

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

**File Ref: F2511999  
Decision Ref: D0242000**

Participants: **Leo Francis Morrissey**  
Complainant

- and -

**Crown Solicitor's Office**  
Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – documents containing information about complainant – file notes, memoranda, correspondence – clause 14(1)(b) – whether matter of a kind mentioned in s.64(2)(a), (2)(b) or 3 of the *Legal Aid Commission Act 1976* – disclosure to any person of information concerning the affairs of another person – whether disclosure to person of information about person's own affairs prohibited – scope of confidentiality provision – scope of exemption provision – clause 5(1)(b) – whether mere mention of a specific prosecution and conviction could reveal the investigation of a contravention of the law – clause 7 – legal professional privilege – communications between legal adviser and third party – whether for purposes of litigation.

*Freedom of Information Act 1992 (WA)* Schedule 1 clauses 5(1)(b), 7, 14(1)(b)  
*Legal Aid Commission Act 1976* s.64

*Re Morrissey and Legal Aid Commission* [1998] WAICmr 25  
*Police Force of Western Australia v Kelly and Anor* (1997) 17 WAR 9  
*Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550  
*Esso Australia Resources Ltd v The Commissioner of Taxation* [1999] HCA 67  
*Trade Practices Commission v Sterling* [1978] 36 FLR 244  
*Handley v Baddock* [1987] WAR 98

## DECISION

The decision of the agency is varied. The second sentence of the text of Document 31 and of Document 32 is exempt under clause 5(1)(b) of Schedule 1 to the *Freedom of Information Act 1992*. Documents 3, 4, 5, 7, 17 and 21 and those parts of Documents 16, 18 and 24 identified in paragraphs 59, 60 and 61 of my reasons for this decision are exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*. The documents are not otherwise exempt.

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

1 May 2000

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Crown Solicitor's Office ('the agency') to refuse Mr Morrissey ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. There is a long-standing dispute between the complainant and the Legal Aid Commission ('the Commission'). On one occasion in 1997, when the complainant visited the offices of the Commission in Fremantle, he became involved in an incident with a security officer. Subsequently, he was charged by police with assaulting the security officer and was convicted of that charge in the Court of Petty Sessions. The complainant appealed to the Supreme Court of Western Australia against his conviction. As I understand it, the agency was instructed by the Police Force of Western Australia in respect of that appeal.
3. The complainant has, on a number of occasions, sought to exercise his rights of access under the FOI Act and to obtain access to documents of the Commission. Whilst he has been successful in obtaining access to some documents, he has been refused access to others that have been found to be exempt: see *Re Morrissey and Legal Aid Commission* [1998] WAICmr 25.
4. On 24 September 1999, the complainant made an application to the agency under the FOI Act for access to documents on a specified file of the agency (CSO 3903/97), in particular, those passing between the agency, the Commission, and any officers or agents of the Commission. Thirty-two documents were identified by the agency as falling within the scope of the complainant's access application. Access to all of those documents was refused on the grounds that they are exempt under clauses 5(1)(b), 7 and 14(1)(b) of Schedule 1 to the FOI Act.
5. The complainant applied for internal review of the agency's decision. The initial decision was confirmed. On 21 December 1999, 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 requested documents from the agency together with the FOI file maintained in respect of the complainant's access application. Various inquiries were made with the parties and with the Commission. On 21 March 2000, after considering the material before me, I informed the parties in writing of my preliminary view of this complaint including my reasons.

7. It was my preliminary view that some of the documents identified by the agency may be exempt under clause 7, but the exemptions claimed by the agency under clause 5(1)(b) and 14 (1)(b) might not be justified. It was also my preliminary view that some documents identified by the agency did not fall within the ambit of the complainant's access application.
8. I received a further written submission from the agency, maintaining its claims that all the documents are exempt. The complainant also responded.

### **The scope of the access application**

9. Although the agency dealt with 32 disputed documents, I consider that 11 of those documents fall outside the scope of the access application. In the complainant's application of 24 September 1999, he clearly stated that it was a request for personal information about himself contained in correspondence between the agency and the Commission and between one particular officer of the agency and various other officers of the Commission and the agency. The complainant specified the agency's files, CSO 3903/97 and 94FM0005 GB/MM, as the files containing the documents he required and he reiterated that his application to the agency was an application for access to personal information about himself for which no fee was payable.
10. It is clear to me, from the description of the documents in the complainant's access application and the fact that no application fee was paid by the complainant at the time the application was made to the agency, that documents that do not contain personal information about the complainant are outside the scope of his application. I consider that the documents numbered 9, 10, 11, 12, 13, 15, 19, 20, 28, 29 and 30 on the agency's schedule do not contain personal information about the complainant.
11. Some of those documents are telephone messages and file notes. They do not mention the complainant by name, nor do they contain any other information about him. The complainant's name is mentioned in Document 9 and Document 11. However, the subject matter of those communications does not appear to me to be about him. Rather, they relate generally to his appeal, although not to the substance of that appeal. They do not contain any personal information, as that term is defined in the FOI Act, about the complainant. Accordingly, it is my view that those documents are outside the scope of the access application and, therefore, this complaint.

### **THE DISPUTED DOCUMENTS**

12. There are 21 documents remaining in dispute between the parties. The disputed documents are described in a schedule prepared by the agency and provided to the complainant with the agency's notice of decision. I shall refer to the documents by the numbers assigned to them in that schedule.

## THE EXEMPTIONS

### (a) Clause 14 (1)(b)

13. The agency claims that Documents 4, 7, 23, 26, 27, 31 and 32 are exempt under clause 14(1)(b) of Schedule 1 to the FOI Act. Clause 14(1)(b) provides that matter is exempt matter if it is matter of a kind mentioned in s.64(2)(a), (2)(b) or (3) of the *Legal Aid Commission Act 1976* ('the Legal Aid Act').
14. Section 64 of the Legal Aid Act, so far as is relevant, provides:

*“64. (1) This section applies to every person who is or has been a member, the deputy of a member, the Director, a member of the staff, a member or acting member of a legal aid committee, a member, substitute member or acting member of a review committee, or a member of a consultative committee.*

*(2) Subject to subsections (2a) and (2c), a person to whom this section applies shall not, either directly or indirectly, except for the purposes of this Act –*

- (a) make a record of, or divulge or communicate to any person, any information concerning the affairs of another person acquired by him by reason of his office or employment under or for the purposes of this Act; or*
- (b) produce to any person a document relating to the affairs of another person furnished for the purposes of this Act.*

*Penalty: \$1000*

*(2a) Notwithstanding anything contained in subsection (2), the Director may –*

- (a) disclose any administrative information to any person; or*
- (b) with the approval of the Chairman or the Commission, disclose any information referred to in subsection (2), other than administrative information, to any person if –*
- (i) the person to whom that information relates has in writing consented to that disclosure and waived legal professional privilege in respect thereof; or*
- (ii) that disclosure is necessary to correct or refute a statement made by the person to whom that information relates.*

*(2b) ...*

(2c) *Notwithstanding anything contained in subsection (2), a person to whom this section applies may, with the approval of the Chairman or the Commission, disclose any information referred to in subsection (2) to the Barristers' Board for the purposes of the Legal Practitioners Act 1893 and, in construing this subsection, "disclose" includes disclose by producing any relevant document.*

(3) *A person to whom this section applies shall not be required to produce before a court any document relating to the affairs of another person of which he has the custody, or to which he has access, by virtue of his office or employment under or for the purposes of this Act, or to divulge or communicate to any court any information concerning the affairs of another person obtained by him by reason of such an office or employment, unless, under subsection (2a) or (2c), that document has been produced or that information has been disclosed to any person."*

15. The Legal Aid Act establishes the Commission, the functions of which are to provide legal assistance in accordance with the Legal Aid Act and to control and administer the Legal Aid Fund established under that Act. Legal aid may be provided to a person in need who is unable to afford the full cost of obtaining legal services from a private legal practitioner. A decision to provide legal aid is made by the Commission after considering, among other things, the income and moneys or other financial resources available to an applicant for aid.
16. Section 64 of the Legal Aid Act is a secrecy provision that applies to members and staff of the Commission and committees established under the Legal Aid Act. Generally, it prohibits recording or divulging to any person information concerning the affairs of any other person acquired in the exercise of the agency's functions, except for the purposes of, and as permitted by, the Legal Aid Act.
17. Clause 14(1)(b) of the FOI Act exempts "*matter of a kind mentioned in section 64(2)(a), (2)(b) or (3)*" of the Legal Aid Act. The kind of information mentioned in those sections is "*information concerning the affairs of another person acquired by [a member of the Commission or one of its committees] by reason of his office or employment under or for the purposes of [the Legal Aid Act].*"
18. Section 64 prohibits the disclosure of that kind of information to "*any person*". However, I do not consider that it prevents the disclosure of information to the person whose affairs the information concerns. That would seem to be the clear intention of the words "*communicate to any person any information concerning the affairs of another person*" (my underlining).
19. The agency submits that the purpose of s.64 of the Legal Aid Act is to prevent the disclosure of information about the affairs of a person that has been acquired for the purpose of the Legal Aid Act and that nothing in s.64 suggests that information sought by a person from whom it was originally acquired is excluded from the ambit of s.64. The agency refers to s.64(3) which provides,

*inter alia*, that a person to whom s.64 applies “shall not be required to produce to a court any document relating to the affairs of another person”, and submits that the words “another person” arguably include information about the affairs of a person including persons involved in the court proceedings. Although it is not entirely clear, I understand the submission to be that, on the basis of the use of the words “another person” in s.64(3), those words are to be interpreted wherever they are used in s.64 to mean a person other than the person to whom s.64 applies, rather than a person other than the person to whose affairs the documents or information relates.

20. I do not accept that submission. Accepting that interpretation of the term “another person” throughout s.64 would, in my view, lead to absurd results. If the term “another person” in s.64(2) is to be interpreted as meaning a person other than the person to whom s.64 applies, then presumably the prohibition of disclosure not only to “another person” but to “any person” - which the agency submits includes the person to whose affairs the information relates - must also include the person to whom s.64 applies. Therefore, it follows that that person would be prohibited by s.64(2) from disclosing to himself information he has acquired concerning the affairs of a person other than himself. That result is clearly ridiculous and not the intended meaning of s.64(2), any more than it is intended in my view to prohibit the disclosure of information to the person whose affairs it concerns.
21. Further, it is clear that in s.64(2a)(b) the term “any person” is not intended to include the person to whose affairs the information relates. That section allows disclosure to “any person” if the person to whose affairs the information relates waives any legal professional privilege in respect of it. If the person to whom it is to be released is the person to whom it relates then there is no question of waiver of privilege. Neither in that provision nor in s.64(2) does the term “any person”, in my view, include the person to whom the information relates. The term “another person”, wherever it appears in s.64(2) and (3), clearly does refer to the person to whose affairs the information relates.
22. I consider that the clear intention of s.64 is to prevent the disclosure of information relating to the affairs of a person to any other person, except as provided for by s.64(2a) and (2c) and as contemplated in s.64(4) and (5), including where the person consents to the disclosure. Clearly, s.64 is designed to protect the privacy of people about whose personal affairs the agency must necessarily obtain information in order to carry out its functions, and to preserve any legal professional privilege attaching to that information, by protecting its confidentiality except where the person consents to its disclosure or its disclosure is otherwise administratively or legally necessary for the purposes of the Legal Aid Act. I do not consider that s.64 was intended to prevent disclosure of information about a person’s affairs to that person, nor that there is anything in the wording of the provision to suggest that it is to be interpreted that way. If I were to accept the claim made by the agency, that would have the result of extending the scope of s.64 beyond what is necessary to preserve confidentiality of information acquired by the agency concerning individuals’ personal affairs.

23. In my view, the purpose of the exemption in clause 14(1)(b) is clearly to preserve the secrecy provided for by s.64(2)(a), (2)(b) and (3) of the Legal Aid Act, which would otherwise be overridden by s.8 of the FOI Act. The purpose is to preserve the confidentiality provided by s.64(2)(a), (2)(b) and 3, not to extend it. If neither s.64(2) nor s.64(3) prevents disclosure of information concerning a person's own affairs to that person (which, in my view, they do not), then neither is clause 14(1)(b) intended to.
24. Having examined Documents 4, 7, 23, 26, 27, 31 and 32, it appears to me that the information contained in them concerns the affairs of the complainant. Disclosure to him of information concerning his own affairs is not disclosure to him of information concerning the affairs of another person. In those circumstances, I do not consider that s.64 of the Legal Aid Act would prohibit the disclosure of the documents to the complainant and, therefore, I do not consider their contents to be matter of a kind described in s.64(2)(a), (b) or (3) of the Legal Aid Act.
25. Accordingly, I find that Documents 4, 7, 23, 26, 27, 31 and 32 are not exempt under clause 14(1)(b).

**(b) Clause 5(1)(b)**

26. The agency also claims that Documents 4, 7, 23, 26, 27, 31 and 32 are exempt under clause 5(1)(b). Clause 5(1)(b) provides that matter is exempt if 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.
27. Two questions arise from the terms of the exemption: firstly, whether there was an investigation into a contravention or possible contravention of the law, which includes identifying the law that has been, or may have been, contravened: and, secondly, whether disclosure of the documents could reasonably be expected to reveal that investigation.
28. In the agency's initial notice of decision neither of those questions was addressed. On page 3, it was merely stated that a wide variety of investigations are covered by clause 5(1)(b) and then, on page 4, claimed that the exemption applies. There were no proper reasons given for the agency's refusal based on clause 5(1)(b); no findings on any material questions of fact were made by the decision maker; and there was no reference to any material to support the findings. In the agency's notice of decision on internal review no reasons at all were given.
29. I have nonetheless considered the contents of the documents themselves to determine whether those documents "reveal" any investigation, in the sense that that term has been interpreted by the Supreme Court of Western Australia in *Police Force of Western Australia v Kelly and Anor* (1996) 17 WAR 9. In *Kelly's* case, Anderson J, after referring to the decision of Owen J in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550, said at page 13:



*"...documents which reveal that there is an investigation, the identity of the people being investigated and generally the subject matter of the investigation probably would satisfy the requirement stipulated by Owen J that the document "must reveal something about the content of the investigation"..."*

30. Anderson J also said, at page 13 of that decision:

*"In my opinion the phrase "...if its disclosure could reasonably be expected to...reveal the investigation of any contravention of the law in a particular case..." is apt to include the revelation of the fact of a particular investigation by police of a particular incident involving certain people."*

31. The decision in the *Kelly* case makes it clear that, if an agency is conducting, has conducted or is about to conduct an investigation into a contravention or possible contravention of the law, and if disclosure of documents connected with that investigation could reasonably be expected to reveal something about the investigation, including the identities of those under investigation and the nature of the matter under investigation, then those documents will be exempt.
32. The agency submits that the disclosure of the disputed documents would reveal that the Police Service conducted a criminal investigation into a specific matter, because the documents contain references to the conviction of a particular person of a particular offence. On that basis, it is submitted, they are therefore exempt under clause 5(1)(b).
33. I do not accept that submission. At least 2 of the documents make no direct reference to that proceeding at all. Further, I do not accept that a mere reference to a particular criminal prosecution having taken place "*reveals the investigation of a contravention...of the law*", and is information intended to be exempt by clause 5(1)(b). However broadly the exemption may be interpreted, I do not consider that *Kelly's* case is authority for that proposition.
34. The documents in dispute in *Kelly's* case were documents directly concerning, and containing information about, the investigation of a possible contravention of the law. Those documents included the running sheet of the investigation file, witness statements, police reports, forensic reports and the like. It is documents such as those that His Honour was considering in *Kelly's* case when he made his comments and his decision in that matter. I do not consider that the case can be argued to be authority that the mere reference to a prosecution following an investigation would "reveal an investigation" in the sense contemplated by clause 5(1)(b).
35. Document 4 and Document 7 are letters from the Commission to the agency. There is no direct reference in those documents to the prosecution referred to by the agency and disclosure of those documents, in my opinion, would not reveal any investigation by the Police Force of Western Australia, or any other body, into a contravention or possible contravention of the law. There is simply nothing in those documents that reveals anything of any criminal or other investigation into a specified matter.

36. Document 23 and Document 26 are both dated 11 March 1998 and are copies of the same original document. They are copies of an internal memorandum between officers of the Commission. Document 27 is also an internal memorandum of the Commission. It deals with similar matters to Documents 23 and 26, but is dated 26 March 1998. Document 23 is heavily annotated and parts are underlined. Parts of Document 26 are underlined and the document bears one annotation. Document 27 bears one annotation. There is one reference in Documents 23 and 26 to the conviction referred to by the agency but nothing relating to the investigation or prosecution that led to it. For the reasons I have given, I do not consider that reference alone to “reveal the investigation” of the relevant offence. Document 27 contains no reference at all to the conviction or the prosecution or the investigation that led to them. In my view, disclosure of none of those documents could reasonably be expected to reveal a particular investigation by the Police Force of Western Australia or any other body of a particular incident involving certain people. Accordingly, I find that those documents are not exempt under clause 5(1)(b).
37. Documents 31 and 32 are copies of the same original document. Document 31 consists of a letter and a facsimile cover sheet from the agency to the Commission. Document 32 consists only of the letter which is stamped with a facsimile stamp indicating that a copy of it was sent to the Commission on 13 September 1999. It may, perhaps, be argued that the second sentence of the text of that document would, if disclosed, reveal something of the investigation of a contravention of the law in that it reveals the identity of the person convicted of a particular specified offence and the identity of a witness, thus revealing something of the process of inquiry leading to the conviction, more than a mere reference to a person’s conviction of an offence. On that basis, I am prepared to find that matter exempt under clause 5(1)(b).
38. Although the information is clearly already known to the complainant, Anderson J made it clear in *Kelly’s* case that that does not affect the question of whether or not matter is exempt under clause 5(1)(b). At pages 10 and 11, His Honour 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...[clause] 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.”*
39. Accordingly, I find that sentence exempt under clause 5(1)(b). However, clearly, that one sentence could be deleted from the document and, if it were so deleted, the remainder of the document would not reveal the investigation of a contravention or possible contravention of the law and is not, therefore, exempt under clause 5(1)(b). Therefore, I consider that it would be practicable for the

agency to delete the matter that I have found exempt and give the complainant access to a copy of the document so edited.

**(c) Clause 7 – Legal professional privilege**

40. Clause 7 provides that matter is exempt if it would be privileged from production in legal proceedings on the ground of legal professional privilege. The agency submits that Documents 1-8, 14, 16, 17, 18, 21, 24 and 25 contain privileged communications and information sought by it for the purposes of litigation and are, therefore, exempt under clause 7.
41. Legal professional privilege is the privilege of the client. It protects the confidentiality of communications made in connection with giving or obtaining legal advice or the provision of legal services, including representation in proceedings in a court. The privilege exists to serve the public interest in the proper administration of justice by encouraging full and frank disclosure by clients to their lawyers.
42. The decision of the High Court of Australia in *Esso Australia Resources Ltd v The Commissioner of Taxation* [1999] HCA 67 has altered the common law test for whether a document attracts the privilege. The test is no longer the “sole purpose test”, but is now whether the dominant purpose for the creation of a document is to give or obtain legal advice or for use in litigation which was on foot or reasonably expected or anticipated.
43. Documents 1-8, 14, 16, 17, 18, 21, 24 and 25 are not communications between the agency and its client, the Police Force of Western Australia. Rather, they are communications and notes of communications between the agency and the Commission. In *Trade Practices Commission v Sterling* [1978] 36 FLR 244, Lockhart J stated that legal professional privilege applies to, *inter alia*, communications and documents passing between a party’s solicitor and a third party if they are made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence.
44. I understand that the agency represented the Police Force of Western Australia in respect of the complainant’s appeal to the Supreme Court of Western Australia against his conviction in the Court of Petty Sessions of assault occasioning bodily harm. The agency’s “client” was the Police Force of Western Australia. It is also my understanding that the agency kept the Commission informed of progress in that appeal because officers of the Commission appeared as witnesses against the complainant in the Court of Petty Sessions and the Commission was interested in the outcome of the appeal.
45. As I understand the decision in *Sterling’s* case, communications between a solicitor and a third party (who is not the agent of the client) will only attract the privilege if they were made for the purpose of obtaining advice, evidence to be used, or information which might result in the obtaining of evidence to be used,

for the purposes of litigation anticipated or commenced at the time the communication was made.

46. The agency submits that *Sterling's* case also identified another class of documents that would be subject to legal professional privilege as third party communications. The agency submits that that category is:

*“Communications passing between the party and a third person (who is not the agent of the solicitor to receive the communication from the party) if they are made with reference to litigation either anticipated or commenced, and at the request or suggestion of the party’s solicitor; or even without any such request or suggestions, they are made for the purpose of being put before the solicitor with the object of obtaining his advice or enabling him to prosecute or defend an action.”*

47. *Sterling's* case did identify such a category. However, it is not relevant to this matter as none of the disputed documents claimed to be exempt under clause 7 is of that kind. That category is communications between “the party” - that is, the client - and a third party. None of the disputed documents claimed to be privileged is a communication between the client (the Police Force) and a third party; they are communications between the solicitor (the agency) and a third party.
48. In my view, the only documents which might be privileged as third party communications are Documents 3, 4, 5, 7, 17 and 21 and parts of Documents 16, 18 and 24. However, I do not consider that the remaining documents were made for the purposes described in *Sterling's* case. Document 4 is a letter dated 3 October 1997 from an officer of the Commission to the agency. Document 5 is a copy of a letter dated 11 November 1997 from the agency to that officer of the Commission. Document 7 is a letter dated 8 December 1997 from that Commission officer to the agency. Copies of Documents 4 and 7 and the original of Document 5 were the subject of a decision by the Acting Information Commissioner, with which I agree, in *Re Morrissey and Legal Aid Commission* [1998] WAICmr 25 and were found to be exempt under clause 7. Documents 4, 5 and 7 correspond to the documents numbered 12, 13 and 18 respectively in *Re Morrissey*. I have considered the documents and the reasons given in *Re Morrissey* in respect of the corresponding documents in that matter, with which I agree. For similar reasons to those given in paragraph 22 in *Re Morrissey*, I find that Documents 4, 5 and 7 are exempt under clause 7.
49. Document 3 is a file note of a telephone conversation between an officer of the agency and an officer of the Commission. It is dated 1 October 1997. I have considered the content of that document and it appears to me to record information that has been provided to the agency for the purposes of the appeal. It bears the same date as Document 11 in the earlier matter, which was a Commission file note of a telephone conversation between the same officer of the Commission and an officer of the agency. I have examined that document. It is not clear on the face of it whether or not Document 3 is a record of the same conversation. In any event, Document 3 appears to me to contain information quite different in nature to that contained in Document 11 in the

previous matter, only 2 lines of which were found to be privileged and therefore exempt. The communication recorded appears to me to have been a communication between the agency and a third party for the purposes of the litigation and, in my view, it would be privileged from production in legal proceedings on the ground of legal professional privilege. Therefore, I find it exempt under clause 7 of Schedule 1 to the FOI Act.

50. Document 17 is the written record of a telephone message dated 23 March 1998 from an officer of the Commission to an officer of the agency. The communication appears to me, from the content of the note, to have been for the purpose of providing the agency with information relevant to its preparation for the appeal. I am of the view, therefore, that it records a communication between a third party and a solicitor for the purposes of litigation and that it would, therefore, be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that Document 17 is exempt under clause 7 of Schedule 1 to the FOI Act.
51. Document 21 is a file note dated 2 April 1998 recording a telephone conversation between an officer of the agency and an officer of the Commission. It is the agency's note of a conversation, the Commission's note of which was Document 28 in the Acting Information Commissioner's decision in *Re Morrissey*. The Acting Commissioner found that document exempt under clause 7. Although I do not consider the agency to have established that Document 21 records a privileged communication, given that the corresponding document of the Commission was found to be exempt, I have reviewed the Acting Commissioner's reasons for so finding and the material submitted by the Commission on that occasion in support of the claim for exemption. I agree with the Acting Commissioner's decision that Document 28 in the earlier matter recorded a privileged communication and was therefore exempt under clause 7. As Document 21 in this matter is a note of the same privileged communication, it must also be privileged and, accordingly, I find that it is exempt under clause 7.
52. Document 1 is a message confirmation report, confirming a facsimile transmission from the agency to the Commission on 12 September 1997. There is a hand-written note towards the foot of the document that appears to be a file note of a conversation between an officer of the agency and the complainant on that date. The message confirmation itself would not, in my opinion, be privileged from production on the ground of legal professional privilege. It discloses nothing in the nature of legal advice, nor is there evidence before me that it was created for the purpose of the agency obtaining information or evidence for the appeal.
53. As to the note written on it, although the privilege for third party communications does not include communications to a client from the solicitor for the other party (*Handley v Baddock* [1987] WAR 98), there is some uncertainty as to whether a document recording a conversation with the other party to litigation is privileged. However, in this instance, I do not consider that that note would be privileged from production on the ground of legal professional privilege. It does not, on the face of it, appear to be a

communication for the purposes of the litigation (rather, it relates merely to a procedural matter) and it contains nothing in the nature of legal advice or anything of substance relating to the litigation. Accordingly, I find that Document 1 is not exempt under clause 7.

54. Document 2 is a facsimile coversheet dated 12 September 1997 and indicating that it accompanied a transmission of an additional 8 pages. Although the coversheet is a communication between the agency and the third party, there is no material before me to establish that it was made for the purposes of the litigation. The appeal is stated on the face of the document as the subject, but not all of the communications between the agency and the Commission related to the appeal were for the purposes of the appeal and, therefore, not all were privileged communications. Accordingly, in the absence of sufficient material to establish otherwise, I do not consider that the facsimile coversheet would be privileged from production in legal proceedings on the ground of legal professional privilege and I find that it is not exempt under clause 7.
55. The document also bears a note on its face that is dated 19 September 1997, one week after the date of the facsimile transmission. Although that note records a conversation between an officer of the agency and a third party in relation to the matter, it does not appear to me to have been made for the purpose of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence. Accordingly, I do not consider that the separate note written on the face of Document 2 would be privileged on the ground of legal professional privilege and I find that it is not exempt under clause 7.
56. Document 6 is a letter dated 28 November 1997 from the agency to an officer of the Commission. Having considered the content of that letter, I do not consider that it is a privileged document as, although it is a communication between the agency and a third party, it does not appear to have been for the purposes of the litigation. It appears to have been merely a courtesy as the Commission, which was not a party to the litigation but merely interested in its progress and outcome, had asked to be kept informed of the progress of the appeal. I find that Document 6 is not exempt under clause 7.
57. Document 8 – a facsimile transmission dated 7 January 1998 from an officer of the agency to an officer of the Commission – does not appear to me, on its face, to be a privileged document. There is no material before me to establish that that communication was for the purpose of the agency obtaining evidence or information for the purpose of the appeal and I find that that document is not exempt under clause 7.
58. Document 14 is a file note of a telephone conversation between an officer of the agency and an officer of the Commission. It does not appear to me to be in relation to the appeal and there is nothing on the face of it, or any other material before me, that establishes that it is a privileged third party communication. Therefore, I find that Document 14 is not exempt under clause 7.

59. Document 16 is a file note dated 23 March 1998 recording a telephone conversation between an officer of the agency and an officer of the Commission. Lines 5 and 6 of the text of that document appear to me to relate to information provided for the purposes of the appeal. In my opinion, therefore, those two lines would be privileged from production on the ground of legal professional privilege and are exempt under clause 7. However, the balance of the information contained in the document appears to me to record inquiries made and information given for the purpose of informing the Commission of the status of the proceedings, as a matter of courtesy to an interested party. Other than the two lines which I have found to be exempt, in my view, the balance of the document is not exempt as a third party communication under the test in *Sterling's* case as it was not a communication for the relevant purposes of the litigation.
60. Document 18 is a file note dated 26 March 1998 of a telephone conversation between an officer of the agency and an officer of the Commission. In my opinion, the first five lines of the last paragraph on the first page contain information relating directly to the appeal. I am of the view that that information would be privileged from production on the ground of legal professional privilege and I find, therefore, that it is exempt under clause 7. However, the balance of the information contained in the document does not appear to me to be of that nature, and does not appear to me to have been for the purpose stated in *Sterling's* case as the test for privilege for third party communications. Accordingly, I find that the balance of that document is not exempt under clause 7.
61. Document 24 contains 2 file notes recording telephone conversations held on the same day but with different people. In my view, the first of the file notes would be privileged from production on the ground of legal professional privilege. It appears to me to record a confidential communication made for the purpose of the agency giving legal advice to its client, the Police Force of Western Australia, concerning the complainant's appeal. Therefore, I find the note of that conversation exempt under clause 7. The second conversation recorded on that document, however, appears to have been for the purpose of informing an interested party of the status of the appeal, as a matter of courtesy, and not for the purposes of the appeal. On that basis, I find that the note of the second conversation is not exempt under clause 7.
62. Document 25 is a file note of a telephone conversation on 19 June 1998 between an officer of the agency and an officer of the Commission. The communication does not appear to me to have been for the purposes of the litigation. The conversation recorded was merely an interested party inquiring and being told what had happened in the appeal to date. I do not consider that that document would be a privileged third party communication protected from disclosure on the ground of legal professional privilege and, therefore, I find that Document 25 is not exempt under clause 7.

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