

JONES AND LOCAL GOVT

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

**File Ref: 97028
Decision Ref: D01997**

Participants:

Edith Winifred Jones
Complainant

- and -

Department of Local Government
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - letters from legal adviser to agency produced to consultant for purposes of inquiry - clause 7 - legal professional privilege - whether waiver of privilege.

Freedom of Information Act 1992 (WA) s. 76(4); Schedule 1 clause 7.

Local Government Act 1960 (WA) s.158.

Grant v Downs (1976) 135 CLR 674.

Waterford v Commonwealth (1987) 163 CLR 54; 71 ALR 673.

Re Walker and Town of Mosman Park (Information Commissioner, WA, 27 May 1997, unreported, D01697.

DECISION

The decision of the agency is confirmed. The disputed document is exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

27th June 1997

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision by the Department of Local Government ('the agency') to refuse Mrs Jones ('the complainant') access to certain documents requested by her under the *Freedom of Information Act 1992* ('the FOI Act').
2. By letter dated 12 December 1996, the complainant applied to the agency under the FOI Act for access to a document described as a "...*legal opinion disclosed to a third party and recorded in Mr Gary Martin's Review - Mosman Park v Walker*". The agency identified two documents as being within the scope of the complainant's access application. After resolving a preliminary issue with the complainant concerning the payment of an application fee, by letter dated 29 January 1997, the agency refused access to those documents on the ground that they were exempt under clause 7 of Schedule 1 to the FOI Act.
3. The complainant sought internal review of that decision and, on 20 February 1997, the internal reviewer in the agency confirmed the agency's initial decision. Thereafter, on 21 February 1997, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

4. I obtained the disputed documents from the agency, and the file maintained by the agency in respect of this matter. My office also received a number of submissions and documents from the complainant which the complainant claims provide support for the view that legal professional privilege has been waived in respect of the disputed documents.
5. After examining the disputed documents and considering the material before me, on 9 May 1997, I provided the parties with my preliminary view of this complaint in writing, together with my reasons. It was my preliminary view that the disputed documents are exempt under clause 7 of Schedule 1 to the FOI Act and that legal professional privilege may not have been waived by the agency.
6. The complainant responded to my preliminary view by seeking clarification in respect of the documents identified by the agency as being within the ambit of her access application. The complainant indicated that she believed that, in addition to the two documents identified by the agency, another document written after 29 July 1990 may also exist, and that was the document to which she sought access. My office subsequently made inquiries with the agency to clarify the scope of the complainant's access application and to determine whether another document of the type initially requested by the complainant might exist in the agency. Following those further inquiries, the complainant was informed that I

was satisfied that the documents identified by the agency in first instance were properly identified by the agency as the only documents which fall within the scope of the complainant's access application.

7. In the course of finalising this matter, I became aware of the fact that one of the disputed documents (Document 1) may have been previously disclosed to the complainant. I informed the agency of my revised view of the exempt status of that document. Subsequently, the agency withdrew its claims for exemption for that document and granted the complainant access to a copy of it.

THE DISPUTED DOCUMENT

8. There is one document in dispute between the parties in this matter. That document is described as a letter dated 8 May 1990 from a Senior Assistant Crown Solicitor to the Secretary for Local Government in the agency.

THE EXEMPTION

9. Clause 7 of Schedule 1 to the FOI Act provides:

"7. 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)."*

10. The requirements to establish whether a document would be privileged from production in legal proceedings on the ground of legal professional privilege are well established by case law in Australia and I have referred to those principles in a number of my formal decisions. Legal professional privilege applies to, *inter alia*, confidential communications between a client and his or her legal adviser made for the sole purpose of giving or receiving legal advice: *Grant v Downs* (1976) 135 CLR 674. Legal professional privilege extends to confidential communications of that kind between government agencies and legal advisers in the employ of government: *Waterford v Commonwealth* (1987) 163 CLR 54; 71 ALR 673.

11. Having examined the disputed document, I am satisfied that it is a confidential communication between a client, the agency, and its legal adviser made for the sole purpose of giving the client legal advice. Accordingly, I am of the view that the disputed document would, *prima facie*, be privileged from production in legal proceedings on the ground of legal professional privilege.

The complainant's submission

12. The complainant claims that legal professional privilege has been "voluntarily abandoned" by the agency and the complainant alleges that the contents of the disputed document has been disclosed to third parties. To understand the basis for that claim requires that I repeat some of the background material contained in my decision in *Re Walker and Town of Mosman Park* (27 May 1997, unreported, D01697). The complaints in both matters stem from substantially the same set of circumstances, outlined below.
13. Mr Walker is a former Town Clerk of the Town of Mosman Park. The complainant's husband is a former mayor. I understand that, in September 1988, following a protracted dispute between Mr Walker and the Council of the Town of Mosman Park, the Council resolved to terminate the employment of Mr Walker. Accordingly, late in 1988, the Governor appointed Mr Bernard O'Sullivan to conduct an inquiry as required by s.158 of the *Local Government Act 1960* ('the Local Government Act') (which has since been repealed and replaced, but was then in force), in relation to the proposed termination of Mr Walker's employment. Following that inquiry, Mr Walker's employment with the agency was terminated.
14. It is my understanding that the complainant was dissatisfied with certain aspects of the inquiry conducted by Mr O'Sullivan and lodged a submission with the Governor in respect of those matters that touched upon the dismissal of Mr Walker and also in response to allegations concerning her husband. I further understand that, as a result of continuing concerns raised by Mr Walker and also by the complainant in respect of that inquiry in the intervening years, a review was undertaken by Mr Gary Martin, a consultant engaged for that purpose by the the agency. Mr Martin provided the the agency with a report dated 4 June 1996 following his inquiries.
15. In his report Mr Martin has made reference to various documents containing legal advice. The complainant claims, therefore, that the disclosure of the disputed documents and others of a similar kind to Mr Martin constitutes a waiver of privilege in respect of those documents.

Waiver of privilege

16. I dealt in some detail with the issue of waiver of privilege in my decision in *Re Walker and Town of Mosman Park*. In particular, I dealt with the question of whether the circumstances in which Mr Martin obtained access to the documents

containing legal advice constituted a waiver of the legal professional privilege attaching to them. For similar reasons to those given in my decision in *Re Walker and Town of Mosman Park* at paragraphs 21-41, I do not accept the complainant's claim that legal professional privilege no longer applies to the document in dispute in this matter. I adopt and incorporate those reasons as part of my reasons for decision in this matter.

17. The complainant also submits that there are other reasons why the disputed document should be disclosed to her. I have summarised the pertinent points of her submission as follows:
- the agency has lied and continues to maintain that the termination inquiry was properly constituted when it was not;
 - the agency failed to enforce the Local Government Act and behaved with impropriety in concealing the advice from Crown Law;
 - the advice from Crown Law on the correct procedures for conducting suspension as against a termination inquiry, should not be confidential;
 - advice on the interpretation of an Act should not be confidential; and
 - it is grossly unfair to deny the complainant access to the document used by Mr Martin because the opinion is needed to refute his recommendations and to respond appropriately to the Governor.

Consideration

18. Legal professional privilege is itself a rule that has been established as a result of the balancing of competing public interests and, in essence, according paramountcy to the public interest in the efficient administration of justice over the public interest that requires the admission in evidence of all relevant documentary evidence, in the interests of a fair trial: *Waterford v Commonwealth*, per Mason and Wilson JJ at pp.64-65. The paramountcy of that public interest is recognised and preserved in the FOI Act by the exemption provided by clause 7.
19. Essentially, the submission of the complainant raises issues of fairness and public interest. However, the exemption in clause 7 is not limited by a public interest test. Therefore, there is no scope for my consideration of whether disclosure of the disputed document would, on balance, be in the public interest. If the disputed document would be privileged from production in legal proceedings on the ground of legal professional privilege, then it is exempt under clause 7. Further, under the terms of s.76(4) of the FOI Act, if it is established that a document is an exempt document, I do not have power to make a decision to the effect that access is to be given to that document.
20. Therefore, for the reasons given, I am satisfied that the disputed document is a confidential communication between the agency and its legal advisers for the sole purpose of the legal adviser giving the agency legal advice in respect of a particular matter. I consider that it would be privileged from production in legal

proceedings on the ground of legal professional privilege. Accordingly, I find that the disputed document is exempt under clause 7 of Schedule 1 to the FOI Act.