

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

**File Ref: F2004025
Decision Ref: D0122004**

Participants:

David Biron
Complainant

- and -

Department of Health
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – legal advice – salaried legal officers – clause 7(1) – legal professional privilege – solicitor/client relationship – privileged communications – waiver of privilege – clause 7(2) - limit on exemption - internal manuals.

Freedom of Information Act 1992 (WA): sections 76(8), 95 and 97; Schedule 1, clauses 7(1) and 7(2)

Esso Australia Resources Ltd v The Commissioner of Taxation (1999) 74 ALJR 339

Waterford v The Commonwealth of Australia (1987) 163 CLR 54

Mann v Carnell (1999) 201 CLR 1

Lovegrove Turf Services Pty Ltd & Another v Minister for Education [2003] WASC 213

Trade Practices Commission v Sterling [1979] 36 FLR 244

Re Post Newspapers Pty Ltd and City of Nedlands [1999] WAICmr 20

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

23 June 2004

REASONS FOR DECISION

1. Mr Biron ('the complainant') seeks external review by the Information Commissioner of a decision of the Department of Health ('the agency') to refuse access to certain documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. By letter dated 3 November 2003, the complainant made an access application to the agency, seeking access to "*ALL correspondence, papers, notes and memos from the Department of Health since January 1st 2003 relating to the control of domestic smoke nuisance, and the application of the 1911 Health Act in Metropolitan Perth.*"
3. The agency made its decision on access on 9 December 2003. The agency identified 27 documents as falling within the scope of the complainant's access application. The agency decided to give the complainant full access to 22 documents and access to an edited copy of one document, and refused him access to 4 documents. The agency waived the charge for time taken by agency staff dealing with the application (\$90), but imposed a charge of \$12 to cover the cost of photocopying the 110 folios that it had decided to give the complainant.
4. By letter dated 19 December 2003, the complainant sought internal review of all aspects of the initial decision except that part of the decision to give him access to an edited copy of one document. The complainant also claimed that the agency had failed to identify and deal with some additional documents.
5. The agency confirmed the initial decision on internal review. Thereafter, the complainant made a complaint to the Information Commissioner against that part of the agency's decision which was to refuse him access to three documents (Documents 2, 7 and 27), for which the agency claimed exemption under clause 7 of Schedule 1 to the FOI Act. The complainant did not seek to make a complaint against the decision of the agency to refuse access to the fourth document and he did not continue to claim that there are missing documents. Finally, although he commented about the charges imposed, the complainant did not seek to have that issue dealt with on external review. In light of the above, the scope of the complaint is limited to the decision of the agency to refuse the complainant access to Documents 2, 7 and 27.

REVIEW BY THE A/INFORMATION COMMISSIONER

6. I obtained from the agency the disputed documents and the FOI file maintained by the agency in respect of the complainant's access application. I have examined those documents. I have considered the complainant's submissions and I have considered the additional information given to me by the agency in respect of this complaint.

7. On 10 May 2004, I informed the parties, in writing, of my preliminary view of this complaint and my reasons, on the basis of the material then before me. It was my preliminary view that the disputed documents are exempt under clause 7 of Schedule 1 to the FOI Act. The complainant subsequently confirmed that he wished to pursue his complaint and he provided me with further submissions.

THE DISPUTED DOCUMENTS

8. There are three documents in dispute. Those documents are briefly described as follows:

Document 2 Copy of letter dated 10 September 2003 from Senior Assistant Crown Solicitor, Crown Solicitor's Office, to Manager, Legal Services, Department of Environment ("DoE") (2 pages).

Document 7 Memorandum dated 21 July 2003 from Professional Assistant, Crown Solicitor's Office, to Deputy Crown Solicitor, Crown Solicitor's Office (10 pages).

Document 27 Copy letter dated 11 March 2003 from Senior Project Officer (Legislation), Department of Health, to Deputy Crown Solicitor (3 pages).

Clause 7 – Legal professional privilege

9. 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 made 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.
10. An agency may also claim the 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: *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54. The exemption in clause 7 is not limited by a public interest test and, therefore, the question of whether disclosure of the disputed documents would be in the public interest does not arise for my consideration.

The agency's claims

11. The agency claims that the disputed documents are exempt under clause 7 because they comprise communications between a legal adviser and a client for the purpose of the provision of legal advice to the client. Therefore, the agency claims, the documents are of a kind that is exempt under clause 7 of Schedule 1 to the FOI Act.

12. Further, the agency states that it has consistently applied this exemption where it is available in order to preserve the confidentiality of legal advice and the principle of legal professional privilege.

The complainant's submissions

13. In his application for internal review, the complainant submitted that the agency's claim for exemption under clause 7 "*acts against the overriding interests of the West Australian Public, as these suppressed documents illustrate clearly how the Health Department while refusing to properly stand behind and ensure the proper operation of the 1911 Health Act, at the same time has been planning their amendment without any regard to their non operation and the effect that has had on the health of amongst others, [the complainant's] family*".
14. In his application for external review, the complainant submitted that the agency has claimed exemption under clause 7 "*to operate it in a blanket fashion to suppress all the legal advice it sought in relation to the operation of the 1911 Health Act and its control of nuisance smoke not issuing from the chimney of the primary residence.*"
15. The complainant further submits that "[c]lause 7 makes it clear that this is neither the intention of these regulations nor how this power should be routinely interpreted by the inclusion of sub paragraph 2 which refers explicitly to the internal manual(s) of agencies like the Health Department."
16. Finally, as I understand it, the complainant submits that the documents are internal manuals of the agency as defined in s.95 and are therefore subject to the limit in clause 7(2) and not exempt under clause 7(1). He submits that "[t]he definition of Internal manuals for the purpose of these regulations are made at length, and are deliberately made as broad as possible in order to forestall ANY Government Departments from improperly seeking to cover up ANY failure to properly enforce State Laws."

Consideration

Document 2

17. Having examined Document 2, it appears to me to be a confidential communication between a legal adviser (the Crown Solicitor's Office) and its client (DoE) made for the dominant purpose of giving legal advice. Therefore, on its face, Document 2 appears to be a document of the kind that may attract legal professional privilege.
18. However, Document 2 is a copy document that the agency received from DoE and the contents of that document were discussed at a meeting of the "Haze Reduction Working Group" on 24 September 2003. I understand that the Haze Reduction Working Group is, in the main, made up of officers from the agency and DoE, together with representatives from selected local government agencies.

19. In light of the use of the document by officers of an agency other than the client agency, it is necessary to consider whether the privilege that attaches to Document 2 may have been waived and, therefore, whether the document may not be exempt as claimed.
20. The agency has submitted the following information:
- Document 2 was faxed from DoE to the agency on an impliedly confidential basis. Usual practice at DoE is to send out such legal advice on a privileged and confidential basis. Disclosure of the overall outcome of legal advice is considered acceptable but not disclosure of the specific detail of that advice. On this occasion legal professional privilege was extended in relation to Document 2 for the limited purpose of maintaining government operations.
 - The agency officer who received Document 2 states his recollection that the fax was sent and received on a confidential basis.
 - The original of Document 2 is held by the DoE. Document 2, the copy received by facsimile at the agency, is held on an internal file of the agency.
 - Document 2 was placed on the table at the meeting of the Haze Reduction Working Group and the contents discussed in the discussion on a future regulatory approach to wood heater smoke control. No other copies were tabled.
 - There are no written instructions, apart from the "Unintended Recipients" instructions printed on the fax coversheet, that expressly restrict disclosure of Document 2. However DoE advises that there was an implied condition of confidentiality attached to Document 2 as described in the first dot point above. DoE's advice to the agency is that legal professional privilege is waived only to the extent of the information contained in Documents 9 and 11 (both of which have been disclosed) but not to the specific content of Document 2.
21. In the circumstances of this matter, I do not consider the disclosure of Document 2 by DoE to the agency for the purpose of discussions of the Haze Reduction Working Group to have been an act by DoE or the agency which amounted to a waiver of the privilege attaching to Document 2.
22. Waiver occurs when the holder of the privilege (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: see *Goldberg v Ng* (1995) 185 CLR 83 at pp.95 and 106.

23. A waiver of privilege may be express or implied, in the sense that it is deliberate or inadvertent. Express waiver is the intentional disclosure of privileged material to persons outside the privileged relationship of client and legal adviser. Following the decision of the High Court of Australia in *Mann v Carnell* (1999) 201 CLR 1, the Supreme Court of Western Australia in *Lovegrove Turf Services Pty Ltd & Another v Minister for Education* [2003] WASC 213 at [15], after a careful analysis of the relevant cases, adopted the following as the test to be applied in determining whether there has been an implied waiver of privilege:

“Waiver at common law occurs where the party entitled to the privilege performs an act which is inconsistent with the maintenance of the confidentiality, assessment of such inconsistency being informed, where necessary, by considerations of fairness: though the assessment is not by reference to some overriding principle of fairness operating at large.”

24. Both express and implied waiver may involve a general or a limited waiver of privilege. In *Mann v Carnell* at [30] – [32], the High Court held that waiver is not established merely by voluntary disclosure to a third party, for example, for a limited and specific purpose. In that case, a disclosure to a member of the Legislative Assembly by the Chief Minister of the Australian Capital Territory (‘the ACT’) of legal advice obtained by the ACT in relation to certain litigation, did not amount to waiver, since such conduct was not inconsistent with the confidentiality which the privilege served to protect.
25. In my view, the present case is one in which the DoE has made an express disclosure of privileged information for a limited and specific purpose. I accept that the disclosure was made for the specific and limited purpose of advising the agency in relation to the deliberations of the Haze Reduction Working Group. In my opinion, the circumstances do not indicate any intention on the part of DoE to waive the privilege that attaches to Document 2. It is clear from the inquiries by my office that it was given to the agency for the specific and limited purpose of discussion at the multi-agency meeting of the Haze Reduction Working Group and not for any other purpose.
26. Having regard to all of the material currently before me, I am satisfied that Document 2 is a confidential communication between a client and its legal adviser, which was made for the dominant purpose of giving the DoE legal advice. I am also satisfied that the privilege has not been waived and, therefore, I consider that Document 2 would be privileged from production in legal proceedings on the ground of legal professional privilege.

Documents 7 and 27

27. Document 27 is a request for legal advice from an officer of the agency to the Crown Solicitor’s Office. It was clearly, in my view, a confidential communication for the express purpose of the agency seeking legal advice from its legal adviser.

28. Document 7 is a memorandum from a professional assistant employed in the Crown Solicitor's Office to a Deputy Crown Solicitor and was an enclosure in a letter dated 21 July 2003 from the Deputy Crown Solicitor to the Senior Project Officer (Legislation), Department of Health (Document 8), which has been released. Together, Document 8 and Document 7 consist of the response to the request for legal advice contained in Document 27.
29. With his covering letter to the agency (Document 8), the Deputy Crown Solicitor enclosed a copy of Document 7 and stated that he endorsed and adopted the views of the Professional Assistant. For the purpose of giving legal advice to his client, I am satisfied that the Deputy Crown Solicitor has given the advice as contained in Document 7 even though he is not the author of Document 7.
30. In *Trade Practices Commission v Sterling* [1979] 36 FLR 244, Lockhart J held, at pages 245-246, that legal professional privilege 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) ...
 - (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 ...;*”.
31. In my view, Document 7 comes within (a) (as it forms part of the correspondence by which the advice was provided to the agency), (c) and perhaps also (d) of the categories referred to in *Sterling's* case. On that basis, I find that Documents 7 and 27 would be privileged from production in legal proceedings on the ground of legal professional privilege.

Limit on exemption

32. Most of the complainant's submissions amount to public interest arguments for disclosing the disputed documents. However, as stated above, the exemption in clause 7 is not limited by a public interest test and, therefore, the question of whether disclosure of the disputed documents is in the public interest does not arise for my consideration.

33. The only limit on the exemption in clause 7(1) is that provided by clause 7(2). Clause 7(2) provides that matter that appears in an internal manual of an agency is not exempt under subclause (1). In his submissions, the complainant appears to claim that the limit on exemption in clause 7(2) applies in this case. Although it is not entirely clear to me, I understand the complainant's submission to be that the definition of "internal manual" is so broad that it would include the disputed documents. In particular, the complainant submits that:

" ... all three of these documents quite clearly contain interpretations, rules, guidelines, statements of policy, practices or precedents relating to nuisance smoke, that the control of nuisance smoke is covered by administrative schemes and that all these documents are likely to mention such schemes, that all three of these documents contain statements of the manner or intended manner, of the administration of written laws – including section 182 of the 1911 Health Act as clearly stated – and other administrative schemes, and that all three of these documents describe procedures to be followed in investigating any contravention or possible contravention of written laws – which include the 1911 Health Act and others, and other administrative schemes, and that all of these documents have been used quite clearly by the Health Department in connection with the performance of such of its functions as affect or are likely to affect my rights, my privileges or other benefits or obligations, penalties or other detriments, to which I am or may become entitled, eligible, liable or subject, as laid out in considerable length in section 95 of the FOI Act – Internal Manuals".

34. Section 95 of the FOI Act defines "internal manual" as follows:

"95. Internal manuals

A reference in this Act to an "internal manual", in relation to an agency, is a reference to —

- (a) a document containing interpretations, rules, guidelines, statements of policy, practices or precedents;*
- (b) a document containing particulars of any administrative scheme;*
- (c) a document containing a statement of the manner, or intended manner, of administration of any written law or administrative scheme;*
- (d) a document describing the procedures to be followed in investigating any contravention or possible contravention of any written law or administrative scheme; or*
- (e) any other document of a similar kind,*

(other than a written law) that is used by the agency in connection with the performance of such of its functions as affect or are likely to affect rights, privileges or other benefits, or obligations, penalties or other detriments, to which members of the public are or may become entitled, eligible, liable or subject.”

35. Section 97 requires that agencies make each of their internal manuals available for inspection and purchase by members of the public, although agencies are permitted to delete exempt matter from those copies.
36. While it could be argued that the documents containing the advice contain “interpretations”, there is nothing before me to establish that they are “... *used by the agency in connection with the performance of such of its functions ...*” as are described in s.95. It appears to me from the material before me that the advices were obtained by the agencies and provided to the working group to inform its consideration and decision-making processes in developing proposals for policies and perhaps guidelines. It is those policies and guidelines, if and when they are accepted and adopted, which will be “used by agencies in connection with the performance of their functions” relating to the control of smoke emissions, among other things. It is those documents – such as, for example, the final version of the “Wood Heater and Firewood Information Kit for Environmental Health Officers”, being developed by the DoE in consultation with the Haze Reduction Working Group – that will constitute internal manuals, not the source documents from which they are developed.
37. The word “manual” is defined by the Concise Oxford Dictionary, 8th edition, as meaning, among other things, “... *a book of instructions, esp. for operating machine or learning a subject; a handbook ...*”. In the public sector, agencies regularly compile internal manuals in respect of particular aspects of their functions for the purpose of guiding their officers in the discharge of those functions. From my experience in the public sector, I am aware that such manuals are generally compiled by an agency from a range of sources of information for the purpose of providing advice to its officers that incorporates all the factors that need to be taken into account when exercising the relevant function. A manual may contain one, or a combination, of the kinds of information detailed in section 95. My understanding is that such internal manuals are intended to be an ongoing guide and are generally available to any staff who may have occasion to exercise a particular function. Clearly, in my opinion, that is what is contemplated by the FOI Act, given the requirement in section 97 to make those manuals publicly available.
38. In my view the definition of “internal manual” in section 95 does not extend to a confidential communication between an agency and its legal advisers for the purpose of obtaining and giving legal advice on a particular question. It may be that a guideline or interpretation or a policy or practice may subsequently be formulated and produced as, or included in, a manual for the guidance of the agency’s officers on the basis of the advice received and interpretations in the manual may be based on that advice.

39. However, in my view, that definition does not include the advice itself. In that regard, I agree with the former Commissioner's decision in *Re Post Newspapers Pty Ltd and City of Nedlands* [1999] WAICmr 20 (2 August 1999) that a letter containing legal advice to the City of Nedlands from its solicitors on the interpretation of certain regulations was not subject to the limit in clause 7(2) and was exempt under clause 7(1). As permitted by s.76(8) the former Commissioner published only a summary of her decision in that case. On page 3 of the published summary, the former Commissioner said:

"In the normal course of events, I would expect that internal manuals of any agency would contain administrative instructions, rules or guidelines that may very well be based on legal advice. However, that has not yet occurred in respect of this matter".

40. Clearly, the former Commissioner did not consider that the legal advice itself could be an internal manual; she stated that her inquiries had established that there were *"no administrative documents in the agency falling within the definition of an "internal manual" in s.95 of the FOI Act that contain, replicate or summarise the contents of the legal advice given to the agency in [that] instance"*.
41. I have considered the documents in dispute in this matter. Clearly, there is no question at all that Document 27 could be an "internal manual" even if I were to accept the complainant's argument about the definition of that term, which I do not. Document 27 is a request to the Deputy Crown Solicitor for legal advice on particular questions. It does not contain interpretations, rules, guidelines, statements of policy, practices or precedents or any other information of the kind described in s.95.
42. Document 7 is a memorandum from an officer of the Crown Solicitor's Office to the Deputy Crown Solicitor providing advice in relation to the questions raised by the agency in Document 27. Document 2 is a letter from a Senior Assistant Crown Counsel to the DoE containing legal advice in response to a memorandum from the DoE. Neither of those documents contains, as the complainant suggests, *"... statements of the manner or intended manner, of the administration of written laws ..."*. They do not contain *"... rules, guidelines, statements of policy, practices or precedents ..."* as asserted by the complainant, and neither of them contains a description of *"... procedures to be followed in investigating any contravention or possible contravention of written laws ..."* as claimed by the complainant. They contain legal advice on particular questions.
43. It may well be that the agency or the DoE, on the basis of that advice, forms a view and takes a policy position as to the procedure to be followed by their officers in the performance of a relevant function of either, and subsequently promulgates rules, guidelines and so forth in respect of the matter and internally publishes them as, or includes them in, an internal manual. However, my inquiries reveal that that is not the case at present. Were either of the agencies to do that, then it is that subsequent document that would be

publicly available as an internal manual. If any of the legal advice contained in those two documents were reproduced or summarised in the manual, then that reproduction or summary contained in the manual would be subject to the limit in clause 7(2) and would not be exempt under clause 7(1). However, in my opinion, that limit would not extend to the original letters containing the advice, although a question may arise whether privilege has been waived by virtue of the inclusion of the advice in a publicly available document.

44. For those reasons, I consider that the complainant's arguments that each of the disputed documents is an internal manual is misconceived. Clearly, that is not the intention of s.95. Nor, in my view, do such documents fall within the definition in s.95. Further, such an interpretation would mean that every letter of legal advice provided to an agency would be an "internal manual" of the agency and therefore could not be exempt under clause 7. Again, clearly that is not the intention of the FOI Act, which provides a specific exemption for matter that would be privileged from production in legal proceedings on the ground of legal professional privilege. In a number of decisions to date, both the former Commissioner and the Supreme Court of Western Australia, on appeal, have accepted that agencies are entitled to claim clause 7 for privileged communications between agencies and their legal advisers.
45. Accordingly, I find that the limit on exemption in clause 7(2) is not applicable and, therefore, I find that the disputed documents are exempt under clause 7 of Schedule 1 to the FOI Act.
