BOYD AND MEDICAL BOARD

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: 94074 Decision Ref: D02194

Participants:

Mark David Boyd
Applicant

- and -

Medical Board of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - letters from medical practitioners to the agency in response to a 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 - prejudice future supply - impair frankness of future responses - personal information about the applicant - third parties consent to release.

Freedom of Information Act 1992 (WA) ss. 13(1)(b); 21; 30; 68(1); 72(1)(b); 75(1); Schedule 1 clauses 5(1)(a), 8(1), 8(2), 8(4).
Medical Act 1894 (WA) s.13; 13(1).
Medical Practitioners Act 1970 (Vic) s. 16.

Re Manly and Ministry of the Premier and Cabinet (16 September 1994, unreported).
Re Simonsen and Edith Cowan University (13 July 1994, unreported).
Re Gahan and City of Stirling (21 October 1994, unreported).
News Corporation Limited v National Companies and Securities Commission (1984) 57 ALR.
Ryder v Booth [1985] VR 869.
Ex parte St Vincent and Others v Medical Board of WA (1989) 2 WAR 279.
Re Knight and Medical Board of Victoria (1991) 5 VAR 171.
Re Barling and Medical Board of Victoria; The Ombudsman (Party Joined) (1992) 5 VAR 542.

DECISION

The decision of the agency of 22 June 1994 is set aside. In substitution it is decided that the documents are not exempt under clause 5(1)(a) or clause 8(2) of Schedule 1 to the FOI Act.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

October 1994

REASONS FOR DECISION

BACKGROUND

1. This is an application for review by the Information Commissioner arising out of a decision of the Medical Board of Western Australia ('the agency') to refuse Mr Boyd ('the applicant') access to two documents being letters from two medical practitioners in response to a complaint made by the applicant to the agency concerning the practitioners' treatment of him.

2. On 25 February 1994 the applicant asked the Assistant Registrar of the agency for copies of written responses from two medical practitioners to complaints he had made about them to the agency. This request did not purport to be made pursuant to the rights of access provided in the *Freedom of Information Act 1992* ('the FOI Act') and it appears that it was not treated as an access application, at least in the first instance. Subsequently, on 3 June 1994 the Assistant Registrar refused the applicant access to the documents claiming they were exempt from disclosure under clauses 5(1)(a), 8(1) and 8(2) of Schedule 1 to the FOI Act. This decision was made some 98 days after the applicant's initial request.

3. On 9 June 1994 the applicant requested an internal review of the decision to refuse access to the letters of the medical practitioners. The internal review was subsequently performed by the Registrar Mr K I Bradbury on 22 June 1994. He confirmed the original decision and refused access on the grounds that the documents were exempt from disclosure under clauses 5(1)(a), 8(1) and 8(2) of Schedule 1 to the FOI Act. On 28 June 1994 the applicant applied to the Information Commissioner for external review of the Registrar's decision of 22 June 1994.

REVIEW BY THE INFORMATION COMMISSIONER

4. In accordance with my statutory obligations under s.68(1) of the FOI Act I notified the agency on 4 July 1994 that I had formally accepted this complaint for review. Pursuant to s.75(1) and s.72(1)(b) I also sought production to me of the original documents in dispute together with the agency's FOI file. Neither the letter from Mr Bradbury to the applicant nor the letter from the Assistant Registrar, which purported to be the notices of decision required under s.13(1)(b) of the FOI Act, complied with the requirements of s.30 and, therefore, I sought additional reasons from the agency to justify its conclusion that the documents were exempt.

5. After some hesitation on the part of the agency in complying with my requirement, the disputed documents and additional information required were provided to me on 12 July 1994. I also received written advice from the two medical practitioners who were the authors of the disputed documents, to the effect that neither objected to the release of his letter to the applicant.
6. In view of this the agency was asked to reconsider its objection to the release of the documents to the applicant. The agency consequently abandoned the claim for exemption based on clause 8(1) of Schedule 1 to the FOI Act but maintained its claims under clauses 5(1)(a) and 8(2). I later met with representatives of the agency and the agency's solicitor on 11 August 1994 to hear oral submissions in support of the exemptions claimed.

THE EXEMPTIONS

(a) Clause 5 - Law enforcement, public safety and property security

7. The agency based one of its claims for exemption on clause 5(1)(a) of Schedule 1 to the FOI Act. That clause provides as follows:

   *"**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;"

8. I had occasion to consider the meaning of this sub-clause and others in my decision in *Re Manly and Ministry of Premier and Cabinet* (16 September 1994, unreported). In my view, the exemption in clause 5(1)(a) is directed at investigative methods and procedures which themselves must be lawful to attract the exemption. To establish that exemption it must be shown that disclosure of the documents could reasonably be expected to impair the effectiveness of investigative methods or procedures to the extent that it would, *prima facie*, be contrary to the public interest to do so. The exemption is concerned with the means employed by agencies to investigate, detect, prevent and deal with contraventions or possible contraventions of the law. Unless the matter in the documents is connected with investigative methods or procedures, or reveals what those methods or procedures might be, then the exemption, in my view, does not apply.

9. In the matter before me the disputed documents consist of letters from medical practitioners to the agency in response to a complaint received. They contain an explanation of the doctors' treatment of the applicant and their responses to his complaint. From my examination of both documents I am unable to conclude

that either of them has any connection with investigative methods or procedures. Disclosure of these documents would reveal the fact that the agency in this instance employed a procedure of seeking responses from two doctors to the complaint it received from the applicant. The agency informed me that this is its usual practice. This procedure is also described on page 6 of the 1992-93 Annual Report of the agency and the fact that such a procedure is employed by the agency is, therefore, in the public domain.

10. The agency did not argue exemption under clause 5(1)(a) with any degree of particularity or force. As far as I can determine from the material before me, the essence of the claim under this clause is based on the agency's belief that its ability under the *Medical Act 1894* to investigate complaints received from the public would be impaired by the disclosure of doctors' responses to those complaints because, if it were to become known that their responses to the agency may be disclosed to complainants, medical practitioners would either refuse to respond to complaints or would be less frank in their responses.

11. For the reasons given at paragraphs 26-36 below, I am not persuaded that disclosure of the two particular documents in dispute in this matter could be reasonably expected to cause medical practitioners to refuse to respond, or to be less frank in their responses to the agency in respect of complaints made about them. However, even if practitioners refused to respond or were less frank with their responses, I do not accept that any impairment to the investigative method of the agency would necessarily follow. The agency claims that its procedures accord with principles of natural justice. I accept that this is the case and, for this reason, I do not accept that the agency's procedures in this regard are likely to change. It follows that I do not accept that the agency's method of investigating complaints against medical practitioners will be impaired to any degree by the disclosure of these documents. Accordingly, I find that the documents are not exempt under clause 5(1)(a).

(b) Clause 8 - Confidential communications

12. Exemption was also claimed for the documents under clause 8(2) of Schedule 1 to the FOI Act. This clause 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."*

13. To satisfy the requirements of clause 8(2), the agency must not only establish that the information was of a confidential nature and obtained in confidence, but also that the disclosure of that information could reasonably be expected to prejudice the future supply of information of that kind to the government or an agency. If those elements are established, consideration must then be given to whether clause 8(4) operates to limit the exemption. That is, matter is not exempt matter under sub-clause (2) if its disclosure would, on balance, be in the public interest.

14. As I have stated in previous decisions (*Re Simonsen and Edith Cowan University* (13 July 1994, unreported) and *Re Gahan and City of Stirling* (21 October 1994, unreported)), the Concise Oxford Dictionary defines "prejudice" as meaning, *inter alia, "harm or injury that results or may result from some action or judgement"*. I also accept as correct for Western Australia the meaning given by all the judges in *News Corporation Limited v National Companies and Securities Commission* (1984) 57 ALR 550 when the phrase "could reasonably be expected to prejudice" arose for consideration by the Federal Court. Woodward J. said, at page 561:

> *"...I think that the words "would, or could reasonably be expected to...prejudice" mean more than "would or might prejudice". A reasonable expectation of an event requires more than a possibility, risk or chance of the event occurring...In my view it is reasonable to expect an event to occur if there is about an even chance of its happening and, without attempting to suggest words alternative to those chosen by the draughtsman, it is in that general sense that the phrase should be read."*

15. The decision of the Full Court of the Victorian Supreme Court in *Ryder v Booth* [1985] VR 869 is also relevant to the matter before me. In that case the court considered whether the Victorian equivalent of clause 8(2)(b) applied to medical reports provided in confidence to the State Superannuation Board. On the question of whether disclosure would be reasonably likely to impair the future supply of similar information, Young C.J. said, at p 872:

> *"The question then is, would disclosure of the information sought impair (i.e. damage) the ability of the Board to obtain similar information in the future. Put in terms of the present appeals this means that the question is, would the disclosure of the information damage the ability of the Board to obtain frank medical opinions in the future. It may be noted that it is the ability of the Board that must be impaired. The paragraph is not concerned with the question whether the particular doctor whose report is disclosed will give similar information in the future but with whether the agency will be able to obtain such information. There may well be feelings of resentment amongst those who have given information "in confidence" at having the confidence arbitrarily destroyed by the operation of the legislation, but it is another thing altogether to say that they or others will not provide such information in the future. It is not*

sufficient to show that some people may be inhibited from reporting so frankly if they know that their report may be disclosed. More is required to satisfy the onus cast upon the agency by s.55(2) of the Act."

16. I consider these comments to be relevant to my consideration of certain categories of exempt matter under the FOI Act. In the context of the complaint before me, the agency is required to establish that the disputed documents contain information of a confidential nature and were given and received in confidence, and also that disclosure of these documents could reasonably be expected to prejudice (harm or injure) its ability to obtain replies from medical practitioners in response to complaints received in the future.

The claims of the agency

17. In a written submission dated 12 July 1994 the agency provided the following reasons in support of its claims that the documents were exempt from disclosure:

"i) The Board is charged with the responsibility of administering the Medical Act 1894, as amended ("The Act').

ii) The Act is in existence for the protection of the public. This is achieved, in part, by providing the Board with the power to investigate complaints received from the public against registered medical practitioners.

iii) Whilst the Board is required to investigate complaints, it can only charge a medical practitioner with an alleged breach of the Act if the Board can form the opinion that there may have been a breach of the Act.

iv) In a decision by the Supreme Court of Western Australia handed down by Ipp J. in Dr P Cranley vs The Medical Board of Western Australia, it was held that the Board does not have the power to hold inquisitorial hearings or inquiries. Further, the Board must be specific in terms of the particulars of any alleged breach of the Act.

v) There is no legislative requirement for medical practitioners to respond to allegations made to the Board by members of the public. Consequently the Board relies totally on the goodwill of the profession in obtaining responses from medical practitioners.

vi) When medical practitioners do respond to enquires made by the Board in relation to complaints, it has always been understood by the Board and the practitioner concerned that the response has been received in confidence.

vii) *If complainants were to be given access to responses received from medical practitioners by the Board, because there is no legislative requirement for them to respond, it could be reasonably expected that the future supply of information/responses from medical practitioners will be prejudiced. This would mean that the Board would be unable to properly and effectively fulfil its function.*

viii) *It would not be in the public interest for the Board to be unable to fulfil its statutory function of protecting the public."*

18. These reasons were expanded on by the agency in its oral submissions on 11 August 1994. I was informed by Dr Brine, Chairman of the agency, that the agency administers the *Medical Act 1894* and acts as a registration board for medical practitioners to maintain medical standards and to take action against persons not qualified to practise medicine. Its members are not employed full-time, neither is the agency funded by government. The Annual Report of the agency for 1992-93 indicates that the agency met on three occasions during the financial year 1992-93 to consider complaints against medical practitioners. During that period the agency dealt with 84 complaints, of which 80 were determined by the agency not to be in breach of the *Medical Act 1894*; 3 resulted in formal inquiries; and 1 was deferred pending the return from overseas of the medical practitioner concerned. In addition, a number of informal complaints were resolved by telephone.

19. It was also submitted by the agency that there are deficiencies in the provisions of the *Medical Act 1894* which make it difficult for the agency to perform its functions when members of the public lodge complaints about medical practitioners. This is because the agency does not have power to investigate complaints received, although it does have power to conduct a disciplinary hearing and may, as a result of that inquiry, remove the name of a medical practitioner from the register, suspend the registration of a medical practitioner for a period not exceeding 12 months, impose a fine not exceeding $10,000 or reprimand a medical practitioner, or a combination of one or more of those penalties.

20. A disciplinary hearing under s.13 of the *Medical Act 1894* may only be conducted in certain circumstances. Section 13(1) of the *Medical Act 1894* provides:

"13 (1) Where it appears to the Board that a medical practitioner, not being a body corporate, may be-

(a) guilty of infamous or improper conduct in a professional respect;
(b) affected by a dependence on alcohol or addiction to any deleterious drug;
(c) guilty of gross carelessness or incompetency;
(d) guilty of not complying with or contravening a condition or restriction imposed by the Board with respect to the practice of medicine by that medical practitioner; or

> (e) *suffering from physical or mental illness to such an extent that his or her ability to practise as a medical practitioner is or is likely to be affected,*
>
> *the Board shall hold an inquiry into the matter."*

21. In *Ex parte St Vincent and Others v Medical Board of WA* (1989) 2 WAR 279, Ipp J., with whom Wallace and Brinsden JJ. agreed, held (at pp.287 and 288) that an "inquiry" in s.13 means solely a disciplinary inquiry and that a purely investigative inquiry was outside the powers of the Board. In other words, the agency must have reached the opinion that the medical practitioner concerned may be guilty of conduct as described in s.13(1) before it is entitled to hold an inquiry into the matter (see Brinsden J. at pp.280 and 281). However, the agency is entitled to carry out an investigation prior to holding a disciplinary inquiry under s.13 (per Ipp J. at p.288).

22. I was informed by the agency that an "investigation" commences when a complaint is received by the agency in the form of a statutory declaration from a member of the public. The Registrar sends a copy of the statutory declaration to the medical practitioner concerned, seeking a response to the allegations. A copy is sent, rather than a summary, so that there can be no misunderstanding about the substance of the allegation. On receipt of the practitioner's reply, a copy of the complaint and the reply is circulated to all members of the agency and they decide at a meeting whether the allegation warrants an inquiry under s.13.

23. I was also informed by the agency that, whilst doctors are sometimes tardy in their responses, there has been only one instance where a doctor refused to respond to the agency's request. Failure to respond to the agency may be considered "infamous or improper conduct" warranting disciplinary action under s.13. I was also informed by the agency that it is difficult to form a *prima facie* view on the basis of the complaint and the doctor's response only, and complainants are sometimes interviewed by the agency's solicitor in an effort to obtain corroboration of the complaint. At the end of this process, complainants are advised by the agency in writing of its decision.

24. Dr Brine, the Registrar and the solicitor for the agency all claimed that the quality of responses from medical practitioners would suffer if the documents in dispute in this matter were to be disclosed. The agency's solicitor said there was anecdotal evidence from a recent psychiatric conference which she attended, where there was a barrage of questions to her from doctors as to the likelihood of their letters to the agency being released under FOI. It was also submitted that, whilst medical practitioners are aware of the deficiencies in the powers of the agency, as a group they have a professional approach to the agency and usually provide full and frank answers to inquiries. However, the agency was firmly of the view that its ability to administer the *Medical Act 1894* and to protect the public would be placed in jeopardy by the release of these documents, with the result that no responses would be provided or, alternatively, the quality of the information provided would be significantly reduced. The agency also claimed that the frankness of replies under the existing system was due to the fact that the

agency required them for a possible disciplinary hearing only and the doctors knew that they would not be used for civil litigation.

FINDINGS (CLAUSE 8(2))

Are the responses confidential communications?

25. The agency asserts that it is well known within the medical profession that responses to the agency in answer to a complaint are given and received in confidence. On each occasion that a complaint is sent to a medical practitioner for a response the agency's correspondence is marked "Private and Confidential" and was on this occasion also. Although neither of the disputed documents bears any indication on its face that it was given to the agency in confidence, one of the doctors concerned subsequently advised me that he considered his response to be "a private communication" between himself and the agency. The disputed documents contain personal information about the applicant including details of the treatment provided to him. I accept that this information is of a confidential nature relating to the doctor/patient relationship. I also accept that it may be implied from the circumstances that the information was both given and received in confidence. On the basis of the material before me, therefore, I am satisfied that part (a) of clause 8(2) has been established.

Is it reasonable to expect the agency's ability to obtain that kind of information in the future will be prejudiced by disclosure of these documents?

26. The "prejudice" that the agency said could reasonably be expected to follow from disclosure of the documents would be either a reduction in the quality of the responses, because the doctors will be less frank, or a cessation of the supply altogether because there is no legislative requirement that doctors respond when invited to do so. The evidence to support this assertion consists of the beliefs of the Chairman and other members of the agency, anecdotal evidence of recent concerns expressed by some doctors, the deficiencies in existing legislation which are claimed to be well-known by doctors and the tardiness of some doctors in replying to the agency in the past.

27. In my view, the oral submissions of the representatives of the agency contradicted some of these arguments. I was told at the meeting on 11 August 1994, for example, that the agency considers a failure to respond to its request to be "infamous or improper conduct" that may warrant disciplinary action under s.13 of the *Medical Act 1894*. I was also told that disciplinary action on this basis has been taken on at least one occasion. The agency also claimed that doctors generally deal with the agency as professionals and usually supply full and frank answers to inquiries.

28. The availability of various documents of this nature under FOI has also been considered by the Administrative Appeals Tribunal in Victoria on at least two occasions, with differing results. In *Re Knight and Medical Board of Victoria*

(1991) 5 VAR 171, the Tribunal considered, *inter alia,* whether a report from a doctor, who was under investigation by the Medical Board, was exempt under the Victorian equivalent of clause 8(2). The report of the doctor contained a brief summary of stapedectomies performed by him since 1978.

29. In *Re Knight* the Medical Board was conducting an inquiry under s.16 of the *Medical Practitioners Act 1970* (Victoria) which was an informal inquiry in which it was empowered to censure or reprimand. Like the agency in Western Australia, the Medical Board in Victoria had no power to compel the provision of the report from the doctor concerned. The Tribunal found, at p.179, on the evidence of a member of the Board, that disclosure would be reasonably likely to impair the ability of that Board to obtain similar information in the future if it were to be known that information provided by a medical practitioner under inquiry pursuant to s.16 would be liable to be disclosed to the wider public. However, in that case, the doctor under inquiry died before the completion of the inquiry and the FOI application was made after his death. He had not, therefore, unlike the authors of the documents the subject of the complaint before me, consented to the disclosure of his report.

30. In *Re Barling and Medical Board of Victoria; The Ombudsman (Party Joined)* (1992) 5 VAR 542, the availability of medical reports including, *inter alia*, a report from the doctor who had treated the applicant's mother, also arose for consideration. In that instance, the contents of the treating doctor's report had already been read to the applicant. In that case the Tribunal found that there was no sensitive environmental matter personal to the mother, known to the doctors but not to the applicant, that could prevent access being granted. The Tribunal, in explanation of its conclusion that the granting of access would not be likely to have an inhibitive effect in the future on the willingness of medical practitioners to co-operate with the Medical Board, said, at p 564:

> *"It should not be understood as an indication that the Tribunal is likely to take the view in all cases in the future, that the Medical Board should disclose to complainants the full contents of all reports which the Board receives in the course of investigating a complaint. Consistent with the views we have expressed in this case it would, we think, be necessary for the Board carefully to consider the contents of each particular document in order to determine whether there is any matter in them which is of such a sensitive nature that it could fairly be said that it is unlikely to be provided in the future if it were to be disclosed. We further emphasise that each case is to be judged on its own facts and circumstances. No two cases are identical. In Knight's case (above) the Tribunal declined to grant access to the applicant where the Tribunal concluded on the facts in that case that the respondent's claim for exemption under the section (as well as other sections in the case of some documents) had been made out. This was largely on the basis of the evidence given by Mr McVey in that case. Freedom of Information legislation has now been in operation in this State for nearly 10 years. Forming a view concerning such questions as the likelihood of impairment of the ability to obtain similar information in the future, necessarily involves, to some extent, an exercise in "crystal-*

> *ball gazing". It may be that fears expressed by witnesses (and even the Tribunal on occasions) concerning the likelihood of dire consequences in the event that a particular piece of information is disclosed, derive from a culture which was well entrenched in our community in the days before freedom of information legislation. It is conceivable that that culture is now undergoing a change as the community, particularly those in Government agencies, become more comfortable with the greater degree of "openness" which the Act is designed to achieve."*

31. I have found these comments and the decisions cited to be of assistance in my deliberations on this matter. However, I am also conscious of the legislative limitations in this State by which the agency feels constrained when dealing with complaints received. Nevertheless, on the evidence before me, I do not consider the expectation of prejudice to the agency's ability to obtain responses from medical practitioners, which the agency says will occur as a result of disclosure of these particular documents, is, in all the circumstances, reasonable.

32. In response to my invitation to provide me with its reasons for claiming that disclosure of the two doctors' responses in this matter could be reasonably expected to prejudice the future supply to it of information of that kind, the agency submitted, *inter alia,* the following:

> *"...it is erroneous to focus on the precise terms of these documents, or indeed the fact that in these cases the medical practitioners have no objections to the documents being provided to the applicant. The issue is whether the disclosure may have the stated effect, that is, prejudice the flow of information from other practitioners to the Board."*

33. The issue is indeed whether disclosure may have the stated effect. However, more particularly, the issue is whether disclosure of these particular documents may have that effect and whether that effect can reasonably be expected. In my view, the provisions of the FOI Act preclude "blanket claims" of exemption for all documents of a particular type. In order to properly deal with an access application under, and in accordance with, the provisions of the FOI Act, it is necessary that each of the requested documents be examined and a decision made in relation to each document or part of a document. In this instance, I consider that the agency did not have sufficient regard to the contents of these particular documents nor to the fact that neither author objected to the release of his response.

34. Each of the documents in dispute in this matter appears to me to contain a factual account of the treatment administered to the applicant and of the professional judgements exercised by the doctors concerned in this regard. That information is clearly "personal information" about the applicant and this fact is, by virtue of s.21 of the FOI Act, a factor in favour of disclosure for the purpose of making a decision as to the effect that the disclosure of the matter might have. They do not appear to me to contain any material of a particularly sensitive nature about which the applicant should not be informed.

35. On the evidence before me in this complaint, I am not satisfied of the reasonableness of the claim that the professional relationship between medical practitioners and the agency, which the agency claims is the basis for its present ability to obtain responses to complaints, will suffer harm from disclosure of the documents in dispute in this instance. I am not persuaded that if it were to become known that practitioners' responses provided to the agency in reply to complaints made are liable to be disclosed to a complainant pursuing his or her rights of access under the FOI Act, in circumstances in which the responses contain an account of the treatment administered to that complainant and the authors do not object to that disclosure, that it could reasonably be expected that other practitioners would refuse to respond or would be less candid in their responses to the agency in the future.

36. Further, I reject the argument that full and frank answers are only supplied because the agency engages in disciplinary inquiries and the doctors are not thereby placed in jeopardy of civil action in the courts. That claim is not supported by any material before me.

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