OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: F2001161** **Decision Ref: D0052002**

Participants:

Perth Radiation Oncology Centre
Complainant

- and -

Department of Health
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access - report relating to costs of contracting out health services - confidential communications - clause 8(1) - scope of exemption - whether breach of contractual obligation of confidence - whether breach of equitable obligation of confidence applicable - clause 8(2) - information of a confidential nature obtained in confidence - prejudice future supply of information.

Freedom of Information Act 1992 (WA) ss. 102(1); Schedule 1 clause 8(1), 8(2) and 8(4).
Hospitals and Health Services Act 1927 (WA)

Re Speno Rail Maintenance Australia Pty Ltd and The Western Australia Government Railways Commission and Another [1997] WAICmr 29
Re B and Brisbane North Regional Health Authority (1994) 1 QAR 279
Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) and Another (1987) 74 ALR 428
Coco v Clark (AN) (Engineers) Ltd [1969] RPC 41
Ryder v Booth [1995] VR 869

DECISION

The decision of the agency is set aside. In substitution it is decided that the disputed document is not exempt under clauses 8(1) and 8(2) of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

18 January 2002

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Department of Health ('the agency') to refuse Perth Radiation Oncology Centre ('the complainant') access to a document requested by it under the *Freedom of Information Act 1992* ('the FOI Act').

2. In 1995, the then Board of Management of Royal Perth Hospital ('RPH') decided to contract out its in-house radiation oncology service to the complainant. I understand that, following a decision by the Government to rationalise the management of the public health system in Western Australia and to provide for the better coordination of service delivery, the Metropolitan Health Services Board ('the MHSB') was constituted as a single Board of Management under the *Hospitals and Health Services Act 1927* in place of the separate boards of management that previously existed in respect of metropolitan public hospitals, including RPH.

3. In 1997, following concerns raised by the complainant about the viability of its arrangement with RPH, the MHSB commissioned an independent review of the costs of providing oncology services to RPH. Franther Consulting Services conducted the review and, as a means of comparison, the consultant included data relating to the cost of oncology services provided by Sir Charles Gairdner Hospital ('SCGH'). Before finalising the report, I understand that the complainant and RPH were each given a copy of those parts of the report relating to their respective operations so that the data could be checked for accuracy. Subsequently, a document entitled "*Report on Radiation Oncology Services at Wembley & RPH"* ('the disputed document') was presented to the MHSB.

4. On 21 November 1997, at the time of the commissioning of the Franther review, the complainant's solicitors wrote to Mr Burns, the Acting Chief Executive Officer of RPH and raised concerns about the potential for disclosure of the disputed document to a third party under the FOI Act. In that letter, the complainant's solicitors referred to clause 4 of Schedule 1 to the FOI Act and sought from Mr Burns, an assurance that the complainant's commercial or business information would be treated as confidential and would not be disclosed to any third party, other than the MHSB, without the complainant's consent. In a letter dated 24 November 1997, Dr Beresford, the then Acting Chief Executive Officer of RPH acknowledged the complainant's concerns and assured the complainant that the hospital would take all reasonable steps to safeguard the information concerned.

5. Following the State Election in 2001, the new Labor Government abolished the MHSB and the agency assumed the custody and control of all documents and records of the former MHSB. On 24 August 2001, the complainant made an application through its solicitors to the agency under the FOI Act for access to the disputed document. The agency refused access on the grounds that the disputed document is exempt under clause 8. However, the agency did not specify which subclause of clause 8 was the basis for its decision to refuse access. An internal review of the decision was conducted, but the reviewer merely confirmed the initial decision to refuse access under clause 8.

6. On 8 November 2001, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

7. I obtained the disputed document from the agency, together with the file maintained by the agency in respect of the complainant's access application. I sought clarification from the agency of the grounds for exemption. The agency informed me that it relies on the exemptions in clause 8(1) and clause 8(2) to justify its decision to refuse access to the disputed document. The agency also gave me a copy of the letter dated 24 November 1997 sent to the complainant's solicitors.

8. I also sought information from the complainant. I was given a copy of the letter dated 21 November 1997 from the complainant's solicitors to the Acting Chief Executive Officer of RPH, and a copy of those parts of the disputed document relating to the complainant and RPH, which were given to the complainant for checking prior to finalisation.

9. On 7 January 2002, after considering all of the material before me, including the disputed document, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the disputed document may not be exempt.

10. The agency sought an extension of time in which to prepare a response to my letter and to enable it to raise new grounds for exemption. However, I consider that the agency had had ample opportunity to discharge the onus on it under s.102(1) of the FOI Act to justify its decision to refuse access, both in the first instance and upon internal review. The agency had a further opportunity during the external review process to raise any new issues or matters for my consideration. However, it did not do so.

11. An agency's responsibilities in the administration of the FOI Act includes it providing the Information Commissioner with sufficient probative evidence to support its claim or claims for exemption, rather than relying on speculation. In his 2000/2001 Annual Report, the Queensland Information Commissioner considered the obligations on agencies under the Queensland *Freedom of Information Act 1992* during the external review process conducted by his office. I consider his comments to be equally applicable to the external review process conducted by me under the FOI Act. The Queensland Information Commissioner said, at page 19 of the report:

> *"In a review under Part 5 of the FOI Act, the respondent agency has an obligation to assist the Information Commissioner to arrive at the correct decision required by law in the application of relevant provisions of the FOI Act to the documents in issue. This involves raising exemption provisions which are honestly believed, on reasonable grounds, to be applicable to the documents or matter in issue, and explaining and supporting the basis of the exemption claims with relevant written argument and evidence. It also involves disclosing to the Information Commissioner all relevant evidence in the possession or control of, or known to, the agency, which bears on the exemption claim, whether it is favourable to the agency's case or not. It is certainly not appropriate for an*

agency to invoke a multitude of weakly argued, or unsupported, exemption claims in the hope that one of them may somehow succeed, or to complicate and delay the finalisation of a review under Part 5 of the FOI Act."

I agree with and endorse those comments so far as they apply to agencies in Western Australia.

12. On 15 January 2002, I received a written response from the agency. In that letter the agency maintains its claims for exemption under clauses 8(1) and 8(2) of Schedule 1 to the FOI Act. The agency submits that clause 8(1) includes equitable breaches of confidence. The agency also claims that there was a 'contractual obligation' between RPH and the complainant, which the agency claims is evidenced by the letter from the complainant's solicitors dated 21 November 1997. However, the agency made no submissions to me in support of those claims and did not provide any new material for my consideration.

THE EXEMPTIONS

Clause 8- Confidential communications

13. Clause 8 of Schedule 1 to the FOI Act provides:

> ***"8. Confidential communications***
>
> ***Exemptions***
>
> *(1) Matter is exempt matter if its disclosure (otherwise than under this Act or another written law) would be a breach of confidence for which a legal remedy could be obtained.*
>
> *(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) Matter referred to in clause 6(1)(a) is not exempt matter under subclause (1) unless its disclosure would enable a legal remedy to be obtained for a breach of confidence owed to a person other than -*
>
> *(a) a person in the capacity of a Minister, a member of the staff of a Minister, or an officer of an agency; or*
>
> *(b) an agency or the State.*

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

(a) Clause 8(1)

14. In my view, clause 8(1) applies to a breach of confidence for which a remedy is available at common law, rather than merely in equity. That is, I consider that clause 8(1) applies to a breach of confidence, such as a breach of a contractual obligation, for which a legal remedy may be obtained, rather than to an equitable breach of confidence, for which only an equitable remedy could be obtained: see my decision and reasons in *Re Speno Rail Maintenance Australia Pty Ltd and The Western Australia Government Railways Commission and Another* [1997] WAICmr 29.

15. In this matter, nothing has been placed before me by the agency to establish that there was a binding contract between RPH and the complainant, which prohibits the disclosure of the disputed document to the complainant and which would, therefore, give rise to a legal remedy for a breach of a contractual obligation of confidence. The letter dated 21 November 1997 from the complainant's solicitors to the Acting Chief Executive Officer of RPH contains a request that should an application for access under the FOI Act be made for documents containing information provided by the complainant, that those documents will be exempt, according to the complainant's solicitors, under clause 4 of Schedule 1 to the FOI Act. That letter only deals with the possibility of the disclosure of the complainant's commercial information to a third party. I have also examined a copy of the agreement between RPH and the complainant relating to the provision of oncology services. However, I can find nothing in that document, which relates to issues of confidentiality.

16. I understand that it is the agency's submission that there was a contractual obligation of confidence between RPH and the complainant, which prevents disclosure of the disputed document to the complainant, and that the 'contract' consists of the letters dated 21 November 1997 and 24 November 1997. In the letter dated 24 November 1997, the Acting Chief Executive Officer of RPH agreed that all reasonable steps would be taken to *"ensure the safe guard* [sic] *of the information as requested."* However, bearing in mind that the complainant wished the agency to treat its information as confidential and did not wish to have its commercial or business information disclosed to a third party, I understand the assurances offered by the Acting Chief Executive Officer to be nothing more than assurances given in relation to that matter. In my view, there is nothing in those letters, which would prevent the disclosure of the disputed document to the complainant under the FOI Act.

17. I accept that the disputed document is clearly marked "Strictly Confidential" and that it includes a statement by the author to the effect that certain business results should not be provided to practitioners operating in the area of oncology services. However, I do not consider that either of those statements creates a contractual obligation of confidence. In my view, the fact that a document is marked as 'Confidential' or 'Strictly Confidential' means that that is a factor to be taken into account when determining the requirements of the exemption in clause 8(2) and whether it was both given and received in confidence.

18. In my view, the language of the two letters does not indicate that the complainant and RPH intended to be legally bound by their contents and I do not accept the claim that the letters constitute a legally enforceable contract. In the event that they do, then I do not accept that the 'contract' applies to the circumstances of this complaint. I can find nothing in the letters, which relates to the disclosure of the disputed document by the agency to the complainant.

19. I do not accept the agency's assertion that the undertaking by RPH to safeguard the commercial information of the complainant, which is contained in the letters, extends to the disclosure of commercial or business information relating to SCGH to a third party. Neither the letter dated 21 November 1997, nor the letter dated 24 November 1997 mentions SCGH directly or indirectly.

20. Further, nothing has been put before me by the agency, which establishes the existence of a contractual obligation of confidence between SCGH and RPH or between SCGH and the MHSB in respect of the commercial or business information of SCGH.

21. The agency asserted that the exemption in clause 8(1) covers equitable obligations of confidence, but did not make any submissions or provide any material to me in support of that claim. For the reasons given in *Re Speno*, I reached the conclusion that clause 8(1) is limited in its application to contractual, but not equitable, obligations of confidence. I note, however, that a similar, but not identical exemption in the Queensland FOI Act covers equitable obligations of confidence. Section 46 of the Queensland *Freedom of Information Act 1992*, was considered by the Queensland Information Commissioner in *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279. In *Re B*, at paragraphs 60-112, drawing on the decisions in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) and Another* (1987) 74 ALR 428 and *Coco v Clark (AN) (Engineers) Ltd* [1969] RPC 41 at 48, the Queensland Information Commissioner detailed the requirements to establish an equitable obligation of confidence. In summary, five criteria must be established:

    (i) the agency or Minister must be able to identify with precision the information in question in order to show that it is secret, rather than generally available;

    (ii) the information must possess the necessary quality of confidence;

    (iii) the information must be communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use it in a way that is not authorised by the confider;

    (iv) it must be established that disclosure to an applicant under the FOI Act would constitute a misuse or unauthorised use of the information in issue; and

    (v) it must be established that detriment is likely to be occasioned to the original confider of the information if it were to be disclosed.

22. I deal with the question of whether the disputed document contains information that is confidential in paragraphs 24 and 25 below. However, I have referred to the requirements for establishing an equitable obligation of confidence because it seems to

me that, the disputed document fails to meet the second of the criteria summarised in paragraph 21 above.

23. Therefore, I find that the disputed document is not exempt under clause 8(1).

(b) Clause 8(2)

24. Having examined the disputed document and the letters dated 21 and 24 November 1997, I accept that the disputed document contains information that was obtained in confidence by the former MHSB through Franther Consulting Services. However, there is nothing before me from the agency, which establishes that the information is of a confidential nature. Clearly, the information in the disputed document relating to the commercial or business operations of the complainant, which has already been disclosed to the complainant by the agency, cannot be exempt nor, in my view, is it information that is in dispute. Further, the information relating to RPH has been disclosed to the complainant by the agency and I do not consider that information is in dispute either.

25. I accept that the financial and business information concerning SCGH in the disputed document may have been confidential at one point, in the sense that it was not generally known. However, I also recognise that the sensitivity of information can diminish over time and whether it remains confidential is to be assessed at the time an application for access to it is made to the agency. There is nothing before me to indicate that the decision-makers in the agency considered that question. On the information before me, I am not satisfied that the agency has established that the information in question is confidential information in 2002 and, accordingly, I am not satisfied that the requirements of paragraph (a) of clause 8(2) have been established by the agency. Even if it had done so, it is necessary for paragraph (b) of clause 8(2) to be established if the exemption is to apply.

26. In respect of paragraph (b), the agency submits that the disputed document was compiled from information provided by the complainant, RPH and SCGH exclusively for the then MHSB, and that full and frank disclosures of business and commercial information were made by each of those bodies. The agency submits that the quality and scope of the information provided to the reviewer *"would certainly be restricted if it was not protected by confidentiality"* and that *"suppliers of similar information in the future would be loath to provide frank and full information if it was known that a promise of confidentiality could not be upheld."*

Consideration

27. In this matter, paragraph (b) of clause 8(2) requires the agency to establish that disclosure of business and commercial information relating to SCGH (since that is the only information that is in dispute) could reasonably be expected to prejudice the future supply of that particular kind of information to the Government or to an agency. Paragraph (b) is directed at the ability of the Government or an agency to obtain the same or similar kind of information in the future from the sources generally available to it: see *Ryder v Booth* [1995] VR 869.

28. Having examined the disputed document, I characterise the information in question as being financial data and projections for the years 1995/96 to 1997/98. There is simply nothing from the agency to persuade me that in the future any hospital or agency within the Western Australia public health sector would refuse or neglect to make that kind of information available to the Government or to the agency. I consider the agency's claims in that regard are speculation and nothing more. I can discern no factual basis for such statements in the agency's submissions, and none is apparent to me from the contents of the disputed document.

29. The agency did not provide me with any material to establish that its ability to obtain past and current financial data and future financial projections from any part of the public health sector in Western Australia could reasonably be expected to be harmed or injured by the disclosure of the disputed document. Accordingly, it is my view that the agency has not discharged the onus on it under s.102(1) to establish that the exemption in clause 8(2) applies.

Public interest

30. If the agency had established a *prima facie* claim for exemption under clause 8(2), which, in my view, it has not, the limit on exemption in clause 8(4), which provides that matter is not exempt under subclause (2) if its disclosure would, on balance, be in the public interest, would need to be considered.

31. Although I need not consider the application of clause 8(4), because I have found that the agency has not justified its decision to refuse access under clause 8(2), I have nevertheless considered the question of the public interest. In the circumstances of this complaint, I recognise that there is a public interest in the accountability of RPH for the decisions made in respect of its expenditure of public monies. I consider that there is a public interest in knowing whether the contracting out of radiation oncology services in 1997 resulted in benefits to the public at large, whether by way of receiving better services for the same or less amount of money, or by achieving savings to the overall health budget, or whether there were no benefits at all.

32. Although it is unnecessary for me to decide whether disclosure would, on balance, be in the public interest, I consider that a strong argument in favour of disclosure could be mounted. However, neither the agency nor the complainant has made submissions on that point. Based on the material before me, and because the agency has failed to discharge the onus on it to establish that its decision to refuse access was justified, I find that the disputed document is not exempt under clause 8(1) or 8(2).

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