

clause 7

Legal Professional Privilege

This is a plain English guide to the application of the exemption in clause 7 of the FOI Act. An agency can refuse access to exempt matter or an exempt document. The word “matter” refers to a piece of information. It can be a whole page or part of a page, or a single word or figure on a page. Parts of a page can be exempt when other parts are not. Exemptions are not mandatory; agencies have discretion to disclose documents that may be technically exempt where that may properly be done.

What is legal professional privilege	Legal professional privilege is a rule of law that protects the confidentiality of communications made between a lawyer and his or her client. The privilege belongs to the client and may only be waived by the client.
Purpose	The exemption in clause 7 protects information that would be privileged from production in legal proceedings on the ground of legal professional privilege.
Criteria	<p>Legal professional privilege protects confidential communications between a lawyer and his or her client made for the dominant purpose of -</p> <ul style="list-style-type: none"> ◆ seeking or giving legal advice or professional legal assistance; or ◆ use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication.
Other communications that are also protected	Legal professional privilege also protects confidential communications between the client or the client’s lawyers (including communications through employees or agents) and third parties made for the dominant purpose of use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication.
Examples of documents that may be privileged	<ul style="list-style-type: none"> ◆ letters to lawyers seeking legal advice and letters from lawyers providing legal advice. ◆ file notes or memoranda made by the client or the client’s lawyer which relate to the legal advice sought. ◆ drafts of documents subsequently filed in court. ◆ statements of witnesses obtained by lawyers or their agents, for the dominant purpose of use in legal proceedings. ◆ documents created in response to requests by the client’s lawyer to enable him or her to advise the client or to conduct litigation on behalf of the client.

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Examples of documents that may not be protected by legal professional privilege

- ◆ letters from a client’s lawyer to another party to court proceedings.
- ◆ a lawyer’s bill of costs (except to the extent that the bill records prior communications which attract the privilege).
- ◆ witness statements or other investigative material which would have been created for administrative purposes in any event, irrespective of possible legal proceedings.

Lawyers employed by government agencies

Communications between salaried lawyers employed by government agencies and their employers may be protected by legal professional privilege, provided the lawyer is consulted in a professional capacity to give independent legal advice or professional legal assistance.

Lawyers employed by government agencies perform administrative functions as well as legal functions and communications relating to administrative functions do not attract legal professional privilege.

Privileged copies of unprivileged documents

Legal professional privilege may attach to a copy document, the original of which does not itself attract legal professional privilege, providing the dominant purpose of creating the copy is one of the privileged purposes previously mentioned. For example, copy documents attached to a brief to counsel or a letter to a solicitor seeking legal advice, would ordinarily attract legal professional privilege, even if the original document would not.

Waiver

Legal professional privilege may be expressly or impliedly waived by the client. For example -

- ◆ by the client or the client’s agent intentionally disclosing a privileged communication to third parties; or
- ◆ by implication, in circumstances where there is conduct by, or on behalf of, the client which is inconsistent with the maintenance of the privilege, whether the client intended that result or not.

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Clause 7 of Schedule 1 to the FOI Act is in the following terms:

"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.*

Limit on exemption

- (2) *Matter that appears in an internal manual of an agency is not exempt matter under subclause (1)."*

There is no "public interest" test attached to the exemption in clause 7. In effect, this means that when the Information Commissioner is conducting an external review of a complaint involving a denial of access, if the Information Commissioner is satisfied that a document is, on its face, exempt under clause 7, the Information Commissioner does not have the power to make a decision to the effect that access is to be given to the document, even if there are strong public interest arguments to do so.

Warning

Legal professional privilege is a difficult area of the law. The information in this guide does not attempt to deal with all of the complex issues that can arise in applying that law. It merely draws attention to some of the general issues most frequently encountered in determining whether the privilege applies to documents requested under the FOI Act.

Further reading

Esso Australia Resources Ltd v Commissioner of Taxation [1999] HCA 67- re dominant purpose test.

Goldberg v Ng (1995) 185 CLR 83; *Mann v Carnell* [1999] HCA 66 - re waiver.

Waterford v Commonwealth of Australia (1987) 163 CLR 54 - general principles and regarding lawyers employed by government agencies.

Trade Practices Commission v Sterling (1979) 36 FLR 244 - general principles and examples.

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Decisions of the Information Commissioner

The following decisions of the Information Commissioner are included as a further guide to the application of the exemption in clause 7. The full decision and reasons can be found on the Information Commissioner's web site at <<http://www.foi.wa.gov.au>>. All decisions of the Information Commissioner involving a consideration of the exemption in clause 7 can be found at that source.

Re Weeks and Shire of Swan [1995] WAICmr 5 - An officer of the agency read part of a privileged document to the applicant and this deliberate act constituted a waiver of privilege.

Re Coastal Waters Alliance of Western Australia Inc and Department of Environmental Protection and Cockburn Cement Limited [1995] WAICmr 37 - A privileged document was given to the agency by the client for the purpose of supporting the third party's attempts to secure a particular course of action by the agency. Disclosure amounted to a waiver of privilege. Also discussion about imputed waiver.

Re Sanfead and State Government Insurance Commission [1996] WAICmr 7— Various documents relating to the complainant's workers' compensation claim were found to be privileged including correspondence between the agency and the Crown Solicitor's Office, notes, memoranda, minutes of meetings and records of telephone discussions between the parties.

Re K, L and F and Department for Family and Children's Services [1996] WAICmr 19 - Legal advice from the agency's own salaried legal officers was clearly privileged, as was information recording communications made between those legal officers and other legal officers who were briefed to represent the agency in an application for wardship.

Re Johnson and State Government Insurance Commission [1996] WAICmr 28 - Solicitors' bills of costs which did not disclose privileged communications and computer records of monies paid which did not reproduce information contained in privileged documents were not exempt under clause 7. Parts of those documents that enable the legal advice or instructions to be inferred are exempt, but could be deleted.

Re Walker and Town of Mosman Park [1997] WAICmr 16 - A privileged document was disclosed to a consultant for a limited purpose and in circumstances of confidentiality to enable the consultant to conduct certain inquiries. There was no imputed waiver of privilege.

Disclaimer

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