

MCPHEE AND MEDICAL BOARD

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: 97041
Decision Ref: D01197**

Participants:

David Russell McPhee
Complainant

- and -

Medical Board of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents believed to contain information about a named person - information identifying a third party - clause 3(1) - personal information - balance of public interest.

Freedom of Information Act 1992 (WA) ss.3, 74, 102(3); Schedule 1 clause 3, 5(1)(b); Schedule 2 Glossary

DECISION

The decision of the agency is varied. It is decided that the disputed document is exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

16th April 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 Mr McPhee ('the complainant') access to a document of the agency requested under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 10 February 1997, the complainant lodged an access application with the agency seeking access to a letter sent by the agency to a certain medical practitioner ('the third party'). The existence of the requested document came to the notice of the complainant when it was referred to in correspondence between the Minister for Health and the Member for Morley, Mr Clive Brown, MLA, following certain inquiries made by the Member for Morley on behalf of the complainant.
3. The agency refused access to the requested document on the ground that it is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. The initial decision of the agency was confirmed following internal review. Thereafter, on 13 March 1997, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

4. I obtained a copy of the disputed document from the agency, together with the file maintained by the agency in respect of this matter. After examining that document and considering the material before me, including information provided to my office by the complainant, on 3 April 1997, I informed the parties in writing of my preliminary view in respect of this complaint and provided reasons for that view. It was my preliminary view that the disputed document may not be exempt under clause 5(1)(b). However, I was of the preliminary view that the document may be exempt under clause 3(1) of Schedule 1 to the FOI Act. Accordingly, the parties were invited to reconsider their respective claims.
5. On 8 April 1997, the agency responded to my preliminary view. The agency did not withdraw its claim for exemption under clause 5(1)(b) but accepted my preliminary view that the disputed document may be exempt under clause 3(1). On 9 April 1997, I received a submission from the complainant. The complainant declined to withdraw his complaint and, pursuant to the onus which the complainant bears under s.102(3) of the FOI Act, directed his submission to addressing the question of whether disclosure of the disputed document would, on balance, be in the public interest. I have considered the agency's response and the complainant's submission but I am not dissuaded from my preliminary view. My reasons follow.

THE DISPUTED DOCUMENT

6. There is one document in dispute between the parties. That document is a letter dated 18 January 1995, from the former Chairman of the agency, Dr Blake, to the third party. It is marked "Private and Confidential".

THE EXEMPTIONS

(a) Clause 3 - Personal information

7. Clause 3, so far as relevant, provides:

"3. *Personal information*

Exemption

(1) *Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*

Limits on exemption

(2) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.*

(3) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to -*

(a) the person;

(b) the person's position or functions as an officer; or

(c) things done by the person in the course of performing functions as an officer.

(4) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, prescribed details relating to -*

(a) the person;

(b) the contract; or

(c) things done by the person in performing services under the contract.

(5) Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.

(6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”

8. In the Glossary in the FOI Act, “personal information” is defined to mean:

“...information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead-

(a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or

(b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample.”

9. I have examined the disputed document and I am satisfied that it contains a considerable amount of personal information, as defined, concerning the third party. It also contains some personal information about another individual. In my view, that personal information is, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act.

10. Clause 3(1) is limited by sub-clauses (2)-(6) inclusive. As I am satisfied that the disputed document does not contain any personal information about the complainant, I do not consider that the limit on exemption in clause 3(2) operates in this instance.

11. Clauses 3(3) and 3(4) concern the disclosure of personal information about a person who is or has been, an officer of an agency, or a person who performs or has performed, services for the agency under a contract for services. There is no evidence before me that either the third party or the other individual concerned was, at the time, an officer of an agency or a person who had performed work for an agency. Therefore, I am also satisfied that the limits on exemption in clauses 3(3) and 3(4) do not apply. Further, as there is no evidence put before me by the complainant to establish that either the third party or the other individual referred to in the disputed document consents to the disclosure of personal information about him or her to the complainant, I am also satisfied that the limit on exemption in clause 3(5) does not apply.

12. Therefore, in the context of this complaint, the only limitation on clause 3(1) which may apply is the limit in clause 3(6) which provides that matter is not exempt matter under sub-clause (1) if its disclosure would, on balance, be in the public interest. Pursuant to s.102(3) of the FOI Act, the onus is on the

complainant to establish that disclosure of the disputed document would, on balance, be in the public interest.

Public interest

13. In a number of my formal decisions I have previously stated my view of the purpose of the exemption in clause 3. I consider the exemption is designed to protect the privacy of individuals about whom personal information may be contained in documents held by State and local government agencies. In the absence of any other statutory protection of personal privacy, I recognise that there is a strong public interest in the maintenance of personal privacy such that it requires a strong competing public interest to displace the *prima facie* reason for non-disclosure of such information.

The complainant's submission

14. In his submission, the complainant identified a number of factors which, he argued, should persuade me that the disclosure of the disputed document would, on balance, be in the public interest. The complainant submits:

“The Medical Board of Western Australia is charged with the important responsibility of supervising the medical profession. The public interest demands that there are high levels of public confidence in the medical profession. The public needs to be assured that any potential breaches by medical practitioners are thoroughly examined by those charged with the responsibility of carrying out this task. Any attempt to hide or conceal the basis upon which the Medical Board makes its decisions will raise doubts about the degree to which such decisions are made ‘in club’ and away from the ordinary lay person.

The fact that the Medical Board wishes to keep the document secret says more about its processes than that of the third person or other person.

It is obviously not possible to separate the decision making process of the Board from the details of the case at hand. Therefore, it is my submission that in balancing up where the public interest lies one must have regard to a number of matters including the outcome of the Board's deliberations. For example, if the Board found complaints against a medical practitioner to be vexatious or frivolous, it could well be argued that any release of a document could damage that medical practitioner in the public eye notwithstanding the nature of the complaints. The converse is the case, however, if the Board found the medical practitioner erred or accepted assurances or undertakings from the medical practitioner about the way he would conduct himself and/or his practice in future. It is my submission therefore that the question of where the public interest lies must be determined by looking at what in fact the document discloses rather than the fact that the document deals with a third party and other person.”

Consideration

15. As previously stated, I recognise that there is a strong public interest in the protection of personal privacy which will only be displaced by a strong competing public interest that requires the disclosure of that information. The protection of an individual's privacy is a public interest which is recognised and enshrined in the FOI Act by clause 3. Further, as I have previously acknowledged, the FOI Act is not intended to open the private and professional lives of its citizens to public scrutiny in circumstances where there is no demonstrable benefit to the public interest by doing so.
16. I also recognise that there is a public interest in an access applicant being able to exercise his or her rights under the FOI Act to gain access to documents of an agency and that there is a public interest in ensuring understanding of, and accountability for, the decision-making processes of government agencies. The FOI Act embodies that aspect of the public interest in s.3. I also accept, in principle, the complainant's submission that there is a public interest in ensuring a high level of public confidence in members of the medical profession and in the capacity of the agency to deal effectively with complaints about medical practitioners.
17. Regrettably, I am unable to expand upon the circumstances of this complaint in order to place the submission of the complainant into context, without breaching the privacy of the complainant or my obligations under s.74 of the FOI Act. However, in balancing the competing interests, I am not satisfied that disclosure of the disputed document would be in the public interest.
18. The disputed document is a private communication between the agency and the third party. From the contents of that document, it appears that the agency created the disputed document in response to correspondence it had received from another source, in order to bring to the third party's attention the concerns of the agency in that regard. The disputed document does not appear to have been created as a result of the agency receiving a complaint from a member of the public and following its usual procedures in dealing with such complaints.
19. Therefore, I do not consider that the disclosure of the disputed document would inform the public about the procedures of the agency, since those procedures have been described in detail in my previous decisions where the agency has been a party, and in the annual reports of the agency. Further, I am not persuaded that disclosure would inform the public of the basis of any decision-making by the agency, nor would it reveal the agency's reasons for decision, nor in any way that is apparent to me further the public interest in the accountability of the agency.
20. After careful consideration and weighing of the competing interests, for the reasons given, I am not persuaded that disclosure of the disputed document would, on balance, be in the public interest. Accordingly, I find the disputed document is exempt under clause 3(1) of Schedule 1 to the FOI Act.

(b) Clause 5(1)(b)

21. As I have found that the disputed document is exempt under clause 3(1) of Schedule 1 to the FOI Act, I need not consider the agency's claim for exemption under clause 5(1)(b).
