

CLEMENTS AND GRAYLANDS

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: 95162
Decision Ref: D04995**

Participants:

David D'Arcy Clements
Complainant

- and -

Graylands Hospital
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - letter from legal adviser to agency - clause 7 - legal professional privilege - legal advice given by the agency's legal advisers - confidential communication between a legal adviser and an officer of the agency for the "sole purpose" of giving legal advice - document recording substance of legal advice given by legal adviser.

Freedom of Information Act 1992 (WA) ss. 68(1), 72(1)(b), 75(1), 102(3); Schedule 1 clauses 3(1), 3(6), 7, 8(2); Glossary in Schedule 2.

Re Read and Public Service Commission (Information Commissioner, WA, 16 February 1994, unreported).

Re Capelli and Fiedukowicz and Town of East Fremantle (Information Commissioner, WA, 3 November 1995, unreported).

Re Clarkson and Attorney-General's Department (1990) 4 VAR 197.

Grant v Downs (1976) 135 CLR 674.

Baker v Campbell (1983) 153 CLR 52.

Attorney-General (NT) v Kearney (1985) 158 CLR 500.

Attorney-General (NT) v Maurice (1986) 161 CLR 475.

Waterford v The Commonwealth (1987) 163 CLR 54.

Trade Practices Commission v Sterling (1979) 36 FLR 244.

DECISION

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

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

9th November 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of Graylands Hospital ('the agency') to refuse Mr Clements ('the complainant') access to a document requested by him under the *Freedom of Information Act 1992* ('the FOI Act'). The agency claims that the requested document is exempt under clause 7 of Schedule 1 to the FOI Act because it is a document that would be privileged from production in legal proceedings on the ground of legal professional privilege. The complainant disputes the claim that privilege applies with respect to the requested document.
2. The complainant initially applied to Fremantle Hospital on 11 July 1995 for access to the requested document. That request was transferred to the agency and received on 20 July 1995. A decision refusing access was made on 25 July 1995. The complainant applied for internal review on 30 July 1995, and, on 14 August 1995, Ms MacDonald, General Manager, Graylands Hospital and Special Care Services, confirmed the earlier decision that the document is exempt under clause 7. On 15 August 1995, the complainant applied to the Information Commissioner for external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

3. In accordance with my usual practice and my authority under s.75(1) of the FOI Act, on 31 August 1995, I obtained the disputed document from the agency. I also obtained a copy of the agency's FOI file maintained in respect of the matter and sought other information concerning the circumstances leading to the creation of the document.
4. After examining the disputed document and considering the submissions of the parties, I formed a preliminary view that the document was exempt under clause 7 of Schedule 1 to the FOI Act. On 25 September 1995, the parties were provided with my preliminary view and reasons for that view. On 27 October 1995, the complainant provided a submission to me in response to my preliminary view.

THE EXEMPTION

5. Clause 7 in Schedule 1 to the FOI Act provides:

"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)."*

6. In a number of my previous formal decisions, I have discussed the principle and application of legal professional privilege, initially in *Re Read and Public Service Commission* (16 February 1994, unreported), at paragraphs 65-66, and most recently in *Re Capelli and Fiedukowicz and Town of East Fremantle* (3 November 1995, unreported), at paragraphs 26-28.
7. The nature and scope of legal professional privilege at common law has been the subject of consideration by the High Court in a number of cases. A concise summary of the general principles extracted from those judgments is contained in the decision of Mr K Howie, Member of the Victorian AAT, in *Re Clarkson and Attorney-General's Department* (1990) 4 VAR 197 at p.199:

"The nature of legal professional privilege has been closely examined by the High Court in a number of decisions, in particular Grant v Downs (1976) 135 CLR 674, Baker v Campbell (1983) 153 CLR 52, Attorney-General (NT) v Kearney (1985) 158 CLR 500, Attorney-General (NT) v Maurice (1986) 161 CLR 475, and Waterford v Commonwealth of Australia (1987) 163 CLR 54.

From these decisions, the following principles emerge:

(1) To determine whether a document attracts legal professional privilege consideration must be given to the circumstances of its creation. It is necessary to look at the reason why it was brought into existence. The purpose why it was brought into existence is a question of fact.

(2) To attract legal professional privilege the document must be brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings. Submission to legal advisers for advice means professional legal advice. It includes the seeking or the giving of advice. Use in legal proceedings includes anticipated or pending litigation.

(3) The reason for legal professional privilege is that it promotes the public interest. It assists and enhances the administration of justice by facilitating the representation of clients by legal advisers. There are eloquent statements of the importance of this public interest in each of the cases referred to above.

(4) Legal professional privilege attaches to confidential professional communications between salaried legal officers and government agencies. It must be a professional relationship which secures to the advice an independent character. The reason for the privilege is the public interest in

those in government who bear the responsibility of making decisions having free and ready confidential access to their legal advisers. Whether or not the relationship exists is a question of fact.

(5) If a document contains material that does not fulfil the required test, that does not necessarily deny the document the protection of the privilege. What matters is the purpose for which the document was brought into existence. If it was for the required purpose, it is not to the point that the document may contain advice which relates to matters of policy as well as law. However, an analysis of the document may assist in determining its moving purpose...”

8. Legal professional privilege applies to, *inter alia*, any communication between a client and his or her professional legal adviser acting in a professional capacity and with a view to obtaining or giving legal advice or assistance. A claim for privilege is not limited in the case of such communications, to communications which have been made for the purpose of existing or contemplated litigation: *Trade Practices Commission v Sterling* (1979) 36 FLR 244. Further, an agency is entitled to claim privilege for advice obtained from salaried legal officers who are employed within the agency as legal advisers, where the legal advice is given within the professional relationship between the legal officer and the client, and the advice is independent in character: *Attorney-General (NT) v Kearney, op cit*; *Waterford v Commonwealth, op cit*.
9. The disputed document is a letter dated 19 May 1993, from Mr Ian Bidmeade to Dr De Felice. Mr Bidmeade was then employed by the agency in its Legal Administration Branch in the position of Senior Legal Policy Officer. The agency submits, and I accept, that the disputed document was brought into existence as a result of Dr De Felice seeking legal advice in respect of certain matters then being raised by the complainant with the Parliamentary Commissioner for Administrative Investigations. The Director of the Legal Administration Branch referred Dr De Felice's letter to Mr Bidmeade for a response.
10. In his submission to me, the complainant stated that “ *[t]he preliminary view that the letter contains legal advice to Dr De Felice is noted: this has never been in dispute...*”. However, the complainant contends that the disputed document is not exempt under clause 7 because “*[t]here are no, nor have been any, legal proceedings instituted or anticipated in this case.*” The complainant contends, therefore, that the disputed document fails the “sole purpose test” for establishing legal professional privilege.
10. In my view, the complainant misunderstands the nature of the “sole purpose” test to establish legal professional privilege. For a document to be protected pursuant to the “sole purpose” test, the document must have been created either for use in litigation or for the giving or receiving of legal advice. I am satisfied, from my examination of the disputed document that it contains legal advice, a fact that the complainant does not dispute. I am also satisfied, from the document itself, that it was created by Mr Bidmeade for the sole purpose of giving legal advice to Dr De Felice. In my view, therefore, the disputed document would be privileged

from production in legal proceedings on the ground of legal professional privilege.

11. Accordingly, I find the disputed document is exempt under clause 7 of Schedule 1 to the FOI Act.
