PAU AND MEDICAL BOARD

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: 94093** **Decision Ref: D02194**

Participants:

Janet Pau
Applicant

- and -

Medical Board of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - letter from medical practitioner to the agency in response to 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 - clause 3 - personal information - public interest in complainant being informed of reasons for agency's decision - embarrassment and potential litigation.

Freedom of Information Act 1992 (WA) s. 13(1)(b); 21; 30; 68(1); 72(1)(b); 75(1); Schedule 1 clauses 3(1), 3(5), 5(1)(a), 8(2), 8(4)
Medical Act 1894 (WA) s 13(1), 13(1)

Re Boyd and Medical Board of Western Australia (31 October 1994, unreported).
Ex parte Vincent; Medical Board of WA (1989) 2 WAR 279.
Re Barling and Medical Board of Victoria; the Ombudsman (Party Joined) (1992) 5 VAR 542

DECISION

The decision of the Medical Board of Western Australia of 27 June 1994 is set aside. In substitution it is decided that the requested document is not exempt under clause 5(1)(a) or clause 8(2) of Schedule 1 to the FOI Act.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

7th December 1994

REASONS FOR DECISION

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 Mrs Janet Pau ('the applicant') access to a document the subject of an access application made by the applicant under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. On 14 February 1994 the applicant provided the agency with a Statutory Declaration containing a complaint against a medical practitioner ('the practitioner'). On 16 February 1994, in accordance with what it claims, and I accept, to be its usual procedures, the agency provided a copy of the complaint to the practitioner in order to give him the opportunity to comment upon the allegations contained therein. The agency requested his response by 1 March 1994. After receiving the practitioner's response on 15 March 1994 the agency advised the applicant that it had determined that the applicant's allegations would not justify disciplinary action against the practitioner, and no further action would be taken in respect of her complaint.

3. On 17 March 1994, the applicant applied to the agency for a copy of the practitioner's letter containing his response to her complaint. On 30 March 1994 the agency responded to the applicant's letter of 17 March 1994. The agency advised her that it was unclear on its position in relation to the release of documents under the FOI Act and that it had sought legal advice and would respond when it was in a position to do so.

4. On 19 May 1994, 18 days after the expiry of the statutory period of 45 days within which an agency is obliged to deal with an access application under the FOI Act, the Registrar of the agency, Mr K I Bradbury ('the initial decision-maker'), issued a notice to the applicant informing her that he had decided to refuse her access to the requested document. Mr Bradbury claimed that the document was exempt from disclosure under clauses 3(1), 5(1)(a) and 8(2) of Schedule 1 to the FOI Act.

5. On 10 June 1994 the applicant applied to the agency to have the decision of the Registrar reviewed internally. Subsequently, on 27 June 1994 the applicant was advised by Dr P Brine, the Chairman of the agency, that he had reviewed the Registrar's decision of 19 May 1994 and that he had withdrawn the claim of exemption based on clause 3(1) of Schedule 1 to the FOI Act, but that the decision of the Registrar to refuse access was otherwise confirmed. On 4 August 1994 the applicant applied to the Information Commissioner for external review of the agency's decision of 27 June 1994.

REVIEW BY THE INFORMATION COMMISSIONER

6. In accordance with my statutory obligations under s.68(1) of the FOI Act, on 11 August 1994 I notified the agency that I had formally accepted this complaint and, in accordance with my authority under s.75(1) and s.72(1)(b) of the FOI Act, I required the agency to produce for my inspection the original of the requested document together with the agency's file maintained in respect of this access application. I also required the agency to provide further explanation for its claims that the document was exempt under clauses 5(1)(a) and 8(2), because neither the letter from the Registrar, Mr Bradbury, nor the letter from the Chairman, Dr Brine, 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 of that Act.

7. On 16 August 1994, this additional information was provided to me by the agency and I subsequently provided a copy to the applicant and invited her to respond by way of comment. She declined to do so. I also obtained additional documents from the agency, including a copy of the agency's covering letter to the practitioner concerned and the agency's letter of advice to the applicant at the conclusion of its inquiry into her complaint against the practitioner. I also sought and obtained the views of the practitioner about the release to the applicant of his response to her complaint. Although the practitioner was initially ambivalent about releasing his response to the applicant, he subsequently indicated that, if it were disclosed, he would be hesitant and reluctant to provide information in the future, truthfully and openly, to avoid possible embarrassment and litigation.

8. On 13 October 1994 I advised the agency that it was my preliminary view, based on the material before me, that the document was not exempt under clause 5(1)(a) nor under clause 8(2) and that access to a copy of the requested document should be granted to the applicant. The agency was invited to reconsider its claims for exemption in light of my preliminary view, or to provide further submissions and evidence to support the agency's claim that the document was exempt from disclosure in the event that it wished, nonetheless to maintain its claims for exemption.

9. On 25 October 1994, I received a response from the agency, dated 20 October 1994, in the following terms:

> *"The Board maintains its claim for exemption on the grounds specified in the Board's earlier correspondence.*
>
> *As the Board has previously submitted to you, it is erroneous to focus on whether the particular medical practitioner in question has an objection to the documents being provided. The relevant issue is the effect that access to the documents under the Freedom of Information Act will have on the flow of information from other practitioners to the Board.*
>
> *The Board's view that the documents are exempt is based on the collective experience of longstanding Board Members who have the day to day*

responsibility of investigating and dealing with breaches or possible breaches of the Medical Act 1894.

The Board awaits your decision pursuant to Section 76 of the Freedom of Information Act."

THE EXEMPTIONS

10. I have recently considered a similar complaint involving this agency. In that matter the documents sought by the access applicant were of the same kind as the requested documents in this matter. My decision in that earlier matter, *Re Boyd and Medical Board of Western Australia* (31 October 1994, unreported), was handed down after the review process in this matter had been concluded. The agency's claims, and my understanding, in respect of the agency's functions and procedures are set out in paragraphs 17-23 of that decision. The exemption claims of the agency and the material provided to me by the agency in that case to justify the exemptions claimed, are substantially the same as those before me in this instance.

(a) Clause 5(1)(a)

11. The agency based one of its claims for exemption on clause 5(1)(a) of Schedule 1 to the FOI Act, which 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;"*

12. As I have said in previous decisions, and most recently in *Re Boyd* (at p.3.): *"...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."*

13. In this matter the document requested by the applicant is a response from a medical practitioner to a complaint made against him by the applicant. From my

examination of the document, I am unable to conclude that it has any connection with investigative methods or procedures. Disclosure of this document would reveal the fact that the agency employed a procedure of seeking a response from the practitioner the subject of the complaint. As that procedure has already been revealed to this applicant and it is described in the agency's Annual Report for 1992/93, I am not persuaded that disclosure of the fact that such a procedure is used could be expected to impair to any degree any method of the agency for investigating complaints.

14. The essence of the agency's argument in support of this claim appears to be, as it was in *Re Boyd*, that disclosure could reasonably be expected to have the effect of discouraging medical practitioners from responding to complaints about them put to them by the Medical Board and that, as the Medical Board has no power to compel practitioners to respond, its investigative method will be impaired.

15. The agency has not put before me any material in relation to its claims in respect of this exemption that the agency has not already put before me in *Re Boyd*. For similar reasons to those given in that case (see paragraphs 8-11 of *Re Boyd)*, I do not accept the agency's claim that disclosure of this document could reasonably be expected to impair its method of investigating complaints against medical practitioners. Accordingly, I find that this document is not exempt under clause 5(1)(a).

(b) Clause 8(2)

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

17. As I have stated in previous decisions, and most recently and relevantly in *Re Boyd* (see in particular paragraphs 13-16 of that decision), to establish an exemption under clause 8(2) it must be shown by the agency that the document contains matter that is confidential in nature, was given in confidence to the agency and was received in confidence by the agency. It must also be shown

that disclosure of the document could reasonably be expected to prejudice the future supply to the agency of information of that kind. That is, there must be a reasonable expectation that disclosure would have the effect of impairing the agency's ability to obtain replies from medical practitioners in response to complaints received in the future. Finally, the agency must give some consideration to whether clause 8(4) operates to limit the exemptions, that is, whether disclosure would, on balance, be in the public interest, in which case the disputed matter is not exempt.

Does the requested document contain confidential information obtained in confidence?

18. Although the agency informed me that the document was a confidential communication, on the face of it the document gives no indication that this is so. The contents of the document provide an account of the treatment given to the applicant's daughter by the practitioner and recounts the practitioner's discussions with the applicant, who was present during the consultation. Whilst the practitioner provides an opinion about aspects of the applicant's behaviour on that visit, the contents of the document do not suggest to me that it is a confidential communication. Nevertheless, as indicated at paragraph 7 above, I sought the views of the practitioner as to whether he had any objections to the applicant having access to the document. I received written advice from the practitioner that he considered the letter to be a confidential communication between himself and the agency. On the basis of this advice, and the submission of the agency that its usual practice is to receive such responses in confidence, I accept that the document is of a type described in clause 8(2)(a) of Schedule 1 to the FOI Act.

Could it reasonably be expected that disclosure would prejudice the ability of the agency to obtain that kind of information in the future?

19. The agency sought to persuade me that its ability to investigate complaints under the *Medical Act 1894* would be prejudiced by the disclosure of this document. This was claimed to be because in future doctors would be less frank in their responses to the agency or, alternatively, that they would not provide responses to the agency as they have done up until now.

20. The agency's submission in support of this exemption was substantially the same as that provided to me in *Re Boyd* (see paragraph 17 of that decision). On this occasion the agency said:

> *"(a) The Board in the exercise of its duty to investigate possible breaches of Section 13(1) of the Medical Act wrote to Dr... seeking his comments on the complaint made to the Board by Mrs Pau;*
>
> *(b) Dr...'s letter the subject of the access application was in response to the Board's request referred to in (a);*

(c) The information contained in Dr...'s letter details events that took place during a doctor/patient consultation which, of its nature, was confidential and the letter was obtained by the Board in confidence;

(d) The Board has the responsibility of administering the Medical Act;

(e) The Medical Act is in existence for the protection of the public. This is achieved, in part, by the Board having the statutory obligation to discipline practitioners who have breached Section 13(1) of the Act;

(f) The Board has no compulsory investigative powers (see Ex parte Vincent; Medical Board of WA (1829) [sic] *2 WAR 279) and relies in large measure upon the professionalism and co-operativeness of registered medical practitioners;*

(g) The medical profession is very conscious of the Freedom of Information Act and the Board's legal practitioner has been quizzed by medical practitioners as to its application to doctor's responses to the Board in relation to complaints;

(h) If doctors' responses to complaints are accessible under the Freedom of Information Act, then the result is very likely to be that no responses will be provided by doctors or, alternatively, the quality of the information they provide will be significantly reduced.

(i) By reason of the matters referred to in paragraphs (d) to (h) above, the Board found that disclosure of the letter could reasonably be expected to:

(i) prejudice the future supply of information by doctors to the Board in response to complaints;

(ii) impair the effectiveness of the Board's procedure for detecting and investigating any contravention or possible contravention of the Medical Act."

21. Further, the agency identified the public interest factors for and against release of the document and said that the public interest factors in favour of disclosure are :

"(a) Mrs Pau complained to the Medical Board about the conduct of a medical practitioner;

(b) The documents contains, inter alia, personal information about Mrs Pau.

The public interest factors against disclosure are set out in paragraphs (d) to (i) above."

22. The agency then said:

> *"This is a case where the public interest in Mrs Pau having access has to be weighed against the clear and undisputed public interest in the Board obtaining information to perform its statutory duty to investigate and take action against medical practitioners who may be in breach of Section 13 of the Act. In the Board's view, the public interest in the Board properly and effectively carrying out its disciplinary functions under the Act far outweighs the public interest in Mrs Pau obtaining access to the requested documents."*

23. The agency's claim at (h) in paragraph 20 above is, in essence, the same argument that was presented to me by the agency in *Re Boyd.* The only material difference between *Re Boyd* and this matter is that the two practitioners concerned in *Re Boyd* did not object to the release to Mr Boyd of their responses to the agency. In this matter the practitioner said:

> *"... in the event the Medical Board allows access to the applicant to the information I provided in confidence I must admit I would be hesitant and reluctant to provide information in future truthfully and openly to avoid any possible embarrassment and litigation."*

24. The practitioner has not stated that he would not provide information to the agency in the future, only that he would be hesitant and reluctant to do so. In any event, the views of one medical practitioner about how he would respond in the future, without more, are insufficient to persuade me that it could reasonably be expected that the future supply to the agency of information of that kind would be prejudiced and that the agency's claims in this regard are justified. Further, the avoidance of embarrassment and litigation are not exemptions from disclosure under the FOI Act.

25. I repeat and endorse the comments of the Victorian Administrative Appeals Tribunal in *Re Barling and Medical Board of Victoria; The Ombudsman (Part Joined)* 1992 5 VAR 542 cited by me in *Re Boyd* at paragraph 30, and in particular the following observations of that Tribunal:

> *"...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."*

26. Having inspected and considered the contents of the document in dispute, I am of the view that there is nothing contained in that document which is of such a sensitive nature that it would be unlikely to be provided in the future if disclosed on this occasion.

27. On the material before me, in my opinion, the agency has not established part (b) of clause 8(2), that disclosure of the document could reasonably be expected to

prejudice the future supply to the agency of information of that kind. Accordingly, I find that the document is not exempt under clause 8(2).

THE PUBLIC INTEREST

28. Even if it were the case that part (b) of clause 8(2) had been established in this instance, I would, in any event, find that disclosure of this document would be, on balance, in the public interest. In my view, there is a public interest in a complainant to the Medical Board being informed of the reasons why the agency has reached a particular decision upon his or her complaint. It is my opinion that the minimum requirement to satisfy this public interest is the provision of a summary, to the extent possible, of a medical practitioners response to the Medical Board, including an explanation of how the Medical Board resolved conflicts, if any, between the evidence of the parties.

29. In this instance, the applicant was informed by the agency that it had discussed her allegations at length and had decided that her allegations would not justify disciplinary action against the practitioner. The applicant was not given any reasons for the agency's decision, nor was she informed of the basis on which the agency had reached the conclusion that disciplinary action was not justified. In my view, there is a public interest in this applicant, and in other complainants before the Medical Board, being informed of the reasons for the agency's decision in respect of their complaints. This public interest, together with the public interest in a person having access to personal information about him or her which is formally recognised in s.21 of the FOI Act, in my view, outweigh any public interest against disclosure of this document on this occasion.

PERSONAL INFORMATION

30. Although the agency had withdrawn its claim for exemption under clause 3(1) of Schedule 1 to the FOI Act, my examination of the document revealed that it contains a considerable amount of personal information about the applicant's daughter. Accordingly, I sought the daughter's views about disclosure of the document. On December 1994, I received written advice from the daughter that she consents to disclosure to the applicant of the personal information about her. Pursuant to clause 3(5), therefore, I find that the personal information about the daughter which is contained in the document is not exempt under clause 3(1).

31. The docunent also contains a minimal amount of matter that may be described as personal information about the practitioner. Having considered the nature of that matter, for the reasons given in paragraphs 28 and 29 above, I consider that disclosure would, on balance, be in the public interest and I find that that matter is not exempt.

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