GD of the RIWI Act, the WRC may give a person a direction, restricting or prohibiting the use of an underground water source, if it is determined that the extraction is causing a harmful effect to the water resources.
5. The WRC also advised the complainant's former legal advisers that, at that stage, it could not support the proposal to extract 394,000kl/a from the aquifer, using the Bore, because it had not then received any information from the complainant or his business partner to assist it to conduct a thorough hydrogeological assessment of their proposal. The WRC recommended that the complainant provide it with a hydrogeological report, for its assessment, and that it would then advise the complainant and his business partner whether or not it supported the proposal.
6. In late December 2002, the complainant commissioned a bore completion and hydrogeological assessment of the Bore. On 16 April 2003, the complainant provided a copy of that report to the WRC, for its consideration and assessment. On 23 May 2003, the Regional Manager, Swan Goldfields Agricultural Region of the WRC, notified the complainant that, after assessing the hydrogeological report, the WRC considered the proposal to extract water using the Bore was unsustainable, because it had the potential to damage downstream flow and water quality and impact on other water users in the area.

7. The WRC also advised the complainant that the hydrogeological report appeared to indicate that the Bore had not been constructed to WRC artesian bore construction standards and specifications and, accordingly, that the operation of the Bore was likely to cross-contaminate artesian and non-artesian aquifers and could be detrimental to the environment and water resources in the area. As a result, the Regional Manager of the WRC directed the complainant to decommission, or partly seal, the shallow aquifer within the Bore, in accordance with a direction issued to him under s.26G of the RIWI Act.
8. On 28 August 2003, the complainant wrote to the A/Chief Executive Officer of the agency, raising several issues of concern about the manner in which the agency had dealt with his earlier correspondence to the Regional Office of the WRC. He also made a complaint to the A/CEO about the conduct of an officer of the Regional Office of the agency. On 29 August 2003, the complainant's legal advisers also wrote to the A/CEO of the agency, on his behalf, objecting to the s.26G direction issued to the complainant by the Regional Manager of the WRC and they invited the A/CEO of the agency to revoke that direction, in accordance with the agency's powers under s.26G (2b) of the RIWI Act.
9. By letter dated 2 October 2003, the A/CEO of the agency wrote to the complainant, in response to the two letters referred to in paragraph 8 above, advising him that the agency had revoked the direction served on him under s.26G of the RIWI Act on 23 May 2003.

### **The access application**

10. On 6 October 2003, the complainant applied to the agency for access, under the FOI Act, to documents relating to the issuing, and subsequent revoking, of the direction served on him under s.26G of the RIWI Act. The agency identified 18 documents within the scope of his access application and, on 12 November 2003, granted him full access to seven documents and access to edited copies of nine documents. However, the agency refused the complainant access to two documents, on the ground that they were exempt under clause 7 of Schedule 1 to the FOI Act.
11. Following further discussions between the complainant and the agency's FOI Coordinator, on 17 November 2003, the complainant sought internal review of the decision on access. By letter dated 1 December 2003, the A/CEO of the agency confirmed the agency's decision to refuse him access to the two documents which the agency claimed were exempt under clause 7. The A/CEO also advised the complainant that the agency had identified four additional documents falling within the scope of his access application. However, he refused the complainant access to those four additional documents, on the ground that they are also exempt under clause 7. On 19 December 2003, the complainant applied to the Information Commissioner for external review of that decision.

**REVIEW BY THE A/INFORMATION COMMISSIONER**

12. After receiving this complaint, I required the agency to produce to me, for my examination, the original of its FOI file relating to the complainant’s access application and the originals of the disputed documents. In order to further assist me with my inquiries into the complaint, the agency also provided me with Volumes 1-3 of its file numbered Sn 16839, which contain other documents relating to the Bore.
  
13. After examining that material, my Senior Legal Officer met with the author of the disputed documents, on 15 January 2004, to obtain further information from her about the background events leading to the issuing and subsequent revoking of the s.26G direction served on the complainant by the agency under the RIWI Act on 23 May 2003. My Senior Legal Officer also made inquiries with the agency, in order to determine whether the complaint might be resolved by conciliation between the parties.
  
14. My Senior Legal Officer invited the agency to consider whether it would exercise the discretion available to it under s.3(3) of the FOI Act, and give the complainant access to the requested documents, notwithstanding the agency’s claim that those documents were exempt under clause 7. Subsequently, the agency advised me that it would not give the complainant access to the requested documents and, further, that it maintained its claim that the requested documents are exempt under clause 7.
  
15. On 4 March 2004, I advised the parties, in writing, of my preliminary view of this complaint. It was my preliminary view that five of the requested documents (Documents 1-5) may be exempt under clause 7 but that the remaining document, Document 6, may not be exempt under clause 7. I invited the parties to reconsider their respective positions, in light of my preliminary view. On 19 March 2004, the agency gave the complainant access to a copy of Document 6 but otherwise maintains its claim that the remaining five documents are exempt under clause 7. The complainant did not withdraw his complaint but provided further submissions to me in support of his request for access to all of the requested documents. Accordingly, this complaint could not be resolved by conciliation between the parties.

**THE DISPUTED DOCUMENTS**

16. Five documents remain in dispute between the parties. The disputed documents are described in the table below, using the descriptions provided by the complainant in his application for external review.

<b>Document No</b>	<b>Previous reference No. – FOI 293</b>	<b>Date and document description</b>
1	4	15/09/03 Internal Agency email from Legal Services to S Bellussi: email re objection to s.26G Notice
2	5	9/09/03 Internal Agency email from S Bellussi to Legal Services: re CVI application

3	a	9/09/03 Agency file note by J Hebiton, Legal Officer, Resource Management
4	b	5/09/03 Agency file note by J Hebiton, Legal Officer, Resource Management
5	c	4/09/03 Agency file note by J Hebiton, Legal Officer, Resource Management

## CLAUSE 7 - LEGAL PROFESSIONAL PRIVILEGE

17. 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”. Legal professional privilege protects the confidentiality of certain communications between a legal adviser and client and is the privilege of the client and may only be waived by the client. In *Esso Australia Resources Ltd v The Commissioner of Taxation* [1999] 201 CLR 49, the High Court of Australia altered the common law test for whether a communication attracts privilege. The High Court overruled its earlier decision in *Grant v Downs* (1976) 135 CLR 674 and decided that the “dominant purpose test” and not the “sole purpose test” is now the common law test for claiming legal professional privilege in Australia. In light of the decision in the *Esso* case, the common law test for claiming legal professional privilege in Australia is that confidential communications between a solicitor and his or her client will be privileged from production in legal proceedings, if made for the dominant purpose of giving or receiving legal advice or for use in existing or anticipated legal proceedings.

### The agency’s claims

18. The agency claims that the disputed documents are exempt under clause 7, because they relate to matters that would be privileged in legal proceedings and because they consist of material produced by an in-house legal officer, solely for the purpose of providing legal advice to the agency. The agency is not prepared to waive privilege in respect of those documents.

### The complainant’s submissions

19. The complainant initially submitted that the disputed documents were not created for the sole purpose of providing legal advice to the WRC for any legal action then in train or pending and, accordingly, that the agency’s claim for exemption under clause 7 was not valid because the disputed documents did not meet the requirements of the sole purpose test. However, after my Senior Legal Officer advised the complainant of the decision in *Esso*, the complainant no longer relied on that submission.
20. The complainant also initially submitted that the disputed documents appeared to be concerned with matters relating to the agency’s administrative processes and procedures and consequential matters arising from any deficiencies in those processes and procedures. In response to my preliminary view, the complainant also made the following submissions:

*“We would contend that as [the Legal Officer] has stated that she has been seconded to the Waters and Rivers Commission to provide specialist water law advice she is, in fact, an employee of the Commission as described in section 65 and section 66, part 3 division 3 of the Public Sector Management Act 1994;*

*Under section 23 and 24, Part 5 of the Waters and Rivers Commission Act 1995, the Commission may enter into arrangements with a relevant employer on such terms as they agree, therefore who pays [the Legal Officer’s] salary is not relevant;*

*We would contend that as an employee of the Commission (as described under the Public Sector Management Act 1994) [the Legal Officer] does not have a legal adviser/client relationship with officers of the Commission or the Board of the Commission; and*

*It appears that legal professional privilege hinges on the concept of a legal adviser and client relationship, with adequate separation between the two parties to establish that relationship. [The Legal Officer] appears to be solely engaged in the business of the Commission and therefore a prima facie employer/employee relationship exists. In this particular case, we would contend that adequate separation has not been established and therefore a privileged relationship does not exist. We would further contend that the clause 7 claim for exemption is not valid and therefore the documents in contention should be released.”*

21. In response to those submissions, the agency submits that, in determining whether or not legal professional privilege attaches to the disputed documents, it is irrelevant who is the Legal Officer’s employer. The agency submits that the critical factor is the existence of a legal adviser/client relationship between the agency and the Legal Officer.

### **Consideration**

22. The first question for my consideration is whether a client/legal adviser relationship exists between the Legal Officer and other officers of the agency. If a privileged relationship exists in this case, the next question is whether the disputed documents are privileged.

### ***The nature of the relationship***

23. The High Court of Australia has held that legal professional privilege attaches to confidential communications between government agencies and salaried legal officers in government employment in respect of legal advice, 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 The Commonwealth of Australia* (1987) 163 CLR 54.

24. In *Kearney's* case, the High Court considered whether legal professional privilege applied to communications between officers of the Northern Territory Government and the salaried legal officers employed in the Northern Territory Law Department. Without deciding that point, the majority of the High Court judges observed that, in principle, there was no reason for denying privilege to the communications passing between the Northern Territory Government and its salaried legal advisers, provided the legal advisers were consulted in a professional capacity, in relation to a professional matter and the communications were made in confidence and arose from the relationship of lawyer and client (Gibbs CJ at p.511; Wilson J at p.521 and Dawson J at p.531).
25. In *Waterford's* case, the High Court considered whether the Commonwealth could claim legal professional privilege in respect of documents containing professional legal advice sought by and given to the Department of Treasury from and by the Commonwealth Attorney General's Department. In that case, the documents under consideration by the High Court were requested under the Commonwealth *Freedom of Information Act 1982* and they were claimed to be exempt under s.42 of the Commonwealth Act (the Commonwealth equivalent of clause 7 of the WA FOI Act).
26. The High Court decided that legal professional privilege attached to confidential professional communications between government agencies and salaried legal officers provided that the advice is sufficiently independent in nature. In the leading judgment, Mason and Wilson JJ said, at p.62:

*“To our minds it is clearly in the public interest that those in government who bear the responsibility of making decisions should have free and ready confidential access to their legal advisers. Whether in any particular case the relationship is such as to give rise to the privilege will be a question of fact. It must be a professional relationship which secures to the advice an independent character notwithstanding the employment.”*
27. Brennan J observed (at pp.72-73) that, in circumstances where the communications are between a government agency and salaried lawyers employed in the Attorney General's Department, the Crown Solicitor's Office (and their equivalents in the State and Territory Crown Solicitors' offices), those salaried legal officers have the independence which is essential if legal professional privilege is to attach to documents brought into existence for the purpose of their giving advice or for the purpose of obtaining advice from them. Similarly, Deane J observed (at p.82) that the weight of authority, both in Australia and elsewhere, supported a conclusion that the principle of legal professional privilege applies to the seeking and giving of professional legal advice within and between the various branches or departments of the Executive Government.
28. Neither of the cases cited above dealt directly with the question of salaried legal officers who are employed directly by an agency as in-house legal advisers, as both involved communications between a government agency and another government agency, the latter being in each case similar in nature to the State Solicitor's Office in Western Australia.



29. However, in response to inquiries made by my office into this aspect of the matter, in relation to her work with the agency, the Legal Officer advised me that:
- she is a Legal Officer, employed by the State Solicitor's Office ('the SSO') and it is in her capacity as an SSO Legal Officer that she has been seconded to the agency;
  - the SSO pays her salary, and her contract of employment remains with the SSO, irrespective of her secondment to the agency and that any human resources issues that may arise in relation to her employment, are dealt with by the Human Resources area of the Department of Justice;
  - she was seconded to the agency to provide specialist legal advice, particularly in relation to water law issues;
  - the agency has its own discrete Legal Services Branch and she is working in that Branch; and
  - although out-posted to the agency, she is still an SSO employee, albeit temporarily physically located at the agency, rather than at the SSO's offices.
30. In the absence of any evidence to the contrary, I accept that the Legal Officer remains an officer of the SSO and it is in her capacity as such that she provides legal advice to the agency. In this instance, therefore, I do not need to consider the situation in respect of an in-house legal officer employed directly by the agency.
31. *Waterford's* case is authority that government agencies, such as the agency, may claim legal professional privilege in respect of confidential communications between salaried legal officers employed by the SSO and officers of the agency, if those communications were made within the professional relationship for the purpose of giving or receiving legal advice or for use in existing or anticipated legal proceedings and the advice is sufficiently independent in character. Taking into account the information provided to me by the Legal Officer relating to her employment with the SSO and her secondment to the agency, in my opinion, she has the independence necessary for legal professional privilege to apply to her confidential communications with the agency for the dominant purpose of giving legal advice.
32. In essence, she is a legal officer employed by the SSO, who may be said to be on loan to the agency from the SSO, for the purpose of providing specialist legal advice to the agency. Notwithstanding the fact that she is physically located at the offices of the agency, in my view, the circumstances clearly indicate that an independent, professional lawyer/client relationship exists between the Legal Officer and the agency. Accordingly, in my view, the agency can claim privilege for communications of the relevant kind between the Legal Officer and the agency.

### *The nature of the advice*

33. As indicated at paragraph 17 above, legal professional privilege protects the confidentiality of communications between a client and his or her legal adviser made for the dominant purpose of giving or obtaining legal advice or providing legal services, including representation in proceedings before a court.
34. In *Trade Practices Commission v Sterling* (1979) 36 FLR 244, Lockhart J of the Federal Court of Australia stated that legal professional privilege also extends to various classes of documents, including the following:
- “(a) *Any communication between a party and his professional legal adviser if it is confidential and made to or by the professional adviser in his professional capacity and with a view to obtaining or giving legal advice or assistance; notwithstanding that the communication is made through agents of the party and the solicitor or the agent of either of them ...;*
  - (b) *Any document prepared with a view to its being used as a communication of this class, although not in fact so used ...;*
  - (c) *Communications between the various legal advisers of the client, for example between the solicitor and his partner or his city agent with a view to the client obtaining legal advice or assistance ...;*
  - (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 ...;*
  - (e) *Communications and documents passing between the party's solicitor and a third party if they are made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence ...;*
  - (f) *Communications passing between the party and a third person (who is not the agent of the solicitor to receive the communication from the party) if they are made with reference to litigation either anticipated or commenced, and at the request or suggestion of the party's solicitor; or, even without any such request or suggestion, they are made for the purpose of being put before the solicitor with the object of obtaining his advice or enabling him to prosecute or defend an action ...;*
  - (g) *Knowledge, information or belief of the client derived from privileged communications made to him by his solicitor or his agent.”*
35. In my preliminary view of this matter, I considered, but did not accept, the complainant's submission that the disputed documents were not created for the purpose of providing legal advice to the WRC for any legal action then in train or pending. No further submissions have been made to me, by the complainant, in support of his claims in this regard.

36. In their letter of 29 August 2003, addressed to the A/CEO of the agency, the complainant's legal advisers informed the A/CEO that the complainant and his business partner reserved their rights to appeal to the Minister or to seek judicial review of the agency's decision to issue the s.26G direction on 23 May 2003, in the event that the agency did not withdraw that direction. Given the language of that letter, in my opinion, a reasonably informed person reading that letter would have understood it to indicate that the complainant and his business partner were contemplating initiating legal proceedings against the agency, in the event the agency did not withdraw the s.26G direction issued on 23 May 2003.
37. In any event, the privilege is not limited to legal advice for the purpose of, or in relation to, litigation. As I have said, confidential communications between client and legal adviser for the dominant purpose of giving or receiving legal advice will be privileged, whether or not litigation is on foot or contemplated. Further, in *Waterford's* case, the High Court also considered a submission that legal professional privilege should not apply to professional communications (including legal advice) between government agencies and their salaried legal officers, in relation to the process of administrative decision-making, such as the manner in which a statutory administrative power should be exercised or a statutory function or duty should be performed by a public officer.
38. In their leading judgment in *Waterford's* case, Mason and Wilson JJ said, at p.64, that there is no warrant to draw an arbitrary line between the functions of government, in order to exclude legal professional privilege from the administrative functions of government. In the same case, Brennan J, at p.75, stated that, provided the purpose for which a document is brought into existence is the seeking or giving of legal advice as to the performance of a statutory duty or the performance of a statutory function or duty, there is no reason why the document should not be the subject of legal professional privilege.
39. In this complaint, the evidence presently before me clearly indicates that the disputed documents were created by the Legal Officer immediately after the complainant's letter of 28 August 2003 and his legal advisers' letter of 29 August 2003, were received by the agency. The A/CEO had referred the files relating to the matter to her to review and to provide him with advice in response to the matters raised in both those letters. The Legal Officer informed my Senior Legal Officer that four of the documents were file notes which she wrote during the course of the inquiries she undertook in order to provide advice to the A/CEO of the agency and that the two other documents are emails which she sent to officers of the agency whilst making those inquiries, seeking information from them about the Bore and the s.26G direction and the information which she received in response.
40. In the circumstances of this matter, I accept that the Legal Officer carried out her review, for the sole purpose of giving legal advice and assistance to the A/CEO of the agency, in response to his request for advice in relation to the issues raised in the complainant's letter of 28 August 2003 and his legal advisers' letter of 29 August 2003 and, in particular, the request that the A/CEO exercise his power under s.26G(2b) of the RIWI Act and revoke the notice issued under s.26G of that Act.

41. Documents 1 and 2 are copies of emails sent by the Legal Officer to officers of the agency, seeking information from them in order to assist her in the course of her inquiries, together with the information she received from those officers, in response to those emails. Documents 3-5 are handwritten files notes which I am satisfied were written by the Legal Officer during the course of her inquiries.
42. On the basis of the evidence presently before me, I am satisfied that Documents 1 and 2 consist of confidential communications between the Legal Officer (a legal adviser) and officers of the agency (the “client”) which were brought into existence for the purpose of providing legal advice to the A/CEO of the agency. I am also satisfied that Documents 3, 4 and 5 consist of file notes made by the Legal Officer – which contain a record of privileged communications between her and several officers of the agency (the “client”) in relation to the information sought by the Legal Officer – to enable her to provide legal advice to the A/CEO of the agency.

**Finding**

43. I find that Documents 1-5 are, or record, communications made for the dominant purpose of giving legal advice to the A/CEO of the agency and, therefore, those documents would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that Documents 1-5 are exempt under clause 7 of Schedule 1 to the FOI Act

**The discretion to disclose exempt matter**

44. Pursuant to s.3(3) of the FOI Act, an agency has the sole discretion to give access to documents, including documents that are technically exempt, where that can properly be done. The agency has not been prepared to exercise its discretion on this occasion. I do not have such a discretion. Section 76(4) of the FOI Act expressly prohibits me from making a decision to the effect that access is to be given to a document if it is established that the document is an exempt document. Therefore, I can only deal with the question of whether the documents are exempt under clause 7, as claimed by the agency and, for the reasons set out above, I am of the view that Documents 1-5 are exempt under clause 7 as claimed by the agency.

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