

MICHAEL AND ATTORNEY GENERAL

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

File Ref: 95069
Decision Ref: D03495

Participants:

**Shawky Michael and Joyce Mary
Michael**
Complainants

- and -

Attorney General
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - access to edited copies of documents - clause 3(1) - file notes of agency - correspondence - briefing note - memoranda - personal information about third parties - public interest factors for and against disclosure of personal information.

FREEDOM OF INFORMATION - clause 7 - legal professional privilege - matter within documents being a record of legal advice given by agency's legal adviser - instructions to legal adviser - information obtained by agency from third party for purpose of litigation - severing of exempt matter from non-exempt matter.

Freedom of Information Act 1992 (WA) ss. 66, 68(1), 72(1)(b), 74, 75(1), 102(3);
Schedule 1 clauses 3, 7; Schedule 2 Glossary clause 1.

Vexatious Proceedings Restriction Act 1930 (WA)

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

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

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

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

Grant v Downs (1976) 135 CLR 674.

Baker v Campbell (1983) 153 CLR 52.

Nickmar Pty Ltd and Another v Preservatrice Skandia Insurance Ltd (1985) 3 NSWLR 44.

Trade Practices Commission v Sterling (1979) 36 FLR 244.
Waterford v The Commonwealth (1987) 163 CLR 54.

DECISION

The decision of the agency is confirmed. The matter deleted from the disputed documents is exempt matter, either under clause 3(1) or clause 7 of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

14th September 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Attorney General of Western Australia ('the agency') to refuse Dr and Mrs Michael ('the complainants') access to certain matter deleted from documents to which the complainants have been granted access to edited copies in accordance with the provisions of the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainants are parties to an action commenced by the agency in the Supreme Court of Western Australia pursuant to the *Vexatious Proceedings Restriction Act 1930*. On 13 December 1994, the complainants first sought access under the FOI Act to documents of the agency associated with that action. It appears that the initial access application did not identify with sufficient particularity, the documents requested by the complainants. Subsequently, the complainants lodged a further access application with the agency dated 2 February 1995. That application was partially transferred to the Ministry of Justice on 15 February 1995.
3. On 17 February 1995, the agency advised the complainants of arrangements that were available to enable them to inspect, as requested, documents held by the agency relating to their access application dated 13 December 1994, to which the agency had decided to grant access either in full or in part.
4. On 27 March 1995, the agency decided to grant the complainants access to edited copies of the documents requested by the complainants in their access application dated 2 February 1995, from which matter claimed to be exempt under clauses 3(1) and 7 of Schedule 1 to the FOI Act had been deleted. On 27 April 1995, the complainants applied to the Information Commissioner for external review of the two decisions of the agency, namely, the decisions dated 17 February and 27 March 1995.
5. However, the application for external review of the decision dated 17 February 1995 was not made within the prescribed time of 60 days as provided by s.66(2) of the FOI Act and the complainants were required to provide a submission to me to show cause why I should exercise my discretion to accept that application out of time. Accordingly, a submission was received from the complainants on 17 May 1995.

REVIEW BY THE INFORMATION COMMISSIONER

6. On 16 June 1995, the complainants were informed that I had declined to exercise my discretion under s.66(4) to accept their complaint with respect to the decision

of the agency dated 17 February 1995. However, the complaint with respect to the decision dated 27 March 1995 was accepted. In accordance with my statutory obligation under s.68(1) of the FOI Act, the agency was also notified of this fact on 16 June 1995. Pursuant to my authority under ss.75(1) and 72(1)(b), I required the production to me of the disputed documents and certain other documents in order that I may properly consider the complaint. Those documents were produced to my office on 23 June 1995.

7. In the course of my dealing with this complaint, the persons about whom personal information is contained within the disputed documents made submissions to my office in relation to the agency's claims, but did not seek to be joined as parties to the complaint.
8. On 27 July 1995, after examining the documents in dispute and considering the submissions of the parties, I met with the complainants at my office. In that meeting the complainants were advised that it was my preliminary view, on the material then before me, that the agency's claims for exemption under clauses 3(1) and 7 for the matter deleted from the disputed documents could be substantiated. Following that meeting I received a further written submission from the complainants dated 10 August 1995.

THE DISPUTED DOCUMENTS

9. There are 19 documents in dispute between the parties. The complainants have been provided with access to edited copies of those documents. The agency claims that the matter deleted from the disputed documents is exempt, either because it would reveal personal information about third parties, or because it is matter that would be privileged from production in legal proceedings on the ground of legal professional privilege. The documents, and the exemptions claimed for the matter deleted from those documents, are as follows:

No	Date	Description	Exemption
1	29/8/84	File note	3(1); 7
2	26/8/94	File note	3(1); 7
3	29/6/94	File note	3(1); 7
4	28/3/94	Letter from agency to third party	3(1)
5	24/2/94	Letter to agency from third party	3(1)
6	Undated	Diary entry	3(1)
7	20/6/94	File note	3(1); 7
8	31/3/94	File note	3(1); 7

9	28/3/94	File note	3(1); 7
10	28/3/94	Copy of document 4	3(1)
11	22/3/94	File note	3(1)
12	22/3/94	Memorandum	3(1); 7
13	18/3/94	File note	3(1)
14	11/3/94	File note	3(1); 7
15	2/3/94	File note	3(1)
16	24/2/94	File note	3(1)
17	28/2/94	Briefing note	3(1)
18	24/2/94	Copy of Document 5	3(1)
19	6/2/95	Letter from agency to third party	3(1)

THE EXEMPTIONS

(a) Clause 3 - Personal information

10. The agency has deleted the names of certain persons from the disputed documents on the ground that that information is personal information that is exempt under clause 3(1) of Schedule 1 to the FOI Act. 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)...
(4)...
(5)...

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

11. In the Glossary in 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."*
12. I have previously expressed the view in many of my decisions that the purpose of the exemption in clause 3 is to protect the privacy of individuals. That exemption is 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.
13. Although, in some instances, the mere mention of a person's name may be "personal information" about that person, there usually must be more information than a name in order to establish the exemption under clause 3. Parts (a) and (b) of the definition quoted in paragraph 11 above suggest that, to attract the exemption, disclosure of the matter must reveal something more about an individual than his or her name. As I have said before, in my view, a document consisting of an untitled list of names and nothing more would be unlikely to be exempt under clause 3. However, a document containing a list of names that also discloses something personal and private about the people mentioned in that list, because of the context in which the names appear in that document or because of the title of the document, may well attract the exemption.
14. When an agency decides, as the agency has in this instance, that a document contains personal information about a person, and that document is the subject of an access application under the FOI Act by some other person, it may provide access to that document with personal information deleted. An agency may delete so much of the personal information that would enable the identity of the person to be ascertained. In some instances, this may be achieved by deleting the name only and providing access to the remaining information if the identity of the person to whom the information relates is not able to be ascertained from that information itself. I consider providing access to a document with only the name deleted, wherever possible, to be in accordance with the objects and intent of the FOI Act.
15. In this instance the complainant has been provided with a copy of the disputed documents with the names of various third parties deleted. I am satisfied, from my examination of those documents and the context in which the names appear, that the disputed documents, listed in paragraph 9 above, contain personal information about persons other than the complainants. Some of the matter that I consider would be personal information, as defined in the FOI Act, if the

identities of the persons to whom it relates were known, has already been disclosed to the complainants in the edited copies of the disputed documents.

16. However, without the names of the persons to whom that information relates, I consider that the identity of those persons cannot be ascertained from the disclosure of that information. In those circumstances, I am of the view that disclosure of the identity of the third parties would reveal personal information about them and, therefore, I find that the names are, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act.
17. The exemption provided by clause 3 is subject to a number of limitations. In the circumstances of this complaint, the only relevant limitation is that in clause 3(6), which provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. the onus of persuading me that the disclosure of that kind of information would, on balance, be in the public interest, lies on the complainants under s.102(3) of the FOI Act.

The public interest test

18. The complainants sought to persuade me that disclosure of the exempt matter would, on balance, be in the public interest. The complainants submitted that it was in the public interest for the personal information to be disclosed because the information was needed by them to ensure that there was a fair trial of their matter, and to enable the evidence of all the people involved in the proceedings against them to be before the Court. Further, the complainants submitted that it was their right to have access to that matter and claimed that the activities of the agency have always been of great interest to the public.
19. I recognise that there is a public interest in the complainants being able to exercise their general right of access to documents. However, in my view, that public interest is subject to the protection of other essential public and private interests. I recognise a public interest in maintaining the privacy of individuals whose personal information may be disclosed in documents held by State and local government agencies. In my view, that public interest factor may only be displaced by strong and convincing arguments.
20. In this instance, I am not persuaded by the arguments of the complainant in favour of disclosure and I am not satisfied that there is any countervailing public interest that outweighs the protection of individual privacy. The complainants claim to know the identity of the persons whose names appear in the disputed documents. I am neither able to confirm nor deny that claim without breaching my duty under s.74(1)(a) of the FOI Act. However, it is open to the complainants to subpoena persons they consider may be able to give evidence as witnesses at the pending proceedings and to examine them or to cross-examine any witnesses called by the other parties to the pending proceedings. Further, the complainants will have the opportunity to inspect any documents that are tendered in evidence in the course of those proceedings.
21. In my view, it is not necessary, in furtherance of the due administration of justice, that the identities of the persons whose names appear in the disputed documents

be disclosed in order for the complainants to be able to call witnesses to give evidence on their behalf, or in order for them to be able to cross-examine any witness called by any other party. Further, taking into account the submissions of those parties and the background to this complaint, in my view, there is a compelling need to maintain individual privacy of the persons concerned.

22. Therefore, on balance, I consider the public interest in maintaining the privacy of individuals outweighs any other public interest in this instance. I find the matter deleted from the disputed documents to be exempt matter under clause 3(1) of Schedule 1 to the FOI Act.

(b) Clause 7 - Legal professional privilege

23. The agency claims that some of the disputed documents contain matter that is also exempt under clause 7 of Schedule 1 to the FOI Act. Clause 7 provides:

"Legal professional privilege

Exemption

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

Limit on exemption

- (2) *Matter that appears in an internal manual of an agency is not exempt matter under subclause (1)."*

24. As I have said before, in my view, that exemption recognises the public interest in the maintenance of the principle of legal professional privilege as outweighing any other competing public interest. In a number of my previous formal decisions, I have discussed the principle and application of legal professional privilege: *Re Read and Public Service Commission* (16 February 1994, unreported), at paragraph 65; *Re Guyt and Health Department of Western Australia* (16 March 1994, unreported), at paragraphs 11-18; *Re Weeks and the Shire of Swan* (24 February 1995, unreported), at paragraphs 15-20; *Re Nazaroff and Department of Conservation and Land Management* (24 March 1995, unreported), at paragraphs 15-19.
25. It is clearly established law in Australia that confidential communications passing between a client and his or her legal adviser for the sole purpose of giving or receiving legal advice need not be given in evidence or otherwise disclosed by the client and, without the client's consent, may not be given in evidence or otherwise disclosed by the legal adviser: *Grant v Downs* (1976) 135 CLR 674.

26. In *Grant v Downs*, after a consideration of the matters in issue, Stephen, Mason and Murphy JJ said, at p.688:

"All that we have said so far indicates that unless the law confines legal professional privilege to those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings the privilege will travel beyond the underlying rationale to which it is intended to give expression and will confer an advantage and immunity on a corporation which is not enjoyed by the ordinary individual. It is not right that privilege can attach to documents which, quite apart from the purpose of submission to a solicitor, would have been brought into existence for other purposes in any event, and then without attracting any attendant privilege. It is true that the requirement that documents be brought into existence in anticipation of litigation diminishes to some extent the risk that documents brought into existence for non-privileged purposes will attract the privilege but it certainly does not eliminate the risk. For this and the reasons we have expressed earlier we consider that the sole purpose test should now be adopted as the criterion of legal professional privilege."

27. Thus, the test to be applied in order to decide whether a document attracts legal professional privilege is the "sole purpose" test. This requires a consideration of whether the document was brought into existence for the sole purpose of giving or receiving legal advice or for use in existing or anticipated legal proceedings: *Grant v Downs*, *op cit*; *Baker v Campbell* (1983) 153 CLR 52.
28. The rule is most often applied to confidential communications between a client and his or her lawyer for either of those purposes. However, the principle extends to communications between a third party and the client or a lawyer, where those communications are made or brought into existence for the sole purpose of use in existing or anticipated litigation: *Nickmar Pty Ltd and Another v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44; *Trade Practices Commission v Sterling* (1979) 36 FLR 244.
29. I have examined the matter deleted from the disputed documents for which a claim for exemption is made pursuant to clause 7 and considered that matter in the context in which it appears in the disputed documents. The matter within the disputed documents which the agency claims is exempt under clause 7 of Schedule 1 to the FOI Act either records instructions given by the agency to the Crown Solicitor's Office; or records legal advice provided to the agency by the Crown Solicitor's Office; or records information obtained by the agency from a third party for the purpose of submitting that information to the Crown Solicitor's Office in the course of the litigation which had been commenced by the agency against the complainants.

30. Taking into account that matter and the pending proceedings against the complainants under the *Vexatious Proceedings Restriction Act 1930*, I am satisfied that the disputed documents contain matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.
31. That is not to say that I am satisfied that all of the matter within the disputed documents numbered 1-3, 7-9, 12 and 14 was brought into existence for the sole purpose of giving or receiving legal advice. That is clearly not the case, as the description of those documents suggests. However, the exemption in clause 7 applies to "matter" rather than to "documents". In my view, information capable of attracting legal professional privilege may appear in documents of an agency and, where that occurs and it is practicable to sever matter that is exempt under clause 7 from non-exempt matter, an access applicant should be provided with access to an edited copy of the document in accordance with the spirit and intent of the FOI Act: *Waterford v The Commonwealth* (1987) 163 CLR 54. I am satisfied that on this occasion, the matter which the agency has deleted is matter which is exempt under clause 7, and which is capable of being severed from the disputed documents.
32. The complainants submitted that the application of clause 7 to the disputed documents described in paragraph 9 above, was unjust, unfair and not in the public interest. However, there is no "public interest test" attached to the exemption in clause 7. That necessarily means that the matters raised by the complainants in their submissions with respect to the matter claimed by the agency to be exempt under clause 7 are irrelevant for the purposes of my determination of this complaint. I find the matter deleted from the disputed documents 1-3, 7-9, 12 and 14 to be exempt matter under clause 7 of Schedule 1 to the FOI Act.
