VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

GENERAL LIST **No 1999/57556**

APPLICANT:	Earl Downing
RESPONDENT:	Victorian WorkCover Authority
WHERE HELD:	Melbourne
BEFORE:	A Coghlan, Deputy President
DATE OF HEARING:	12 November 1999
DATE OF DECISION:	12 November 1999

ORAL REASONS FOR DECISION

MRS COGHLAN: This application relates to four letters written by Hall & Wilcox to Switzerland Insurance Company. They are letters created in the context of a Workcover matter involving Mr Downing, who was employed by Visypaper. Switzerland Insurance were Visypaper's insurers for Workcover purposes and were the authorised agents of WorkCover.

As it turns out, Mr Downing first made a request for documents in 1993. Apparently, that request was not pursued and a further request to the Victorian WorkCover Authority was made in 1999. Following some technical hitches, this application for review of the Authority's decision not to grant access to some documents included in the request was received by the Tribunal on 16 July 1999.

Mr Hurley, counsel for the Authority, provided a useful chronology of events and it is not necessary to repeat that here. There are four documents in dispute. Parts of those have been released today. The released parts could fairly be described as

purely factual parts. What remains are parts of letters from Hall and Wilcox to Switzerland Insurance dated 12 May, 18 June, 28 august and 3 September 1992.

Mr Kitch who is now a solicitor with Hall & Wilcox and who is familiar with the WorkCover system gave evidence. Although this was not one of his matters, understandably given his working history, he has studied the Hall &Wilcox file. He confirmed that the file shows that Hall & Wilcox were instructed to act on behalf of the WorkCover agent, Switzerland Insurance.

He said that each of the four letters were written by Hall & Wilcox to Switzerland Insurance and that each provides legal advice to Switzerland Insurance at different stages of Mr Downing's claim regarding an appeal to the Accident Compensation Commission from a WorkCover Appeals Board decision to put Mr Downing on weekly payments.

I have perused the four letters in question. Their context and contents accords with Mr Kitch's evidence.

The Authority claims that they are exempt from release under s.32(1) of the Freedom of Information Act (the Act).

Section 32(1) states :

> ***"32. Documents affecting legal proceedings***
>
> *(1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege".*

Mr Hurley referred to a passage in a decision of Judge Wood in *Re Thwaites and Department of Human Services (1998) 14 VAR 347* which set out the principles that one should apply when deciding whether a document would be privileged from production in legal proceedings on the ground of legal professional privilege such that the exemption under s.32(1) would be attracted.

I respectfully adopt Judge Wood's exposition as follows at 357:

> *"The principle is a clear one, namely, that confidential communications between client and legal adviser may not be disclosed without the consent of the client if such communication was made for the sole purpose of obtaining and providing legal advice, or is referable to litigation that is on foot, or was at the time in the contemplation of the client : Grant v Downs (1976) 135 CLR 674 and Baker v Campbell (1983) 153 CLR 52.*
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> *The learned authors of Cross on Evidence, Australian Edition, para 25210, identify three kinds of communication of this nature :*
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> *(a) communications between the client or the client's agents and the client's professional legal advisers;*
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> *(b) communications between the client's professional legal advisers and third parties, if made for the purpose of pending or contemplated litigation; and*
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> *(c) communications between the client or the client's agent and third parties, if made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the purpose of obtaining advice upon pending or contemplated litigation".*

I agree with Mr Hurley's submissions that these letters clearly fall within clause (a) being communications between the client, Switzerland Insurance and its solicitors. Further, there has been no consent to their release.

I am satisfied that the letters are exempt from release under s.32(1) of the Act.

Although the Tribunal has found many of the documents exempt from release that is not the end of the matter.

Section 50(4) of the **Freedom of Information Act** gives the Tribunal power to grant access where it is of the opinion that the public interest requires that access be granted.

Section 50(4) states :

> *"On the hearing of an application for review the Tribunal shall have, in addition to any other power, the same powers as an agency or a Minister in respect of a request, including power to decide that access should be granted to an exempt document (not being a document referred to in section 28, section 3(3) or in section 33) where the Tribunal is of opinion that the public interest requires that access to the document should be granted under this Act".*

Section 50(4) is subject to some exceptions, which are not relevant in this case.

The task of the Tribunal is to decide whether the public interest has been demonstrated to the extent that it outweighs the competing interest of documents protected from disclosure by specific provisions of the Act and requires that access should be granted.

"Public interest" is a term not defined in the legislation. However, the case law is clear in that we need to distinguish between what is in the public interest and what is of interest for the public to know

The Full Court of the Supreme Court in DPP v Smith [1991] VR 63 at pp 73 and 75 made the following comments on the meaning of "public interest" in s50(4) :

> *"The [FOI Act] does not contain any definition of public interest. Nevertheless used in the context of this statute it does not mean that which gratifies curiosity or merely provides information or amusement ..... Similarly it is necessary to distinguish between 'what is in the public interest and what is of interest to know' ....*
>
> *[There is a] distinction between the public interest and a matter of public interest. The public interest is a term embracing matters, amongst others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the wellbeing of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals. ..... There are several and different features and facets of*

> *interest which form the public interest. On the other hand, in the daily affairs of the community events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest per se is not a facet of the public interest".*

The Authority in its statement of legal contentions filed stated that it is not in the public interest that the documents be released in that "it is now established that its (legal professional privilege) justification is to be found in the fact that the proper functioning of our legal system depends upon a freedom of communication between legal advisers and their clients which would not exist if either could be compelled to disclose what passed between them for the purpose of giving or receiving advice".

Mr Downing contends that his pursuit of these documents is in the public interest. He believes that the Victorian Government has covered up criminal actions and favoured Visypaper at his expense.

He says that over a period of around two years beginning in October 1991, he has written to the Victorian WorkCover Authority complaining about the false statements and collusion of Mr Dennis Pearson, manager, Mr Phillip Scardilli, accountant and Mr Wayne Hall, foreman, all employed by Visypaper at Coolaroo.

He claims that Hall & Wilcox, the solicitors representing his ex-employer Visypaper, approached his barrister, Mr John Frederik Goldberg at the Accident Compensation Tribunal on August 31 1992 and offered to pay his costs if he could get him to drop the case against Visypaper.

He complained about bribery of his barrister by a defendant in the Workcare case. He says he was told by the Minister for WorkCover Mr Rodger Hallam and Ms Faye Burton, a Director of WorkCover, that his case had been reviewed and all processes were followed by the Authority and that nothing was amiss. He persisted with his complaint to the Authority and was then told by Ms Burton that an investigation had revealed nothing of an illegal nature. WorkCover FOI stated that there was no documentation of any investigation into his allegations.

He says that Premier Kennett ignored his accusations of cover up in the WorkCover Authority and refused to answer most of the letters he sent.
He says that he has recently come into possession of documents from the Victorian WorkCover Authority FOI. These are in the form of file notes from Switzerland Insurance, the WorkCover insurer, and he says in these file notes there is evidence of conspiracy and bribery by the WorkCover insurer, their solicitors, Hall & Wilcox and the defendant Visypaper to bribe his barrister.
He says these notes show that Switzerland Insurance, Hall & Wilcox and Visypaper have attempted to hide criminal acts using Legal Professional Privilege.

He says that in an attempt to cover up their lies concerning these criminal acts, the Minister for WorkCover Mr Rodger Hallam and Ms Faye Burton have used section (31). The Premier Jeff Kennett has condoned the cover up by his inaction.

Switzerland Insurance and the Victorian WorkCover Authority were always in possession of these files and knew the consequences of disclosure of the contents of these files.

He says that if the material is innocuous why not release it.

Mr Hurley submitted that Mr Downing had not placed any material before me on which I could form the opinion to apply s.50(4) to overcome the legal professional privilege exemption, which he also pointed out contained its own strong public interest reasons why such material is exempt from release.

Further, he submitted that all Mr Downing relied on was a sneaking suspicion of bribery but that there was nothing in his case that pointed to any malpractice nor anything which indicated it was out of the ordinary. He submitted that Mr Downing's

interest was personal to him in that he was disappointed about what had happened. That, he submitted, was not a public interest.
I am not satisfied that Mr Downing's contentions about those matters are any more than assertions based on what he describes as a definite feeling. He has already

raised his concerns with the former Premier and Minister for WorkCover and staff without a satisfactory outcome from his perspective.

Whilst Mr Downing has his own interest in the release of the documents, I am not satisfied that the public interest requires their release such that s50(4) should be applied to override the specific exemption made out. Nothing has been placed before me to show that his concerns are part of a wider controversy rather than merely the grievances of an individual.

Finally, so far as his submission about the documents being "innocuous", that is not the test to be used in deciding whether s.50(4) should be applied to override the specific exemption.

In relation to the unreleased parts, I affirm the decision of the respondent.

ANNE COGHLAN
DEPUTY PRESIDENT