

OSET AND MOJ

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

**File Ref: 95004
Decision Ref: D04695**

Participants:

Batoul Oset
Complainant

- and -

Ministry of Justice
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - clause 7 - legal professional privilege - legal advice given by Crown Solicitor's Office to agencies - confidential communications between a legal adviser and an agency for the "sole purpose" of giving legal advice - legal advice provided to Commissioner of Police - legal advice provided to former Ministry of Cabinet and Public Sector Management - documents prepared for the purpose of legal proceedings anticipated or commenced.

Freedom of Information Act 1992 (WA) ss. 72(1)(b), 75(1); Schedule 1 clause 7.

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).

Re Waghorn and Christmass and Police Force of Western Australia (Information Commissioner, WA, 22 May 1995, unreported).

Re Rehman and Medical Board of Western Australia (Information Commissioner, WA, 1 August 1995, unreported).

Re "E" and Department for Family and Children's Services (Information Commissioner, WA, 29 August 1995, unreported).

Re Michael and Attorney General (Information Commissioner, WA, 14 September 1995, unreported).

Re Coastal Waters Alliance of Western Australia Incorporated and Department of Environmental Protection and Cockburn Cement Limited (Information Commissioner, WA, 28 September 1995, unreported).

Grant v Downs (1976) 135 CLR 674.

Baker v Campbell (1983) 153 CLR 52.

Re Oset and Health Department of Western Australia (Information Commissioner, WA, 1 June 1995, unreported).

Re Oset and Ministry of the Premier and Cabinet (Information Commissioner, WA, 2 September 1994, unreported).

DECISION

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

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

26th October 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Ministry of Justice ('the agency') to refuse Mrs Oset ('the complainant') access to certain documents requested by her under the *Freedom of Information Act 1992* ('the FOI Act').
2. In September 1989, the complainant was advised that her contract of temporary employment with the Public Service would not be renewed after its expiration. As a result, the complainant made a complaint to the Equal Opportunity Tribunal against the then Director General of the Ministry of the Cabinet and Public Sector Management ('the Ministry'). The Director General instructed the Crown Solicitor's Office ('the CSO') to provide him with legal advice on the complaint and to represent him at the hearing of the complaint. In late 1989, following those events, several officers of the Ministry alleged that they had been harassed by the complainant. The Director General instructed the CSO to provide him with legal advice in relation to those allegations and to conduct any litigation the Ministry may have initiated against the complainant as a result of the alleged harassment.
3. In 1990, the complainant lodged an appeal with the Supreme Court of Western Australia. As the respondent to that appeal was a police officer, the then Commissioner of Police instructed the CSO to provide him with legal advice for the purposes of that appeal and to represent the Respondent at the hearing of the appeal.
4. On 6 October 1994, the complainant lodged an access application with the agency seeking access to a number of documents related to various complainants she had made to the former Under Secretary for Law, the Equal Opportunity Tribunal, the Supreme Court of Western Australia, the Public Service Appeal Board, the former Attorney General, the former Minister for Justice and to former and present Ministers for Police and to the former Commissioner of Police.
5. The agency dealt with the complainant's access application in two parts. On 18 November 1994 and on 28 November 1994, the agency provided the complainant with access to a number of documents. However, the agency refused the complainant access to a number other documents on the ground that those documents are exempt under clause 7 of Schedule 1 to the FOI Act.
6. The complainant sought internal review of that decision on 13 December 1994, and, on 29 December 1994, Mr Peter Nella, Manager, Records Management Branch, confirmed the initial decision of the agency. On 13 January 1995, the complainant applied to the Information Commissioner for external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

7. In accordance with my usual practice, pursuant to my powers under s.75(1) and 72(1)(b) of the FOI Act, on 1 February 1995, I obtained the documents in dispute from the agency and examined them. I also obtained the agency's FOI file. On 8 February 1995, a member of my staff met with the complainant in order to assess the prospects for conciliation of this matter. However, following discussions with the complainant at that meeting conciliation was not considered to be an option in this instance.
8. On 27 February 1995, after examining the documents in dispute, I formed the preliminary view that all of the disputed documents were exempt under clause 7 of Schedule 1 to the FOI Act. Both parties were informed of my preliminary view and reasons for that view. The complainant did not accept my preliminary view with respect to all of the documents and she further alleged that other documents were "missing" from the agency's files to which she had been granted access.
9. Following receipt of my preliminary view, I received a barrage of correspondence from the complainant, including copies of letters she had written to various other people within the public sector and to members of Parliament. Those letters from the complainant bore no relevance to the particular subject matter of this complaint, nor did the complainant provide me with any probative evidence or other material to support her claims about the existence of the documents which she alleged are "missing" from the agency's files.
10. In light of the issues raised in the complainant's response to my preliminary view, I directed a member of my staff to attend at the agency for the purpose of inspecting the agency's record-keeping and document storage and retrieval systems. My officer also obtained from the agency additional information about the manner in which it had conducted searches for the documents which had been identified by the agency as being within the ambit of the complainant's access application. I also sought further information about one of the disputed documents.
11. On 21 July 1995, the agency provided a further submission in relation to that particular document. However, I subsequently became aware that a copy of that document had been released to the complainant by another agency. When this fact was brought to the attention of the agency, the claims for exemption with respect to that document were withdrawn and a copy was released to the complainant. As the remaining issues could not be resolved between the parties, I have proceeded to a formal decision.

THE DISPUTED DOCUMENTS

12. There are 44 documents in dispute in this instance. The documents consist of various notes, memoranda, statements and letters prepared by several solicitors of the CSO. Twenty five of the disputed documents relate directly to the matter of the complainant's complaint to the Equal Opportunity Tribunal. Twelve concern the matter of the complainant's appeal to the Supreme Court of Western Australia and the remaining seven relate to the advice provided to the then Director General about the allegations of harassment against staff of the Ministry by the complainant.

THE EXEMPTION

13. Clause 7 of Schedule 1 to the FOI Act 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)."*

14. 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 paragraphs 65-66; *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; *Re Waghorn and Christmass and Police Force of Western Australia* (22 May 1995, unreported), at paragraphs 19-36; in *Re Johnson and State Government Insurance Commission* (20 May 1995, unreported), at paragraphs 20-24; *Re Rehman and Medical Board of Western Australia* (1 August 1995, unreported), at paragraphs 59-73; *Re "E" and Department for Family and Children's Services* (29 August 1995, unreported), at paragraphs 22-23, 25 and 26; *Re Michael and Attorney General* (14 September 1995, unreported), at paragraphs 24-28; *Re Coastal Waters Alliance of Western Australia Incorporated and Department of Environmental Protection and Cockburn Cement Limited* (28 September 1995, unreported), at paragraphs 38-59.

15. It is clearly established law in Australia that confidential communications passing between a legal adviser and his or her client 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, if made for the sole purpose of enabling the client to obtain, or the adviser to give, legal advice or for use in existing or anticipated legal proceedings: *Grant v Downs* (1976) 135 CLR 674; *Baker v Campbell* (1983) 153 CLR 52.
16. 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.*).
17. I have examined the documents in dispute. I am satisfied that some of the disputed documents either are, or record, confidential communications between the CSO and its clients or between various solicitors of the CSO with a view to providing either the Director General or the Commissioner of Police with legal advice. I am also satisfied that the remaining disputed documents were brought into existence for the sole purpose of seeking or giving legal advice or use in existing or anticipated legal proceedings against the complainant.
18. It is my opinion therefore, that the disputed documents would be privileged from production in legal proceedings on the ground of legal professional privilege. I find that the disputed documents are exempt under clause 7 of Schedule 1 to the FOI Act.

Sufficiency of Search Issue

19. The complainant also alleged that she had not been provided with access to all of the documents requested in her access application and that documents were "missing" from the agency's files. The complainant has previously made claims about alleged "missing" documents from another two agencies which were the subject of my decisions in *Re Oset and Health Department of Western Australia* (1 June 1995, unreported) and *Re Oset and Ministry of the Premier and Cabinet* (2 September 1994, unreported). The complainant should, therefore, be well aware of my view about the role and function of the Information Commissioner when dealing with complaints that concern documents allegedly missing from an agency's files. In my view, the function of the Information Commissioner is limited to determining whether, in all the circumstances, the searches conducted by the agency were reasonable.
20. In this instance, a member of my staff visited the agency on 13 March 1995 and inspected the agency's computerised record-keeping system. The agency demonstrated to the member of my staff, the manner in which it had searched for documents within the ambit of the access application. The agency searched its records using the complainant's name as the search field. That search located 10 files. A further search of the contents of those 10 files was made and three files

were eliminated as being outside the ambit of the access application. The remaining 7 files were inspected by the agency's FOI Co-ordinator. Except for the disputed documents, the complainant was provided with access to the remainder of those files. On the basis of the report provided to me by my officer following that visit, I am of the view that the agency has complied with its obligations under the FOI Act.

21. The complainant did not provide me with any probative evidence or information which forms the basis for her belief that documents are missing from the agency's record-keeping system. I am satisfied, from the inspection of that system by the member of my staff and the material before me, that the agency has located and identified the documents that come within the ambit of the complainant's access application. Whilst I cannot state with any degree of certainty that no documents are missing from the agency's record-keeping system, in the circumstances, I consider it unlikely. Therefore, in relation to the part of the complaint concerning "missing" documents, I am satisfied that the agency has taken reasonable steps to locate the requested documents and I find that part of the complaint to be lacking in substance.
