

MORRISSEY AND INSURANCE COMMISSION

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

**File Ref: 97113
Decision Ref: D03597**

Participants:

Leo Francis Morrissey
Complainant

- and -

Insurance Commission of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents on motor vehicle injury claim file - notes of legal advice received from agency's legal adviser - compensation proceedings - clause 7 - legal professional privilege - whether privilege waived by agency through certain disclosures.

Freedom of Information Act 1992 (WA) ss.66(2); 66(4); Schedule 1 clauses 3(1), 6, 7.

Grant v Downs (1976) 135 CLR 674

Trade Practices Commission v Sterling (1979) 36 FLR 244

Attorney-General for the Northern Territory v Maurice (1986) 161 CLR 475

General Accident Insurance Fire and Life Assurance Corp Ltd v Tanter (1984) WLR 100

DECISION

The decision of the agency is confirmed in so far as Documents 5, 6, 7, 13 and 15 are exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*, and the matter deleted from Documents 14 and 16 is also exempt under clause 7.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

16th December 1997

REASONS FOR DECISION

BACKGROUND

1. This is an external review by the Information Commissioner arising out of a decision by the Insurance Commission of Western Australia ('the agency') (formerly the State Government Insurance Commission) to refuse Mr Morrissey ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. In September 1986, the complainant was involved in a motor vehicle accident. He subsequently lodged a claim with the agency seeking damages for injuries suffered as a result of that motor vehicle accident. It is my understanding that the parties settled that claim out of court. By letter dated 3 December 1996, the complainant lodged an application with the agency seeking access under the FOI Act to certain documents associated with his personal injury claim.
3. In early January 1997, the agency allowed the complainant to inspect his entire file, except for 24 documents that were removed from the file. The agency listed and briefly described each of the 24 documents on a schedule and provided the complainant with a copy of that schedule. Subsequently, the complainant indicated that he wished to have access to each of those 24 documents. Thereafter, in a notice of decision dated 7 February 1997, the agency granted the complainant full access to 13 documents and part access to 5 documents, and refused access to 6 others. The agency claimed exemption under clause 3(1) and clause 7 for the documents and parts of documents to which access was refused.
4. The complainant sought internal review of the agency's decision. On 7 March 1997, the Managing Director and principal officer of the agency, Mr Evans, confirmed the initial decision of the agency. On 27 May 1997, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.
5. Initially, it appeared that the application for external review had been lodged outside the period of 60 days provided for in s.66(2) of the FOI Act. However, inquiries by my office established that the agency's notice of decision on internal review had been sent to the wrong address. In the circumstances, I considered that the complainant should not be disadvantaged by an administrative error and I exercised my discretion under s.66(4) of the FOI Act and allowed the complaint to be made.

REVIEW BY THE INFORMATION COMMISSIONER

6. I obtained the disputed documents from the agency. The complainant also provided my office with copies of various documents to which he had been granted access. Following discussions with my office, the complainant withdrew

his complaint in respect of 3 documents for which the agency had claimed exemption under clause 3(1) of Schedule 1 to the FOI Act.

7. On 26 November 1997, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the claims for exemption under clause 7 appeared to be justified in respect of most, but not all, of the documents remaining in dispute. Consequently, the agency withdrew its claims in respect of 1 document (Document 4), but maintained its claims for exemption for the remaining documents and parts of documents. I received further submissions from the parties in support of their respective claims.

THE DISPUTED DOCUMENTS

8. The disputed documents, identified by the numbers assigned to them in the agency's schedule, are described as follows:

Document 5	File note dated 11 March 1992
Document 6	Internal memorandum dated 13 March 1992
Document 7	File note dated 4 May 1992
Document 13	Pre-trial Conference Checklist dated 30 December 1992
Document 14	Internal memorandum dated 18 February 1993
Document 15	Internal memorandum dated 31 March 1993
Document 16	File note dated 23 April 1993

The agency refused access to Documents 5, 6, 7, 13 and 15 on the ground that those documents are exempt under clause 7 of Schedule 1 to the FOI Act. The agency granted the complainant access to edited copies of Document 14 and Document 16. The agency claims that the matter deleted from Document 14 is exempt under clause 7, and the matter deleted from Document 16 is exempt under clause 6 and clause 7.

THE EXEMPTIONS

(a) Clause 7 – Legal professional privilege

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 common law principle is that confidential communications between a solicitor and his or her client will be privileged from production in legal proceedings 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. A claim for privilege is not limited to communications that have been made for the purpose of existing or contemplated litigation.
11. Legal professional privilege also extends to cover confidential communications for the requisite purpose between a lawyer and the client's agent. In *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 247 Lockhart J. stated that privilege applies to "*any communication between a party and his professional legal adviser if it is confidential and made to or by the professional adviser in his professional capacity and with a view to obtaining or giving legal advice or assistance, notwithstanding that the communication is made through agents of the party and the solicitor or the agent or either of them*".
12. In that case, at p.246, Lockhart J. also stated that legal professional privilege extends to, *inter alia*:
- "(d) 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 his behalf...*
- (e) Communications and documents passing between the 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..."*
13. In addition, legal professional privilege also protects documents which are not communications provided they are brought into existence for the sole purpose of preparing for, or for use in, existing or contemplated judicial or quasi-judicial proceedings: see *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475.

WAIVER OF PRIVILEGE

14. The complainant claims that any privilege that may have applied to the disputed documents has been waived by the agency by its disclosure to him of all of the other documents comprising his claims file. The complainant submits that the

substance of the contents of the disputed documents has therefore already been disclosed to him.

15. Waiver occurs when the client performs an act that is inconsistent with the confidence protected by the privilege. The consequences of waiver are that the client becomes subject to the normal requirements of disclosure of the communication. However, waiver of privilege in a document does not necessarily waive privilege in associated documents. In *General Accident Insurance Fire and Life Assurance Corp Ltd v Tanter* (1984) WLR 100, Hobhouse J determined that waiver of privilege in a document before tender at trial affected only the document itself. In *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 the High Court held that waiver of privilege in a Claims Book lodged with the Aboriginal Land Commissioner, and referred to in proceedings before him, did not waive privilege in the documents that formed the source material for the claim book. As I understand that authority, privilege in associated materials will only be impliedly waived where privileged material has been used by the privilege-holder in such a way as to render it unfair as against another party to maintain the privilege in the associated materials.

Document 5

16. Document 5 is a record of a telephone conversation between the agency's legal adviser and an officer of the agency in relation to a legal opinion that the legal adviser was about to give to the agency. In my view, it is a record of a privileged conversation between those parties. I consider that Document 5 would be privileged from production in legal proceedings on the ground of legal professional privilege
17. Although the evidence before me establishes that the complainant has inspected a legal opinion dated 11 March 1992, in my view, the waiver of privilege in respect of that document does not extend to associated documents such that it could be said that privilege in Document 5 has also been waived. The conversation recorded in Document 5 was, in my view, a separate, privileged conversation. There is no evidence before me to suggest that the privilege in that document has been waived. Accordingly, I find that Document 5 is exempt under clause 7.

Document 6

18. Document 6 is an internal memorandum between officers of the agency. It refers to a written legal opinion of the agency's legal adviser and includes comments on that advice. Whilst I consider that the comments of the officer of the agency may not be privileged, those comments could not be disclosed without also disclosing the legal advice. As both the author and recipient of the memorandum are officers of the client agency, disclosure as between them is not disclosure by the client agency to a third party. In those circumstances, I do not consider that privilege has been waived. In my view, Document 6 would be privileged from production in legal proceedings on the ground of legal professional privilege. I find that Document 6 is exempt under clause 7.

Document 7

19. Document 7 records a telephone conversation between an officer of the agency and the agency's legal adviser, in which legal advice was given to the agency. There is no evidence before me to suggest that privilege in that document has been waived. I am satisfied that that document would be exempt from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that Document 7 is exempt under clause 7.

Document 13

20. Document 13, as its description suggests, is a checklist prepared by an officer of the agency for a pre-trial conference in respect of the complainant's claim. It contains a note of legal advice and comments on the complainant's compensation case that, at that time, was the subject of litigation. In my view, that document was clearly prepared in connection with the proceedings then on foot between the parties. For those reasons, I consider it would be privileged from production in legal proceedings on the ground of legal professional privilege. I find that Document 13 is exempt under clause 7.

Document 14

21. Document 14 is an internal memorandum between officers of the agency. It refers to various matters in connection with the complainant's compensation claim. The agency has provided the complainant with access to an edited copy of Document 14. The matter to which access is denied consists of four lines of text in the fourth paragraph. The matter that has been deleted clearly records legal advice provided to the agency by its legal adviser. As there is no evidence before me that privilege in respect of that matter has been waived, I am of the view that it would be privileged from production in legal proceedings on the ground of legal professional privilege. I find that the matter deleted from Document 14 is exempt under clause 7.

Document 15

22. Document 15 records a telephone conversation between the agency's legal adviser and an officer of the agency in which legal advice was given to the agency. Having considered the contents of the document, I am of the view that it is a record of a privileged communication. There is no evidence before me of any waiver of the privilege in that document. In my view, Document 15 would be privileged from production in legal proceedings on the ground of legal professional privilege. I find Document 15 to be exempt under clause 7.

Document 16

23. Document 16 is a file note of certain matters discussed at a pre-trial conference between the Registrar of the District Court, the agency's legal adviser and an officer of the agency, in connection with the litigation then on foot between the agency and the complainant. Part of that document relates to a subsequent

telephone discussion between the officer and the agency's legal adviser in respect of those same matters.

24. That matter comprises three lines of text in the first paragraph and four lines of text in the third paragraph which have been deleted from the copy of the document to which the complainant has been given access. The first passage deleted records part of a conversation between the agency's legal adviser and the Registrar in the absence of the complainant. The second passage also refers to a conversation between the agency's legal adviser and the Registrar.
25. In my opinion, those conversations were confidential communications between the agency's legal adviser and a third party, the Registrar, for the sole purpose of the litigation then on foot. On that basis, and as there is no evidence before me that the agency has waived privilege in respect of those communications, I am of the view that both of the deleted passages would be privileged from production in legal proceedings on the ground of legal professional privilege. Therefore, I find the matter deleted from Document 16 exempt under clause 7 of Schedule 1 to the FOI Act.

(b) Clause 6 – Deliberative process

26. The agency also claims exemption under clause 6(1) for the deleted parts of Document 16. As I have found those parts of that document to be exempt under clause 7, I need not further consider whether they are exempt under clause 6.
