

Request for Ministry of Health Legal Opinion

Legislation	Official Information Act 1982, s 2(2), 9(2)(h)
Agency	Ministry of Health
Ombudsman	Peter Boshier
Case number(s)	537086
Date	18 June 2021

Section 9(2)(h) applied to a Health Legal opinion relied on by Health and Disability Ethics Committee when making its decision to decline a research study application—privilege held by the Crown—no implied waiver although finely balanced—strong public interest in knowing the reasons for decisions—the Health and Disability Ethics Committee agreed to prepare and release a detailed summary of the considerations that it took into account in making its decision—this summary adequately addressed the countervailing public interest considerations

Background

A research study application by Middlemore Clinical Trials was declined by the Southern Health and Disability Ethics Committee (SHDEC). The Randomised Evaluation of Sodium Dialysate Levels on Vascular Events (RESOLVE) study involves comparing the effectiveness of two standard-of-care treatments in dialysis patients used in New Zealand. The study had received funding approval from the Health Research Council of New Zealand in 2016 and was part of an international study. The researchers had provided a legal opinion stating that the proposed clinical trial was in accordance with New Zealand law. However, based on an opinion it received from Health Legal, the SHDEC was not satisfied that the trial would be legal so long as written consent was not being sought from the trial participants.

The researchers sought a copy of the Health Legal opinion from the SHDEC. The Ministry of Health (the Ministry) responded, declining the request under section 9(2)(h) of the Official Information Act 1982 (OIA).

When making its complaint about the Ministry's decision to withhold the Health Legal opinion, the researchers noted that their request had not been considered by the SHDEC itself. The researchers believed that the SHDEC was the client in the solicitor/client relationship, not the

Ministry. The researchers also claimed that the public interest and the specific interests of the researchers, including the transparency of the ethics committee decision-making process, overrode the public interest and the maintenance of legal professional privilege. They argued that there was a strong public interest given the information related to a '*low risk publicly funded pragmatic trial to improve public health*'.

Investigation

Solicitor-client privilege

The Chief Ombudsman was satisfied that the Health Legal opinion was subject to solicitor-client privilege. It was a confidential communication between a Ministry legal advisor and the Ethics team in the Quality Assurance and Safety group, where the legal advisor was acting in a legal capacity and the purpose of the communication was to provide confidential legal advice.

The Ombudsman noted that while HDECs are established by the Minister of Health under Section 11 of the New Zealand Public Health and Disability Act 2000, their functions are more operational in nature compared to most other Section 11 Ministerial committees. In these circumstances, their functions are not clearly delineated between functions connected with the Minister or the Ministry. However, HDECs are serviced and supported by the Ministry and the information is held by the Ministry. In terms of section 2(2) of the OIA (which deals with information held by an unincorporated body such as the committee), it did not appear wrong or unreasonable for the Ministry to have responded to the request. Either way, whether the Ministry or the Minister responded to the request, the privilege was held by the Crown.

In general, a party is entitled to waive legal professional privilege and disclose or acquiesce in the disclosure of legal advice. Furthermore, waiver of the privilege need not be express, but can be implied and contrary to the intentions of the party claiming it. The [Cabinet Manual](#) guidance on implied waiver (at 4.68), states:

***Implied waiver** occurs when a client voluntarily discloses a significant part of the legal advice in a way that is inconsistent with a claim to its confidentiality. In these circumstances the privilege would likely be treated as implied to have been waived even if the client did not intend this. A simple statement by a client that legal advice has been received is unlikely to amount to an implied waiver of privilege. Partial disclosure of the actual legal advice received, or reference to the content of the legal advice, however, may result in waiver of privilege. For example, a statement such as “I have received legal advice and acted on it” may constitute a waiver. If upholding privilege following partial disclosure would result in injustice, a court would be likely to find there had been implied waiver.*

In the Ombudsman's opinion, whether there had been a waiver of legal professional privilege in this case was very finely balanced. The SHDEC's decision did not set out the substance or conclusion of the advice, just the fact it was obtained and was more persuasive. On the other hand, the Ombudsman did not consider that the SHDEC had adequately explained its

reasoning. The Ombudsman did not dispute the value of decision-makers being able to get and rely on confidential advice, but equally they had a duty of candour, which meant providing sufficient reasons. These 'fairness' considerations would support a finding that waiver had occurred. The way the SHDEC had framed its decision ran a real risk of waiver but ultimately the Ombudsman decided that there had not been an implied waiver and that it was necessary to withhold the opinion to maintain the privilege.

Public interest

The Ombudsman noted the strong public interest in knowing the reasons for decisions. Where there are legal questions involved and the decision-maker wishes to place reliance on reasons expressed in some legal advice they have obtained, it is appropriate for decision-makers to explain why they prefer one view on a contested issue. This was important in this case so that the researchers could properly assess their appeal rights and to assist them to shape future applications. The Ombudsman therefore suggested that the SHDEC provide more clarity by explaining the reasons why it considered that opt-out consent was not permitted by the Code of Health and Disability Services Consumers' Rights 1996. This action would not in itself result in an implied waiver of the legal advice.

Outcome

In response, the SHDEC prepared and released a detailed summary of the considerations that it took into account in making its decision. The Ombudsman reviewed the summary and considered that it met the public interest discussed above. The release of this additional information was consistent with the requirement for transparency that is a fundamental principle of the [New Zealand Health Research Strategy 2017-2027](#). In light of the release of the summary, the Ombudsman did not consider that there was a public interest in disclosure of the Health Legal opinion which outweighed the interest protected by section 9(2)(h).

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