

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

**File Ref: F1982000
Decision Ref: D0182001**

Participants:

Suzanne Marie Smith
Complainant

- and -

The Ministry of Housing
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to investigation of workers’ compensation claim – clause 3(1) – personal information about third parties – public interest factors for and against disclosure – clause 6(1) – deliberative process – whether disclosure would, on balance, be contrary to the public interest – whether workers’ compensation deliberations adversely affected by premature disclosure – clause 7 – legal professional privilege.

Freedom of Information Act 1992 (WA) ss. 21, 102(3); Schedule 1 clauses 3(1), 3(3), 3(6), 4(3), 6(1) and 7.

Freedom of Information Regulations 1993

Esso Australia Resources Ltd v The Commissioner of Taxation [1999] 74 ALJR 339

Trade Practices Commission v Sterling (1979) 36 FLR 244

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

DECISION

The decision of the agency is varied:

- (i) The whole of Document 19 and the matter deleted from Documents 34 and 62 is exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*;
- (ii) The whole of Document 26 and the matter deleted from Documents 2, 4, 5, 7, 13, 14, 16, 17, 22, 23, 27, 28, 30, 32, 36, 37, 39, 42, 43, 44, 45, 46, 53, 54, 55, 56 and 57 is exempt under clause 7; and
- (iii) Documents 64 and 65 are not exempt under clause 6(1).

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

7 May 2001

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Ministry of Housing ('the agency') to refuse Ms Smith ('the complainant') access to documents requested by her under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant is an employee of the agency who is employed in its regional office at Broome. On 29 March 1999, she made a workers' compensation claim in relation to an incident, which had occurred on 13 November 1998. I understand that her claim was settled on a "Without Prejudice" basis on 29 April 1999.
3. In November 1999, following certain matters at work, the complainant provided the agency with a medical certificate certifying that she was unfit for work for 3 weeks. On 25 January 2000, the complainant signed a "Recurrence of Disability" form in respect of that medical certificate in which she asserted that her sick leave was a result of the events of 13 November 1998, which had given rise to her original workers' compensation claim. I understand that the complainant made a second claim for workers' compensation in November 1999, which has not yet been finalised.
4. Subsequently, in July 2000, the complainant made an application to the agency for access under the FOI Act to the personnel files maintained in respect of her employment, including documents relating to her workers' compensation claim. The agency dealt with the access application in two parts. In respect of the first part, the agency granted the complainant access to edited copies of 6 documents. The agency claimed that the matter deleted from those documents is exempt under clause 6(1) of Schedule 1 to the FOI Act. The agency also refused access to 1 document on the ground that it is exempt under clause 7. In respect of the second part of the access application, the agency granted the complainant access to edited copies of 60 documents and claimed that the matter deleted from those documents is exempt under clauses 3(1), 6(1) and 7 of Schedule 1 to the FOI Act. The agency refused the complainant access to 9 other documents on the ground that those documents are exempt under clauses 3(1), 4(3), 6(1) and 7 of Schedule 1 to the FOI Act. The agency's initial decisions were confirmed following an internal review.
5. On 29 November 2000, the complainant lodged a complaint with the Information Commissioner, seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. I obtained the disputed documents from the agency, together with the FOI file maintained by the agency in respect of the complainant's access application. To assist me in my dealings with this complaint, my Investigations Officer prepared a schedule, listing and describing the documents in dispute. Both the complainant and the agency were provided with copies of that schedule.

7. Following discussions between my Investigations Officer and the complainant, the complainant withdrew her complaint in respect of some of the disputed documents, with the result that 45 documents or parts of documents remained in dispute between the parties.
8. On 14 March 2001, after examining those documents and considering the material before me, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that some of the disputed documents may be exempt, either in full or in part, under clause 7 and that certain matter deleted from some of the documents may be exempt under clause 3(1). However, in respect of the documents for which the agency claimed exemption under clauses 4(3) and 6(1), it was my preliminary view that those documents or parts of documents may not be exempt.
9. The complainant withdrew her request for access to the documents I considered may be exempt under clause 7. The agency responded in writing and released additional documents to the complainant. The agency maintained its claims that the majority of the documents remaining in dispute are exempt, either in full or in part, under clause 6. In addition, the agency also claimed that certain matter in the disputed documents is exempt under clause 7 and offered further reasons in support of its claims for exemption under that clause. The agency maintained its claims that parts of 4 documents are exempt under clause 3(1) and that 1 document is exempt under clause 4(3) and clause 7.
10. I was not entirely satisfied that the agency's reasons established grounds for exemption under clause 7. Therefore, further inquiries were made with the agency and discussions were held with the Senior Assistant Crown Solicitor who had been involved in advising the agency in relation to its management of the complainant's workers' compensation claims. Following those discussions, I was provided with a Statutory Declaration, signed by the Senior Assistant Crown Solicitor, attesting as to background facts and legal advice given by him to the agency in respect of the complainant's workers' compensation claims.
11. The complainant was given a copy of that Statutory Declaration and an edited copy of the agency's submission in response to my preliminary view. My Investigations Officer informed the complainant that, on the basis of the evidence in the Statutory Declaration, it was now my preliminary view that the information deleted from the disputed documents may be exempt under clause 7. The complainant was invited to reconsider her complaint but she made no further written submissions to me and did not withdraw her complaint.

THE DISPUTED DOCUMENTS

12. There are 33 documents remaining in dispute between the parties. Those documents are Documents numbered 2, 4, 5, 7, 13, 14, 16, 17, 19, 22, 23, 26, 27, 28, 30, 32, 34, 36, 37, 39, 42, 43, 44, 45, 46, 53, 54, 55, 56, 57, 62, 64 and 65 in the schedule prepared by my office. The disputed documents consist of internal email messages, file notes, letters and memoranda. The agency claims that Documents 19 and the matter deleted from Documents 34 and 62 is exempt

under clause 3(1); that Document 26 is exempt under clauses 4(3) and 7; that the information deleted from Documents 64 and 65 is exempt under clause 6(1); and that the information deleted from the balance of the disputed documents is exempt under clauses 6(1) and 7.

THE EXEMPTIONS

(a) Clause 3 – Personal information

13. Clause 3, so far as is relevant, provides:

"3. *Personal information*

Exemption

(1) *Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*

Limits on exemption

(2)...

(3) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to -*

(a) *the person;*

(b) *the person's position or functions as an officer; or*

(c) *things done by the person in the course of performing functions as an officer.*

(4)...

(5)...

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

14. In the Glossary in Schedule 2 to the FOI Act, "*personal information*" is defined as meaning "*...information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead-*

(a) *whose identity is apparent or can reasonably be ascertained from the information or opinion; or*

- (b) *who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample."*
15. In my view, the purpose of the exemption in clause 3 is to protect the privacy of individuals, the exemption being a recognition by Parliament of the fact that all government agencies collect and hold a vast amount of important and sensitive private information about individual citizens and that information of that kind should not generally be accessible by other persons without good cause.
16. I have examined Document 19 and the matter deleted from Documents 34 and 62. The disputed matter consists of the names of third parties, opinions about those third parties, and other information of a personal kind relating to the third parties. I am satisfied that that information is personal information as that term is defined in the FOI Act and that it is, on its face, exempt matter under clause 3(1).
17. Clause 3(1) is subject to the limits on exemption in clauses 3(2)-3(6). In the circumstances of this complaint, I consider that only clauses 3(3) and 3(6) are relevant.

Clause 3(3)

18. Clause 3(3) provides that matter is not exempt matter under clause 3(1) merely because its disclosure would reveal, in relation to a person who is or has been, an officer of an agency, prescribed details relating to the person, the person's position or functions as an officer of an agency, or things done by the person in the course of performing functions as an officer of an agency. The prescribed details referred to in clause 3(3) are set out in regulation 9 of the *Freedom of Information Regulations 1993* ('the Regulations'). Regulation 9, so far as is relevant, provides:

"9(1) In relation to a person who is or has been an officer of an agency, details of-

- (a) the person's name;*
- (b) any qualifications held by the person relevant to the person's position in the agency;*
- (c) the position held by the person in the agency;*
- (d) the functions and duties of the person, as described in any job description document for the position held by the person; or*
- (e) anything done by the person in the course of performing or purporting to perform the person's functions or duties as an officer as described in any job description document for the position held by the person,*

are prescribed details for the purposes of Schedule 1, clause 3(3) of the Act."

19. Having examined Document 19, and the matter deleted from Documents 34 and 62, I am satisfied that that matter consists of personal information about third

parties other than the complainant and I am also satisfied that that information is not information of the kind prescribed by regulation 9(1) as being prescribed details for the purpose of clause 3(3). Rather, it consists of information and opinions about the third parties concerned that goes well beyond the kind of information that relates to the duties performed by those third parties as officers of the agency or the positions held by them. In my view, it does not consist of prescribed details of the kind set out in regulation 9(1) and the limit on exemption in clause 3(3) therefore, does not apply.

Clause 3(6)

20. Clause 3(6) provides that matter is not exempt matter under clause 3(1) if its disclosure would, on balance, be in the public interest. Pursuant to s.102(3) of the FOI Act, the complainant bears the onus of persuading me that the disclosure to her of personal information about third parties would be in the public interest.
21. I did not receive any additional submissions from the complainant on that point. However, in her complaint to me, the complainant expressed the view that natural justice was a factor in favour of disclosure and that she was entitled to be given access to documents containing personal information about her.

Public Interest

22. I recognise that there is a strong public interest in maintaining personal privacy and that that public interest may only be displaced by some other stronger countervailing public interest, which requires the disclosure of personal information. I recognise a public interest in the agency being able to obtain information from a variety of sources and people, both inside and outside the agency, in order to properly deal with workers' compensation claims, and for people who provide such information to have confidence that the agency will respect their privacy where the information provided includes personal information about third parties.
23. However, I also recognise that there is a public interest in persons, such as the complainant, being able to exercise their rights of access under the FOI Act. In the circumstances of this complaint, I am satisfied that that public interest has been satisfied, to a large extent, by the number of documents and the amount of material already released to the complainant by the agency. Therefore, I have given less weight to that factor.
24. I also consider there to be a public interest in people obtaining access to documents containing information about them that is held by government agencies. Where the requested documents contain personal information about an access applicant, s.21 of the FOI Act provides that that fact is considered to be a factor in favour of disclosure. However, the matter in dispute in Documents 19, 34 and 62 is not personal information about the complainant. Accordingly, I have given less weight to that aspect of the public interest.

25. I recognise a public interest in ensuring that natural justice is afforded to any individual who considers that he or she has a legitimate claim against a government agency and takes action in the exercise of his or her legal rights in respect of such matters. However, in the circumstances of this complaint, I do not consider that the disclosure of personal information about third parties would assist the complainant in her grievances against the agency or that natural justice requires the disclosure of personal information about third parties.
26. In balancing the competing public interests, it is my view that the public interest in maintaining the personal privacy of third parties is not outweighed by any other public interest that requires the disclosure of personal information about third parties to the complainant. Accordingly, I find that the whole of Document 19, and the disputed matter in Documents 34 and 62 is exempt under clause 3(1).

(b) Clause 7 – Legal professional privilege

27. Clause 7(1) provides:

Exemption

(1) Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.”

28. Legal professional privilege applies to confidential communications between a client and his or her legal adviser which are made or brought into existence either 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. Legal professional privilege also extends to other classes of documents including, among other things, 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 behalf of the client: *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 245-6.
29. Document 26 is a letter written to Riskcover, the agency’s insurer, by the Acting Employee Relations Manager. The agency claims exemption under clause 7 because Document 26 was created, at the request of, and on the advice of the agency’s legal adviser, the Senior Assistant Crown Solicitor, and that it contains legal advice given to the agency concerning the complainant’s workers’ compensation claim.
30. Documents 2, 4, 5, 7, 13, 14, 16, 17, 22, 23, 30, 32, 36, 37, 39, 44, 46, 53, 54, 55, 56 and 57 are emails exchanged between officers of the agency involved in dealing with the complainant’s workers’ compensation claim. The agency claims that the matter deleted from those documents consists either of the legal advice given to the agency by its legal adviser, which was disseminated to those officers of the agency responsible for the management of the complainant’s

workers' compensation claim, or information obtained by the agency for transmission to its legal adviser for the purpose of obtaining legal advice about anticipated legal proceedings in respect of that claim.

31. Documents 27 and 43 are handwritten notes of issues discussed at meetings attended by officers of the agency, representatives of Riskcover, and the agency's legal adviser. Documents 28 and 42 are file notes of discussions with officers of the agency, the agency's insurer and the legal adviser. The agency submits that the disputed matter in those documents is exempt because it consists of the legal advice provided by the agency's legal adviser about anticipated litigation in respect of the complainant's claim.
32. Document 45 is a confidential memorandum from the Employee Relations Manager to other officers of the agency. The subject matter of Document 45 is the complainant's workers' compensation claim. The agency claims that the disputed matter in that document consists of legal advice given to it by its legal adviser.
33. The Statutory Declaration of the Senior Assistant Crown Solicitor attests to the circumstances surrounding the creation of those documents and declares that the documents were prepared either for his use, at his request, upon his advice or at his instigation for the purpose of him providing legal advice to the agency. The sworn evidence of the Senior Assistant Crown Solicitor is uncontested. It establishes, among other things, that:
 - (i) The solicitor had discussions with the agency and provided legal advice to the agency prior to December 1999 in respect of the complainant's claim, and received formal instructions on 16 March 2000 from the agency in respect of the complainant's workers' compensation claim;
 - (ii) Various meetings took place between officers of the agency and the solicitor at which he gave the agency legal advice in respect of the complainant's claims, and he also gave the agency legal advice by telephone at various times when contacted by officers of the agency; and
 - (iii) The legal advice given by him to the agency is contained in Documents 2, 4, 5, 7, 13, 14, 16, 17, 22, 23, 26, 27, 28, 30, 32, 36, 37, 39, 42, 43, 44, 45, 46, 53, 54, 55, 56 and 57 and consists of the parts to which access is refused.
34. I accept the sworn evidence of the Senior Assistant Crown Solicitor. I am therefore satisfied that the disputed matter in Documents 2, 4, 5, 7, 13, 14, 16, 17, 22, 23, 26, 27, 28, 30, 32, 36, 37, 39, 42, 43, 44, 45, 46, 53, 54, 55, 56 and 57 would be privileged from production in legal proceedings on the ground of legal professional privilege as described by Lockhardt J in *Trade Practices Commission v Sterling*. Accordingly, I find that Document 26, and the matter deleted from the remaining documents for which exemption is claimed under this clause, is exempt under clause 7 of Schedule 1 to the FOI Act.

35. The agency also claims that Document 26 is exempt under clause 4(3). However, in light of my finding that that document is exempt under clause 7, I need not deal with the question of whether it is also exempt under clause 4(3). Further, in light of my findings in paragraph 34 above, I need not consider the agency's claims for exemption under clause 6(1) in respect of Documents 2, 4, 5, 7, 13, 14, 16, 17, 22, 23, 27, 28, 30, 32, 36, 37, 39, 42, 43, 44, 45, 46, 53, 54, 55, 56 and 57.

(c) **Clause 6 – Deliberative processes**

36. Documents 64 and 65 are internal agency memoranda dated 15 December 1999, sent from the Manager, Employee Relations to the Manager, Human Resources, the General Manager, Housing and the Executive Director, Business Strategies. Document 64 includes a hand written notation. The agency claims that the matter deleted from Documents 64 and 65 is exempt under clause 6(1). 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.

37. To establish an exemption under clause 6, the agency must satisfy the requirements of both paragraphs (a) and (b) of subclause 1 of the exemption. In the case of this exemption, the complainant is not required to demonstrate that disclosure of the documents would, on balance, be in the public interest. Rather, the complainant is entitled to access unless the agency can establish that disclosure would, on balance, be contrary to the public interest.

38. I agree with the comments of the Commonwealth Administrative Appeals Tribunal in *Re Waterford and Department of the Treasury (No.2)* (1984) 5 ALD 588, that the deliberative processes of an agency are its "thinking processes"; the process of reflection, for example, on the wisdom and expediency of a proposal, a particular decision or course of action. I also agree

with the Tribunal when it said, at paragraph 59, that *“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 first appear to be 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 an agency.”*

The agency’s submission

39. Initially, the agency made a number of submissions in support of its claims for exemption under clause 6 for the majority of the disputed documents. I have considered and relied on those claims in so far as they relate to Documents 64 and 65. The agency claimed that the documents were created in the course of its investigations into the claim for workers’ compensation made by the complainant and that the deleted matter consists of advice, opinion and recommendations obtained in respect of that claim. The agency claims that, as that workers’ compensation matter remains unresolved, the disputed matter in Documents 64 and 65 should not be disclosed.
40. The agency made a further written submission to me following my preliminary view. In that submission, the agency reiterated its claims for exemption under clause 6(1) and informed me that:

“The documents in question contain advice, opinion and/or recommendations that were prepared and recorded in the course of investigating the complainant’s workers’ compensation claim, handling the complainant’s employment within the agency, and seeking resolution of the relevant matters.

- *The complainant’s workers’ compensation claim is still pending and a formal Review hearing is scheduled for 14-16 May 2001.*
- *The agency has sought (and is continuing to seek) advice, opinion and recommendations regarding the complainant’s workers’ compensation claim from a variety of internal and external sources. Such sources include the Crown Solicitor’s Office, RiskCover, WorkCover, medical practitioners, Worklink, and in-house human resource advisers and senior managers. In particular, tactics and strategies for managing the Conciliation Conferences, the Preliminary Review hearing, and the final Review hearing scheduled for May 2001 have been deliberated on by the agency’s senior managers, human resource advisers, solicitor and insurer.*
- *The deliberations in relation to the complainant’s workers’ compensation claim have been conducted at senior-management level and have involved the agency’s solicitor since early February 2000. Since the claim is still pending and the final Review hearing will not take place until 14-16 May 2001, the agency’s deliberations on this matter are still continuing. The agency’s*

deliberations about strategies for defending its position that the complainant's workers' compensation claim is invalid are of particular importance.

- *The documents in question were prepared by the agency's senior managers or human resources advisers for the purpose of offering advice, exchanging views, and eliciting consideration and deliberation of possible options and strategies for the handling and/or settlement of the complainant's workers' compensation claim.*
- *The clause 6 exemption has not been applied to matter that is merely factual or concerned with "the purely procedural or administrative processes involved in the functions of the agency". Nor has it been applied to advice or recommendation that has already been acted upon or conveyed to the Applicant.*
- *The clause 6 exemption has only been applied to matter that is still under consideration by the agency or that would prematurely and inappropriately reveal the agency's deliberations about its likely negotiating position and/or strategies for defending its view that the workers' compensation claim is invalid at the formal Review hearing scheduled for 14-16 May 2001. Furthermore, the exemption has not been applied to matter that appears in the agency's internal manuals; nor to matter that is merely factual or statistical; nor to matter that has been in existence for at least 10 years."*

Consideration

41. Based on my examination of Documents 64 and 65, I accept that their disclosure would reveal opinions and recommendations that have been obtained, prepared or recorded in the course of, or for the purposes of, the agency dealing with the complainant's workers' compensation claim. However, I consider that those documents are administrative documents, prepared very early in the process. Essentially, they deal with the issue of whether a letter should be sent to the complainant about certain matters relating to her workers' compensation claim. It appears to me that those documents have little, if anything, to do with the subsequent inquiries made by the agency into that claim. Rather, they are documents dealing with purely procedural or administrative processes involving the complainant's employment and, in particular, correspondence that was sent to the complainant about her sick leave entitlements whilst her claim was being considered.
42. I accept that Documents 64 and 65, generally, contain matter of the kind referred to in clause 6(1)(a). However, that is not enough to establish that the documents are exempt for the reasons advanced by the agency. The agency must also establish that disclosure of those documents would, on balance, be contrary to the public interest.

Public interest

43. As I understand it, the agency submits that it would not be in the public interest to disclose the disputed matter in Documents 64 and 65 because its deliberations about the complainant's workers' compensation claim are continuing and agencies should be able to deliberate on such matters, which may need to be resolved through the legal system. The agency claims that there is a strong public interest in government agencies being able to conduct negotiations to settle workers' compensation claims without having to disclose options that are still under consideration. The agency submits that disclosure may be misleading, because a final decision has not been reached. Finally, the agency claims that it would not be in the public interest for the premature disclosure of deliberations relating to the settlement of a workers' compensation claim.
44. I understand that the workers' compensation claim is being progressed through the system. In those circumstances, it may be argued that premature disclosure of information about, for example, the agency's negotiation strategies and possible options for a conciliated resolution of the claim would adversely affect the chances of an agreed settlement being reached. However, I do not consider that Documents 64 and 65 are of that kind. Those documents predate the substantive part of the negotiations that are presently underway. Further, the agency has already provided the complainant with access to a complete copy of an email message dated 13 December 1999, which is referred to in Document 64. That email message appears to me to contain information of a similar nature to the disputed matter in Documents 64 and 65.
45. I accept that it may be contrary to the public interest to prematurely disclose deliberative process documents while deliberations in an agency are continuing, if there is material before me to establish that disclosure could adversely affect the agency's decision-making process, or that disclosure would, for some other reason, be demonstrably contrary to the public interest.
46. However, whilst the agency claims that the disputed matter in Documents 64 and 65 should not be disclosed to the complainant, it has not given me any reasons as to why disclosure would be contrary to the public interest. Whilst I accept that there is a public interest in the agency being able to negotiate a settlement of any workers' compensation claim, it has not explained how or why disclosure would prevent such a settlement being reached by the parties, nor has it explained how disclosure would adversely affect the agency's deliberations on that matter.
47. I do not consider that the agency has established that it would be contrary to the public interest to disclose documents that contain administrative options for managing the employment of the complainant nor do I accept that disclosure of that kind of information would necessarily be misleading. It is always open to any agency to explain its preferred position and its reasons and to release additional information if necessary, to clarify any misunderstandings that might arise.

48. I recognise that there is a public interest in the complainant being able to exercise her rights of access under the FOI Act. Clearly, in my view, there is also a public interest in giving the complainant access to personal information about her, where that can properly be done. In the circumstances of this complaint, I consider that some of the disputed matter in Documents 64 and 65 is personal information about the complaint and I have given that fact some weight in the balancing process.
49. In my view, Documents 64 and 65 are purely administrative in nature. I am not persuaded that disclosure of the disputed matter in those documents would, on balance, be contrary to the public interest. Accordingly, I find that the disputed matter in Documents 64 and 65 is not exempt under clause 6(1).
