

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

**File Ref: F1532000
Decision Ref: D0542000**

Participants:

Ljiljana Maria Ravlich
Complainant

- and -

State Supply Commission
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to the sale and hiring back of the government’s fleet vehicles – legal professional privilege – clause 7 – privileged communications – waiver of privilege – clause 8(1) – scope of exemption – whether breach of a contractual obligation of confidence – clause 8(3) – matter referred to in clause 6(1)(a) – obligation owed to private organisations.

Freedom of Information Act 1992 (WA) Schedule 1 clauses 6(1)(a), 7, 8(1) and 8(3).

Esso Australia Resources Ltd v The Commissioner of Taxation [1999] 74 ALJR 399

Trade Practices Commission v Sterling [1979] 36 FLR 249

Re Weeks and Shire of Swan [1995] WAICmr 5

Mann v Carnell (1999) 168 ALR 86

Re Speno Rail Maintenance Pty Ltd and Another and The Western Australian Government Railways Commission [1997] WAICmr 29

DECISION

The decision of the agency is confirmed. Document 1 and Document 4 are exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*, and Document 2 and Document 3 are exempt under clause 8(1).

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

24 October 2000

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the State Supply Commission ('the agency') to refuse the Hon L M Ravlich MLC ('the complainant') access to documents requested by her under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 28 June 1996, the State Government entered into an arrangement with the Matrix Group Ltd and a funding consortium in respect of the sale and hiring back of the Government's fleet of vehicles ('the Matrix Contract'). The agency is a party to the Matrix Contract, valued at \$250 million, which involves the sale of the vehicles and their subsequent hire by government agencies.
3. Initially, responsibility for management of the Matrix Contract on behalf of the government was given to the Department for Contract and Management Services ('CAMS'). However, in mid 1998, that responsibility was transferred to the Treasury Department.
4. On 24 August 1999, the complainant made an application to CAMS for access under the FOI Act to various documents relating to the Contract. Some 10 months after receiving the application, CAMS transferred it to the agency. On 20 June 2000, the agency refused the complainant access to the requested documents on the grounds that they are exempt under clauses 7 and 8(1) of Schedule 1 to the FOI Act.
5. The Matrix Contract was subsequently tabled in the State Parliament of Western Australia. Following the tabling of that document, the complainant applied to the agency for an internal review of its decision. An internal review was conducted, but the initial decision to refuse access did not change. On 23 August 2000, 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 disputed documents from the agency and reviewed the contents of the Matrix Contract that had been tabled in the Parliament. Discussions were also held with the agency. Subsequently, the agency granted the complainant access to one of the disputed documents, but maintained its claim for exemption for the other 4 documents.
7. There appeared to me to be little prospect of resolving this complaint by conciliation between the parties. On 5 October 2000, after considering the material before me, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the disputed documents may be exempt under clauses 7 and 8(1). The complainant did not withdraw her complaint but made no further submissions.

THE DISPUTED DOCUMENTS

8. There are 4 documents in dispute:

Document 1 is a facsimile message dated 21 November 1997 from the Crown Solicitor's Office to the agency;

Document 2 is a letter dated 19 March 1997 from the agency to CAMS;

Document 3 is an undated letter sent in May 1997 from the agency to CAMS;
and

Document 4 is a letter dated 1 May 1997 from the agency to CAMS.

The agency claims that Document 1 is exempt under clause 7 and clause 8(1), Document 4 is exempt under clause 7, and Documents 2 and 3 are exempt under clause 8(1) of Schedule 1 to the FOI Act.

THE EXEMPTIONS

(a) Clause 7 – Legal professional privilege

9. Clause 7(1) provides that matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege. The exemption applies to confidential communications between a client and his or her legal adviser made for the dominant purpose of giving or seeking legal advice, or for use in existing or anticipated legal proceedings: *Esso Australia Resources Ltd v The Commissioner of Taxation* [1999] 74 ALJR 399.
10. I have examined Document 1 and Document 4. In my opinion, it is clear on the face of Document 1 that it is a confidential communication sent to the agency from the Crown Solicitor's Office, the agency's legal adviser, for the dominant purpose of giving the agency legal advice. In my view, Document 1 would be privileged from production in legal proceedings on the ground of legal professional privilege.
11. Document 4 is a letter from the Chief Executive Officer of the agency to the Chief Executive Officer of CAMS. It clearly contains advice given by the Crown Solicitor's Office to the agency. Legal professional privilege extends to various classes of documents including, among other things, information derived from privileged communications made to a client by his or her solicitor: *Trade Practices Commission v Sterling* [1979] 36 FLR 249.
12. In my view, Document 4 falls within the class of documents described by Lockhart J in *Trade Practices Commission v Sterling* to which the privilege applies. I consider that Document 4 would be privileged from production in legal proceedings on the ground of legal professional privilege.
13. I dealt with the issue of waiver of privilege in my decision in *Re Weeks and Shire of Swan* [1995] WAICmr 5 at paragraphs 22-27. Waiver occurs when the person entitled to privilege performs an act which is inconsistent with the confidence preserved by it. The consequence of waiver where it occurs is that

the person becomes subject to the normal requirements of disclosure of the communication: Byrne D and Heydon JD, *Cross on Evidence*, Butterworths, 4th Edition (1991), at paragraph 25010.

14. Waiver of privilege may be express or implied. The question of whether or not there has been an implied waiver of privilege most often arises when there has been a limited disclosure of the contents of the privileged material and the question will turn upon whether, in all the circumstances, the particular conduct is inconsistent with the maintenance of the confidentiality the privilege is intended to protect: *Mann v Carnell* (1999) 168 ALR 86.
15. In the circumstances of this matter, I do not consider the disclosure of its legal advice to CAMS to have been an act by the agency amounting to express waiver of the privilege attaching to it. The question, therefore, is whether waiver of the privilege attaching to the legal advice in Document 4 should be imputed from the act of the agency in disclosing it to CAMS. What brings about such a waiver is the inconsistency which the courts, informed by considerations of fairness, perceive between the conduct of the client and maintenance of the confidentiality: *Mann v Carnell*.
16. The advice sought and received related directly to the management of the contract. In my opinion, the disclosure of the privileged communication by the agency, a party to the contract on behalf of the Government, to CAMS, the agency involved in managing the Matrix Contract on behalf of the Government, for the purpose of further discussion between the two agencies concerning the management of the contract, is not conduct inconsistent with the maintenance of the privilege and did not, therefore, amount to an implied waiver of the privilege.
17. Accordingly, I find that Document 1 and Document 4 are exempt under clause 7. As I have found that Document 1 is exempt under clause 7, I need not consider whether it is also exempt under clause 8(1).

(b) Clause 8(1) – Confidential communications

18. Clause 8(1) provides that matter is exempt matter if its disclosure (otherwise than under the FOI Act or another written law) would be a breach of confidence for which a legal remedy could be obtained.
19. In my decision in *Re Speno Rail Maintenance Australia Pty Ltd and Another and The Western Australian Government Railways Commission* [1997] WAICmr 29, I considered the application of the exemption in clause 8(1). It is my view, for the reasons given in *Re Speno* at paragraphs 15-28, that the exemption applies to information the disclosure of which would give rise to a cause of action for breach of a common law obligation of confidence, such as a contractual obligation of confidence, for which a legal remedy could be obtained.

20. The complainant submits that the tabling of the Matrix Contract in Parliament means that no part of the agreement should be subject to claims of commercial confidentiality. The complainant submits that when documents are tabled in Parliament they then become part of the public record and that the public interest is not served by a refusal to disclose the disputed documents.
21. I have examined Documents 2 and 3 and I have considered the terms of the confidentiality obligation in clause 9.10 of the Interpretation Deed, a document which is part of the Matrix Contract. An obligation of confidence is imposed prohibiting disclosure of “confidential information” except in certain specified circumstances. Clause 1 of the Interpretation Deed defines the term “Confidential Information” as:
- “(a) *the terms and conditions of the Transaction Documents;*
 - (b) *any information provided...with respect to the Transaction by any party to this deed or any other person on behalf of such party; and*
 - (c) *all details of the Transaction which are otherwise known...”.*
22. It appears to me that the definition of the term “Confidential Information” is very broad and that it covers more than merely the contents of the Matrix Contract. Further, the obligation of confidence is imposed on all parties to the Matrix Contract and to various other persons acting for, or on behalf of, the parties. Clearly, the agency as a party to the Matrix Contract is bound by it to keep relevant information confidential.
23. In my view, the tabling in Parliament of the Matrix Contract does not affect the confidentiality obligation under clause 9.10 of the Interpretation Deed from continuing to bind the agency. It seems to me that the contents of the Matrix Contract form only a part of the information provided with respect to the Transaction by parties to the deed.
24. Further, the only information that is not confidential information, as defined in the Interpretation Deed, is stated in clause 9.10(f) to be information that is “*generally and publicly available*”. In my view, information consisting of the terms and conditions of the Transaction documents falls within the terms of clause 9.10(f) because those terms and conditions were tabled in the Parliament. However, the disputed documents do not contain information about the terms and conditions of the Matrix Contract.
25. Therefore, I consider that the agency remains bound by the confidentiality obligation in respect of information that falls within paragraphs (b) and (c) of the definition of “Confidential Information” in the Interpretation Deed. In my view, disclosure of any information of the kind referred to in paragraph (b) or (c) would be a breach of a contractual obligation of confidence owed by the agency to one or more of the other parties to the Matrix Contract. I consider that to be a breach of confidence for which a legal remedy could be obtained and, accordingly, I consider that the exemption in clause 8(1) applies to the disputed documents.

Limit on exemption

26. Clause 8(1) is subject to the limit on exemption in clause 8(3). Clause 8(3) provides:

(3) *Matter referred to in clause 6(1)(a) is not exempt matter under subclause (1) unless its disclosure would enable a legal remedy to be obtained for a breach of confidence owed to a person other than*

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(a) *a person in the capacity of a Minister, a member of the staff of a Minister, or an officer of an agency; or*

(b) *an agency or the State.”*

27. The limit on exemption only applies to matter which is referred to in clause 6(1)(a), which is information which would reveal opinion, advice or recommendation that has been obtained, prepared or recorded in the course of, or for the purposes of, the deliberative processes of the Government, a Minister or an agency, or any consultation or deliberation that has taken place in the course of, or for the purposes of those deliberative processes.

28. However, whether or not Documents 2 and 3 could be said to contain information of that kind, the obligation in respect of it is owed by the agency to the other parties to the Matrix contract. Those parties are private organisations. As the obligation is not owed to a Minister, an agency, an employee of either, or the State, the limit in clause 8(3) does not apply. Accordingly, for the reasons given, I find that Document 2 and Document 3 are exempt under clause 8(1).
