REHMAN AND MEDICAL BOARD

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: 94154** **Decision Ref: DO2495**

Participants:

Mujeeb Rehman
Complainant

- and -

Medical Board of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - minutes of meetings of agency - clause 6 - deliberative processes - advice and opinion obtained and recorded for the purpose of the deliberative processes of the agency - whether contrary to the public interest to reveal deliberations of the agency.

FREEDOM OF INFORMATION - clause 7 - legal professional privilege - documents recording substance of legal advice given by the agency's legal adviser - instructions to legal adviser - confidential communications between the agency and its legal advisers made for the "sole purpose" of obtaining legal advice.

FREEDOM OF INFORMATION - clause 3 of Schedule 2 - whether a court is an agency - clause 5 of Schedule 2 - whether document is a "document of the court".

Freedom of Information Act 1992 (WA) ss.10(1); 11(3); 12; 13(1)(b); 13(2); 21; 30; 65(1)(c); 65(1)(d); 66(6); 68(1); 72(1)(b); 75(1); 102(1); Schedule 1 clauses 6 and 7; Glossary in Schedule 2
Freedom of Information Regulations 1993 (WA)
Freedom of Information Act 1982 (C'wlth) s.36(1)(a).
Medical Act 1894 ss.9(3); 13(1); 13(1)(c).

Re Boyd and Medical Board of Western Australia (Information Commissioner, WA, 5 November 1994, unreported).
Ex parte St Vincent and Others v Medical Board of WA (1989) 2 WAR 279.
Loughnan (Principal Registrar, Family Court of Australia) v Altman (1992) 11 ALR 445.
Eccleston and Department of Family Services and Aboriginal and Islander Affairs (Information Commissioner, QLD, 30 June 1993, unreported).
Re Waterford and Department of the Treasury (No. 2)(1984) 5 ALD 588

Re Read and Public Service Commission (Information Commissioner, WA, 16 February 1994, unreported).
Re Kobelke and Minister for Planning and Others (Information Commissioner, WA, 27 April 1994, unreported).
Re Veale and Town of Bassendean (Information Commissioner, WA, 25 March 1994, unreported).
Re Taylor and Ministry of the Premier and Cabinet (Information Commissioner, WA, 23 December 1994, unreported).
Re Jones and Shire of Swan (Information Commissioner, WA, 9 May 1994, unreported).
Re Jeanes and Kalgoorlie Regional Hospital and Others (Information Commissioner, WA, 7 February 1995, unreported).
Re Johnson and State Government Insurance Commission (Information Commissioner, WA, 29 May 1995, unreported)
Re Guyt and Health Department of Western Australia (Information Commissioner, WA, 16 March 1994, unreported).
Re Weeks and the Shire of Swan (Information Commissioner, WA, 24 February 1995, unreported).
Re Nazaroff and Department of Conservation and Land Management (Information Commissioner, WA, 24 March 1995, unreported).
Grant v Downs (1976) 135 CLR 674.
Baker v Campbell (1983) 153 CLR 52.
Great Atlantic Insurance Co v Home Insurance Co and others [1981] 2 All ER 485.
Mobil Oil Australia Limited v Curtis and Others (Supreme Court of WA, 9 October 1987, unreported.).
Waterford v The Commonwealth (1987) 163 CLR 54.

DECISION

The decision of the agency is set aside. In substitution it is decided that, except for the matter described in these reasons which is exempt matter under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*, the requested documents are not exempt.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

1st August 1995

REASONS FOR DECISION

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 Dr Rehman ('the complainant') access to various minutes of meetings of the agency requested by the complainant under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. In July 1993, a complaint was made to the agency against the complainant by another medical practitioner. After considering the substance of that complaint, the agency resolved that the complainant may have been guilty of a breach of s.13(1)(c) of the *Medical Act 1894* and determined to hold a formal inquiry to consider the matter.

3. On 6 August 1993, Mr K I Bradbury, the Registrar of the agency, caused a "Notice of Inquiry" to be served on the complainant. The notice informed the complainant of the matters of complaint alleged against him and further informed him that the agency would hold an inquiry into those matters of complaint, on a date to be fixed and notified to the complainant.

4. On 6 January 1994, the complainant, through his solicitors, applied to the agency under the provisions of the FOI Act for access to, and copies of, documents in the possession of the agency relating to, *inter alia*, the agency's decision to hold the inquiry. On 3 March 1994, solicitors for the agency informed the complainant that the Registrar of the agency had made the decision on access. The solicitors informed the complainant that the Registrar had decided to grant the complainant access in full to a number of documents but had also decided to refuse him access to other documents, on the basis that those documents were exempt under one or more of clauses 3, 6, 7 and 8 of Schedule 1 to the FOI Act.

5. On 16 March 1994, the complainant's solicitors applied on his behalf to the agency for internal review of the decision of the Registrar. On 13 June 1994, the agency's solicitors informed the complainant that the Chairman of the agency had made the decision on internal review. The Chairman of the agency decided to release additional documents to the complainant, but confirmed the agency's claims that other documents, to which access had previously been refused, were exempt under clauses 3, 6, 7 and 8 of Schedule 1 to the FOI Act. Thereafter, the complainant did not pursue his request for access to those remaining documents.

6. However, some 6 months later, on 16 November 1994, the complainant's solicitors lodged a second access application with the agency on behalf of the complainant. In that application, the complainant's solicitors referred to my decision in *Re Boyd and Medical Board of Western Australia* (5 November 1994, unreported) and requested access to some, but not all, of the documents to which

access had previously been refused by the agency. Specifically, the complainant sought access to:

(i) minutes of meetings of the agency at which the question of a disciplinary enquiry against him was discussed;
(ii) minutes of meetings of the agency at which the question of his registration under the *Medical Act 1894* was discussed; and
(iii) minutes of meetings of the agency at which the question of his application for alteration in his registration status was discussed.

7. On 2 December 1994, the agency's solicitors responded in the following terms to the complainant's access application of 16 November 1994 to the agency and, in particular, to his request for access to the above-mentioned documents:

> *"[w]e refer to your request under the Freedom of Information Act for the documents specified in your letter. Those documents have been the subject of an earlier request which was refused. The Board's refusal was not the subject of an appeal to the Information Commissioner. We see no basis upon which it was proper to make a fresh application for the same documents".*
>
> *"In any event, your summary of the Information Commissioner's ruling in the Boyd case is inaccurate. There was no ruling that Medical Board documents generally are available under the Freedom of Information Act. There is nothing in the Commissioner's reasons for decision in that case that warrant a reconsideration by the Board of its original decision in relation to your client's request.".*

8. On 30 December 1994, the complainant applied to my office for external review of the decision conveyed to him by the agency's solicitors to refuse to deal with his second access application.

REVIEW BY THE INFORMATION COMMISSIONER

9. On 13 January 1995, in accordance with my statutory obligations under s.68(1) of the FOI Act, I notified the agency that I had formally accepted this complaint for review. I also required, pursuant to ss.75(1) and 72(1)(b) of the FOI Act, the production to me of the documents in dispute, together with the agency's file maintained in respect of this matter. On 19 January 1995, the Chairman of the agency, Dr Blake, provided me with certified extracts of some of those parts of the agency's minutes of its meetings to which access had been sought by the complainant and the agency's FOI file in respect of the access application.

10. However, in his letter of 19 January, the Chairman also raised a query as to my jurisdiction to accept and deal with this complaint. That matter is discussed at paragraphs 16-27 below. On 25 January 1995, I informed the agency in writing

that it was my view that I had jurisdiction to accept, and deal with, this complaint and the agency was informed of my reasons for that view.

11. In addition, because the agency had produced to me only certified extracts of some parts of the relevant documents, the Registrar was also served with a further notice, pursuant to my authority under s.75(1) of the FOI Act, requiring him to produce to me for my inspection the originals of the documents specified in that notice.

12. On 27 January 1995, the Registrar notified me that he objected to the production of the documents specified in that notice of requirement to produce documents, on the grounds that:

> *"(a) the power granted by section 75 of the Freedom of Information Act ('the Act') can only be exercised to assist you in the proper exercise of your powers and function pursuant to Part 4 Division 3 of the FOI Act;*
>
> *(b) Dr Rehman's access application dated 16 November 1994, the subject of this complaint, is properly characterised as a request for further consideration by the Board of an earlier decision to refuse access. Such an application does not fall within the terms of the Freedom of Information Act and is beyond the jurisdiction of the Information Commissioner to review;*
>
> *(c) the documents the subject of the Notice are beyond the terms of the request for documents made by Dr Rehman in November 1994.".*

13. The Registrar requested that, if I ruled against those objections and insisted upon the production of the documents, the agency, without waiving its objections to the production of the documents, be given the opportunity to make further submissions. In particular, the agency would seek to submit that the documents were exempt under clause 7 and clause 6(1) of Schedule 1 to the FOI Act and, further, that the documents were not documents of the agency to which the complainant was entitled to access under the FOI Act by reason of clause 5 of Schedule 2 in the Glossary to the FOI Act.

14. After I had received the Registrar's letter of objection on 27 January 1995, the Registrar requested a meeting with me in order that those submissions might be put to me by Counsel for the agency. Accordingly, a meeting was held at my office on 27 January 1995.

15. Counsel for the agency made further oral submissions to me on behalf of the agency, concerning the agency's grounds of objection in respect of my jurisdiction to review this complaint and to the production of the documents referred to in my notice dated 27 January 1995. I considered the agency's grounds of objection and counsel's submissions, but ruled that the documents were to be produced to me. My reasons for that decision are set out at paragraphs 16-27 below. The Registrar produced to me the originals of each of the documents concerned, together with extracts taken from those documents, for the purpose of dealing with this complaint.

Preliminary Issue - Jurisdiction of the Information Commissioner

16. Section 12 of the FOI Act prescribes how an access application may be made under that Act. A valid access application must be in writing, give enough information to enable the requested documents to be identified and give an address in Australia to which notices under the FOI Act could be sent and be lodged at an office of the agency, together with any application fee payable under the *Freedom of Information Regulations 1993.*

17. The complainant's access application of 16 November 1994 complied with the requirements of s.12 of the FOI Act. However, an application fee was not lodged with the application. From my examination of the material provided to me by the complainant, and taking into account the terms of the access application, in my view, it is evident that the documents to which the complainant seeks access are documents containing "personal information" about the complainant. Where an access application is made for documents containing personal information about the access applicant, an application fee is not required to be paid. Accordingly, in my view, the complainant's access application of 16 November 1994 was, *prima facie*, a valid access application under the FOI Act.

18. Further, if the agency considered that the complainant's access application did not comply with the requirements of s.12 of the FOI Act, the agency ought to have complied with its obligations under s.11(3) of the FOI Act to take reasonable steps to help the complainant change his application so that it complied with the requirements of s.12 of the FOI Act. The agency failed to do so.

19. The agency claims that the complainant's access application of 16 November 1994 was properly characterised as a request for a reconsideration by the agency of its original decision to refuse the complainant access to the documents requested and, because an internal review had been conducted, there was no statutory obligation upon the agency, pursuant to the FOI Act, to reconsider that decision. However, in a subsequent letter to the complainant's solicitors, it was also stated that there was no basis on which it was proper to make a "*fresh"* application for the same documents.

20. In my view, it is clear from the plain language of the complainant's access application that it was not a request that the agency reconsider its original decision but, rather, it was a fresh access application from the complainant.

21. At the meeting on 27 January 1995, Counsel for the agency further submitted to me that there was no basis upon which a person may make a fresh application for documents the subject of a previous access application. However, Counsel was unable to direct me to any provisions of the FOI Act which, in the agency's submission, either expressly or impliedly prohibit a person from making a fresh access application to an agency for documents which have been the subject of a previous access application and to which access has previously been refused.

22. I can find nothing in the FOI Act that prohibits an unsuccessful access applicant from making another access application to an agency for the same documents which were the subject of a previous access application to that agency, and to which access has previously been refused, particularly in circumstances in which a complainant may have reason to believe that the law or the policy or the agency's position in respect of certain types of document may have changed. Further, I have examined the FOI legislation of other jurisdictions, including the Commonwealth, Queensland, Victoria and New South Wales, and none contains provisions which prohibit an unsuccessful access applicant from making a second access application for the same documents.

23. In addition, in respect of the complainant's first access application, I consider the letter to the complainant from the Registrar of the agency, dated 3 March 1994, which purported to be a notice of decision under s.13(1)(b) in respect of that access application, did not comply with the requirements of s.30 of the FOI Act. Similarly, the decision on internal review made by the Chairman of the agency and communicated to the complainant on 13 June 1994, was also deficient in this regard.

24. It is apparent from an examination of the material provided to me by the complainant that the agency's failure to provide the complainant with a notice of decision that complied with s.30 of the FOI Act, in relation to either the initial decision of the agency or the decision on internal review, was a significant factor in prompting the complainant to make his later request for the same documents, following my decision in *Re Boyd*.

25. As I have said, the complainant's access application to the agency, dated 16 November 1994, complied with the requirements of s.12 of the FOI Act and was a valid access application. Following receipt of that access application, the agency was obliged to deal with that access application in accordance with the procedures prescribed by the FOI Act. It did not do so and, in my view, my jurisdiction to deal with the complaint arises, therefore, under s.65(1)(c) or (d) of the FOI Act, as either a complaint against a decision to refuse to deal with the access application or a deemed refusal of access pursuant to s.13(2).

26. Further, taking into account the history of this matter and in light of the agency's reluctance to comply with its statutory obligations under the FOI Act in respect of the complainant's access application of 16 November 1994, I considered there was sufficient cause shown for me to exercise my discretion under s.66(6) and accept this complaint even though internal review had not taken place.

27. Having taken the view that I have jurisdiction to deal with this complaint, clearly it is my view that I may exercise in respect of this matter all the powers conferred upon me by the FOI Act for dealing with complaints, including the power under s.75(1) to require production to me of documents so that I can decide whether they contain exempt matter or are documents of an agency, and the power under s.72(1)(b) to require the production to me of documents relevant to a complaint.

Additional Documents

28. In his letter of 19 January 1995, Dr Blake also informed me that he did not understand that my notice of requirement to produce documents, dated 13 January 1995, required the agency to produce the agency's minutes relating to interlocutory applications and matters relating to the conduct of the inquiry under s.13(1) of the *Medical Act 1894*, or minutes of the agency to which access has already been granted. The agency therefore did not produce to me all the documents specified in the notice. Dr Blake informed me that the agency had previously advised the complainant that the agency's minutes relating to interlocutory applications and matters relating to the conduct of the inquiry were exempt documents under clauses 6 and 7 of Schedule 1 to the FOI Act.

29. In my view, the terms of the complainant's access application of 16 November 1994 are clear, as were the terms of my notice to produce the documents. After receiving that advice from Dr Blake, it appeared to me that it may have been that not all the documents within the ambit of the access application had been identified by the agency or produced to me in any form. Accordingly, with the co-operation and assistance of the agency, a member of my staff inspected the full record of the meetings of the agency. That staff member advised me that, in his view, there were other minutes of the agency which came within the ambit of the complainant's access application and which had not been produced to me by the agency.

30. I accepted that advice. Accordingly, pursuant to my power under s.75(1) of the FOI Act, I served a further notice of requirement to produce documents on the Registrar on 25 January 1995. The additional documents identified by my staff member on inspection of the agency's records were produced to me on 27 January 1995. I am satisfied, from my own examination of those documents, that they are within the ambit of the complainant's access application of 16 November 1994.

THE DISPUTED DOCUMENTS

31. There are 9 documents in dispute in this matter, being parts of the minutes of meetings of the agency on 10 December 1991, 13 July 1993, 10 August 1993, 12 October 1993, 14 December 1993, 11 January 1994, 8 February 1994, 14 June 1994 and 13 September 1994. Following my examination of the documents produced to me, it was immediately apparent that the agency's minutes recorded information about a number of other matters unrelated to the complainant and, in my view, those parts of the minutes which do not contain information about the complainant are not within the ambit of his access application. Therefore, my decision and reasons for decision deal only with those parts of the disputed documents which deal with matters relating to the complainant.

Are the disputed documents "Documents of a court" as described in Clause 5, Schedule 2?

32. The right of access under s.10(1) of the FOI Act is a right to be given access to the documents of an agency, other than an exempt agency. Clause 3 of the Glossary in Schedule 2 to the FOI Act provides:

> *"3. For the purposes of this Act -*
>
> *(a) a court is an agency;*
>
> *(b) a registry or other office of a court and the staff of such a registry or other office are part of the court;*
>
> *(c) a person holding a judicial office or other office pertaining to a court, being an office established by the written law establishing the court, is not an agency and is not included in an agency."*

33. A "court" is defined in clause 1 of the Glossary to include a tribunal. Clause 5 of the Glossary provides:

> *"5. A document relating to a court is not to be regarded as a document of the court unless it relates to matters of an administrative nature."*

34. 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 1993-94 indicates that the agency met on one occasion during the financial year 1993-94 to consider a complaint against a medical practitioner. During that period the agency dealt with 80 new complaints (there being 13 complaints unresolved from the previous year). Of those new complaints, in 75 cases the medical practitioners concerned were found not to have breached the *Medical Act 1894*. One complaint resulted in a formal inquiry. In addition, a number of informal complaints were resolved by telephone.

35. The agency does not have statutory 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.

36. 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 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."*

37. 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).

38. An "investigation" commences when a complaint is received by the agency from a member of the public. The agency requires the complaint to be in the form of a statutory declaration. The Registrar sends a copy of the statutory declaration to the medical practitioner concerned, seeking a response to the allegations. The agency informs me that 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, which is not required to be a statutory declaration, 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. However, in this instance, it appears that those procedures did not apply.

39. The agency submits that each disputed document concerns matters of an interlocutory nature relating to the conduct of an inquiry by the agency under section 13(1) of the *Medical Act 1894.* Further, the agency rejects the view that minutes of meetings of the agency relate to matters of an administrative nature and, for this reason, the agency asserts that I have no jurisdiction to deal with the complaint.

40. I accept the agency's claim that where the agency holds an inquiry pursuant to section 13(1)(c) of the *Medical Act 1894,* it is exercising a judicial or quasi-judicial function. When exercising that function, the agency is clearly, in my view, a tribunal and, therefore, a court for the purposes of the FOI Act. However, the issue before me concerns the extent of the agency's judicial or quasi-judicial function and whether it extends to include monthly meetings of the agency at which members discuss the business of the agency and decide issues associated with its functions under s.13(1) of the *Medical Act 1894.*

41. In a submission received through his solicitor, the complainant rejects the agency's claim and submits that the disputed documents were brought into existence by the agency in the exercise of its administrative or investigative function, but not its judicial function.

42. The Full Court of the Federal Court in *Loughnan (Principal Registrar, Family Court of Australia) v Altman* (1992) 11 ALR 445, considered whether the respondent in that case was entitled to access, under the Commonwealth FOI Act, a transcript of an *ex tempore* judgment produced by a court reporting service at the request of a judge. The Court decided that the transcript was a "document of a court" although it was in the possession of another agency, being the court reporting service, then called "Auscript". In the course of hearing that matter, Black CJ, Sweeney and Lee JJ said, at p.449:

> *"The exclusion of the application of the Act to a request for access to a document of a court unless the document relates to matters of an administrative nature, read in the light of the stated object in s.3, reflects the view that an exception or exemption is necessary in such a case for the protection of an essential public interest."*

43. The Court in *Loughnan v Altman* did not define the outer limits of the field covered by the expression "a document of a court". It was unnecessary for it to do so because, in the context of the matter before it, the documents to which the respondent was seeking access were clearly documents concerning the judicial function of that court. However, the question for me is whether the disputed documents are documents of a type so closely connected with the judicial or quasi-judicial functions of a court that they are clearly within the description of "documents of a court" to which the FOI Act does not apply, or whether they are documents that are purely administrative in nature and hence accessible under the FOI Act.

44. The Concise Oxford Dictionary, Eighth Edition, defines "administrative" as *"concerning or relating to the management of affairs".* In my view, there is a right of access under the FOI Act to documents relating to the management of the affairs of a court. That is, where a court is an agency under the FOI Act, it is my view that the right of access encompasses all of those documents which concern the routine administration of the court.

45. The documents in dispute are parts of minutes of the monthly meetings of the agency. A member of my staff has inspected the full record taken on each occasion mentioned in the extracts provided to me by the agency. I accept his advice that on each occasion the agency met on the dates mentioned, the full minutes of those meetings comprise some 7-8 foolscap pages of a Minute Book and that they contain an abundance of other information about other doctors; matters of an administrative nature dealt with by the agency at those meetings, including correspondence received and sent; progress reports on other investigations; and reports of the Registrar.

46. Based on that information and my examination of the extracts from the minutes of the agency, I am of the view that the disputed documents are administrative documents of the agency. Although meetings of the agency may involve the performance of both its administrative and judicial or quasi-judicial functions, the disputed documents do not indicate that this occurred. Further, s.9(3) of the *Medical Act 1894* requires that the agency hold an inquiry under s.13(1) of that Act in public unless, for reasons of confidentiality, the agency orders that the proceedings or part of the proceedings of such an inquiry be conducted *in camera.* There is no material before me to indicate that the meetings of the agency at which matters concerning the complainant were discussed were public meetings.

47. Further, the Notice of Inquiry signed by the Registrar of the agency on 6 August 1993, which was subsequently served on the complainant, states, at paragraph 2, that *"[t]he Board shall hold an inquiry into the matters referred to above, at a date and time to be fixed and notified to you."* This statement clearly indicates to me that at the date of that notice, no formal inquiry had yet commenced. On that basis, the minutes dated 10 December 1991 and 13 July 1993 can have no connection with the judicial or quasi-judicial function of the agency. In any case, there is material in the rest of the disputed documents which suggests to me that as late as 13 September 1994, the agency had not finalised the contents of its charges against the complainant and that service of notice of the time and date of the inquiry had, in fact, not yet occurred. Service of that notice took place on or about 2 December 1994.

48. For these reasons, I reject the agency's claim that the disputed documents are not accessible under the Act. I consider the disputed documents to be administrative documents of the agency, being documents of a kind to which the complainant is entitled to be given access, subject to, and in accordance with, the FOI Act.

THE EXEMPTIONS

(a) Clause 6 - Deliberative processes

49. The agency argued, in the alternative, that the disputed documents are exempt under clause 6(1) of the FOI Act. Clause 6(1) provides:

> ***"6. Deliberative processes***
>
> ***Exemptions***
>
> *(1) Matter is exempt matter if its disclosure -*
> *(a) would reveal -*
>
> *(i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or*
>
> *(ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency;*
>
> *and*
>
> *(b) would, on balance, be contrary to the public interest."*

50. To establish an exemption under clause 6, the agency must satisfy the requirements of both paragraphs (a) and (b) of this exemption. Only when paragraph (a) of the exemption is satisfied is it necessary to consider paragraph (b), that is, whether disclosure of the documents would, on balance, be contrary to the public interest.

51. The key words in clause 6(1)(a) are the "*deliberative processes...of an agency*". The meaning of the phrase "deliberative processes" has been considered in a number of cases based on the equivalent section in the Commonwealth *Freedom of Information Act 1982* (s.36(1)(a)). The relevant authorities were extensively canvassed by the Queensland Information Commissioner in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (30 June 1993, unreported) where the relevant provision is s.41(1).

52. In my view, the oft cited passage in *Re Waterford and Department of the Treasury* (No 2) (1984) 5 ALD 588 in relation to the equivalent Commonwealth provision applies to a consideration of clause 6(1) of the FOI Act in Western Australia and the meaning of the words "deliberative processes". In that case, the Commonwealth Administrative Appeals Tribunal said, at paragraphs 58-60:

> *"58. As a matter of ordinary English the expression 'deliberative processes' appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. "Deliberation" means "the action of deliberating; careful consideration with a view to decision": see the Shorter Oxford English Dictionary. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and*

> *expediency of a proposal, a particular decision or a course of action. Deliberations on policy matters undoubtedly come within this broad description. Only to the extent that a document may disclose matter in the nature of or relating to deliberative processes does s.36(1)(a) come into play...*
>
> *59. It by no means follows, therefore, that every document on a departmental file will fall into this category...Furthermore, however imprecise the dividing line may first appear in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of the agency...*
>
> *60. It is documents containing opinion, advice, recommendations etc. relating to the internal processes of deliberation that are potentially shielded from disclosure...Out of that broad class of documents, exemption under s.36 only attaches to those documents the disclosure of which is 'contrary to the public interest'..."*

53. In a number of my previous decisions, I have accepted that statement as correct for Western Australia: *Re Read and Public Service Commission* (16 February 1994, unreported), at para 26; *Re Kobelke and Minister for Planning and Others* (27 April 1994, unreported), at para 40; *Re Veale and Town of Bassendean* (25 March 1994, unreported), at para 13; *Re Taylor and Ministry of the Premier and Cabinet* (23 December 1994, unreported), at para 23; *Re Jones and Shire of Swan* (9 May 1994, unreported), at para 16; *Re Jeanes and Kalgoorlie Regional Hospital and Others* (7 February 1995, unreported), at para 13; *Re Johnson and State Government Insurance Commission* (29 May 1995, unreported), at para 16. I reiterate that view.

54. From my examination of the disputed documents, I am satisfied that each of them, if disclosed, would reveal opinion, advice or recommendations that were obtained, prepared or recorded, or consultations or deliberations that took place in the course of, or for the purposes of, the deliberative processes of the agency. The matter recorded in the documents includes resolutions of the meetings, legal advice obtained by the agency from its legal advisers, discussions between members of the agency and instructions given by the agency to the Registrar and to the agency's legal advisers. In my view, each document satisfies the requirements of part (a) of clause 6(1) of Schedule 1 to the FOI Act.

55. However, I am not satisfied that disclosure of those documents would, on balance, be contrary to the public interest. There is simply no evidence or other material before me that would enable me to conclude that the agency has discharged its onus under s.102(1) of the FOI Act in this regard. Part of the agency's claims for exemption are based on its assertion that the documents relate to the agency's functions as a judicial or quasi-judicial body. However, I have rejected this aspect of the agency's claim for the reasons already given.

56. Each document contains "personal information" about the complainant. The agency does not appear to have given any consideration to the requirements of s.21 of the FOI Act in deciding whether it is in the public interest for the matter to be disclosed, or the effect that disclosure of the matter might have. Nor has it considered whether there is a public interest in the complainant being able to access information about himself.

57. In my view, there is a public interest in a person being able to gain access to documents of the agency, where those documents contain information about the personal and professional affairs of that person. On the other hand, I also recognise a public interest in preserving the integrity of an agency's deliberative processes and consider that it may be contrary to the public interest to disclose documents in circumstances where the disclosure would affect the integrity of an agency's deliberations.

58. However, I am not persuaded by the material before me that this is one of those instances. There is no evidence before me which suggests that the process by which members of the agency, the Registrar or the agency's solicitors deliberate over matters concerning the functions of the agency would be affected by the disclosure of the disputed documents such that it would, on balance, be contrary to the public interest to disclose those documents. Accordingly, I find that the documents are not exempt under clause 6(1) of Schedule 1 to the FOI Act.

(b) Clause 7 - Legal professional privilege

59. The agency claims that each of the disputed documents is also exempt under clause 7 of Schedule 1 to the FOI Act. Clause 7 provides:

> *"**Legal professional privilege***
>
> ***Exemption***
>
> *(1) Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.*
>
> ***Limit on exemption***
>
> *(2) Matter that appears in an internal manual of an agency is not exempt matter under subclause (1)."*

60. The exemption in clause 7 is not limited by a "public interest test". In my view, that exemption recognises the public interest in the maintenance of the principle of legal professional privilege as outweighing any other competing public interest. In a number of my previous formal decisions, I have discussed the principle and application of legal professional privilege: *Re Guyt and Health Department of Western Australia* (16 March 1994, unreported) at paragraphs 11-18; *Re Read* at

paragraph 65; *Re Weeks and the Shire of Swan* (24 February 1995, unreported) at paragraphs 15-20; *Re Nazaroff and Department of Conservation and Land Management* (24 March 1995, unreported) at paragraphs 15-19.

61. It is clearly established law in Australia that confidential communications passing between a client and his legal adviser for the sole purpose of giving or receiving legal advice need not be given in evidence or otherwise disclosed by the client and, without the client's consent, may not be given in evidence or otherwise disclosed by the legal adviser: *Grant v Downs* (1976) 135 CLR 674.

62. In *Grant v Downs*, the High Court considered whether the privilege attached to reports made by officers of the Health Commission of New South Wales following the death of a patient in a psychiatric hospital. In support of the claim, an affidavit was sworn by an officer of the Health Commission to the effect that the documents concerned were brought into existence for a number of purposes - to determine whether any member of the staff was guilty of breaches of discipline, to detect whether there were any shortcomings in the hospital administration and for submission to the legal advisors of the Health Commission in the event that disciplinary proceedings involving staff arose, or coronial proceedings arose, or in the event that a civil claim arising from the death was initiated against the Health Commission. The High Court unanimously rejected that claim to privilege and held that only those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings are entitled to immunity from production.

63. After consideration of the matters in issue, Stephen, Mason and Murphy JJ said, at p.688:

> *"All that we have said so far indicates that unless the law confines legal professional privilege to those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings the privilege will travel beyond the underlying rationale to which it is intended to give expression and will confer an advantage and immunity on a corporation which is not enjoyed by the ordinary individual. It is not right that privilege can attach to documents which, quite apart from the purpose of submission to a solicitor, would have been brought into existence for other purposes in any event, and then without attracting any attendant privilege. It is true that the requirement that documents be brought into existence in anticipation of litigation diminishes to some extent the risk that documents brought into existence for non-privileged purposes will attract the privilege but it certainly does not eliminate the risk. For this and the reasons we have expressed earlier we consider that the sole purpose test should now be adopted as the criterion of legal professional privilege."*

64. Thus, the test to be applied in order to decide whether a document attracts legal professional privilege is the "sole purpose" test. This requires a consideration of whether the document was brought into existence for the sole purpose of giving

or receiving legal advice or for use in existing or anticipated legal proceedings: *Grant v Downs, (op. cit); Baker v Campbell* (1983) 153 CLR 52.

65. From my examination of the disputed documents I am satisfied that some, but not all, of the matter contained in the disputed documents is matter that would be privileged from production in legal proceedings on the ground of legal professional privilege. That matter is contained in those parts of the documents which record the advice the agency obtained from, and instructions given by the agency to, the agency's solicitors.

66. However, the agency claimed that, once a document is subject to legal professional privilege, then the entirety of the document is privileged insofar as it deals with the same matter as the privileged content. I was referred to the judgment of Templeman LJ in a decision of the Court of Appeal in *Great Atlantic Insurance Co v Home Insurance Co and Others* [1981] 2 All ER 485. The agency submitted that the principle of Templeman LJ was accepted by all members of the Full Court of the Supreme Court of Western Australia in a judgment in *Mobil Oil Australia Limited v Curtis and Others* (9 October 1987, unreported).

67. In *Great Atlantic Insurance Co,* Templeman LJ said, at page 490:

> *"The second question is whether, the whole of the memorandum being a privileged communication between legal adviser and client, the plaintiff may waive the privilege with regard to the first two paragraphs of the memorandum, but assert privilege over the additional matter. In my judgment severance would be possible if the memorandum dealt with entirely different subject matters or different incidents and could in effect be divided into two separate memoranda, each dealing with a separate subject matter...In my judgment the simplest, safest and most straightforward rule is that if a document is privileged then privilege must be asserted, if at all, to the whole of the document unless the document deals with separate subject matters so that the document can in effect be divided into two separate and distinct documents each of which is complete."*

68. The exemption in clause 7 of Schedule 1 to the FOI Act refers, as all exemptions in that Schedule do, to *"matter"* which may be exempt for various reasons. The use of the word "matter" rather than "documents" in my view, is an indication that, in the context of FOI legislation, parts of a document, namely those parts consisting of exempt matter, may not be accessed under the general right provided in s.10(1) of the FOI Act, but that others parts may be disclosed to an access applicant.

69. In my view, the use of the word "matter" also facilitates the deletion of exempt parts of a document under the provisions of s.24 of the FOI Act where practicable, so that, in the circumstances provided for in s.24, an agency is obliged to provide an access applicant with access to an edited copy of a document from which exempt matter has been deleted. It is my view that clause 7 seeks to exempt only matter, not documents and, where exempt matter can be

deleted from a document, then, subject to any other claims for exemption, an edited copy of such a document should be provided to an applicant.

70. The disputed documents are not memoranda containing legal advice from a solicitor to a client, as was the case in *Great Atlantic Insurance Co.* They are a record of the contents of a communication which is, *prima facie,* privileged. In my view, the decision of the High Court in *Waterford v The Commonwealth* (1987) 163 CLR 54 is a more relevant authority. In that case the High Court considered an appeal from a decision of the Federal Court, on appeal from a decision of the Commonwealth Administrative Appeals Tribunal, involving an access application lodged by Mr Waterford under the Commonwealth FOI Act. In that case several documents were claimed to be subject to legal professional privilege.

71. In *Waterford's* case some of the disputed documents contained or recorded both legal advice given by the Crown Solicitor's Office and general policy advice given by the FOI section of the Attorney-General's Department. Deane J said, at p.85:

> *"If privileged material was contained in one distinct part of a document and non-privileged material was contained in another, protection of the confidentiality of the privileged part of the document would not, as the Act itself recognises...ordinarily require that that part which was not covered by privilege should also be immune from production...If it were not possible to classify the contents of the document into distinct parts, it would be necessary to determine whether the contents as a whole were outside the protection of legal professional privilege for the reason that, notwithstanding the professional legal advice, they did not satisfy what has conveniently, if somewhat loosely, been referred to as "the sole purpose" test..."*

72. In my view, minutes of the meetings of the agency are created for reasons other than for the sole purpose of recording advice received from its solicitors. Certainly those documents were not brought into existence for that purpose. The agency creates minutes for each of its monthly meetings as part of its administrative processes.

73. In any case, I am of the view that the matter in the disputed documents, which are themselves part of the complete minutes of the agency's meetings, which is exempt from disclosure on the ground of legal professional privilege, can readily be identified and that it is practicable for the agency to give the complainant access to a copy of those documents from which that exempt matter has been deleted. Further, I am satisfied from discussions with and submissions by the complainant, that he would wish to be given access to an edited copy of those documents. Therefore, in my view, the agency is under an obligation under s.24 of the FOI Act, to provide the complainant with access to an edited copy of the disputed documents from which matter that is exempt matter under clause 7 of Schedule 1 to the FOI Act has been deleted.

74. The matter that I find to be exempt under clause 7 of Schedule 1 to the FOI Act is described as follows:

Document	Date	Description of exempt matter
1	10/12/91	nil
2	13/7/93	paragraph 1 - all text after "Westgarth" paragraph 2 - lines 2, 3 and 4 paragraph 3 - all paragraph 4 - nil paragraph 5 - all
3	10/8/93	paragraph 1: line 2 - last two words line 3 - all line 4 - all
4	12/10/93	paragraph 1 - nil paragraph 2: line 1 - last 3 words lines 2, 3 and 4 - all paragraph 3 - all paragraph 4 - last two lines
5	14/12/93	paragraph 1: lines 2-6 inclusive paragraph 2 - all
6	11/1/94	paragraph 1 - all paragraph 2 - all paragraph 3 - all paragraph 4 - nil paragraph 5 - nil
7	8/2/94	paragraph 1 - nil paragraph 2 - all text after "that" paragraph 3 - all
8	14/6/94	paragraph 1 - all text after "Westgarth" paragraph 2 - all text after "Westgarth" paragraph 3 - all paragraph 4 - points (i) and (ii)
9	13/9/94	paragraph 1 - all text after "Westgarth" paragraph 2 - all and sub-paragraphs (1)-(4) inclusive paragraph 3 - all paragraph 4 - all text after "agreed" in line 2 to the end of that sentence.

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