

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

**File Ref: F1791998
Decision Ref: D0171999**

Participants:

Jennifer Zaccaria

Complainant

- and -

Fremantle Hospital

Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to investigation of workers’ compensation claim – clause 3(1) – personal information about third parties – public interest factors for and against disclosure.

FREEDOM OF INFORMATION – refusal of access – clause 7 – legal professional privilege – privileged communications – legal advice given to agency’s insurer – whether legal professional privilege waived by disclosure to agency.

Freedom of Information Act 1992 (WA) ss.21; 102(3); Schedule 1, clauses 3(1), 3(6), 7, 8(2); Schedule 2, Glossary.

Nickmar Pty Ltd and Another v Preservatrice Skandia Insurance Limited (1985) 3 NSWLR 44;

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

Attorney General for the Northern Territory v Maurice and Others (1996) 161 CLR 475

Goldberg v Ng (1995) 132 ALR 57

DECISION

The decision of the agency is confirmed. Document 3 is exempt under clause 7 of the *Freedom of Information Act 1992*, and the matter deleted from Document 2 is exempt under clause 3(1).

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

14 July 1999

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision made by Fremantle Hospital ('the agency') to refuse Mrs Zaccaria ('the complainant') access to documents of the agency requested by her under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant is a former employee of the agency. In March 1996, she commenced a period of 12 months leave without pay. However, when she failed to resume her duties as a telephonist in March 1997, the agency terminated her employment.
3. In June 1997, the complainant lodged a complaint with the Public Sector Standards Commissioner concerning the actions of the agency. Subsequently, an independent reviewer was appointed to investigate that complaint and, in December 1997, the reviewer reported the results of the review to the agency and to the Public Sector Standards Commissioner. I understand that the complainant was also informed of the results of the investigation and received from the agency copies of various documents associated with that matter.
4. In October 1997, the complainant lodged a workers' compensation claim with the Insurance Commission of Western Australia ('the Insurance Commission'). The Insurance Commission instructed an inquiry agent to investigate and report on the compensation claim. During the course of that investigation, the complainant and various third parties were interviewed and statements obtained. Following the inquiry agent reporting back to the Insurance Commission, the claim by the complainant for compensation was denied by the agency.
5. The complainant has lodged four previous access applications under the FOI Act; three were lodged with the agency and one with the Insurance Commission. Each of those applications resulted in a complaint to the Information Commissioner and each was resolved by conciliation between the parties.
6. The present matter arises from an access application lodged with the agency in July 1998. In that application, the complainant sought access under the FOI Act to seven categories of information, excluding documents already in her possession from the agency. The agency decided, therefore, that any documents that had previously been the subject of an access application by the complainant were outside the scope of the latest request and it did not deal with that part of the request.
7. The agency granted the complainant access to edited copies of some documents from which exempt matter had been deleted, and refused access to one document in full. The agency claims that the deleted matter is exempt under clause 3(1) and clause 8(2) of Schedule 1 to the FOI Act, and that the other document is exempt under clause 7. The agency's initial decision was

confirmed following internal review. On 10 December 1998, the complainant lodged an application with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

8. I obtained the disputed documents from the agency and instructed my Investigations Officer to make further inquiries to determine if this complaint could be resolved by conciliation between the parties. However, it appears that the complainant remains dissatisfied with the level of access granted by the agency. She maintains her view that additional documents should exist and, as a result, further conciliation of this matter is not an option.
9. After considering the material before me, on 31 May 1999, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that only two documents were in dispute and that the agency's decision to refuse access to parts of Document 2 and to the whole of Document 3 appeared to be justified.
10. In addition, and with the assistance of the agency, my office prepared a schedule of 40 pages listing and describing all documents held by the agency that relate to the complainant, including the documents that were dealt with by the agency in previous access applications. The schedule also contains the agency's decision on access in respect of each of those documents. This action was considered necessary as the complainant signalled her intention to lodge further applications until she received full access or the FOI Act was amended.
11. On 15 June 1999, I received a further submission in writing from the complainant.

THE DISPUTED DOCUMENTS

12. There are two documents in dispute in this matter. Document 2 is a report dated 11 November 1997 from the inquiry agent to the Insurance Commission. That document was provided under cover of a letter dated 4 December 1997 from the RiskCover Division of the Insurance Commission to the agency. The agency claims that the matter deleted from Document 2 and its attachments is exempt under clause 3(1) and clause 8(2).
13. Document 3 is a letter dated 9 June 1998 from a firm of solicitors to the Managing Director, RiskCover. The agency claims that Document 3 is exempt under clause 7.

THE EXEMPTIONS

(a) Clause 3 – Personal information

14. Clause 3, so far as is relevant, provides:

“3. Personal information

Exemption

(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).

Limits on exemption

(2) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.

(3) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to -

- (a) the person;*
- (b) the person’s position or functions as an officer; or*
- (c) things done by the person in the course of performing functions as an officer.*

(4)...

(5) Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant

(6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”

15. In the Glossary in Schedule 2 to the FOI Act “personal information” is defined to mean:

“... information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead -

- (a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or*
- (b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample”*

16. In my opinion, the purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom personal information may be contained in documents held by State and local Government agencies. The definition of “personal information” in the Glossary makes it clear that any information or

opinion about a person from which that person can be identified is, on the face of it, exempt matter under clause 3(1).

17. The complainant has been given access to an edited copy of Document 2. The matter deleted from that document consists of names and other personal and private information about various third parties. In my view, the deleted matter is personal information, as defined in the FOI Act, about those third parties. Whilst there is some personal information about the complainant in parts of the document, I consider that that information is so inextricably interwoven with the personal information about third parties that it could not be disclosed to the complainant without also disclosing the personal information about those third parties.
18. I have considered whether any of the limits on exemption in clause 3(2)-3(6) applies to the deleted matter. The complainant provided me with evidence that a third party consented to the disclosure of personal information about her if such information had been deleted from the disputed documents. I understand that the agency has provided the complainant with copies of additional material following the giving of that consent. However, there is more than one third party mentioned in Document 2 and there is nothing before me to establish that any of those other persons has consented to the disclosure of personal information. I am satisfied, therefore, that the limit on exemption in clause 3(5) does not apply to the matter remaining in dispute.
19. I am satisfied that the matter remaining in dispute does not consist merely of personal information about the complainant and, therefore, the limit in clause 3(2) does not apply. I am also satisfied that any information provided to the insurance agent by persons who are, or were at the relevant time, officers of the agency is not merely prescribed details within the terms of clause 3(3) or (4). In my view, the deleted matter consists of more than merely prescribed details relating to the persons concerned, each person's functions as an officer of the agency or things done in the course of performing functions as an officer of the agency. It consists of information about third parties that goes well beyond the kind of work-related information that, in the interests of accountability, ought to be disclosed.
20. The only remaining limit on exemption to be considered is that provided by clause 3(6). Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Under s.102(3) of the FOI Act, the onus is on the complainant to persuade me that disclosure of personal information about other people would be in the public interest.

Public interest

21. Determining whether or not disclosure would, on balance, be in the public interest involves identifying the public interest factors for and against disclosure, weighing them against each other and deciding where the balance lies. I have consistently taken the view that there is a strong public interest in maintaining personal privacy. That public interest is recognised by the inclusion of the exemption in clause 3(1) and, in my view, that public interest may only be

displaced by some other considerably stronger public interest that requires the disclosure of private information about another person.

22. The complainant expressed her concern to me that she was unable to obtain access to statements about her made by third parties. She was of the view that there was a public interest in the disclosure of such information to her. In that regard, she said:

“I am of the view that the thinking members of the general public should be kept fully informed of issues relating to the efficiencies and professionalism by which all Public Sector agencies are managed. Other issues that I believe would be of public interest is to ensure that all public sector agencies conduct their activities in accordance with the laws, legislation, codes of conduct and codes of ethics they are governed by...

In addition I strongly believe I have been denied natural justice and the opportunity to re-establish my character and integrity which have been unjustly and falsely jeopardised.

Accordingly it is my opinion that the best public interest would be served by exposing these breaches by an agency and by challenging any untruths by any officer of that agency.”

23. I accept that there is a public interest in ensuring the efficient and effective management of agencies, and in an agency’s observance of legislative requirements and due process in its dealings with staff and the public. However, having inspected the disputed matter which, as I have said is composed in the main of personal information about third parties, I do not consider that its disclosure to the complainant would serve that public interest.
24. I also recognise that there is a public interest in persons being able to exercise their rights of access under the FOI Act. Of particular relevance to this case, I recognise a public interest in people being able to access personal information about them that is held by a government agency. That public interest is also recognised in s.21 of the FOI Act. That section provides that the fact that information requested is personal information about the applicant must be considered as a factor in favour of disclosure for the purpose of making a decision as to whether it is in the public interest for the information to be disclosed. I consider there to be a particular public interest in people being informed of allegations that have been made against them and being afforded an opportunity to respond to those allegations and to be informed of any action taken by an agency in respect of them and why.
25. However, in this case, I am of the view that those public interests have been adequately served by the disclosure already made to the complainant as the result of her access applications. The documents and parts of documents already released to the complainant, in my opinion, fully inform her of the matters of concern that were raised and considered by the agency in respect of the complaint. The deleted matter, on the other hand, does not relate only to the complainant. It concerns other people as well. Taking into account the

information already disclosed to the complainant, I do not consider that the public interest in the complainant having access to personal information about her is greater than the public interest in maintaining the privacy of other people.

26. In addition, also weighing against disclosure, is a public interest in the agency maintaining its ability to obtain sufficient information to enable it to discharge its obligations to the community at large, as well as to its staff, in relation to workers' compensation issues. In the circumstances of this matter, it appears to me that protecting the privacy of third parties, whilst at the same time giving the complainant access to personal information, as far as it is possible for the agency to do so, will adequately serve that particular public interest.
27. Therefore, in balancing the competing interests, I am not persuaded that disclosure of the disputed matter would be in the public interest. Accordingly, I find that the matter deleted from Document 2 is exempt under clause 3(1) of Schedule 1 to the FOI Act. In view of that finding, I need not consider the agency's claim that the deleted matter is also exempt under clause 8(2).

(b) *Clause 7 - Legal professional privilege*

28. The agency claims that Document 3 is exempt under clause 7. Clause 7 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.”

29. It is clearly established law in Australia that confidential communications passing between a client and his or her legal adviser for the sole purpose of giving or receiving legal advice need not be given in evidence or otherwise disclosed by the client and, without the client's consent, may not be given in evidence or otherwise disclosed by the legal adviser: *Grant v Downs* (1976) 135 CLR 674.
30. The rule is most often applied to confidential communications between a client and his or her lawyer for either the sole purpose of giving or receiving legal advice or for use in existing or anticipated legal proceedings. However, the principle extends to communications between a third party and the client or a lawyer, when 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 Limited* (1985) 3 NSWLR 44; *Trade Practices Commission v Sterling* (1979) 36 FLR 244.
31. Document 3 is a letter from a firm of solicitors to RiskCover, giving legal advice about the complainant's claim for workers' compensation. From my examination of Document 3, I am satisfied that it is a confidential communication between legal advisers and a client, the RiskCover Division of

the Insurance Commission, for the sole purpose of providing the client with legal advice in respect of that claim. I am satisfied, therefore, that it is a privileged document.

32. However, legal professional privilege can be waived by the privilege-holder. A client may waive legal professional privilege, either generally or in respect of a particular issue or parts of a document. Waiver may be implied where conduct on a client's part makes it unfair or misleading to maintain the privilege (*Attorney General for the Northern Territory v Maurice and others* (1986) 161 CLR 475). The question in this case is whether or not RiskCover waived the privilege by passing the document to the agency.
33. Waiver of privilege occurs where the party entitled to the privilege performs an act that is inconsistent with the confidence preserved by it. The consequence of waiver where it occurs is that the privilege-holder becomes subject to the normal requirements of disclosure of the document. Waiver of privilege may be express or implied. There is no evidence before me of any express waiver of privilege in this case.
34. The question of whether or not there has been an implied waiver of privilege most often arises where there has been limited disclosure of the contents of privileged material and the question is whether, in all the circumstances, it would be unfair to maintain the privilege, whether or not the privilege-holder intended to waive it: *Goldberg v Ng* (1995) 132 ALR 57 at 64.
35. The legal advisers created Document 3 for the sole purpose of providing legal advice to RiskCover. RiskCover requested that advice as the agency's insurer. In my view, the act of passing Document 3 to the agency does not amount to a waiver of privilege. In the circumstances of this matter, I do not consider that the limited disclosure of the document to the agency was an act by the privilege-holder amounting to an express waiver of the privilege attaching to the document.
36. The question, therefore, is whether waiver should be imputed from the act of disclosing that document to the agency. It seems to me that the purpose of the disclosure was not to put the documents to any particular use as against the complainant or any other person. Rather, it appears to have been for the purpose of informing the agency about the status and progress of the matter in which RiskCover was acting as the agency's insurer. In those circumstances it consider that disclosure does not amount to an act on the part of the privilege-holder which would render it unfair to a party in any proceedings that the privilege be maintained. Accordingly, in my view, considerations of fairness do not require that waiver of privilege should be imputed.
37. In my view, therefore, Document 3 would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that it is exempt under clause 7 and confirm the decision of the agency to refuse access to that document.