

OFFICE OF THE INFORMATION COMMISSIONER (WA)

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

COMPLAINT Nos: F0041998 and F0051998

DECISION No: D0111998

PARTIES: Zoran KILPA

Complainant

INSURANCE COMMISSION OF WESTERN AUSTRALIA

Respondent

No. of documents in dispute: 11

Exemption clause(s): Clause 7

Mr Kilpa ('the complainant') is an employee of the Western Australia Museum ('the Museum'). In July 1997, he lodged a workers' compensation claim with the Museum. Under the provisions of the *Workers' Compensation and Rehabilitation Act 1981*, the Museum referred his claim to its insurers, the Insurance Commission of Western Australia ('the agency'). By two letters both dated 29 October 1997, the complainant lodged two access applications with the agency seeking access under the *Freedom of Information Act 1992* ('the FOI Act') to various documents submitted by the Museum to the agency concerning his workers' compensation claim.

I understand that the agency has 14 days in which to make a decision on liability in respect of workers' compensation claims. In this matter, because of the nature of the claim, a firm of investigators conducted further inquiries on behalf of the agency's solicitors. The firm provided a report to the agency's solicitors and, on the basis of that report, the solicitors advised the agency in respect of the complainant's claim. The correspondence between the agency, its solicitors and the firm conducting the investigation forms the subject matter of the complainant's access applications.

The agency determined that the two access applications were related and dealt with them in one notice of decision. The agency identified 31 documents as falling within the ambit of the requests and provided access to 23 of those documents. The agency refused access to 8 documents on the ground that those documents are exempt under clause 7 of Schedule 1 to the FOI Act. The agency's initial decision was confirmed following internal review. Thereafter, on 7 January 1998, the complainant lodged two complaints with the Information Commissioner seeking external review of the agency's decisions.

As both complaints deal with similar issues, this decision summary contains my decisions and my reasons in respect of both complaints.

Review by the Information Commissioner

I obtained the disputed documents from the agency. Inquiries were made by a member of my staff in relation to this matter. As a result of further inquiries and discussions between my office and the agency, the agency released 4 documents to the complainant, being attachments to one of the disputed documents.

After considering the material before me, on 19 March 1998, I informed the parties in writing of my preliminary view of the complaints, including my reasons. It was my preliminary view that the disputed documents would be privileged from production in legal proceedings on the ground of legal professional privilege, and therefore exempt under clause 7 of Schedule 1 to the FOI Act. I invited the complainant to reconsider his complaints in light of my preliminary view. Nothing further was received from the complainant. Therefore, I have not been dissuaded from my preliminary view that the disputed documents are exempt under clause 7 of Schedule 1 to the FOI Act. A summary of my reasons follows.

The disputed documents

There are 11 documents in dispute consisting of 8 documents and 3 attachments to one of those documents. Those documents are described below using the same numbering used by the agency in its schedule of documents provided to the complainant.

Documents 7, 11, 12, 20, 24, 25, 30 and 31 are all copies of letters between the agency and its solicitors, and the solicitors and a third party. Document 30 comprises 31 pages and is a letter dated 30 October 1997 containing a report and is addressed to the agency's solicitors. There are 7 attachments to that report but only those listed below remain in dispute.

- Attachment 2 - a handwritten copy of a facsimile transmission dated 30 October 1997 from the agency to a third party;
- Attachment 6 - an unsigned and undated draft statutory declaration by a third party; and
- Attachment 7 - a signed statutory declaration dated 27 October 1997 by a third party.

The exemption – Clause 7 Legal Professional privilege

Clause 7 of Schedule 1 to the FOI Act provides that “[m]atter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.”

Legal professional privilege applies to, amongst other things, any confidential communication between a client (or an agent of the client) and his or her professional legal adviser acting in a professional capacity (or an agent of the legal adviser) and for the sole purpose of obtaining or giving legal advice or assistance. It also extends to documents between legal advisers and third parties, if the documents are prepared for the sole purpose of current or anticipated litigation with a view to obtaining legal advice as to the litigation or evidence to be used in it or information which may result in the obtaining of such evidence.

Having examined Documents 7, 11, 12, 20, 24, 25, 30 and 31 and Attachments 2, 6 and 7, I consider that those documents are communications of the type referred to above. Documents 7, 12, 20, 25 and 31 are confidential communications between the agency and its legal adviser for the sole purpose of the agency seeking, and the legal adviser giving, legal advice. In my opinion, they clearly would be privileged from production in legal proceedings on the ground of legal professional privilege.

Documents 11, 24 and 30 are confidential communications between the legal adviser and a third party. Although it may be that those documents were prepared for the purpose of reasonably contemplated litigation, on the material before me, I cannot be entirely satisfied that that was the case. However, I consider that in any event they would be subject to legal professional privilege on the basis that the third party was “an agent by direction” and the third party’s communication with the legal adviser is considered to be a communication between the agency and the legal adviser.

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

The exemption provided by clause 7 is not limited by a public interest test. Therefore, the public interest factors for and against disclosure do not arise for my consideration. Accordingly, I find that the disputed documents are exempt under clause 7 of Schedule 1 to the FOI Act. I confirm the decision of the agency to refuse access to those documents.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER
28th April 1998