



## Request for information held by Abortion Supervisory Committee concerning Court judgment and harassment of medical staff and patients

**Legislation:** Official Information Act 1982, ss 9(2)(h), 9(2)(g)(i), 18(d) and 9(2)(ba)(i)  
**Requester:** Right to Life New Zealand Inc.  
**Agency:** Abortion Supervisory Committee  
**Request for:** Correspondence re judgment in *RTL v The Abortion Supervisory Committee* SC73/2011 [2012] 68; Correspondence between Abortion Supervisory Committee and District Health Board re harassment of medical staff and patients  
**Ombudsman:** Professor Ron Paterson  
**Reference number:** 345580  
**Date:** June 2015

### Contents

<b>Summary</b>	<b>3</b>
<b>Background</b>	<b>3</b>
<b>Request 1: Correspondence to ASC regarding Supreme Court decision</b>	<b>4</b>
Information at issue	4
Comments received during investigation	4
RTL comments	4
ASC comments	4
Analysis and findings	5
Section 9(2)(h) of the OIA	5
Solicitor – client privilege	5
Litigation privilege	7
Section 9(2)(g)(i)	7
Section 18(d)	8
Public interest	8
<b>Request 2: Correspondence relating to harassment</b>	<b>8</b>
Information at issue	8

---

Comments received during investigation	9
ASC comments	9
RTL comments	9
Analysis and findings	10
Section 9(2)(ba)(i)	11
Public interest	11
<b>Ombudsman's opinion and recommendation</b>	<b>12</b>

## Summary

In October and December 2012 Mr Ken Orr of Right to Life New Zealand Inc. made requests to the Abortion Supervisory Committee (ASC) for:

- correspondence relating to the judgment in *RTL v The Abortion Supervisory Committee SC 73/2011* [2012] 68; and
- correspondence between the ASC and District Health Boards regarding harassment.

The ASC refused both requests under the Official Information Act 1982 (OIA).

In my opinion:

- sections 9(2)(h) and 9(2)(g)(i) of the OIA do not apply to the correspondence relating to the judgment, apart from two short passages; and
- there is good reason under the OIA to refuse the request for correspondence regarding harassment pursuant to section 9(2)(ba)(i) of the OIA.

I recommend that the ASC release the Deputy Solicitor-General's letter of 13 August 2012, with two passages redacted.

## Background

1. By letter dated 8 October 2012, Mr Ken Orr of Right to Life Inc. (RTL) requested:

*“Correspondence received by the ASC from the Ministry of Justice or Crown Law Office, and any subsequent responses from the ASC, relating to the Supreme Court judgment in Right to Life v Abortion Supervisory Committee – case 73/2011.”*

2. The request was refused under sections 9(2)(h) and 9(2)(g)(i) of the OIA. On 21 November 2012 Mr Orr asked the Ombudsman to investigate the refusal.

3. By letter dated 3 December 2012, Mr Orr made a second request for:

*“Correspondence between the ASC and District Health Boards regarding harassment to medical staff and/or patients.”*

4. The second request was refused under sections 9(2)(a) and 9(2)(ba)(i) of the OIA. On 18 January 2013 Mr Orr asked the Ombudsman to investigate the refusal.
5. On 6 May 2014 the ASC was notified of the Ombudsman's intention to investigate Mr Orr's complaints.

## Request 1: Correspondence to ASC regarding Supreme Court decision

### Information at issue

6. The withheld information consists of a letter dated 13 August 2012 from the Deputy Solicitor-General to the Chairperson of the ASC.

### Comments received during investigation

#### RTL comments

7. In making his complaint, Mr Orr made a number of comments about the public interest in disclosure of the information at issue. In particular, he considered that *“it is in the public interest to know what advice the Committee has received on its legal obligations enunciated by the Supreme Court ...”*

#### ASC comments

8. The ASC explained that it continued to withhold the letter under section 9(2)(h) of the OIA, but was no longer relying on section 9(2)(g)(i) because of the *“strong interest in protecting the legal professional privilege attaching to the advice”*. However, the ASC noted that disclosure could still inhibit the flow of free and frank expressions of opinion in the future, or discourage officials from adequately recording their advice in writing.
9. The ASC explained that the purpose of the letter was to highlight significant parts of the judgment.
10. The ASC submitted that the advice in the letter is covered by legal professional privilege as it was brought into existence for the purpose of giving or receiving legal advice or assistance. The ASC considered that solicitor-client privilege attaches to the document as a whole, and litigation privilege applies to paragraph 13.
11. The ASC also submitted that, as it has not waived privilege, it is necessary to withhold the letter to maintain legal professional privilege, and that no public interest considerations outweigh the need to maintain legal professional privilege.
12. The ASC made the following specific points:
  - a. the letter at issue is not in the same category of documents as mentioned in the excerpt cited from *Laws of New Zealand* and is not a public document;<sup>1</sup>

---

<sup>1</sup> *Laws NZ, Discovery*, para 62.

- b. the *Simunovich Fisheries Ltd*<sup>2</sup> case is not applicable because the letter at issue does not have an existence “*apart from the process of giving or receiving advice or the conduct of litigation*”;
- c. although the document in the *Jupiter Air*<sup>3</sup> case could not attract privilege due to its character as a record of non-privileged discussions, the Deputy Solicitor-General’s letter contains elements of opinion in that the particular passages from the judgment it quotes are selective; and
- d. if the letter is nothing more than a summary of the publicly available judgment, the ASC could refuse the request under section 18(d) of the OIA (“*that the information is or will soon be publicly available*”).

## Analysis and findings

### Section 9(2)(h) of the OIA

13. Section 9(2)(h) applies if, and only if, the withholding of the information is necessary to “*maintain legal professional privilege*”. There are two aspects to legal professional privilege:
  - a. solicitor-client privilege, applying to confidential communications between a legal adviser and client, where the legal adviser is acting in his or her capacity as such, and the communications are for the purpose of obtaining or giving legal advice; and
  - b. litigation privilege, which extends to communication with third parties, where that communication has as its dominant purpose the object of enabling a legal adviser to advise on or conduct litigation.

### Solicitor – client privilege

14. In the present case, I have considered the Deputy Solicitor-General’s letter alongside the Supreme Court judgment. In my opinion solicitor-client privilege attaches to the following two passages of the letter:
  - a. the last bracketed sentence of paragraph 13; and
  - b. paragraph 20.
15. These two passages may be redacted from the document in reliance on section 9(2)(h) of the OIA. I address the remainder of the letter at issue below.
16. I do not accept the ASC’s position that the remainder of the letter amounts to communications for the purpose of obtaining or giving legal advice. The letter is a

---

<sup>2</sup> *Simunovich Fisheries Ltd v TVNZ Ltd* (CA447/07, 8 September 2008).

<sup>3</sup> *Jupiter Air Ltd (in liq) v Australian Aviation Underwriting Pool Pty Ltd* (BC200460001, Lang M, CP71/02, January 2004).

summary of the outcome of the proceedings in the Supreme Court, to which privilege does not attach. I have not identified any other sections of the letter that could be construed as Ms Gwyn's advice or personal views in relation to the proceedings.

17. The point is well explained in the following passage from *Laws NZ, Discovery*, para 62:

*"62. Extent of privilege. Legal professional privilege does not extend to statements or documents that are in the public domain, such as shorthand or other notes of proceedings in open Court, in chambers, or before an arbitrator, or depositions filed in the course of an action."*

18. Proceedings relating to discovery of a document in the *Jupiter Air* case illustrate this distinction in respect of a lawyer providing a summary of information that is not privileged. In that case, Master Lang distinguished between providing a summary, and the expression of personal views about that information that may be covered by legal professional privilege.

19. The High Court in the *Jupiter Air* case directed disclosure of a memorandum prepared by a solicitor which recorded details of a discussion held between a number of parties (including the solicitor). Master Lang gave his reasons as follows:

*"I directed that that document be disclosed because I took the view that it was no more than a record created by [the solicitor] of the discussion which was held on 1 May 1995. Although I was conscious that the document reflected [the solicitor's] personal recollection of the discussion, nevertheless I did not consider that it contained elements of advice or opinion so as to be privileged in terms of the principles expressed in cases such as *Crisford v Haszard* [2000] 2 NZLR 729."*

20. Master Lang further stated:

*"Having reviewed the document again in its entirety I am prepared to accept that there are certain passages in the document which do in fact reflect [the solicitor's] personal views and could also relate to advice to be given to his client. Overall, however, I remain satisfied that the document simply records the content of the discussion."*

21. I also note that in *Simunovich Fisheries Ltd*, the Court of Appeal endorsed Dawson J's judgment in *Baker v Campbell* (1983) 153 CLR 52 at 122 (HCA), in which he stated:

*"The privilege cannot operate to put beyond the reach of the law documentary or other material which has an existence apart from the process of giving or receiving advice or the conduct of litigation."*

22. In the *Simunovich Fisheries Ltd* case the Court of Appeal, in holding that copies of non-privileged documents sent to a lawyer are privileged only if their disclosure would reveal a privileged communication, made the point that *"The privilege should be as narrow as its principle necessitates"* (at para 165). I see this principle as equally applicable to documents sent from a lawyer to a client.

23. It follows that that where a solicitor makes a record of non-privileged information, that information does not become privileged simply by being communicated to a client.
24. The cases cited above are examples of situations where claims for privilege have been rejected on the grounds that no privilege applies to facts communicated outside the context of seeking or giving legal advice. The principle is similarly illustrated in *Re Merit Finance and Investment Group Ltd*,<sup>4</sup> in which it was held that bills of costs do not, as a category, attract privilege. However, if they contain passages that attract legal professional privilege as a communication made for the purpose of getting or giving confidential legal advice or assistance, privilege may be claimed in relation to the particular passages.
25. Accordingly, I am not persuaded by the ASC's proposition that in providing the Committee with a summary of the Supreme Court's judgment, the Deputy Solicitor-General was providing legal advice or communicating it in the context of giving legal advice.

### Litigation privilege

26. Finally, I have considered the ASC's comment that litigation privilege applies to paragraph 13. I do not consider that litigation privilege attaches to the whole of paragraph 13. However, I accept that litigation privilege attaches to the last bracketed sentence of that paragraph. The remainder of the paragraph is a purely factual account of the court proceedings.
27. For the reasons set out above, I do not consider that section 9(2)(h) applies to the letter, other than the last bracketed sentence in paragraph 13 and the whole of paragraph 20.

### Section 9(2)(g)(i)

28. The ASC no longer relies on section 9(2)(g)(i) of the OIA to refuse the request, in view of the strong interest in protecting the legal professional privilege. However, given my opinion that section 9(2)(h) does not apply to the majority of the letter at issue, I have gone on to consider the alternative withholding ground.
29. Subject to section 9(1) of the OIA, section 9(2)(g)(i) provides good reason to withhold information if, and only if the withholding of the information requested is necessary to "*maintain the effective conduct of public affairs through ... [t]he free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any Department or organisation in the course of their duty*".
30. In assessing whether disclosure of certain information would be likely to inhibit the free and frank expression of opinions in the future, relevant factors include the nature and

---

<sup>4</sup> *Re Merit Finance and Investment Group Ltd* [1993] 1 NZLR 152.

content of the information, the source of the information, and the context in which it was generated.

31. In this case, Ms Gwyn's letter is of a factual, informative nature, and does not contain elements of opinion (barring parts of paragraphs 13 and 20, as discussed above). I am not persuaded that disclosure of the remainder of Ms Gwyn's letter would make ASC's legal advisors, Committee members or other officials, any less likely to provide this type of information or write this type of letter. I cannot see how disclosure is likely to prejudice the free and frank expression of opinion in the future. Thus, I do not consider that section 9(2)(g)(i) applies to the remainder of the letter.

### Section 18(d)

32. In responding to the provisional opinion, the ASC also noted that if it were to be found that the letter at issue is nothing more than a summary of the publicly available judgment, and privilege does not apply, the ASC would have grounds to refuse the request under section 18(d) of the OIA (that the information is or will soon be publicly available).
33. The plain fact is that the letter is *not* publicly available and the requester is seeking a copy of the letter only. The public availability of the judgment itself does not make the summary contained in the letter 'publicly available'. I do not consider that section 18(d) applies to the Deputy Solicitor-General's letter.

### Public interest

34. Section 9(1) of the OIA requires that I consider whether there is an overriding interest in the disclosure of the two short passages to which legal privilege attaches.
35. I acknowledge Mr Orr's comments that Right to Life has an interest in knowing "*what advice the Committee has received on its legal obligations enunciated by the Supreme Court*".
36. I do not consider that there are any public interest considerations that would outweigh the legal privilege interests in withholding the two short passages at paragraphs 13 and 20, notwithstanding the general interest alluded to by Mr Orr.

## Request 2: Correspondence relating to harassment

### Information at issue

37. The information at issue comprises a cover letter from a District Health Board (DHB) enclosing copies of complaints received by the DHB and its written responses to those complainants.

## Comments received during investigation

### ASC comments

#### Section 9(2)(a)

38. The ASC explained that it is necessary to withhold the information at issue to protect the privacy of the women who made complaints. The complaints contain personal identifiers and personal health information.
39. The ASC also highlighted the circumstances under which the information came to be held by it. The information was provided to the DHB for the purpose of responding to complaints. It was forwarded by the DHB to the ASC in confidence, as an example of incidents of harassment at the DHB.

#### Section 9(2)(ba)(i)

40. The ASC considered that the information was provided in confidence by the women who complained to the DHB. The ASC submitted that it is in the public interest that information regarding harassment continues to be supplied, so that it can accurately report to Parliament on the functioning of the abortion law. There is a public interest in Parliament being informed of factors that affect access to services, including harassment.
41. Further, the ASC does not have any statutory powers to compel the supply of this type of information from DHBs. The information was voluntarily supplied under an obligation of confidence. If the information were released, there is a real and substantial risk that the DHB and other DHBs would avoid supplying the ASC with further specific or written information.
42. The ASC noted that the following brief summary of the information at issue was provided to Mr Orr in respect of a subsequent OIA request he made in January 2013:

*“Women complaining about harassment by protestors at clinics, including complaints from women not seeking termination of pregnancy (... several reports notified to Committee in writing, withheld as noted below).”*

### RTL comments

43. In his initial complaint, Mr Orr submitted:

*“[I]t is not our desire to infringe on the privacy of any person our sole objective is to protect the good name of the members of S4L and of the pro-life movement in New Zealand. Our Society believes that it is unjust for the [DHB] to make allegations that the lives of staff have been threatened while at the same time withholding the information as to the source of the allegations.”*

44. In response to my provisional opinion, Mr Orr submitted:

*“... [O]ur Society has no desire to know the personal details of persons who have complained in writing to the [DHB]. It is reiterated that the pro-life movement is passionately pro-women and pro-life. The movement is totally opposed to the harassment of women seeking an abortion, doctors who perform abortions, hospital patients, or members of the public. Our objective in this complaint is to identify the specific complaints in order that we may investigate them to ensure that individual members of our movement are not responsible.*

*The leader of the pro-life group which prays outside the ... Hospital, advises that ... it is physically impossible to speak to the women attending the hospital as they invariably travel by car. It is not known for what reason the persons are attending the hospital. The patients or persons entering the hospital are some distance away and well out of earshot. They categorically deny speaking to these people let alone, harassing them.*

*This group of concerned citizens is there to offer compassionate help to women who seek support with their pregnancy. During the years that the group has been praying outside the hospital, 29 mothers have been helped and their babies have been saved from abortion. The group advises that mothers have thanked the group for being there and offering help in their hour of need.*

*It is noted that the prayer group has been harassed, abused and attempts have been made to run them over. The only time that the group has seen the Police is when they have approached them to enquire if they are safe; there has never been any mention of alleged harassment. There has never been an approach to the group by staff at the [DHB] alleging harassment. In the light of the assurances given by the group outside the [DHB] it may be assumed that the complaints made to the DHB are fictitious or relate to other persons unknown.”*

45. Mr Orr sought the release of copies of the complaints with all personal identifying information deleted.

## **Analysis and findings**

46. Based on Mr Orr’s advice that RTL is not seeking the personal information of the women who made complaints, I have not formed a view on the application of section 9(2)(a) of the OIA.
47. Accordingly, my analysis of the ASC’s decision is based on the application of section 9(2)(ba)(i) to the information at issue.

## Section 9(2)(ba)(i)

48. Section 9(2)(ba)(i) applies if, and only if, the withholding of the information is necessary to:

*“protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information—*

- (i) would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied;”*

49. Section 9(2)(ba)(i) is also subject to the countervailing public interest test in section 9(1).

50. Generally speaking, section 9(2)(ba) may apply where someone has provided the information at issue to the organisation concerned (either under compulsion or on a voluntary basis) in circumstances which give rise to an obligation of confidence owed to the person who supplied the information.

51. When assessing whether the information in question is ‘subject to an obligation of confidence’, the following factors are relevant:

- a. The nature of the information requested. Why is the information believed to be confidential? Does the information have the necessary ‘quality of confidence’ about it?
- b. The full circumstances of its supply. What are the circumstances which are claimed to create the obligation of confidence? Do these circumstances suggest there is an obligation of confidence?
- c. If an obligation of confidence exists, the test under section 9(2)(ba)(i) is whether making the information available would be likely to prejudice the supply of similar information, or information from the same source. If it would be likely to cause such prejudice, is it in the public interest that such information should continue to be supplied?

52. I accept the ASC’s submission that the information is of a highly confidential nature and that it was supplied in confidence.

53. In the absence of statutory powers to compel DHBs to supply information about harassment, it is important that the ASC continues to receive such information, to help fulfil its statutory function of overseeing the provision of abortion services in New Zealand. I accept that release would be likely to prejudice the supply of similar specific information from other DHBs. On this basis, I consider that section 9(2)(ba)(i) applies.

## Public interest

54. Having accepted that section 9(2)(ba)(i) applies, I must consider whether, in terms of section 9(1) of the OIA:

*“the withholding of the information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.”*

55. Mr Orr sought the information about the “*alleged harassment*” to enable RTL to investigate the issue of harassment with the local pro-life movement.
56. I do not consider it a proper function of RTL to investigate the veracity of the complaints made to the DHB. It is the DHB’s role to investigate complaints received by it and take action as it deems appropriate.
57. On balance, I do not consider that the public interest in disclosure of full copies of the complaints outweighs the strong confidentiality interests identified above. Any public interest in knowing details of incidents of harassment has been met by the summary provided in the ASC’s letter of 11 July 2014.

## Ombudsman’s opinion and recommendation

58. For the reasons set out above, I have concluded that the ASC had good reason under the OIA to refuse the request for correspondence regarding harassment pursuant to section 9(2)(ba)(i) of the OIA.
59. I have also concluded that, apart from the passages indicated at paragraphs 13 and 20, sections 9(2)(h) and 9(2)(g)(i) do not apply to the letter from the Deputy Solicitor-General to the ASC dated 13 August 2012.
60. I recommend that the ASC release to the requester a copy of the Deputy Solicitor-General’s letter to the ASC dated 13 August 2012, with the last sentence of paragraph 13 and the entirety of paragraph 20 redacted.
61. Under section 32 of the OIA, a public duty to observe an Ombudsman’s recommendation is imposed from the commencement of the 21st working day after the date of that recommendation. This public duty applies unless, before that day, the Governor-General, by Order in Council, otherwise directs.

Professor Ron Paterson  
Ombudsman

June 2015