Lib No: 960189

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
CORAM	**:**	OWEN J
HEARD	**:**	11 MARCH 1996
DELIVERED	**:**	4 APRIL 1996
FILE NO/S	**:**	APPEAL SJA 1198 of 1996
BETWEEN	**:**	DAVID CLEMENTS Appellant AND GRAYLANDS HOSPITAL First Respondent HEALTH DEPARTMENT OF WESTERN AUSTRALIA Second Respondent

Catchwords:

Freedom of Information - Document created for purpose of giving or receiving legal advice - Document raised matters of policy - Access refused on grounds of legal professional privilege - "Sole purpose" test discussed and applied - Opportunity to make submissions - Whether opportunity was reasonable.

Decision within 30 days - Directory provision only - *Freedom of Information Act 1992*, ss70(3); 76(3); Schedule 1, clause 7.

Representation:

Counsel:

Appellant	:	In Person
Respondent	:	Mr R L Hooker

Solicitors:

Appellant	:	In Person
Respondent	:	State Crown Solicitor

Case(s) referred to in judgment(s):

Grant v Downs (1976) 135 CLR 674
Grofam Pty Ltd v Australia and New Zealand Banking Group Ltd (1993) 45 FCR 445
Transport Amalgamated Pty Ltd v AAA Transport Services Pty Ltd [1975] WAR 101
Waterford v The Commonwealth (1987) 163 CLR 54

Case(s) also cited:

Attorney General (NT) v Kearney (1985) 158 CLR 500
Attorney General (NT) v Maurice & Ors (1986) 161 CLR 475
Baker v Campbell (1983) 153 CLR 52
Re Lawless and Secretary to Law Department & Ors (1987) 1 VAR 42
Re Pyle and Health Commission of Victoria (1987) 2 VAR 54
Re Setterfield and Chisholm Institute of Technology & Ors (1987) 1 VAR 250
Trade Practices Commission v Stirling (1979) 36 FLR 24

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OWEN J:

This appeal has been brought pursuant to s85 of the *Freedom of Information Act 1992* ("the Act"). It is an application for review of a decision made by the Freedom of Information Commissioner ("the Commissioner") which bears the number D04995. The Commissioner refused to grant the appellant's application for access to a document held by Graylands Hospital ("the agency") on the grounds that the document was protected by legal professional privilege.

There is a document on the court file entitled "Amended notice of motion". An affidavit has been filed in support of this motion. The amended notice of motion is in similar terms to the notice of motion dated 27 November 1995 which relates solely to D04995. It contains further proposed grounds of appeal in relation to decision D04995 and proposed grounds of appeal in relation to a quite separate decision which bears the number D05795. The challenge to D05795 was made out of time and no application has been made to extend time. In addition the purported amendments were not served on the respondent. This hearing proceeded in relation to D04995 only although I granted leave for the amended grounds to be argued. If the appellant wishes to challenge D05795 he is at liberty to do so but he will need to issue a separate originating process and obtain an extension of time within which to do so.

Background

In 1995 the appellant was involuntarily admitted to the agency. After he was discharged he requested the ombudsman to investigate the circumstances surrounding his (the appellant's) admission to the agency. There was an investigation and a report was compiled. Dr De Felice, a consultant psychiatrist employed by the agency, made inquiries on matters pertaining to the ombudsman's investigation. During the course of those inquiries he wrote a letter to Mr McBride, the Director of the Legal Policy Branch of the agency. That letter is dated 6 May 1993 and it is in the following terms:

"Dear Nigel,

> enclosed is correspondance*(sic)* regarding Mr Clements, as I discussed with you. The last four pages detail the Ombudsman's most recent concerns and our respose*(sic)* to June McDonald, our Executive Director.
>
> I think this should be adequate, but I would appreciate any comments you may have. I would also value your advice regarding the events which occur from the time the PET staff arrive at a home to assess a person and the form 5 being completed. I would appreciate your comments regarding police powers in these circumstances (before form 5), and what directions the PET staff can legitimately give to police if they have concerns about the patient given that the person is not in the act of harming themselves or others. Also, what does "duty of care" compel PET staff to do in such circumstances.
>
> Thankyou for your help in these matters."

Mr McBride referred Dr De Felice's letter to Mr Ian Bidmeade, a Senior Legal Policy Officer employed by the agency in its Legal Policy Branch. Mr Bidmeade responded to Dr De Felice's inquiry by way of letter dated 19 May 1993 ("the Bidmeade letter"). The Bidmeade letter is the document to which the appellant seeks access.

On July 11 1995 the appellant applied to Fremantle Hospital for access to the Bidmeade letter. The request was transferred to the agency and received by it on 20 July 1995. On 25 July 1995 the agency informed the appellant that his application had been refused. An internal review of the agency's decision was conducted and the agency's decision was upheld. On 15 August 1995 the appellant applied to the Commissioner for external review of the agency's decision.

The Commissioner's Reasons for Decision

In her reasons for decision the Commissioner discloses that she obtained the document from the agency and considered submissions from the parties before coming to the preliminary view that the document was exempt

under the Act. On 25 September 1995 the Commissioner wrote to the parties informing them of her preliminary view. She also advised the parties that they were at liberty to lodge any further submissions on or before 3 October 1995. The appellant did not see this letter until returning from overseas on 18 October 1995. He explained this to the Commissioner and was given permission to file a late submission. He filed very brief additional submissions in response to the Commissioner's preliminary view. Those submissions are dated 27 October 1995. The agency did not file any further submissions.

The Commissioner's final reasons for decision ("the reasons") were delivered on 9 November 1995. In the reasons she confirmed her preliminary view that access to the document should be denied on the basis that the Bidmeade letter is exempt under clause 7 of Schedule 1 of the Act. Clause 7 of Schedule 1 of the 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)."

At para 11 of her reasons the Commissioner stated her conclusion that the letter is exempt under the Act. The substance of her conclusion is found in the second of the paragraphs numbered 10 in the reasons:

> "... 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."

Grounds of Appeal

The appellant filed a notice of motion dated 27 November 1995. The grounds of appeal stated therein are as follows:

> "1. The Information Commissioner erred in law by misconceiving the legal precedent; 'the sole purpose test' when granting exemption by legal professional privilege to a document.
>
> or
>
> 2. The Information Commissioner erred in law by granting legal professional privilege to a document which would not, by established legal precedence, be granted such legal professional privilege by a Court of Law."

At the hearing of the appeal leave to amend the notice of motion dated 27 November 1995 to include the following ground was granted:

> "3. The Information Commissioner erred by failing to publish her reasons for decision within 30 days after the complaint was made."

The Basis of Legal Professional Privilege

The legal principles governing claims to legal professional privilege are well known. Whether or not privilege exists is a question of fact to be decided in the circumstances of the particular case: ***Waterford v The Commonwealth*** (1987) 163 CLR 54 at 66. To assist in the decision making process the Court can examine the document in question: ***Grant v Downs*** (1976) 135 CLR 674

Provided that the document was created for the sole purpose of use in legal proceedings *or* for the purpose of giving or obtaining legal advice the privilege will be available. This is often referred to as the sole purpose test. It was adopted by a majority of the High Court in ***Grant v Downs*** *(supra).* Their Honours said, at 688:

> "All that we have said so far indicates that unless the law confines legal professional privilege to those documents which are brought into existence for the sole purpose of submission to legal advisers for advice *or* for use in legal proceedings the privilege will travel beyond the underlying rationale to which it was intended to give

> expression ... It is not right that the privilege can attach to documents which, quite apart from the purpose of submission to a solicitor, would have been brought into existence, and then without attracting any attendant privilege...we consider that the sole purpose test should now be adopted as the criterion of legal professional privilege." (emphasis added)

Attention will be focused on the purpose for which the document was created. The court is entitled to examine the circumstances surrounding the creation of the document. The Bidmeade letter was written in response to the queries raised by Dr De Felice. That letter is written on paper embossed with the Health Department's letterhead and it is addressed to the Legal Policy Branch. Dr De Felice's concerns were raised in the context of a professional relationship. In his letter to the Legal Policy Branch the doctor has asked for "advice" and for "comments on police powers". He has also sought advice on "duty of care", a well known legal concept. I am satisfied that in writing the letter Dr De Felice was seeking advice on what counsel for the respondent referred to as "lawfulness issues". He was clearly anticipating the provision of legal advice from someone in the Legal Policy Branch.

The Bidmeade letter raises certain issues of policy and the appellant submitted that the agency could not claim the privilege because the sole purpose test could not be satisfied. In ***Waterford*** *(supra)* Mason and Wilson JJ said, at 66:

> "The sole purpose test is a test that looks to the reason why the document was brought into existence. If its sole purpose was to seek or to give legal advice then the fact that it contains extraneous matter will not deny to it the protection of the privilege. The presence of other matter may raise a question as to the purpose for which it was brought into existence but that is simply a question of fact ..."

In this particular case the policy matters were raised for the purpose of providing the agency with legal advice on the particular factual matrix involving the appellant. The matters of policy raised in the Bidmeade letter

could not be separated from the legal advice and for this reason the agency could still claim the protection of the privilege.

There was some doubt as to whether Mr Bidmeade was admitted to practise in Western Australia. This issue was not finally resolved at the hearing of the appeal. In any event it was held in ***Grofam Pty Ltd v Australia and New Zealand Banking Group Ltd*** (1993) 45 FCR 445 that where a person genuinely though mistakenly believes that the person providing the legal advice is authorised to do so the privilege will still be available to the mistaken party. Given the context in which Dr De Felice wrote to the Legal Administration Branch it is clear that he was expecting to receive advice from someone competent to give legal advice.

Like the Commissioner, I have had the opportunity of reading the Bidmeade letter. By virtue of s90 of the Act this is an advantage that I am unable to confer on the appellant. I am satisfied that the Bidmeade letter was brought into existence for the sole purpose of seeking and giving legal advice. In my opinion the Commissioner correctly held that the Bidmeade letter was exempt under clause 7 of Schedule 1 of the Act. This ground of appeal has not been made out.

The Reasonable Opportunity to Make Submissions.

Section 70(3) of the Act is in the following terms:

> "The Commissioner has to ensure that the parties to a complaint are given a reasonable opportunity to make submissions to the Commissioner."

The question on this ground of appeal is whether the appellant has been given a reasonable opportunity to make submissions to the Commissioner. The legislation does not specify what has to be done to satisfy the "reasonable opportunity" requirement. Indeed it would be surprising if it did. Each case is to be judged according to its own particular circumstances. What is reasonable in one instance will not necessarily be reasonable in another.

In this instance the Commissioner obtained and examined the Bidmeade letter and invited both parties to make submissions. Both parties availed themselves of this opportunity. The Commissioner then formed the preliminary view that the Bidmeade letter was exempt under the Act. The parties were informed of the preliminary view and written reasons were provided. The appellant filed further submissions. The agency did not. On 9 November 1995 the Commissioner confirmed her preliminary view that the Bidmeade letter was an exempt document.

At the hearing of the appeal the appellant referred to a document entitled "Complaints to the Information Commissioner. Freedom of Information Act 1992" and in particular Stage 7 of that document. This document states that after the Commissioner has formed a preliminary view and "if the matter is not resolved at this point the parties will be provided with the opportunity to make final submissions, which will be exchanged and to respond to the submissions of the other parties before the Commissioner proceeds to a formal decision." There are several things to note about this document. First, it is a *general outline* of the procedures to be followed by the Commissioner. It is directory rather than mandatory and it has no statutory force. Secondly, each complaint is unique and the process employed will depend on the circumstances of the case at hand. Put another way the Commissioner is only required to provide the parties with a reasonable opportunity to make submissions. That is the statutory duty set out in s70(3). Thirdly, on one reading of stage 7, final submissions will only be necessary when there are matters still in issue between the parties on which the opponents have not been given the opportunity to comment. At this stage of the review there was no factual dispute between the parties. It was simply up to the Commissioner to make her decision. The appellant had made two submissions to the Commissioner: one before the preliminary view and one before the final decision. The agency filed a submission at the preliminary

stage only. There was nothing put to the Commissioner by the agency on which the appellant was denied the opportunity to comment.

On 7 November 1995 the appellant spoke to an officer at the Commission. His initial submission was that the officer had invited him to lodge a further submission before the Commissioner's final reasons were delivered. After the conversation the appellant sent a fax to the Commission indicating that he would file further submissions. That fax is dated 7 November and a copy of it is at p10 of the appeal book. The final paragraph reads:

> "I will prepare a 'final submission' on cases 95124/95127 and 95162 and send these to you in the next few days if this is acceptable."

Two days later, and before the appellant had lodged his further submission, the Commissioner published her reasons for decision.

If the Commission officer had invited the appellant to make further submissions then general principles of administrative law relating to legitimate expectations and procedural fairness could be invoked by the appellant. However, at the hearing of this appeal the appellant conceded that he had not received an "invitation" to lodge a further submission. The conversation was of a general nature relating to the process of lodging final submissions. In light of this concession the question remains whether in all the circumstances of the case the appellant was given a reasonable opportunity to make submissions to the Commissioner. In my opinion he was.

This ground of appeal fails.

Ground 3.

Section 76(3) of the Act provides:

> "The Commissioner has to make a decision on the complaint within 30 days after the complaint was made unless the Commissioner decides that it is impracticable to do so."

It was not in issue between the parties that the Commissioner had failed to comply with the time limit specified in s76(3). The appellant's real grievance was that he was not given reasons for the delay. There was nothing to suggest that he had been prejudiced by the delay. In fact, had the section been strictly complied with the appellant would have been unable to lodge the second set of submissions because he was overseas at the time.

The general rule is that provisions with respect to time are mandatory unless the context otherwise indicates: ***Transport Amalgamated Pty Ltd v AAA Transport Services Pty Ltd*** [1975] WAR 101. In my opinion the addition of the words "unless the Commissioner decides that it is impracticable to do so" indicates that the provision is directory only. That is, the Commissioner is required to use her best endeavours to make a decision within the specified period unless she decides that it is impracticable to do so. Given the directory nature of the provision non-compliance with s76(3) will not invalidate the decision. It simply goes to the administrative process by which a decision is reached. In my opinion the failure of the Commissioner to hand down a decision within 30 days will not invalidate the decision unless it could be shown, on conventional administrative law principles, that the decision should be reviewed. The onus would be on the person seeking to set aside the decision to establish a ground for review. The appellant did not adduce any materials which would satisfy that test. I also note that there was nothing to suggest that the appellant was prejudiced by the delay.

By way of a gratuitous aside, I believe the Commissioner should consider including in her reasons, or in correspondence with the parties involved in the application, a brief explanation for any delays under s76(3).

This ground of appeal has not been made out.

Conclusion.

In my opinion the appellant has not made out any of his grounds of appeal and the appeal must be dismissed.