Guyt and Health Department

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: S1493 & 94012** **Decision Ref: D00194**

Participants:

Leendert Guyt
Applicant

- and -

Health Department of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - Refusal of access - medical report - prepared at request of respondent - Schedule 1 clause 7 - legal professional privilege - document brought into existence by third party for purpose of anticipated litigation.

FREEDOM OF INFORMATION - notices of decision - requirement to give reasons - s.30 - internal review decisions - s.42.

Freedom of Information Act 1992 (WA) ss.30, 42, Schedule 1 clauses 6, 7, 8 and 11.

Grant v Downs (1976) 135 CLR 674
Baker v Campbell (1983) 153 CLR 52
Nickmar Pty Ltd and another v Preservatrice Skandia Ltd (1985) NSWLR 44
Causton v Mann Egerton (Johnsons) Ltd [1974] 1 All ER 453
Topp v Lawnton Sawmill [1968] QWN 34
Re Peric and Commonwealth Banking Corp. (1985) 7 ALN N.2
Re Greenbank and Secretary, Department of Social Security (1986) 9 ALD 338
Re McMaugh and Australian Telecommunications Commission (1991) 22 ALD 393
Re Kaur and Australian Postal Commission (1991) 23 ALD 159
Taylor v Guttilla (1992) 59 SASR 361

DECISION

The decision under review is confirmed. The document is exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992.*

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

16th March 1994.

REASONS FOR DECISION

BACKGROUND

1. This is a decision upon an application by Mr Guyt ('the applicant') to the Information Commissioner for external review of a decision under the *Freedom of Information Act 1992* ('the FOI Act'), made by the Health Department of Western Australia ('the agency'), refusing access to a medical report.

2. On 30 November 1993, the applicant applied to Royal Perth Hospital for access to his medical files and to a report prepared by an independent specialist ('the report') at the request of the agency. The first agency, Royal Perth Hospital, dealt with the request for access to the applicant's medical files and copies of these papers were provided to him. The request for access to the report was transferred to the agency on 30 December 1993. On 19 January 1994 the agency advised the applicant that access to the report was refused. This decision was made by the Director, Legal Administration on 10 January 1994 on the basis that the document was exempt under clauses 6, 7 8 and 11 of Schedule 1 to the FOI Act.

3. The applicant sought internal review of this decision on 3 February 1994 and on 4 February 1994, a decision confirming the initial decision was made and the applicant advised accordingly. The applicant applied to my office on 14 February 1994 for external review of the decision of the agency, being the decision dated 4 February 1994.

4. The background to this FOI request is that in 1988 the applicant was a patient at Rockingham Hospital. He subsequently complained of certain adverse effects to his health allegedly suffered as a consequence of two surgical operations. His complaints were referred to the Legal Administration Branch of the agency. Subsequently the applicant agreed to an examination by an independent specialist nominated by the agency and the report generated by this specialist is the subject of the access application

THE REVIEW PROCESS

5. In accordance with standard practice in my office, upon receipt of the request for external review, the agency was notified on 14 February 1994 and a request was made for the production of the original report of the specialist, together with the agency FOI file. These documents were provided to me on 17 February 1994. Although I did not seek further reasons from the agency to justify its claims for

exemption, neither the decision in the first instance, nor that on internal review, met the requirements mandated by s.30 of the FOI Act.

6. Section 30 requires a decision-maker to provide an applicant with comprehensive reasons for denying access to documents. In particular, s.30(f) includes a requirement to specify the **findings made on any material questions of fact** and a reference to the **material on which those findings were based**. Decisions made on internal review are subject to the same requirements and it is not enough for a person conducting an internal review to merely "rubber stamp" the initial decision. Section 42 of the FOI Act provides that an application for review must be dealt with, in all respects, as if it were an access application. In other words, it must be dealt with on its merits and the applicant must be provided with a notice of decision that complies with s.30.

7. In this instance, the initial decision to deny access included a claim for exemption based on clauses 6, 7, 8 and 11. However, the purported notice of decision did not include any material findings of fact in relation to the exemptions claimed. On the face of it, the claim for exemption under clause 7 appeared the strongest. Nevertheless if an agency seeks to invoke any of the exemptions in Schedule 1, it is incumbent on that agency to provide a full explanation to the applicant and to ultimately satisfy me that the decision is justified. To discharge this onus, more is required than simply paraphrasing the wording of the exemption or worse, merely quoting it in full. The decision on internal review dated 4 January 1994, being the decision under review for the purposes of external review by the Information Commissioner, was similarly inadequate.

8. After an initial inspection of the document in dispute I formed a preliminary view that it was likely the claim for exemption under clause 7 (Legal Professional Privilege) could be sustained and the applicant was advised accordingly. At that point my office attempted to conciliate this complaint. However, the agency was not prepared to waive the claim of privilege and the applicant, whilst accepting my preliminary view as to the exempt status of the report, confirmed that he required a formal decision in this matter.

THE DISPUTED DOCUMENT

9. The document in dispute is described as a medical report prepared by the specialist, marked "Confidential" and dated 15 June 1992. The report bears a date stamp indicating that it was received by the Legislation Review and Development Section (the Legal Branch) of the agency on 19 June 1992.

10. In addition to the report, the agency also supplied my office with copies of other relevant documents including a letter dated 16 March 1992 from the Assistant Crown Solicitor. In this letter the Assistant Crown Solicitor confirmed that she had requested the Senior Legal Policy Officer ('the senior Legal Officer') obtain a report from a specialist, together with other information, in order to consider the

applicant's claims. Based on this information, it was my view that the refusal of access based on a claim for exemption under clause 7 of Schedule 1 was open to the agency. If such a claim could be sustained, it would be unnecessary to consider the other applicability of other exemptions.

THE EXEMPTION - LEGAL PROFESSIONAL PRIVILEGE

11. Clause 7 of Schedule 1 provides:

> *"(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)."*

12. The purpose of this exemption is to ensure that a document which would be protected from production in legal proceedings cannot otherwise be obtained under the FOI Act. The doctrine of legal professional privilege is founded on consideration of high public policy. In the joint judgement of Stephen, Mason and Murphy JJ in *Grant v Downs* (1976) 135 CLR 674 at 685 it was said :

> *"The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege, legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision."*

13. The test to be applied in order to decide whether a document attracts legal professional privilege is the "sole purpose" test. This requires a consideration of whether the document was brought into existence for the sole purpose of giving or receiving legal advice or for use in existing or anticipated legal proceedings: *Grant v Downs, op.cit; Baker v Campbell* (1983) 153 CLR 52.

14. The rule is most often applied to confidential communications between a client and his or her lawyer for either of those purposes. However, the principle extends to communications between a third party and the client or lawyer, where those communications are made or brought into existence for the sole purpose of

use in existing or anticipated litigation: *Nickmar Pty Ltd and Another v Preservatrice Skandia Insurance Ltd* (1985) NSWLR 44.

15. In *Nickmar's* case it was held that legal professional privilege only attaches to documents prepared by third parties (not being servants or employees of the entity called upon to produce the documents) when they are prepared for or in contemplation of litigation or for the purpose of giving advice or obtaining evidence with reference to such litigation. Wood J, at 55, said:

> *"...it is well-established that the question whether litigation is contemplated the time a document is prepared, is an objective one. It is necessary that circumstances be shown to exist, at the time, from which, objectively viewed, the Court can subsequently conclude that litigation could reasonably be anticipated: Grant v Downs (at 682)."*

16. In the English case of *Causton v Mann Egerton (Johnsons) Ltd* [1974] 1 All ER 453, it was held that a Court had no power to order a party to produce medical reports, which are privileged documents, in the absence of an agreement between the parties for disclosure and exchange of medical reports or waiver of the privilege otherwise attaching to the reports. Stamp LJ, at 458, held that:

> *"...medical reports made on behalf of either party on the advice of their legal advisers and for the purpose of preparing their case at the trial are privileged documents. Such documents are by well recognised principles privileged.'*

Roskill LJ on the same point said:

> *"...[m]edical reports are in no different category from other expert's reports and it would be quite wrong to engraft a qualification on the doctrine of privilege according to the nature of the report or the class of professional qualification attaching to its maker."*

17. *Causton's* case arose from existing litigation in which the plaintiff requested disclosure of the defendant's medical reports about the plaintiff. Before proceedings had been initiated, the plaintiff had agreed to be medically examined by a doctor on behalf of the defendant's insurers. The doctor who examined the plaintiff for the insurers provided two reports to the insurers.

18. The privilege attached to medical reports in the manner described in *Causton's* case, has been recognised in Australia: *Topp v Lawnton Sawmill* [1968] QWN 34; *Re Peric and Commonwealth Banking Corp.* (1985) 7 ALN N2; *Re Greenbank and Secretary, Department of Social Security* (1986) 9 ALD 338; *Re McMaugh and Australian Telecommunications Commission* (1991) 22 ALD 393; *Re Kaur and Australian Postal Commission* (1991) 23 ALD 159. Furthermore, in the South Australian case of *Taylor v Guttilla* (1992) 59 SASR 361, a decision of the Full Court of the Supreme Court of that State, it was held that Rule 126A of the *Local Court Rules (1970)* (SA), which purported to abrogate legal professional privilege in respect of medical reports, was *ultra vires* the rule-making power of the

District Court as it destroyed the substantive legal right of legal professional privilege and, therefore, was invalid.

19. In the matter before me, the report was not prepared for use in existing legal proceedings as there was no litigation then on foot. It is for me to decide whether circumstances have been shown to have existed, at the time, from which I can objectively conclude that litigation was reasonably anticipated and that the document was prepared solely for that purpose.

THE AGENCY'S CLAIMS OF EXEMPTION

20. In the notice of decision provided to the applicant in the first instance, the agency claimed the exemption based on clause 7 and provided the following reason - *"This report was obtained at the request of the Senior Assistant Crown Solicitor for the sole purpose of getting advice in connection with anticipated litigation"*.

21. A copy of a memorandum supplied to my office by the agency, indicated that the matter concerning the applicant had been referred to the Legal Branch by another doctor on 3 April 1991 and it was that doctor who had raised the possibility of potential litigation by the applicant. However, it was not clear from the memorandum whether the purpose of obtaining the report was for use in anticipated litigation or was for the purpose of the agency merely assessing its liability in respect of the matter.

22. Similarly, it was not clear from the letter of the Assistant Crown Solicitor dated 16 March 1992, confirming her request that the agency obtain a report from a specialist, nor from the letter of the Senior Legal Officer to the specialist requesting the report, that litigation was then contemplated and that the report was to be prepared for that purpose. The report itself was equally unhelpful in regard to determining whether the "sole purpose" test could be satisfied or whether the purpose of the report was to assess the legal position of the agency and any issues of compensation.

23. As a result, I requested the production of the agency's legal file in relation to this matter. This was subsequently produced and after inspecting the contents of that file, including the full correspondence leading up to the request for, and preparation of, the report, I am satisfied that the report was prepared in contemplation of anticipated litigation by the applicant. On that file are a number of documents, including a letter referring the matter to the legal branch in the first instance, which indicate a belief in the agency that litigation was likely. These documents include a note which suggests that the matter of negligence was raised by the applicant's wife, advice from the Assistant Crown Solicitor seeking a specialist report, an authority signed by the applicant relating to his medical records and his agreement to undertake the medical examination for the purpose outlined and correspondence from a

solicitor relating to the release of reports connected with the applicant's *" proposed common law damages claim of medical negligence."*

CONCLUSION

24. I am therefore satisfied that, objectively viewed, the circumstances surrounding the creation of the documents described, at the time when the report was requested and prepared, indicate that it was reasonable to anticipate that litigation was likely. For these reasons I am of the view that the report would be privileged from production in legal proceedings on the ground of legal professional privilege and that it is therefore exempt under clause 7 of Schedule 1 of the FOI Act.

25. I am also satisfied that the limitation to the exemption in clause 7 is not applicable in this instance. Further, clause 7 is not limited by a public interest test and I am therefore unable to consider whether the fact that the report contains personal information of the applicant, should be a factor in favour of disclosure of the document.

26. Having decided that the report is exempt under clause 7, it is not necessary to consider the claims of exemption under clauses 6, 8 and 11 of Schedule 1 to the FOI Act.

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