

Decision D0052025 – Published in note form only

Re Mineralogy Pty Ltd and Department of the Premier and Cabinet [2025] WAICmr 5

Date of Decision: 24 June 2025

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

On 3 May 2023, Mineralogy Pty Ltd (**the complainant**) applied to the Department of the Premier and Cabinet (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents which included correspondence between the Premier or the Office of the Premier and the State Solicitor’s Office relating to the funding of costs in Federal Court of Australia Proceedings NSD 912 of 2020.

The agency sought an extension of time in which to deal with the access application, which the complainant did not agree to. The agency did not give the complainant a notice of decision within the permitted period and, pursuant to section 13(2) of the FOI Act, the agency was deemed to have refused access to the requested documents. On 4 July 2023, the complainant sought internal review of the agency’s deemed refusal of access to documents.

The agency sought an extension of time to deal with the internal review to 31 July 2023, which the complainant agreed to. However, the agency did not provide an internal review decision by the agreed date.

The agency subsequently gave the complainant an internal review decision dated 5 September 2023. The agency identified two emails, together with their attachments (collectively **the disputed documents**), within the scope of the access application. The agency refused the complainant access to the disputed documents on the ground they were exempt under clause 7(1) of Schedule 1 to the FOI Act (**clause 7(1)**). In addition, the agency claimed that one attachment to one of the emails was also exempt under clause 1(1) of Schedule 1 to the FOI Act (**clause 1(1)**).

On 14 September 2023, the complainant applied to the Information Commissioner (**Commissioner**) for external review of the agency’s decision and provided submissions claiming the disputed documents were not exempt as claimed. The agency provided the Commissioner with its 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 agency’s decision to refuse access to the disputed documents was justified.

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 consist of an email from the Office of the Premier to the State Solicitor's Office, with an attachment, and an email from the State Solicitor's Office to the Premier and other Ministers, with attachments.

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 a legal adviser and their client 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 agency 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 agency's decision.

In light of that finding, it was not necessary for the Commissioner to consider the agency's clause 1(1) exemption claim and she did not do so.