MACHE AND MEDICAL BOARD

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)

File Ref: 95170
Decision Ref: D00496

Participants:

Colette Teresa Mache
Complainant

- and -

Medical Board of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - letter from medical practitioner to agency in response to complaint lodged - clause 5(1)(a) - impair effectiveness of investigative methods or procedures - clause 8(2) - confidential communications - information of a confidential nature obtained in confidence - whether disclosure could reasonably be expected to prejudice future supply - impair frankness of future responses.

Freedom of Information Act 1992 (WA) ss.21, 68(1), 72(1)(b), 75(1); Schedule 1 clauses 5(1)(a), 7, 8(2).
Medical Act 1894
Freedom of Information Act 1992 (Qld) s. 42(1)(e).

Re Boyd and Medical Board of Western Australia (Information Commissioner, WA, 31 October 1994, unreported).
Re Pau and Medical Board of Western Australia (Information Commissioner, WA, 7 December 1994, unreported).
Re Lawless and Medical Board of Western Australia (Information Commissioner, WA, 5 July 1995, unreported).
Re Egan and Medical Board of Western Australia (Information Commissioner, WA, 28 September 1995, unreported).
Re Sanfead and Medical Board of Western Australia (Information Commissioner, WA, 15 November 1995)
Re Foy and Medical Board of Western Australia (Information Commissioner, WA, 18 October 1995, unreported).
Re "T" and Queensland Health (1994) 1 QAR 386.
Manly v Ministry of Premier and Cabinet (Supreme Court of Western Australia, 15 June 1995, unreported).
Ryder v Booth [1985] VR 869.

DECISION

The decision of the agency is set aside. In substitution it is decided that, except for the second paragraph on page 2 of the disputed document which is exempt under clauses 4(3) and 8(2) of Schedule 1 to the *Freedom of Information Act 1992*, the disputed document is otherwise not exempt.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

10th January 1996

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Medical Board of Western Australia ('the agency') to refuse Ms Mache ('the complainant') access to a document requested by her under the *Freedom of Information Act 1992* ('the FOI Act').

2. The background to this complaint essentially concerns similar issues to those that were before me in my previous decisions concerning the agency and other complainants: see my decisions in *Re Boyd and Medical Board of Western Australia* (31 October 1994, unreported); *Re Pau and Medical Board of Western Australia* (7 December 1994, unreported*); Re Lawless and Medical Board of Western Australia and "X"* (5 July 1995, unreported); *Re Egan and Medical Board of Western Australia* (28 September 1995, unreported); *Re Foy and Medical Board of Western Australia* (18 October 1995, unreported); *Re Sanfead and Medical Board of Western Australia* (15 November 1995, unreported).

3. In each of the cases referred to in paragraph 2 above, a member of the public complained to the agency about the conduct of a medical practitioner. The agency dealt with those complaints in accordance with its usual procedures. On each occasion after seeking a response from the medical practitioner concerned and after considering the content of those responses, the agency resolved to take no further action against the medical practitioner under the *Medical Act 1894*, and the individual making the complaint was advised accordingly. On each occasion, the member of the public was dissatisfied with the decision of the agency and the reasons given by the agency for that decision. Consequently, each of those persons sought access under the FOI Act to certain documents of the agency in order to understand the reasons for the apparent lack of response by the agency to the subject matter of the complaint. In each case, the agency refused access to the documents, in particular, to the doctors' letters of response to the complaints and the member of the public subsequently sought external review of the agency's decision by the Information Commissioner.

4. On this occasion, on 3 July 1995, the complainant lodged an access application with the agency under the FOI Act, seeking access to all information held by it regarding the complaint she had made against a certain medical practitioner. On 11 July 1995, the Registrar of the agency, Mr K Bradbury, granted access to 3 documents but denied access to 4 others on the grounds that those documents are exempt under one or more of clauses 5, 6, 7 and 8 in Schedule 1 to the FOI Act. The agency's decision was confirmed on internal review by the Chairman of the agency, Dr Blake. On 28 August 1995, the complainant applied to the Information Commissioner for external review of the decision of Dr Blake.

REVIEW BY THE INFORMATION COMMISSIONER

5. As required by s.68(1) of the FOI Act, I notified the agency that a complaint had been made to my office about its decision. In accordance with my usual practice and my authority under s.75(1) of the FOI Act, I obtained copies of the disputed documents. I also obtained other information from the agency, including the FOI file maintained in respect of this matter, to assist me in my determination of this matter. I also sought the views of the medical practitioner concerned. Although initially there were 4 documents in dispute between the parties, during the conciliation stage of the proceedings, the complainant withdrew her request for access to 3 of the disputed documents and the complainant's solicitor confirmed that she was only seeking access to the response received by the agency from the medical practitioner concerned. Hence, there is only one document that is in dispute between the parties.

6. On 7 November 1995, after examining the document in dispute and considering the material before me, I provided with agency with my preliminary view and reasons for that view. For reasons similar to those that I gave in my decisions in *Re Boyd*, *Re Pau*, *Re Lawless*, *Re Egan*, *Re Foy* and *Re Sanfead*, it was my preliminary view that the disputed document was not exempt under clause 5(1)(a), nor was it exempt under clause 8(2) of Schedule 1 to the FOI Act. However, the agency maintains its claims for exemption under those clauses.

THE DISPUTED DOCUMENT

7. There is only one document remaining in dispute between the parties. That document is a letter dated 22 May 1995 to the agency from a medical practitioner. The letter contains, among other things, the medical practitioner's response to the agency about the matters which the complainant had previously complained to the agency.

THE EXEMPTIONS

(a) Clause 5(1)(a)

8. The agency claims that the disputed document is exempt under clause 5(1)(a) of Schedule 1 to the FOI Act. Clause 5, so far as is relevant, provides:

> ***"5. Law enforcement, public safety and property safety***
>
> ***Exemptions***
>
> *(1) Matter is exempt matter if its disclosure could reasonably be expected to-*

> *(a) impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law;"*

9. At paragraphs 10-24 of my most recent decision involving the agency, *Re Sanfead*, I considered the agency's claims for exemption under clause 5(1)(a) in some detail. I have said before in previous decisions, that I am of the view that the exemption in clause 5(1)(a) is directed at the protection of lawful investigative methods and procedures. In my view, the words *"...any contravention or possible contravention of the law"* require that the particular method or procedure that attracts the exemption be one that is connected with a breach of the law and it should be possible for an agency to identify, either generally or specifically, the particular law that is alleged to have been contravened in some way. I also accept that clause 5(1)(a) is capable of applying to any law that imposes an enforceable legal duty to do or refrain from doing some thing, and not merely to a contravention of the criminal law: see also the decision of the Queensland Information Commissioner in *Re "T" and Queensland Health* (1994) 1 QAR 386, at paragraph 32.

10. Further, the phrase *"could reasonably be expected to"* in clause 5(1) means that the standard of proof required to establish an exemption under clause 5(1) does not have to amount to proof on the balance of probabilities, but it must be supported by some probative material that is persuasive. In other words, there must be real and substantial grounds for concluding that disclosure could result in impairment to those investigative methods or procedures: see the observations of Owen J. in *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, 15 June 1995, unreported) at p.44.

What is the investigative method or procedure employed by the agency?

11. The investigative method or procedure employed by the agency in this instance, is the same method that is described in my previous decisions and most recently in my decision in *Re Sanfead*, at paragraph 13. When the agency receives a complaint about a medical practitioner it sends a copy of the statutory declaration containing the matters of complaint to the medical practitioner concerned and seeks his or her response to the matters of complaint. In other words, the agency does not "investigate" a complaint in the usual sense of the word. Instead, it deals with a complaint by giving the medical practitioner concerned a copy of the statutory declaration so that there is no misunderstanding about who is complaining nor the substance of the complaint, and inviting a response from the medical practitioner.

Are there real and substantial grounds to expect that the agency's investigative method or procedure could be impaired if the disputed document is disclosed?

12. The agency claims, as it has done previously, that a broad interpretation of clause 5(1)(a) should be adopted. The agency claims that impairment to its methods or

procedures could reasonably be expected to occur if medical practitioners, upon whom the methods or procedures rely for their effectiveness, are dissuaded from co-operating with the agency for fear of having their documents disclosed. The agency submits that the effectiveness of its procedures depends upon the co-operation of medical practitioners in responding to complaints in the manner in which they have always done, because the agency is not empowered, under the provisions of the *Medical Act 1894*, to compel a medical practitioner about whom a complaint has been made, to provide a response to that complaint to the agency.

13. I have dealt with, and rejected, that argument in my previous decisions involving the agency. I reject it again in this matter, because the agency has not provided any new or additional material that is different in any aspect to the material previously put to me by the agency. There is no probative material before me to support the agency's claims for exemption. Therefore, for the same reasons as I gave in my decision in *Re Sanfead*, at paragraphs 18-22, I do not find the agency's arguments convincing on this point.

14. Further, although I did not seek submissions on the point, I remain unconvinced that a complaint about the manner and behaviour of a medical practitioner involves any contravention of the law in the sense that those words are used in clause 5(1)(a). However, it is unnecessary for me to decide that point because, for the reasons given, I am not satisfied that there are real and substantial grounds for expecting that the effectiveness of the agency's methods or procedures for dealing with complaints could reasonably be expected to be impaired by the disclosure of the disputed document. Accordingly, I find the disputed document is not exempt under clause 5(1)(a) of Schedule 1 to the FOI Act.

(b) Clause 8(2) - Confidential communications

15. The agency also claims that the disputed document is exempt under clause 8(2) of Schedule 1 to the FOI Act. Clause 8(2) provides:

> *"(2) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal information of a confidential nature obtained in confidence; and*
>
> *(b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.*
>
> ***Limits on exemption***
>
> *(3)...*

> *(4) Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest."*

16. To establish a *prima facie* claim for exemption under clause 8(2), the agency must not only show that the document comprises a confidential communication of the type described in paragraph (a) of sub-clause 2, but also that it meets the requirements of paragraph (b) of sub-clause 2. That is, once I am satisfied that the matter is of a type referred to in sub-clause 8(2)(a), the agency must persuade me that disclosure of the disputed document could reasonably be expected to prejudice the future supply to the agency of information of the relevant kind.

17. Further, as I have most recently stated in *Re Sanfead* at paragraph 32 of that decision, I consider that paragraph (b) of the exemption in clause 8(2) is directed at the ability of an agency to obtain similar information from medical practitioners in general in the future, and is not concerned with whether the particular practitioner concerned will give information of that kind to the agency in the future: see *Ryder v Booth* [1985] VR 869, at 872 per Young J.

18. The agency's claims for exemption under clause 8(2) are substantially similar to those that it proffered in support of its claims under clause 5(1)(a). That is, it is the submission of the agency that it relies upon the goodwill of medical practitioners in responding to complaints received and, that if medical practitioners knew their responses could be released to persons who have complained to the agency about them, then medical practitioners would be likely to be less frank and open in their responses to the agency. Alternatively, the agency claims that medical practitioners may not respond at all.

19. I am informed by the agency that it receives responses from medical practitioners in confidence. I accept as fact that it is the agency's usual practice to do so. There is material before me in this instance, that the disputed document was provided to the agency in confidence by the medical practitioner concerned. The disputed document contains, *inter alia,* personal information about the complainant and her consultation with the medical practitioner. On that basis, I am satisfied that the disputed document meets the requirements of paragraph (a) of clause 8(2), in that the document contains information of a confidential nature obtained in confidence by the agency.

20. However, the agency has been unable to provide any probative evidence or material to support its claims in respect of paragraph (b) of clause 8(2). Essentially, its claims are the same as those that were before me in my decisions in *Re Boyd, Re Pau, Re Lawless, Re Egan, Re Foy* and *Re Sanfead.* I accept as fact, the agency's claim that the agency performs a service to the public in receiving and acting upon complaints about medical practitioners. I also accept that the Chairman of the agency is an experienced medical practitioner and that his beliefs about the consequences of disclosure under the FOI Act are genuinely held. However, without some probative evidence or other material, against which I am able to assess whether there are real and substantial grounds for the beliefs of the Chairman in this regard, the claims of the agency about the likely

consequences of disclosure are insufficient to satisfy the onus upon the agency under s.102(1) of the FOI Act. I do not consider the facts as described, to constitute real and substantial grounds for believing that the future supply of information to the agency could reasonably be expected to be prejudiced by the disclosure of the disputed document.

21. However, part of the disputed document contains matter which, in my view, relates to the professional and business affairs of the medical practitioner. In respect of that part only, namely, the second paragraph on page 2, I consider that matter to be exempt under clauses 4(3) and 8(2) of Schedule 1 to the FOI Act. The matter in the second paragraph on page 2 comprises information that is not related to the matters about which the complainant complained to the agency. It appears to me to be information that is voluntarily provided to the agency, by the medical practitioner, as background information to his response to the agency. The medical practitioner informed me that he would not have made such an open, honest and frank reply to the agency if he had known that it could be disclosed under the FOI Act.

22. The claims of the medical practitioner must, in my view, be treated with some caution. In the agency's letter to the medical practitioner dated 28 April 1995, which enclosed the complainant's statutory declaration, the agency clearly notified the medical practitioner that the agency is subject to the FOI Act. The agency specifically requested the medical practitioner to inform the agency whether he would be willing to release a copy of his response to the complainant. The medical practitioner did not reply to the agency on this aspect of the matter.

23. Nevertheless, I am of the view that it is reasonable to expect that additional information provided to the agency as background information would be unlikely to be forthcoming in the future, if it were to be disclosed. In respect of that kind of information, I consider that this medical practitioner and many other medical practitioners, would be unwilling to volunteer background information to the agency when responding to a patient's complaint, including information concerning their business and professional affairs, if that kind of information was likely to be disclosed under the FOI Act. It is my opinion that background information of the kind in paragraph 2 on page 2 of the disputed document, may be useful for the agency's decision-making processes, although I do not consider that in all instances it is essential for those purposes.

24. As there is evidence before me that medical practitioners frequently volunteer information to the agency over and above that which is necessary to respond to a complaint, I consider there are real and substantial grounds for expecting that the agency's ability to obtain that kind of information in the future could reasonably be expected to be prejudiced by the disclosure of that kind of information in the disputed document. My investigations officer discussed this aspect of the matter with the complainant's solicitor. He confirmed that the complainant did not seek access to the matter contained in paragraph 2 of page 2 of the disputed document.

25. Accordingly, for the reasons given in *Re Boyd, Re Pau, Re Lawless, Re Egan, Re Foy* and *Re Sanfead*, I find the disputed document is not exempt under clause 8(2) of Schedule 1 to the FOI Act. However, I find the second paragraph on page 2 of the disputed document is exempt under clauses 4(3) and 8(2) of Schedule 1 to the FOI Act..

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