

BARTLETT-WALKER AND MEDICAL BOARD

OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)

File Ref: 96166
Decision Ref: D00497

Participants:

Helena Faye Julia Bartlett-Walker
Complainant

- and -

Medical Board of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - correspondence from medical practitioners to agency in response to a complaint lodged - clause 5(1)(b) - possible disciplinary action - whether contravention or possible contravention of the law - whether disclosure could reasonably be expected to reveal the investigation of a contravention or possible contravention of the law in a particular case.

Freedom of Information Act 1992 (WA) s. 74; Schedule 1 clauses 5(1)(b), 5(5).
Medical Act 1894 (WA) s.13.

Re McGiveron and Police Force of Western Australia (Information Commissioner, WA, 31 October 1996, unreported, D05796).

Police Force of Western Australia v Kelly and Smith (Supreme Court of Western Australia, 30 April 1996, unreported, Library No. 960227).

DECISION

The decision of the agency is confirmed. The disputed documents are exempt under clause 5(1)(b) of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

11th February 1997

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 Bartlett-Walker ('the complainant') access to certain documents of the agency requested by her under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 9 October 1995, the complainant lodged a complaint with the agency regarding the conduct of a medical practitioner. In accordance with its normal procedures for dealing with such complaints, the agency provided a copy of the complaint to the medical practitioner concerned and sought his response to the allegations. The agency also made further inquiries with colleagues of the medical practitioner into aspects of the complaint. Subsequently, the complainant was informed by the agency that it was unable to form a view that a breach of the *Medical Act 1894* ('the Medical Act') had occurred, and the agency was unable to take further action in respect of the complaint.
3. By letter dated 9 July 1996, solicitors for the complainant applied to the agency under the FOI Act for access to a copy of the complaint; a copy of the medical practitioner's response; and copies of the opinions obtained by the agency from the other practitioners.
4. The Registrar of the agency granted the complainant access to a copy of her complaint and to copies of correspondence from the agency to her. However, access was refused to the remaining documents on the ground that those documents are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.
5. The complainant sought internal review of the agency's decision and, by letter dated 23 October 1996, the Chairman of the agency confirmed the initial decision to refuse access on the ground that the documents are exempt under clause 5(1)(b). On 13 November 1996, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision to refuse her access to the requested documents.

REVIEW BY THE INFORMATION COMMISSIONER

6. I obtained copies of the disputed documents from the agency, together with the file maintained by the agency in respect of this matter. After examining the documents and reviewing the material before me, I was not satisfied that the agency had established a claim for exemption under clause 5(1)(b). On 19 December 1996, I informed the parties in writing of my preliminary view and reasons for that view.

7. The agency provided a further submission which expanded upon its earlier claims for exemption under clause 5(1)(b) and gave further reasons for refusing access to the documents under that clause. After considering the additional material, I was then of the view that the disputed documents may be exempt under clause 5(1)(b) and the parties were advised accordingly. However, the complainant remains dissatisfied with the inquiries conducted by the agency in respect of her complaint and she required a formal determination in respect of her complaint before me.

THE DISPUTED DOCUMENTS

8. There are 4 documents in dispute in this matter. Document 1, dated 17 October 1995, is a letter to the agency marked "Private and Confidential" from the medical practitioner the subject of the complainant's allegations containing his response to those allegations. The remaining three documents are letters sent to the agency by colleagues of the medical practitioner concerned, in response to inquiries by the agency. I am unable to describe the documents in dispute in any more detail without breaching the obligation imposed upon me by s.74 of the FOI Act to avoid disclosing exempt matter.

THE EXEMPTION

9. Clause 5(1)(b) provides:

"5. Law enforcement, public safety and property security

Exemptions

(1) Matter is exempt matter if its disclosure could reasonably be expected to -

(a) ...

(b) reveal the investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted;"

10. I have recently discussed the scope and meaning of the exemption in clause 5(1)(b) in a number of decisions, including *Re McGiveron and Police Force of Western Australia* (31 October 1996, unreported, D05796). Those decisions apply the law as to the meaning of the exemption in clause 5(1)(b) following the decision of the Supreme Court of Western Australia in *Police Force of Western Australia v Kelly and Smith* (30 April 1996, unreported, Library No 960227).

11. In order for a document to be exempt under clause 5(1)(b), it is necessary that disclosure of the document could reasonably be expected to reveal an investigation into a contravention or possible contravention of the law. It does not matter whether disclosure could, or would have any harmful effects, nor whether the document may also contain personal information about the access applicant. In *Police Force of Western Australia v Kelly and Smith*, Anderson J said, at page 8:

“...documents which reveal that there is an investigation, the identity of the people being investigated and generally the subject matter of the investigation probably would satisfy the requirement stipulated by Owen J. that the document “must reveal something about the investigation”.”

12. It was His Honour’s view that it matters not the stage at which an investigation had reached or whether the investigation had in fact been completed. At pages 9-10, His Honour said:

“Even after an investigation has been completed there may be very good operational reasons why there should be no disclosure of it...Of course there may be no need for any secrecy whatever in a particular case and there may be good public interest reasons to give public access to the documents or to give the applicant access to the documents. However, whilst that may be a relevant consideration for the agency in exercising its discretion under s23(1) whether to allow access to the documents to the public or to a particular individual, it cannot help to determine whether the documents are in fact exempt documents under cl 5(1)(b).”

13. The agency submits that its investigation in this case was an investigation into a possible contravention of s.13(1)(a) of the Medical Act. Section 13(1)(a) provides that, where it appears to the agency that a medical practitioner may be guilty of infamous and improper conduct in a professional respect, the agency shall hold an inquiry into the matter.
14. I am informed by the agency that, with respect to complaints made against medical practitioners, it makes a preliminary investigation by corresponding with the practitioner concerned. It is the agency’s submission that communications between the agency and members of the medical profession concerning complaints received against medical practitioners are part of such investigations. If the complaint relates to allegations of a breach of s.13(1) of the Medical Act, the agency then decides, on the evidence available, whether there may have been a breach of one or more of paragraphs (a)-(g) of s.13(1). If the agency forms the opinion that a medical practitioner may have contravened any of those provisions, it must conduct a formal inquiry. Once a formal inquiry has been held, and if the medical practitioner is found guilty, then, by virtue of s.13(3), the agency may impose one or more of a number of penalties, including the removal of the name of the medical practitioner from the register, suspension, a fine or a reprimand.

15. The agency claims that the procedures provided for in s.13(1) and s.13(3) of the Medical Act encompass the investigative procedures of the agency, and that s.13(1) and s.13(3) together imply that being found guilty of any of the conduct described in s.13(1) is a breach of the Medical Act, which will result in the imposition of a penalty prescribed by s.13(3). Accordingly, the agency submits that a breach of s.13(1) of the Medical Act may be a contravention or possible contravention of the law, so as to satisfy the requirements of clause 5(1)(b).
16. I am, reluctantly, prepared to accept that argument. I do not consider that such matters generally were intended to be covered by clause 5(1)(b) which, like the other exemptions in clause 5, are primarily directed at protecting documents relating to the enforcement and administration of the law, and the authorities and personnel concerned with such matters. However, as a medical practitioner engaging in any of the conduct described in s.13(1) of the Medical Act is punishable under that Act, committing such conduct is a breach (or contravention) of that Act and, accordingly, a contravention of the law as “the law” is defined in clause 5(5).
17. Having examined the documents in dispute in this matter, and taking into account the nature of the allegation in this instance and the fact that the agency investigated the complaint to the extent of seeking corroborating evidence from other medical practitioners, I am satisfied that the disclosure of those documents could reasonably be expected to reveal the investigation by the agency of the complaint made against the medical practitioner. Further, given the nature of the complaint in this instance, it appears to me the matters being investigated were capable of amounting to conduct of the kind described in s.13(1)(a) of the Medical Act. Accordingly, I find that the disputed documents are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.
