

PERRY AND FREMANTLE HOSP.

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

**File Ref: 96138
Decision Ref: D05596**

Participants:

Patricia Dianne Perry
Complainant

- and -

Fremantle Hospital
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - clause 7 - legal professional privilege - report prepared by third party at request of agency's legal adviser - information obtained for purpose of litigation.

Freedom of Information Act 1992 (WA) s. 76(4); Schedule 1 clause 7.

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

DECISION

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

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

17th October 1996

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of Fremantle Hospital ('the agency') to refuse Ms Perry ('the complainant') access to a document requested by her under the provisions of the *Freedom of Information Act 1992* ('the FOI Act').
2. In February 1993, the complainant, who was an employee of the agency, was performing her normal nursing duties as a registered nurse and certified midwife at the Woodside Maternity Hospital. In the course of assisting a patient in the delivery of a child, the complainant allegedly slipped and injured herself on the floor of the delivery room. Subsequently, the complainant commenced an action in the District Court in Perth against the agency, being the body ultimately responsible for the administration of Woodside Maternity Hospital. The Crown Solicitor's Office ('the CSO') had the conduct of the matter on behalf of the agency. That claim was settled prior to the matter proceeding to trial.
3. In the course of the defence of the action, the CSO, on behalf of the agency, requested and obtained a report from a third party relating to the condition of the floor on which the complainant was alleged to have injured herself. On 24 June 1996, the complainant lodged an access application under the FOI Act with the agency seeking access to any reports relating to the condition of the terrazzo floors in labour wards, particularly those at Woodside Maternity Hospital. After lodging that request, the complainant confirmed that she was seeking access to a copy of the report prepared or requested by the agency or the CSO in the course of the District Court action.
4. By letter dated 30 July 1996, the agency refused the complainant access to the requested document on the ground that it is exempt under clause 7 of Schedule 1 to the FOI Act. Subsequently, the initial decision of the agency was confirmed on internal review. On 6 September 1996, the complainant lodged a complaint with the Information Commissioner in respect of the agency's decision to deny access to the requested document.

REVIEW BY THE INFORMATION COMMISSIONER

5. Pursuant to the provisions of the FOI Act, on 18 September 1996 I was provided with a copy of the disputed document by the agency. After examining that document, further inquiries were made into the circumstances in which that document had been created. I then informed the parties that it was my preliminary view that the document is exempt under clause 7 of Schedule 1 to the FOI Act. However, the complainant subsequently informed my office that she wished to pursue her complaint.

THE DISPUTED DOCUMENT

6. The document in dispute in this matter is a technical report prepared by a third party which deals with, *inter alia*, the condition of the floor of the delivery room at Woodside Maternity Hospital.

THE EXEMPTION

7. Clause 7 of Schedule 1 to the FOI Act provides:

"7. 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)."*

8. Legal professional privilege applies to, *inter alia*, confidential communications between a client's legal adviser and a third party if made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence: *Trade Practices Commission v Sterling* (1979) 36 FLR 244.
9. The agency claims that the document is subject to a claim of legal professional privilege as it was prepared by a third party at the request of the CSO for the purpose of the District Court action that was, at the time of the request, ongoing between the agency and the complainant.

The complainant's submission

10. The complainant claims that the agency was expected to provide a copy of the disputed document to the complainant as part of the exchange of expert reports prior to the trial. However, the disputed document was not provided to the complainant, and the matter was settled. In relation to the agency's claim that the disputed document is subject to a claim of legal professional privilege, the complainant submits that legal professional privilege should not apply to protect documents once a case has been settled.

11. Further, the complainant submits that she should be entitled to obtain a copy of the document in dispute as she has a duty of care to other employees of the agency and to the public, especially to pregnant women, in respect of their safety in public hospitals. The complainant considers that the agency should not be able to rely on a claim of legal professional privilege when issues of public safety arise.
12. In my view, it is not necessary in order for a document to be subject to a claim of legal professional privilege in these circumstances that the document has actually been used in the litigation. It is sufficient that the document was created for the sole purpose of obtaining advice or evidence with respect to that litigation, whether it was in fact so used.
13. The material before me, including the document itself, satisfies me that that it is a communication between a third party and the agency's legal adviser for the purposes of the litigation which, at the date of its preparation, had been commenced in the District Court of Western Australia between the agency and the complainant. Accordingly, I consider the disputed document would be privileged from production in legal proceedings on the ground of legal professional privilege.
14. In this instance, for the reasons given, I am satisfied that the disputed document would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that the disputed document is exempt under clause 7 of Schedule 1 to the FOI Act.
15. In support of her claim, the complainant has raised what she considers to be public interest factors in favour of the disclosure of the disputed document. However, the exemption provided for by clause 7 is not limited by a "public interest test". Therefore, in accordance with s.76(4) of the FOI Act, once I am satisfied that a document is exempt, I do not have power to make a decision to the effect that access is to be given to that document. Legal professional privilege is the privilege of the client, in this case, the agency, and once it has been claimed by an agency in relation to a document to which access is sought under the FOI Act, it may be waived only at the discretion of the agency.
