OFFICE OF THE INFORMATION COMMISSIONER (W.A.)

File Ref: F2072000
Decision Ref: D0192001

Participants:

William Daly Reed
Complainant

- and -

Sir Charles Gairdner Hospital
First Respondent

- and -

Craig Bennett
Second Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to administrative deliberations of senior public sector officers – clause 7 – legal professional privilege – privileged communications – clause 8(2) – whether information of a confidential nature obtained in confidence – whether reasonable expectation of prejudice to future supply of information to the government or to an agency.

Freedom of Information Act 1992 (WA) s. 30; Schedule 1 clauses 7 and 8(2).

Esso Australia Resources Ltd v The Commissioner of Taxation [1999] 74 ALJR 339
Trade Practices Commission v Sterling (1979) 36 FLR 244
Attorney General's Department v Cockcroft *(1986) 10 FCR 180*
Ryder v Booth [1985] VR 869

DECISION

The agency's decision is set aside. In substitution it is decided that the disputed matter in Documents 5, 8, 12 and 15 is not exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

22 May 2001

REASONS FOR DECISION

1. This complaint arises from a decision made by Sir Charles Gairdner Hospital ('the agency') to refuse Professor Reed ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

2. Until recently, the complainant was employed by The University of Western Australia ('the University'), but based at the Queen Elizabeth II Medical Centre, a section of the agency, where he provided clinical services to patients under an arrangement entered into between the agency and the University.

3. In late 1998, the former Metropolitan Health Service Board ('the MHSB') suspended the complainant's clinical privileges and, following certain disciplinary proceedings, the MHSB withdrew those privileges. Subsequently, in December 2000, the complainant commenced legal action against the MHSB.

4. On 20 September 2000, the complainant's solicitor made application to the agency, and to the Health Department of Western Australia and the MHSB, for access under the FOI Act to various documents, including those held on the personal file of the complainant. Potentially, the scope of the access application was very large, but it was reduced following negotiations between the parties. However, the application still involved a considerable number of documents. At the same time, the agency was also dealing with certain documents from two related access applications made by the complainant, which had been transferred to the agency from the Health Department and from the MHSB.

5. In two notices of decision dated 6 November 2000 and 8 November 2000, the agency decided to give the complainant access to most of the documents requested by him. However, the agency refused him access to others and claimed exemption for those documents under various exemption clauses of Schedule 1 to the FOI Act. The complainant applied for internal review of the agency's decisions. Subsequently, the internal reviewer varied the agency's original decisions and granted the complainant access to additional documents, but refused him access to others. On 19 December 2000, the complainant lodged a complaint with the Information Commissioner seeking external review of those decisions.

REVIEW BY THE INFORMATION COMMISSIONER

6. I obtained the disputed documents from the agency, together with the agency's FOI file maintained in respect of the complainant's applications. In my opinion, the agency's notice of decision did not comply with s.30 of the FOI Act. They did not provide the complainant with findings on any material questions of fact underlying the agency's reasons for its decision to refuse access to the disputed documents. Consequently, I sought information from the agency to justify those decisions. At that stage of the proceedings, the Chief Executive of the agency applied to be joined as a party to these proceedings and he has been so joined.

7. Meetings were held with officers of the agency to discuss the agency's claims for exemption. Following those initial discussions, the agency granted the complainant access to 16 additional documents, but maintained its exemption claims in respect of 11 other documents.

8. On 21 February 2001, I met with the Chief Executive of the agency and the Medical Administrator of the agency and informed them of my preliminary view of the agency's claims for exemption. Based on the material then before me, it was my preliminary view that some of the disputed documents may be exempt, but that the majority did not appear to be exempt as claimed by the agency. Following that meeting, the agency reconsidered its position and released further material to the complainant. The agency made a further submission in writing in respect of the documents remaining in dispute.

THE DISPUTED DOCUMENTS

9. There are 4 disputed documents. Those documents are Documents 5, 8, 12 and 15.

   (i) Document 5 is 5 pages and consists of 5 email messages between the Chief Executive Officer of the MHSB, the Chief Executive of the agency and the Medical Administrator of the agency. The complainant has been provided with access to an edited copy of Document 5. The disputed matter consists of the second paragraph of an email message dated 14 June 2000 from the Medical Administrator of the agency to the Chief Executive of the agency. The agency claims that that matter is exempt under clause 7 of Schedule 1 to the FOI Act.

   (ii) Document 8 is 2 pages and consists of email messages between the Chief Executive of the agency and an officer of the MHSB. The complainant has been provided with access to an edited copy of Document 8. The disputed matter consists of an email message sent on 15 October 1999 (Document 8a), and two email messages sent on 20 October 1999 at 11.48 hours (Document 8b) and 17.59 hours respectively (Document 8c). The agency claims that all of Document 8a, and certain matter in Documents 8b and 8c is exempt under clause 7.

   (iii) Document 12 is an email message dated 14 December 1999 from the Chief Executive of the agency to the Commissioner for Health and the Chief Executive Officer of the MHSB. It is marked "Strictly Confidential". The agency claims that this document is exempt under clause 8(2).

   (iv) Document 15 contains 3 email messages sent on 20 October 1999 at 11.48 hours, 5.51 hours and 5.59 hours, respectively. The disputed matter in Document 15 is identical to the disputed matter in Documents 8b and 8c and the agency claims this matter is exempt under clause 7.

THE EXEMPTIONS

(a) Clause 7 – Legal professional privilege

10. Clause 7(1) provides that matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege. Legal professional privilege protects from disclosure confidential communications between a client and his or her legal adviser which are made or brought into existence either for the dominant purpose of giving or seeking legal advice or for use in existing or anticipated legal proceedings: *Esso Australia Resources Ltd v The Commissioner of Taxation* [1999] 74 ALJR 339.

11. I have examined Documents 5, 8 and 15. In my view, none of those documents is a confidential communication between the agency and its legal adviser. As I have stated, those documents consist of email messages between the Chief Executive of the agency, the Medical Administrator of the agency and an officer of the MHSB. To my knowledge, none of those persons is a solicitor. There is simply nothing, either in the documents themselves or that has been provided to me by the agency, to establish that a solicitor/client relationship existed between any of the senders or recipients of these email messages.

The agency's submission

12. The agency made alternative submissions in support of its claims for exemption under clause 7. The agency contends that, given the close relationship between it and the MHSB, the disputed matter is exempt under clause 7 because it may be categorised as communications between officers of the one client (the MHSB), which were made for the dominant purpose of acquiring information to provide to the MHSB's legal adviser for the purpose of obtaining legal advice with reference to litigation either anticipated or commenced, or which is a record of legal advice given by that legal adviser. In the alternative, the agency submits that the disputed documents are communications of the kind referred to in *Trade Practices Commission v Sterling* [1979] 36 FLR 244, in paragraph (f) on page 246.

The complainant's submission

13. The complainant's solicitor submits that the agency and the MHSB are separate legal entities and should be regarded as such. The solicitor informed me that the MHSB considered the issue of the complainant's clinical privileges at its meetings held on 26 and 27 June 2000 and 15 August 2000 and that the MHSB did not decide to suspend his client's clinical privileges until 22 September 2000. Following that decision, on 18 December 2000, the complainant notified the MHSB that he would commence legal proceedings to have the decision of the MHSB quashed. The complainant's solicitor submits that the connection between the disputed matter and the litigation is too remote for the communications to be privileged.

Consideration

14. I have considered the agency's submission that the disputed documents may be characterised as communications between officers of the MHSB. I do not accept that claim. Clearly, after receiving the complainant's access applications, the Health Department of Western Australia and the MHSB transferred certain documents to the agency to be dealt with by the agency. That step would have been unnecessary if the officers were all officers of the MHSB. Further, it is apparent to me from material in the agency's FOI file, that the agency was working with the MHSB to avoid duplication while both agencies were dealing with separate parts of the complainant's access applications. In my view, the Health Department of Western Australia, the MHSB and the agency are all separate and distinct "agencies" under the FOI Act and there is nothing to suggest to me that the officers of the agency and the MHSB are, or should be treated as, officers of the one agency.

15. Legal professional privilege is not limited to documents of the kind discussed in the *Esso* case. In *Trade Practices Commission v Sterling*, Lockhart J stated that legal professional privilege applies to several other kinds of documents, including:

> *"Communications passing between the party and a third person (who is not the agent of the solicitor to receive the communication from the party) if they are made with reference to litigation either anticipated or commenced, and at the request or suggestion of the party's solicitor; or even without any such request or suggestions, if they are made for the purpose of being put before the solicitor with the object of obtaining his advice or enabling him to prosecute or defend an action."*

Document 5

16. The agency claims that the disputed matter in Document 5 is a communication between a client, in this case the MHSB, and third parties (being officers of the agency). For a communication of that kind to be exempt under clause 7, it must have come into existence in the circumstances described in paragraph (f) of *Sterling*'s case, as described in paragraph 15 above. However, in my view, the disputed matter in Document 5 is not a communication of the kind described in paragraph (f) in *Sterling*'s case. The disputed matter is contained in an email message between officers of the agency. That is, it is a communication between those two officers. It is not a communication between the MHSB and a third party. In my view, the disputed matter in Document 5 would not be privileged from production in legal proceedings on the grounds of legal professional privilege. Accordingly, I find that it is not exempt under clause 7.

Document 8

17. The agency claims that the first 4 paragraphs of Document 8a are exempt under clause 7 because they contain a paraphrasing of advice received by the MHSB from its legal adviser. Taking into account the contents of those 4 paragraphs, it

appears to me that that part of Document 8a may contain information given to the MHSB by its legal adviser.

18. However, there is no material before me, either that is apparent on the face of Document 8a or in the submissions made by the agency, to establish that the communication was made between the MHSB and the Chief Executive of the agency with reference to litigation then in contemplation or for the purpose of obtaining information to be put before the MHSB's legal adviser with the object of obtaining legal advice to defend an action against the MHSB. Accordingly, I do not consider that those 4 paragraphs would be privileged from production in legal proceedings on the ground of legal professional privilege. Further, the remaining parts of Document 8a do not contain or refer to any legal advice received by the MHSB from its legal adviser, nor are those parts a communication of the kind referred to in paragraph (f) in *Sterling*'s case. Accordingly, I find that Document 8a is not exempt under clause 7.

19. The agency claims that Document 8b is a privileged communication between a client (the MHSB) and a third party made for the purpose of putting the communication before the MHSB's legal adviser for advice. However, having considered the contents of that communication, I do not accept that claim. It seems to me that the message is nothing more than an administrative update on the current state of affairs with respect to the complainant's employment. There is nothing, either in the contents of that document or that has been put before me by the agency that satisfies me that the communication was made for any of the privileged purposes described in *Sterling*'s case. Accordingly, I find that Document 8b is not exempt clause 7.

20. The agency claims that Document 8c is a privileged communication between a client (the MHSB) and its legal adviser, which was made for the dominant purpose of recording legal advice obtained from the MHSB's legal adviser. An examination of Document 8c establishes, in my view, that that is clearly not the case, since Document 8c is an email message between an officer of the MHSB and a third party (an officer of the agency). Further, in my view, that document does not contain a record of any such privileged communication. Although it appears to be a third party communication of the kind described in paragraph (f) in *Sterling*'s case, having examined that document, I do not consider that Document 8c was made for any of the purposes referred to in paragraph 15 above. Rather, it appears to me to be an administrative request for information. There is nothing put before me by the agency to establish that that information was to be put before the MHSB's legal adviser for legal advice, or for use in anticipated legal proceedings. Accordingly, I find that Document 8c is not exempt under clause 7.

21. Given that I have found the disputed matter in Documents 8b and 8c is not exempt under clause 7, I also find that the disputed matter in Document 15 is not exempt under clause 7 for the same reasons.

(b) Clause 8(2) – Confidential communications

22. The agency claims that Document 12 is exempt under clause 8(2). Clause 8, so far as is relevant, provides:

> ***"8. Confidential communications***
>
> *(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."*

23. To establish a *prima facie* claim for exemption under clause 8(2) for Document 12, the agency must establish that the document contains information of a confidential nature obtained in confidence and also that its disclosure could reasonably be expected to prejudice the ability of the agency to obtain information of the kind contained in Document 12 in the future. Further, if the requirements of both paragraphs (a) and (b) of clause 8(2) are established, then the limit on exemption in clause 8(4) must be considered.

24. Information is inherently confidential if it is not in the public domain. That is, the information must be known by a small number or limited class of persons. Document 12 is marked "Strictly Confidential" and, in our meeting, the Chief Executive of the agency informed me that he sent Document 12 in confidence on the understanding that the Commissioner for Health and the Chief Executive Officer of the MHSB would receive it in confidence.

25. I accept that, occasionally, senior officers in the public sector communicate with one another in confidence. However, it is evident on the face of Document 12 that it is not a confidential communication of that kind. Copies of Document 12 were also forwarded to two other individuals who, in my view, are not senior officers in the public sector. There is nothing before me to suggest that those officers received the document in confidence. Further, given that Document 12 is over 12 months old and, taking into account the history of the complainant's dealings with the agency and the events that have transpired in the intervening months, I consider that it contains information already known to the complainant. Therefore, whilst Document 12 might have been confidential at one point, it seems to me that it may no longer be confidential, and certainly not confidential viz-a-viz the complainant.

26. Accordingly, I am not satisfied that the agency has established that Document 12 meets the terms of paragraph (a) of clause 8(2) and, even if it does, the exemption in clause 8(2) consists of two parts and paragraph (b) must also be satisfied for the exemption to apply.

8(2)(b) - Prejudice to the future supply of information of that kind

27. In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, the Full Federal Court said at page 190, that the words *"…could reasonably be expected to prejudice the future supply of information"* in s.43(1)(c)(ii) of the *Freedom of Information Act 1982* (Commonwealth) were intended to receive their ordinary meaning and required a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the relevant kind to the Commonwealth would decline to do so if the documents in question were disclosed.

28. In previous decisions, I have accepted that the decision in *Cockcroft* correctly states the test that is to be applied when considering the application of the exemption in paragraph (b) of clause 8(2). Further, the exemption is not concerned with the question of whether the particular author of a document would refuse or neglect to supply to the Government or an agency, information of a similar kind in the future. Rather, the question is whether disclosure could reasonably be expected to prejudice the future supply of that kind of information from other sources available or likely to be available to the Government or an agency: see the comments of Young C.J. in *Ryder v Booth* [1985] VR 869, at p.872.

The agency's submission

29. The Chief Executive of the agency informs me that, if Document 12 is disclosed under the FOI Act, he might not give as much detailed information in the future and might decide to communicate in another form so that a written record of his advice does not exist. He also submits that disclosure would establish a precedent in the agency, which would hinder his ability to effectively administer and resolve sensitive issues in the future.

30. The Chief Executive informs me that a number of people are interested in the outcome of the complainant's access applications and that, if the disputed documents are disclosed under the FOI Act, it would make his job more difficult. The Chief Executive informs me that he has implemented procedures to ensure that the files and records of the agency are complete and that vital information is properly recorded and not merely left to memory. However, he submits that disclosure of Document 12 would send a message to agency staff that the confidentiality of information in the agency could not be assured and that, in the future, staff may be unwilling to properly record matters that ought to be recorded.

31. Notwithstanding those concerns, the Chief Executive acknowledges that the complainant is already aware of the subject matter of Document 12 and that, in normal circumstances, the information contained in that document was of a type to which access would be given.

Consideration

32. I have examined Document 12 and I have considered the submissions made by the agency. I characterise Document 12 as an administrative communication dealing with historical issues and proposing certain administrative action to be taken at the time that document was created, if a need arose.

33. Taking into account the fact that Senior Executives in the Public Sector are under a legal obligation to properly perform their duties as employees, I have some difficulty in accepting the agency's submission that Senior Executives in the Public Sector would not willingly communicate similar information to each other in the future, or that the subject matter of such communications, if not the communications themselves, would not be properly recorded in an agency.

34. I accept that the existence and operation of the FOI Act has the potential to change the culture and the record-keeping practices in agencies and the manner in which staff communicate and record information. However, I consider that the benefits of an open and accountable public sector more than outweigh any negative effects from the disclosure of official documents. Further, it is now over 7 years since the enactment of the FOI Act. I do not consider that there is any evidence (at least none has been provided to me) of any deterioration in record-keeping standards in public sector agencies resulting from disclosures made under the FOI Act.

35. The agency's claims appear to be based on the "candour and frankness" argument, which has been consistently rejected as being without foundation, by the Commonwealth Administrative Appeals Tribunal; by the Information Commissioner in Queensland and by me, in a number of my previous decisions. Therefore, based on the material before me in this matter, I am not persuaded that the requirements of clause 8(2) have been established. It follows that I find that Document 12 is not exempt under clause 8(2) of Schedule 1 to the FOI Act.

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