

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

**File Ref: F1721999
Decision Ref: D0471999**

Participants:

Bruce Frederick Bailey
Complainant

- and -

Education Department of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – correspondence between the agency and its legal advisers – clause 7 – legal professional privilege – privileged communications – whether legal professional privilege attaches to internal memorandum – whether legal professional privilege attaches to draft letters.

Freedom of Information Act 1992 (WA) Schedule 1 clause 7.

Attorney General v Kearney (1985) 158 CLR 500

Grant v Downs (1976) 135 CLR 674

Re Clements and Graylands Hospital [1995] WAICmr 49

Trade Practices Commission v Sterling [1979] 36 FLR 244

Waterford v The Commonwealth of Australia (1987) 163 CLR 54

DECISION

The decision of the agency is varied to the extent that I find that part of Document 1 and part of Document 2 are exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*, and the whole of Document 3 is exempt under clause 7.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

21 December 1999

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Education Department of Western Australia ('the agency') to refuse Mr Bailey ('the complainant') access to certain documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant is the former Principal of the Cunderdin Agricultural College ('the college'). In 1998, the agency wrote to the complainant about his continuing in the position of Principal and various letters between the complainant and the agency were created in respect of that issue.
3. On 7 July 1999, the complainant made an application to the agency under the FOI Act seeking access to copies of various documents subsequently clarified to be:
 - correspondence from the agency's Occupational Physician to a third party between 26 August 1998 and 12 September 1998 concerning him;
 - correspondence from the Director General of the agency to the Crown Solicitor's Office in the period 3 December 1998 to 25 January 1999 relating to him; and
 - documents relating to the complainant's position and duties as Principal of the college in 1999 or the agency's plans with respect to those matters.
4. I understand that, in discussions with the agency, the complainant identified other documents including correspondence from the Director General to other officers of the agency or documents created by those officers in respect of the same matters and included those additional documents within the scope of his application. Although the agency accepted the complainant's access application in that expanded form, it failed to make a decision on access within the permitted period of 45 days prescribed by the FOI Act. Therefore, on 2 September 1999, the complainant sought an internal review of the agency's deemed refusal to grant him access to those documents.
5. On 16 September 1999, following internal review, the agency decided to grant the complainant access to most, but not all, of the requested documents. The agency refused access to 3 documents on the ground that those documents are exempt under clause 7 of Schedule 1 to the FOI Act. The agency also informed the complainant that, in respect of the first dot point of his access application, no documents of that kind could be found.

6. On 21 September 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision in respect of 2 of the 3 documents to which access had been denied. In that letter the complainant described three documents that had not been identified by the agency and claimed that those documents were within the ambit of his access application.

REVIEW BY THE INFORMATION COMMISSIONER

7. I obtained the disputed documents from the agency and directed my officer to determine whether this complaint could be resolved by conciliation between the parties. However, this complaint could not be resolved in that manner. In the course of my dealing with this complaint, the agency found a copy of the document identified in the first dot point in paragraph 3 above and granted the complainant access to a copy of that document. The agency also found another document (Document 3 in the table below) and decided to refuse access to it. It was also clarified that some references which had led the complainant to believe further documents existed were, in fact, references to the two documents already identified by the agency (Documents 1 and 2 in the table below).
8. On 3 December 1999, after considering the material before me, the parties were informed in writing of my preliminary view of this complaint, including my reasons. It was my view that 3 documents remained in dispute between the parties. In respect of those documents, it was my preliminary view that parts of 2 of those documents may not be exempt under clause 7 of Schedule 1 to the FOI Act, but that the balance of those documents may be exempt under clause 7 as claimed by the agency.
9. I received further submissions in writing from both parties. However, the complaint remained unresolved.

THE DISPUTED DOCUMENTS

10. The disputed documents are described below:

Document	Folio Nos	File No	Description
1	6-12	173898V08	Handwritten notes of Director General (the date of 9/1/99 appears on one page only).
2	1-4	"	Internal memorandum dated 11 January 1999 from Director General to Executive Director, Human Resources, with 3 pages of typed notes attached.

3	140-140A	173898V04	Facsimile message, undated, from Employee Relations to Crown Solicitor's Office, including a draft letter addressed to the complainant from the Director General.
---	----------	-----------	---

THE EXEMPTION

11. 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.”

12. The requirements to establish that 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. Legal professional privilege applies to confidential communications between a professional legal adviser and client for the sole purpose of giving or obtaining legal advice or use in legal proceedings: *Grant v Downs* (1976) 135 CLR 674. Thus, a claim for legal professional privilege is not limited to communications which have been made for the purpose of existing or contemplated litigation: *Trade Practices Commission v Sterling* [1979] 36 FLR 244.
13. Further, in *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54 at p.66, Mason and Wilson JJ explained the nature of the sole purpose test in the following way:

“...the sole purpose test is a test that looks at the reason why the document was brought into existence. If its sole purpose was to seek or to give legal advice in relation to a matter, then the fact that it contains extraneous matter will not deny to it the protection of the privilege. The presence of matter other than legal advice may raise a question as to the purpose for which it was brought into existence but that is simply a question of fact to be determined by the Tribunal as its decision on such a question is final”.

14. In the context of considering whether extraneous matter could be severed from such a document, their Honours also said:

“It may also be appropriate in a particular case for the Tribunal to require those parts of the document which do not bear the necessary relation to legal advice to be disclosed. The doctrine of legal professional privilege allows room for questions of fact and degree such as these to fall for decision. Moreover, the Act contemplates that where an exempt document contains material which, standing alone, would not render the document exempt, the agency or Minister should, if it is reasonably practicable to do so, delete the privileged material and grant access to the remainder: s.22.” (ibid).

15. Further, in a number of my decisions, including *Re Clements and Graylands Hospital* [1995] WAICmr 49 at paragraph 8, I have noted that an agency is entitled to claim privilege in respect of advice obtained from salaried legal officers who are employed within government agencies as legal advisers, where the advice given is within the professional relationship between legal officer and client and is independent in character: *Attorney General v Kearney* (1985) 158 CLR 500 at pp510, 521-522, 530-31; *Waterford (supra)* at pp 63-64, 70-73, 79-82, 95-100.

The agency's submission

16. The agency informs me that, at the time the disputed documents were created, legal proceedings had been initiated by the complainant challenging the decision of the agency to transfer him from the position of Principal of the college. As a result, the agency took certain steps to ensure that its subsequent dealings with the complainant did not compromise the agency's position in defending the legal action initiated by him.
17. I am informed by the agency that a direction was issued to the complainant in October 1998 to report to the District Education Office rather than the college or, as an alternative, to commence leave. I understand that the complainant commenced leave, but his solicitor informed the agency, on 8 January 1999, that he wished to return to duties as Principal of the college. Notwithstanding that, I understand that the complainant was prepared, under protest, to report to the District Education Office as previously directed and he did so.
18. At the particular time, the Director General of the agency was interstate. Apparently, she was kept informed of the situation in respect of the complainant as it developed during her absence. Consequently, the Director General created Document 1 which was sent by facsimile to Ms Kerr, who was the Acting Director General in her absence. I understand that Ms Kerr subsequently created Document 2 from the handwritten notes of Document 1 and included a memorandum by way of instruction. The agency informs me that the Crown Solicitor's Office was involved because the agency was seeking advice about the matter. Document 3 was created prior to Document 1 and Document 2 and was submitted to the Crown Solicitor's Office for advice in respect of its contents.
19. The agency submits, therefore, that the disputed documents are exempt under clause 7 of Schedule 1 to the FOI Act because they were created for the sole purpose of obtaining legal advice.

Document 1

20. Document 1 consists of 7 pages of handwritten notes compiled by the Director General of the agency in the circumstances outlined in paragraphs 17-19 above. The first page of Document 1 refers to the contents of the following pages and contains instructions from the Director General to Ms Kerr. It appears to me that page 1 was not created for the sole purpose of obtaining legal advice. Rather, it

appears to me to have been created for the purpose of giving instructions to Ms Kerr.

21. The agency submits that, although page 1 of Document 1 does not refer in specific terms to the particular issues upon which legal advice was sought, that page nevertheless reveals that the agency was obtaining legal advice from the Crown Solicitor's Office about the complainant. The agency also submits that certain words on page 1 confirm the confidential nature of the communication.
22. It is also the submission of the agency that the date on page 1 of Document 1 would permit someone with knowledge of the matter, such as the complainant or his solicitor, to identify the specific matter upon which legal advice was being sought. Therefore, the agency claims, page 1 is exempt under clause 7.
23. It seems clear to me from my reading of page 1 that that document is an instruction to Ms Kerr from the Director General. When the first page is read in conjunction with the balance of Document 1, it is apparent that page 1 contains specific instructions to Ms Kerr about certain matters and that document has a different heading to the balance of Document 1 which is clearly marked as being privileged and confidential for discussion with the agency's legal advisers.
24. Therefore, I am not persuaded that page 1 was prepared for the sole purpose of obtaining legal advice. Further, I do not consider that either the date on page 1 or the words on that page, to which the agency directed my attention, establish that that was the purpose for which it was created. The contents of page 1 as a whole suggests its purpose to me. As I have said before, I consider that its purpose was to convey an instruction from the Director General of the agency to Ms Kerr. Therefore, I do not consider that page 1 would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that page 1 is not exempt under clause 7.
25. Having taken into account the submission from the agency regarding the purpose for which the notes sent to Ms Kerr were created, and the contents of the notes themselves, I am of the view that the balance of Document 1 was prepared for submission by the agency to the agency's legal adviser for the sole purpose of the agency obtaining legal advice in respect of the matters detailed in it. Accordingly, I consider that it would be privileged from production in legal proceedings on the ground of legal professional privilege and I find that it is exempt under clause 7.

Document 2

26. Document 2 consists of 3 pages of typed notes and a memorandum of transmission from the Director General, but signed on her behalf by Ms Kerr, to another officer of the agency. The memorandum does not appear to me to have been created for the sole purpose of obtaining legal advice. Rather, it appears to me to have been created for the purpose of instructing the officer of the agency to whom it was addressed.

27. The agency submitted similar reasons in respect of the memorandum to those outlined in paragraphs 21 and 22 above. However, for similar reasons to those given in paragraph 24 above, I consider that the purpose for which the memorandum was created was not to obtain legal advice. Rather, it was a means of transmitting papers from one officer to another within the agency. Therefore, I do not consider that the memorandum would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that the memorandum is not exempt under clause 7.
28. However, it would appear that the sole purpose for creating the balance of Document 2 was to obtain legal advice from the Crown Solicitor's Office. Accordingly, I find that the balance of Document 2 would be privileged from production in legal proceedings on the ground of legal professional privilege and that it is, therefore, exempt under clause 7.

Document 3

29. Document 3 consists of a facsimile cover sheet from an officer of the agency to the agency's solicitor and a draft letter. In my view the facsimile cover sheet constitutes a confidential communication between the agency and its legal adviser and both documents appear to me to have been created for the sole purpose of the agency obtaining legal advice.
30. The complainant submits that the draft letter is addressed to him and, as the decision about his transfer was solely a decision to be made by the Director General, it was not subject to a legal opinion. The complainant submits that the draft letter was not written by the agency's legal adviser, nor is it addressed to the legal adviser. The complainant submits that, therefore, it was the clear intention of the agency to send that letter to him and it is not associated with any legal professional privilege.
31. Of course, the complainant has not seen the documents in question but I have. The contents of Document 3, together with the material provided to me by the agency concerning the context in which it was created, make it clear to me that the whole of Document 3 was created for the sole purpose of obtaining legal advice. I do not accept the complainant's submission that the fact that the letter is addressed to him means that it would not attract privilege. Clearly, the agency was seeking legal advice about its contents before it was sent to the complainant and it was created for that purpose. In my view, Document 3 would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that Document 3 is exempt under clause 7.
