

JOHNSON AND SGIC

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

**File Ref: 95001
Decision Ref: D01395**

Participants:

Terence Hurley Johnson
Complainant

- and -

**State Government Insurance
Commission**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - minutes of meetings of Board of Commissioners of agency - clause 6 - advice and opinion obtained and recorded for the purpose of the deliberative processes of the Board of Commissioners of the agency - documents relating to settlement negotiations between the parties - contrary to the public interest to reveal upper limit of negotiating range.

FREEDOM OF INFORMATION - clause 7 - legal professional privilege - substance of legal advice given by the agency's legal adviser - confidential communication between the agency and its legal advisers made for the "sole purpose" of obtaining legal advice.

FREEDOM OF INFORMATION - clause 3(1) - name of person giving legal advice - name and employment position of an officer of another agency - effect of clause 3(3).

FREEDOM OF INFORMATION - clause 11(1)(c) and 11(1)(d) - meaning of substantial.

Freedom of Information Act 1992 (WA) ss. 13(1)(b); 30; 68(1); 72(1)(b); 75(1);
Schedule 1 clauses 3(1), 3(3), 6(1), 6(2), 6(3), 7(1), 11(1)(c), 11(1)(d).

Freedom of Information Regulations 1993 (WA) regulation 9(1).

Freedom of Information Amendment Regulations 1994 (WA) regulation 7.

Freedom of Information Act 1982 (C'wlth) s.36(1)(a)

State Government Insurance Commission Act 1986 (WA) s.5(3)

Eccleston and Department of Family Services and Aboriginal and Islander Affairs
(Information Commissioner, QLD, 30 June 1993, unreported).

Re Waterford and Department of Treasury (No 2) (1984) 5 ALD 588.

Re Read and Public Service Commission (Information Commissioner, WA, 16 February 1994, unreported).

Re Kobelke and Minister for Planning and Others (Information Commissioner, WA, 27 April 1994, unreported).

Re Veale and Town of Bassendean (Information Commissioner, WA, 25 March 1994, unreported).

Re Taylor and Ministry of the Premier and Cabinet (Information Commissioner, WA, 23 December 1994, unreported).

Re Jones and Shire of Swan (Information Commissioner, WA, 9 May 1994, unreported).

Re Jeanes and Kalgoorlie Regional Hospital and Others (Information Commissioner, WA, 7 February 1995, unreported).

Re Guyt and Health Department of Western Australia (Information Commissioner, WA, 16 March 1994, unreported).

Re Weeks and the Shire of Swan (Information Commissioner, WA, 24 February 1995, unreported).

Re Nazaroff and Department of Conservation and Land Management (Information Commissioner, WA, 24 March 1995, unreported).

Grant v Downs (1976) 135 CLR 674.

Harris v Australian Broadcasting Corporation (1983) 78 FLR 236.

Re Healy and Australian National University (Administrative Appeals Tribunal, (C'wlth), 23 May 1985 unreported).

Re James and Australian National University (1984) 2 AAR 327.

DECISION

The decision of the agency of 23 December 1994 is varied. It is decided that Documents A and B are only exempt under Schedule 1 to the *Freedom of Information Act 1992* to the following extent:

- (i) The fourth paragraph of Document A is exempt under clause 7(1);
- (ii) The first three words in the fifth paragraph of Document A are exempt under clause 6(1);
- (iii) The amount appearing in the sixth paragraph of Document A is exempt under clause 6(1);
- (iv) The name disclosing the source of legal advice in paragraph 2 in Document B is exempt matter under clause 3(1); and
- (v) The third paragraph of Document B is exempt under clause 7(1),

and are otherwise not exempt

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

29 May 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the State Government Insurance Commission (SGIC) ('the agency'), to refuse Mr T H Johnson ('the complainant') access to certain documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant was formerly employed by the agency in the position of Manager, Government Insurance. On 5 June 1992, he was involved in a vehicle accident on the Mitchell Freeway. That accident and subsequent events were investigated by the agency and the results of that investigation and certain other information were referred to police for further inquiry. Subsequently, the complainant was charged with, and acquitted of, the offence of making a false declaration as to the number of alcoholic drinks he had consumed prior to the accident.
3. On 18 August 1994, the Managing Director of the agency dismissed the complainant from his position with the agency. That dismissal followed consideration by the Board of Commissioners of the agency ('the Board') of various documents and information at different meetings of the Board.
4. On 31 August 1994, the Board endorsed the action taken by the Managing Director. At subsequent meetings of the Board, it received "update" reports from various officers of the agency as to developments following the complainant's dismissal, and advice in relation to future action.
5. On 28 October 1994, the complainant sought access under the FOI Act to documents consisting of Minutes and Resolutions from meetings of the Board held since, and including, its meeting on 2 June 1994, at which matters concerning the complainant had been discussed.
6. On 9 December 1994, Mr K McAullay, Corporate Secretary of the agency, refused the complainant access to the requested documents on the grounds that they were exempt under clauses 6(1) and 11(1)(c) and (d) of Schedule 1 to the FOI Act. The complainant sought internal review of that decision on 13 December 1994. That review was carried out by Mr V Evans, Managing Director of the agency. On 23 December 1994, Mr Evans confirmed the earlier decision and advised the complainant that the requested documents were exempt under clause 6(1) and clause 11(1)(c) and (d) of Schedule 1 to the FOI Act.
7. On 30 December 1994, the complainant applied to the Information Commissioner for external review of the agency's decision that the requested documents were exempt under clauses 6(1) and 11(1)(c) and (d) of Schedule 1 to the FOI Act.

REVIEW BY THE INFORMATION COMMISSIONER

8. On 11 January 1995, in accordance with my obligation under s.68(1) of the FOI Act, the agency was notified that I had accepted this complaint for review. Pursuant to my authority under s.75(1) and s.72(1)(b) I sought the production to me of the originals of the documents in dispute and the file maintained by the agency in respect of the complainant's access application. As I considered that the notices to the complainant dated 9 December and 23 December 1994, which purported to be notices issued under s.13(1)(b) of the FOI Act, did not comply with the requirements of s.30 of the FOI Act, I also required the agency to provide further information to justify its decision to deny the complainant access to the requested documents. The additional information and a schedule listing and describing the documents in dispute, together with the documents required, were provided to my office on 18 January 1995. Submissions were subsequently invited and received from both parties.
9. Although conciliation between the parties was not considered an option in this instance, following receipt of my preliminary view on 8 February 1995, the agency released to the complainant certain documents which, in my preliminary view, were not exempt. However, the agency maintained its claims for exemption under clauses 6(1) and 11(1)(c) and (d) of Schedule 1 to the FOI Act for certain parts of two remaining documents. I also formed a preliminary view that, although it had not been argued by the agency, the fourth paragraph of Document A and the third paragraph of Document B are exempt under clause 7 of Schedule 1 to the FOI Act. The complainant was informed of my view but chose, nonetheless, to pursue his complaint in respect of all the disputed paragraphs of the documents.

THE DISPUTED DOCUMENTS

10. The disputed documents are described as follows:
 - Document A** that part of the Minutes of the 94th Meeting of the Board of Commissioners held on 28 September 1994 which records item 249/94.
 - Document B** that part of the Minutes of the 93rd Meeting of the Board of Commissioners held on 31 August 1994 which records item 215/94.
11. The agency maintains its claims for exemption for the final 3 paragraphs of item 249/94 (Document A) and the second and third paragraphs of item 215/94 (Document B) only.

THE EXEMPTIONS

(a) Clause 6 - Deliberative processes

12. The agency claimed exemption under clause 6(1) of Schedule 1 to the FOI Act for the last 3 paragraphs in Document A and for the second and third paragraphs in Document B. Clause 6(1) provides:

"6. *Deliberative processes*

Exemptions

(1) Matter is exempt matter if its disclosure -

(a) would reveal -

(i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or

(ii) any consultation or deliberation that has taken place,

in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency;

and

(b) would, on balance, be contrary to the public interest."

13. To establish an exemption under clause 6, the agency must satisfy the requirements of both paragraphs (a) and (b) of this exemption. Matter which is purely factual, or which is contained in internal manuals of the agency, is excluded from the ambit of the exemption by sub-clauses (2) and (3). Only when paragraph (a) of the exemption is satisfied is it necessary to consider paragraph (b) and whether disclosure of the documents would, on balance, be contrary to the public interest.
14. The key words in clause 6(1)(a) are the "*deliberative processes...of an agency*". The meaning of the phrase "deliberative processes" has been considered in a number of cases based on the equivalent section in the Commonwealth *Freedom of Information Act 1982* (s.36(1)(a)). The relevant authorities were extensively canvassed by the Queensland Information Commissioner in *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (30 June 1993, unreported) where the relevant provision is s.41(1).
15. In my view, the oft cited passage in *Re Waterford and Department of Treasury* (No 2) (1984) 5 ALD 588 in relation to the equivalent Commonwealth provision applies to a consideration of clause 6(1) of the FOI Act in Western Australia and

the meaning of the words "deliberative processes". In that case the Commonwealth Administrative Appeals Tribunal said, at paragraphs 58-60:

"As a matter of ordinary English the expression 'deliberative processes' appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing on one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. Only to the extent that a document may disclose matter in the nature of or relating to deliberative processes does s.36(1)(a) come into play..."

It by no means follows, therefore, that every document on a departmental file will fall into this category. Furthermore, however imprecise the dividing line may appear in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of the agency..."

It is documents containing opinion, advice, recommendations etc. relating to internal processes of deliberation that are potentially shielded from disclosure...Out of that broad class of documents, exemption under s.36 only attaches to those documents the disclosure of which is 'contrary to the public interest'..."

16. In a number of my previous decisions, I have accepted that statement as correct for Western Australia: *Re Read and Public Service Commission* (16 February 1994, unreported), at para 26; *Re Kobelke and Minister for Planning and Others* (27 April 1994, unreported), at para 40; *Re Veale and Town of Bassendean* (25 March 1994, unreported), at para 13; *Re Taylor and Ministry of the Premier and Cabinet* (23 December 1994, unreported), at para 23; *Re Jones and Shire of Swan* (9 May 1994, unreported), at para 16; *Re Jeanes and Kalgoorlie Regional Hospital and Others* (7 February 1995, unreported), at para 13. I reiterate that view.
17. The agency claimed that meetings of the Board are a deliberative process of the agency. Further, it was the agency's view that it would be contrary to the public interest to release details of advice and opinion obtained or prepared for deliberations of the Board in relation to this matter because to do so would undermine the negotiation process, which was on-going, in order to settle the complainant's claim against the agency. In particular, the agency claimed it was contrary to the public interest to disclose the amount and terms upon which the agency was prepared to settle the complainant's claim.
18. The complainant disputed the agency's claims on two bases. Firstly, he claimed that the sum of money authorised by the Board as payment in settlement of his

claim was an outcome of the deliberative process and that the exemption was aimed at the protection of the process itself. Secondly, he submitted that it was in the public interest for his claim to be settled and that full disclosure of the amount would achieve that purpose.

19. Section 5(3) of the *State Government Insurance Commission Act 1986* (the SGIC Act) provides that the Board of Commissioners is a governing body of the agency with authority, *inter alia*, to exercise and perform the powers, functions and duties conferred or imposed on the agency under the SGIC Act. For this reason, and from my examination of the documents, I am of the view that the requested documents satisfy the requirements of paragraph (a) of clause 6(1) of Schedule 1 to the FOI Act in so far as they contain advice and opinion that has been obtained and recorded for the purpose of the deliberative processes of the Board. However, both paragraphs (a) and (b) of clause 6 must be satisfied in order to establish the exemption. Accordingly, whether the documents are exempt under clause 6 will depend upon whether their disclosure would, on balance, be contrary to the public interest.

Document A

20. Although the agency did not raise the point, on the face of the document itself, it is clear that the fourth paragraph of document A records a confidential communication between the Board and its legal adviser for the sole purpose of obtaining legal advice. Therefore, I consider that paragraph would be privileged from production in legal proceedings on the ground of legal professional privilege. Although it may be argued that it would, therefore, be contrary to the public interest to disclose that matter, I do not consider it necessary to make any such finding. The public interest in maintaining the protection of matter that would be privileged from production in legal proceedings on the ground of legal professional privilege is recognised and enshrined in clause 7(1) of Schedule 1 to the FOI Act.
21. Clause 7 provides:

"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)."*

22. The exemption in clause 7 is not limited by a "public interest test". In my view, that exemption recognises the public interest in the maintenance of the principle of legal professional privilege as outweighing any other competing public interest.
23. In a number of my previous formal decisions, I have discussed the principle and application of legal professional privilege: *Re Guyt and Health Department of Western Australia* (16 March 1994, unreported) at paragraphs 11-18; *Re Read and Public Service Commission* (16 February 1994, unreported) at paragraph 65; *Re Weeks and the Shire of Swan* (24 February 1995, unreported) at paragraphs 15-20; *Re Nazaroff and Department of Conservation and Land Management* (24 March 1995, unreported) at paragraphs 15-19. It is clearly established law in Australia that confidential communications passing between a client and his legal adviser 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: *Grant v Downs* (1976) 135 CLR 674.
24. Given that I have found that the fourth paragraph of document A records a confidential communication between the agency and its legal advisers made for the sole purpose of obtaining legal advice, it is my view that that paragraph would, therefore, be exempt from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that paragraph exempt under clause 7(1) of Schedule 1 to the FOI Act, and it is not necessary that I address the claims that it is exempt under clause 6 or clause 11(1)(c) and (d).
25. Paragraph five of Document A reveals the position taken by the Board following the conference before the Public Service Arbitrator. It was the view of the Public Service Arbitrator that a settlement between the parties was the best option. In my view, it would, on balance, be contrary to the public interest to disclose the preferred position of the Board, as disclosure could reasonably be expected to affect the outcome of the dispute between the parties. Therefore, I find that the first three words in paragraph five of Document A are exempt matter under clause 6(1) of Schedule 1 to the FOI Act.
26. As to the sixth paragraph of Document A, I recognise a public interest in negotiated settlements of disputes between parties, particularly where those disputes involve employees and employers or former employers. However, there is also a public interest in government agencies treating their employees fairly. In my view, it would be contrary to the public interest for the agency to disclose matter which would reveal the upper limit of its negotiating range. The fundamental premise behind a negotiated settlement is that both parties agree to settle their dispute for an amount that is fair and equitable.
27. The circumstances in this case are different to those that I found existed in my decision in *Re Jones and Shire of Swan* (9 May 1994, unreported). The Shire of Swan in that case argued that the estimated valuations of an applicant's property which were contained in valuation reports should not be provided to the applicant because he would fix on the higher amount as being correct and thus negotiations would be hindered. That result, it was argued, would be contrary to the public interest. However, Mr Jones had become aware of the differing values placed on

- his property from another source. He was seeking access to the documents in question in order to find out the basis upon which the Shire had settled upon the price it had offered Mr Jones for his property.
28. During the course of negotiations to settle the complainant's claims against the agency, the range within which the agency is prepared to settle a claim will become apparent to the complainant. In my opinion, the disclosure of the upper limit could reasonably be expected to affect the likelihood of a negotiated agreement being reached and would, on balance, be contrary to the public interest. I find that the amount appearing in paragraph 6 in Document A is, therefore, exempt under clause 6(1) of Schedule 1 to the FOI Act. The substance of the balance of that paragraph has already been disclosed to the complainant when, with the agency's agreement, a copy of its submission to me was provided to him. Disclosure of that part of the paragraph cannot, therefore, in my view, be contrary to the public interest.

Document B

29. The second paragraph of Document B refers to the source of legal advice to the agency. In my view, the name of the person from whom the advice was obtained is personal information about that person that is, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act, and I find that it is exempt from disclosure. However, the rest of that paragraph, in my view, is not exempt because it consists merely of factual matter, namely, the reason and date of dismissal and the officer making that decision. Although that paragraph also refers to another source of advice, the person referred to is an officer of another agency. His identity and employment position is information that consists of matter prescribed by regulation 9(1) of the *Freedom of Information Regulations 1993*, as amended by regulation 7 of the *Freedom of Information Amendment Regulations 1994*, as matter that is not exempt under clause 3(3).
30. I find that the third paragraph of Document B is exempt under clause 7 of Schedule 1 to the FOI Act because its disclosure would reveal the substance of legal advice given to the Board by its legal adviser and would, in my view, be protected in legal proceedings by legal professional privilege.

(b) Clause 11(1)(c) and (d)

31. Clause 11 of Schedule 1 to the FOI Act provides:

"11. Effective operation of agencies

Exemptions

- (1) *Matter is exempt matter if its disclosure could reasonably be expected to -*

- (a) *impair the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency;*
- (b) *prevent the objects of any test, examination or audit conducted by an agency from being attained;*
- (c) *have a substantial adverse effect on an agency's management or assessment of its personnel; or*
- (d) *have a substantial adverse effect on an agency's conduct of industrial relations.*

Limit on exemptions

(2) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."*

- 31. To establish an exemption under clause 11(1)(c) or (d) the agency must show that disclosure could reasonably be expected to result in a "*substantial adverse effect*" on the management or assessment of its personnel or on an agency's conduct of industrial relations. The requirement that the adverse effect must be "substantial" is an indication of the degree of gravity that must exist before the exemption can be made out: *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236. In the context of the exemption in clause 11(1)(c) and (d), I accept that "substantial" is best understood as meaning "serious" or "significant": *Re Healy and Australian National University* (AAT, 23 May 1985 unreported); *Re James and Australian National University* (1984) 2 AAR 327 at 341.
- 32. On the material before me, the agency has not persuaded me that disclosure of matter in the parts of Documents A and B, which I have found is not exempt under clause 6(1), could reasonably be expected to have an adverse effect, much less a substantial adverse effect, on the management or assessment of personnel or on its conduct of industrial relations. Therefore, I find that those parts of Documents A and B are not exempt under clause 11(1)(c) or (d).
