

DECISION SUMMARY ISSUED BY THE INFORMATION COMMISSIONER (WA)

Decision title and citation: *Re Box and Legal Practice Board* [1999] WAICmr 19

COMPLAINT No: F1761998

DECISION No: D0191999

PARTIES: Stephen Raymond BOX

Complainant

LEGAL PRACTICE BOARD

Respondent

No. of documents in dispute: 1

Exemption clause(s): Clause 7

In 1983, Mr Box ('the complainant') lodged a complaint with the Barristers' Board against a legal practitioner. After making inquiries with the legal practitioner concerned, the Secretary of the Barristers' Board informed the complainant that no further action would be taken in respect of his complaint.

On 27 August 1998, the complainant lodged an application with the Legal Practice Board, formerly the Barristers' Board ('the agency') seeking access under the *Freedom of Information Act 1992* ('the FOI Act') to documents relating to his complaint to the agency in 1983.

Access to some documents was granted, but access to others was refused on the grounds that those documents were exempt under clause 5(1) and clause 7 of Schedule 1 to the FOI Act. The complainant sought internal review of the agency's decision. The internal reviewer varied the initial decision and granted the complainant access to 5 documents. However, the agency claimed that one document was exempt under clauses 5(1)(a) and (d) and clause 8(2) of Schedule 1 to the FOI Act. On 2 December 1998, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

Review by the Information Commissioner

I obtained the disputed document from the agency. Inquiries were made with the agency concerning its procedures for dealing with complaints made by members of the public about legal practitioners. On 23 December 1998, the agency informed me that its claim for exemption for the disputed document was based on clauses 5(1)(b) and (e) and clause 7, rather than those grounds previously cited. On 7 January 1999, I received a submission from the agency in support of its claim for exemption.

On 24 June 1999, after 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 the disputed document may be exempt under clause 5(1)(b), and parts may also be exempt under clause 7. The complainant did not withdraw his complaint and provided further material for my consideration. However, that material has not dissuaded me from my preliminary view that the document is exempt. A summary of my reasons follows.

The disputed document

The disputed document is a copy of a letter dated 7 June 1983, from a legal practitioner to the agency. That letter contains the legal practitioner's response to the complaint made to the agency by the complainant.

The exemptions

(a) Clause 5(1)(b)

For a document to be exempt under clause 5(1)(b) requires that its disclosure could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted.

The term "the law" in clause 5(1)(b) is used in a broad sense and is not limited to the criminal law only. Further, it is clear from the words of the clause that it is intended to extend to disciplinary proceedings. The *Legal Practitioners Act*

1893-1979 regulates the conduct of legal practitioners and empowers the agency to investigate complaints made to it about the conduct of legal practitioners. The agency may impose a penalty on any practitioner who is found to have engaged in any of the behaviours specified in that Act. Given the scheme of the legislation, I am of the view that, impliedly, engaging in any of those behaviours may be considered a breach of that Act, and therefore a contravention of the law. In my view, an investigation by the agency into such a complaint amounts to an investigation into a possible contravention of the law, within the terms of clause 5(1)(b).

In *Police Force of Western Australia v Kelly and Another* (1996) 17 WAR 9, Anderson J said that documents can reveal an investigation even when the fact of the investigation has been revealed through other materials or the investigation has concluded. Although the complainant has some knowledge about that matter, the contents of the legal practitioner's response to the agency are not known to him. The application of the exemption in clause 5(1)(b) is not affected by the access applicant's knowledge of the investigation. In *Kelly's* case, Anderson J made that clear, at page 14, when he said:

"I do not think that it could have been intended that exemption should depend on how much the applicant already knows or claims to know of the matter...cl.5(1)(b) is not limited to new revelations but covers all matter that of itself reveals the things referred to, without regard for what other material might also reveal those things, or when that other material became known, and without regard to the actual state of knowledge that the applicant may have on the subject or the stage that the investigation has reached."

I am satisfied that the disclosure of the disputed document could reasonably be expected to reveal something of the investigation into a contravention or possible contravention of the *Legal Practitioners Act 1893-1979*. Clause 5(1) is subject to the limit on exemption in clause 5(4). I have inspected the disputed document and I am satisfied that it does not contain any information of the kind described in subclause 5(4)(a)(i), (ii) or (iii). Accordingly, I find that the disputed document is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

(b) Clause 7 – Legal professional privilege

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 applies to, amongst other things, any confidential communication between a client (or agent of the client) and his or her professional legal adviser acting in a professional capacity (including an agent of a legal adviser) if made for the sole purpose of giving or receiving legal advice, or for use in existing or anticipated legal proceedings: *Grant v Downs* (1976) 135 CLR 674; *Trade Practices Commission v Sterling* (1979) 36 FLR 244.

The disputed document was created by the legal practitioner as his response to the agency concerning the complaint made by the complainant. In my view, it is not a communication between a solicitor and a client. Rather, it is a communication between a solicitor and the agency that was not made for the sole purpose of enabling the solicitor to give legal advice to a client.

However, some of the information in that document refers to the specific advice given by the solicitor to a client. Although the practitioner may have breached his client's privilege by disclosing that information to the agency, the privilege attaching to that advice has not been waived. The privilege is that of the client, not the legal adviser, and there is no evidence before me that the client agreed to disclosure of that information. Nothing before me suggests that the client either expressly or impliedly waived the privilege.

In my view, therefore, parts of the document would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I consider that parts of the disputed document are also exempt under clause 7 of Schedule 1 to the FOI Act.

Conclusion

For the reasons given to the parties, which I have summarised above, I find that the disputed document is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. I also find that parts of it are exempt under clause 7. Accordingly, I confirm the decision of the agency to refuse access to that document.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER
21 July 1999