

**Decision D0032025 – Published in note form only**

***Re Mineralogy Pty Ltd and Attorney General [2025] WAICmr 3***

**Date of Decision: 31 March 2025**

***Freedom of Information Act 1992 (WA): Schedule 1, clause 7(1)***

On 4 July 2023, Mineralogy Pty Ltd (**the complainant**) applied to the former Attorney General, the Hon John Quigley MLA (**Attorney General**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents between named individuals, including the Attorney General of Western Australia and the Solicitor General of Western Australia, concerning the funding and/or payment of the legal costs and expenses in connection with Federal Court of Australia Proceedings ref. NSD912 of 2020.

By undated decision, provided to the complainant on 22 September 2023, the Attorney General refused the complainant access to two documents (**the disputed documents**) on the ground they were exempt under clause 7(1) of Schedule 1 to the FOI Act (**clause 7(1)**).

On 28 September 2023, the complainant applied to the Information Commissioner (**Commissioner**) for external review of the Attorney General’s decision and provided submissions claiming the disputed documents were not exempt as claimed. The Attorney General provided the Commissioner with his FOI file maintained in respect of the access application, together with a copy of the disputed documents.

On 10 January 2025, one of the Commissioner’s officers provided the complainant with her assessment of the matter. It was the officer’s assessment that the Commissioner was likely to consider, based on the information then before her, that the disputed documents are exempt under clause 7(1).

The complainant did not accept the assessment and requested that the Commissioner provide a decision on the matter. The complainant reiterated its submissions provided with its application for external review.

Clause 7(1) provides that matter is exempt if it would be privileged from production in legal proceedings on the ground of legal professional privilege. The grounds upon which a document is subject to legal professional privilege are fairly well settled in Australian common law.

In brief, legal professional privilege protects from disclosure confidential communications between clients and their legal advisers, if those communications were made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in proceedings in a court: *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 (**Esso**).

The disputed documents consisted of an email to the Attorney General from the Solicitor General, with an attachment, described as ‘Advice to the Attorney General’.

The Commissioner examined the disputed documents and considered the submissions made by the parties and the applicable law in relation to legal professional privilege. The

Commissioner was satisfied that the disputed documents were confidential communications between the Attorney General and his legal adviser made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, as described in *Esso*.

As a result, the Commissioner was satisfied that the disputed documents would be privileged from production in legal proceedings on the ground of legal professional privilege and that they were, therefore, exempt under clause 7(1).

The complainant submitted that consideration should be given to whether legal professional privilege had been waived. The Commissioner noted that her role in deciding whether documents are exempt under clause 7(1) is restricted to a consideration of whether they would be, on their face, privileged from production in legal proceedings: *Department of Housing and Works v Bowden* [2005] WASC 123. As a result, it was not open to the Commissioner to consider the question of waiver.

The complainant contended that consideration should be given to whether disclosure of the disputed documents was in the public interest. Under the FOI Act, legal professional privilege is an absolute exemption, and no public interest test arises in respect of clause 7(1). Therefore, the Commissioner noted that it was not open to her to consider the public interest.

The complainant also argued that consideration should be given to whether access could be given to an edited copy of the disputed documents with the exempt matter deleted, pursuant to section 24 of the FOI Act. As the Commissioner was satisfied the disputed documents are exempt in their entirety, she considered it was not practicable for the Attorney General to give access to a copy of the disputed documents with the exempt matter deleted: *Scott J in Police Force of Western Australia v Winterton* (Unreported, Supreme Court of WA, Library No 970646, 27 November 1997), at page 16. As a result, the Commissioner considered that the obligation under section 24 did not apply.

The Commissioner found that the disputed documents were exempt under clause 7(1) and confirmed the Attorney General's decision.