

**Decision D0092014 – Published in note form only**

***Re Correy and City of Greater Geraldton* [2014] WAICmr 9**

**Date of Decision: 20 May 2014**

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

On 13 September 2013, Max Correy (**the complainant**) applied to the City of Greater Geraldton (**the agency**) under the *Freedom of Information Act 1992* (**the FOI Act**) for access to a copy of a particular letter from the agency to the agency's solicitor.

The agency identified one document within the scope of the application and refused the complainant access to the requested document on the ground that it was exempt under clause 7 of Schedule 1 to the FOI Act (legal professional privilege).

The complainant applied for internal review of the agency's decision and on internal review the agency confirmed its initial decision.

On 23 October 2013 the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision.

Following receipt of the complaint, the Commissioner obtained the disputed document from the agency, together with the FOI file maintained by the agency in respect of the complainant's access application. On 26 February 2014, the parties attended a conciliation conference conducted by the Commissioner's office. However, this matter was not resolved at that stage.

On 13 March 2014, one of the Commissioner's officers informed the complainant that, after considering all of the information before him, the Commissioner was of the view that the disputed document was exempt under clause 7 as claimed by the agency. The complainant was invited to provide the Commissioner with further submissions or to withdraw his complaint. The complainant did not withdraw his complaint and made further submissions claiming, among other things, that any privilege attached to the disputed document had been impliedly waived by the agency. In light of further information provided by the complainant, the Commissioner made additional inquiries with the agency and invited it to reconsider its decision and to provide further information to the complainant, in an effort to resolve this matter. However, the agency maintained its exemption claim and declined to provide any further information to the complainant in relation to this matter.

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. Legal professional privilege applies to confidential communications between clients and their legal advisers 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] 201 CLR 49.

In relation to the complainant's claim that privilege had been waived by the agency in this case, the Commissioner noted that, following the decision of the Supreme Court of Western

Australia in *Department of Housing and Works v Bowden* [2005] WASC 123, no question of waiver of legal professional privilege could be determined by the Commissioner.

The Commissioner was satisfied that the disputed document consists of a confidential communication between the agency and its legal advisers made for the dominant purpose of seeking or giving legal advice. Accordingly, the Commissioner found that the disputed document would be privileged from production in legal proceedings and is, therefore, exempt under clause 7(1) of Schedule 1 to the FOI Act and confirmed the agency's decision.