

DECISION SUMMARY ISSUED BY THE INFORMATION COMMISSIONER (WA)

Decision title and citation: *Re Rodoreda and King Edward Memorial and Princess Margaret Hospitals* [2002] WAICmr 18

COMPLAINT No: F2002058

DECISION No: D0182002

PARTIES: Rachel Lee RODORED A

Complainant

**KING EDWARD MEMORIAL AND
PRINCESS MARGARET HOSPITALS**

Respondent

No. of documents in dispute: 1

Exemption clause(s): Clause 7

By letter dated 26 August 1991, the Legal Aid Commission of Western Australia informed the Registrar of the Princess Margaret Hospital for Children ('PMH') of a possible claim for medical negligence against PMH made on behalf of Rachel Lee Rodoreda ('the complainant').

Following that, on 28 August 1991, the Medical Director of PMH sought certain information from the Director of Neonatology. The Director of Neonatology provided that information in a letter dated 30 August 1991. On 3 September 1991, the two documents, dated 26 August 1991 and 30 August 1991, respectively were sent to the Crown Solicitor's Office for advice.

On 29 November 2001, solicitors acting on behalf of the complainant made an application to King Edward Memorial and Princess Margaret Hospitals ('the agency') under the *Freedom of Information Act 1992* ('the FOI Act') for access to copies of all notes relating to the complainant dating from 30 March 1987. The agency granted access to various documents, but refused access to three documents on the ground that those documents are exempt under clause 7(1) of Schedule 1 to the FOI Act. The agency's decision was confirmed following an internal review. On 4 April 2002, the complainant's solicitors lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

Review by the Information Commissioner

After I had accepted this complaint, the agency advised me that it had identified three additional documents, which were covered by the terms of the complainant's access application. The agency also claimed exemption for those documents under clause 7(1). Following discussions between my office and the parties, the complainant withdrew the complaint in respect of two documents and the agency granted the complainant access to two other documents, together with an attachment. That left two documents remaining in dispute.

On 1 May 2002, after considering the material before me, I informed the parties, in writing, of my preliminary view of this complaint, including my reasons. It was my preliminary view that Document 1 may not be exempt under clause 7, but that Document 2 may be exempt under clause 7.

Following that, the agency granted the complainant access to Document 1, but maintained its claim for exemption for Document 2. The complainant's solicitors made a written submission to me and submitted that Document 2 was not exempt under clause 7 because it appeared that that document was not prepared for the dominant purpose of giving or receiving legal advice, or for use in existing or anticipated legal proceedings. However, I am not dissuaded from my preliminary view that Document 2 is exempt under clause 7 for the reasons previously given to the parties. A summary of my reasons follows.

Legal professional privilege

Clause 7(1) of Schedule 1 to the FOI Act provides that matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege. Legal professional privilege protects from disclosure confidential communications between clients and their legal advisers if made or brought into existence for the dominant purpose of giving or seeking legal advice or for use in existing or anticipated legal proceedings: *Esso Australia Resources Ltd v The Commissioner of Taxation* [1999] 74 ALJR 339.

The privilege applies to confidential communications and seeks to promote communication with a legal adviser, not to protect the content of a particular document. In *Commissioner of Australian Federal Police and Another v Propend Finance Pty Ltd and Others* [1997] 188 CLR 501, Toohey J observed, at p.525:

“... privilege does not attach to a piece of paper. It attaches to a communication, written or oral, and it is the communication that is at issue. While it is natural to speak of legal professional privilege in terms of documents, it is the nature of the communication within the document that determines whether or not the privilege attaches.”

The complainant’s submission

Having received a copy of Document 1, the solicitors acting for the complainant submitted that the dominant purpose for which Document 2 was created was to provide the Medical Director of PMH with an overview of the treatment provided to the complainant and that the transmission of Document 2 to the Crown Solicitor’s Office was an additional, rather than a dominant, purpose for creating that document. It was submitted that there is a distinction between asking the Director of Neonatology for an overview of the treatment provided and obtaining an expert opinion from a treating specialist as to the adequacy of care provided to a patient.

Consideration

In my view, the purpose of creating Document 1 was to seek information from the Director of Neonatology. Document 1 makes it clear that the information provided would then be forwarded to the agency’s legal advisers, the Crown Solicitor’s Office. The material before me, which includes those documents numbered 3, 4, 5, and 6 to which access was originally refused, makes it clear that Document 2 was forwarded to the Crown Solicitor’s Office on 3 September 1991, together with the letter dated 26 August 1991 from the Legal Aid Commission. On the basis of my examination of that material, I am satisfied that Document 2 is a confidential communication between the agency and its legal advisers, which was made for the dominant purpose of seeking legal advice. I consider that Document 2 falls clearly within a category of documents described by Lockhart J in *Trade Practices Commission v Sterling* [1979] 36 FLR 244, at pp.245-246, as being those to which the privilege applies, namely:

“Any communication between a party and his professional legal adviser if it is confidential and made to or by the professional adviser in his professional capacity and with a view to obtaining or giving legal advice or assistance ...”.

Therefore, I am satisfied that Document 2 would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find Document 2 exempt under clause 7 of Schedule 1 to the FOI Act and confirm the decision of the agency to refuse access to it.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER
15 May 2002