EGAN AND MEDICAL BOARD

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: 95059** **Decision Ref: D03895**

Participants:

Peter Egan
Complainant

- and -

Medical Board of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - letter from medical practitioner to 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 - whether disclosure could reasonably be expected to prejudice future supply - impair frankness of future responses.

Freedom of Information Act 1992 (WA) ss. 13(1)(b), 30, 68(1), 72(1)(b), 75(1); Schedule 1 clauses 5(1)(a), 8(2), 11(1)(a).
Freedom of Information Act 1992 (Qld) s. 42(1)(e).
Freedom of Information Act 1982 (C'wlth) ss. 40(1)(a), 43(1)(c)(ii).
Medical Act 1894 (WA) s. 13(1).

Re Simonsen and Edith Cowan University (Information Commissioner, WA, 13 July 1994, unreported).
Re "T" and Queensland Health (1994) 1 QAR 386.
Re Lawless and Medical Board of Western Australia (Information Commissioner, WA, 5 July 1995, unreported).
Re Pau and Medical Board of Western Australia (Information Commissioner, WA, 7 December 1994, unreported).
Re Boyd and Medical Board of Western Australia (Information Commissioner, WA, 31 October 1994, unreported).
Attorney-General's Department v Cockcroft (1986) 10 FCR 180.
Ryder v Booth [1985] VR 869.
Manly v Ministry of Premier and Cabinet (Supreme Court of Western Australia, 15 June 1995, unreported).

DECISION

The decision of the agency is set aside. In substitution it is decided that the document is not exempt under clause 5(1)(a) nor is it exempt under clause 8(2) of Schedule 1 to the *Freedom of Information Act 1992.*

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

28th September 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Medical Board of Western Australia ('the agency') to refuse Mr Egan ('the complainant') access to a document requested by him under the *Freedom of Information Act 1992* ('the FOI Act'), being the response received by the agency from a medical practitioner following a complaint made to the agency by the complainant.

2. In November 1994, a complaint was made to the agency by the complainant about treatment he received from a medical practitioner. The agency instituted inquiries in relation to the complainant's allegations and, in the course of those inquiries, received a response to the allegations from the medical practitioner. On 20 December 1994, the agency advised the complainant that it had discussed his allegations. The complainant was informed that the agency was of the view that the allegations would not justify disciplinary action against the practitioner concerned, and no further action would be taken by the agency in respect of the matter.

3. On 12 January 1995, the complainant lodged an access application under the FOI Act, seeking access to documents of the agency pertaining to his complaint regarding the medical practitioner, including the written response of the medical practitioner to the agency. On 17 January 1995, Mr K I Bradbury, Registrar of the agency, refused the complainant access to the response of the medical practitioner on the grounds that the document is exempt under clause 5 and clause 8 of Schedule 1 to the FOI Act. However, the Registrar did not notify the complainant of any decision with respect to any other documentation held by the agency.

4. On 15 February 1995, the complainant applied for internal review of the initial decision of the agency. On 24 February 1995, Dr L G Blake, Chairman of the agency, confirmed the initial decision of the agency. However, Dr Blake did not make a decision in relation to the documents other than the response to the agency of the medical practitioner. On 5 April 1995, the complainant applied to the Information Commissioner for external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. On 20 April 1995, in accordance with my statutory obligation under s.68(1) of the FOI Act, 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 originals of the documents identified by the agency as coming within the ambit of the

complainant's access application, together with the file maintained by the agency in respect of the access application. I also required the agency to provide further explanation for its claims for exemption under clause 5 and clause 8, because neither the letter from the Registrar nor the letter from the Chairman, which purported to be the notices of decision required under section 13(1)(b) of the FOI Act, complied with the requirements of section 30 of the FOI Act.

6. On 27 April 1995, that additional information was provided to me by the agency and I subsequently provided a copy to the complainant. I also sought and obtained the views of the medical practitioner about the release to the complainant of his response to the agency.

7. By letter dated 24 May 1995, the complainant confirmed that the documents to which he seeks access consist of the response dated 25 November 1994 from the medical practitioner to the agency, together with two reports enclosed with that response, being a report dated 27 October 1994 and a report dated 24 November 1994.

8. On 17 August 1995, after examining the documents in dispute and considering the submissions of the parties, I advised the agency that it was my preliminary view, based on the material before me, that the documents were not exempt under clause 5(1)(a) or clause 8(2) of Schedule 1 to the FOI Act. The agency was invited to reconsider its claim for exemption in light of my preliminary view and the fact that the complainant had obtained access, through another source, to the reports dated 27 October 1994 and 24 November 1994. In the course of considering my preliminary view, the agency agreed to release those reports which are enclosures to the response of the medical practitioner. However, the agency maintained its claim for exemption in relation to the response of the medical practitioner, and provided a further submission to me in support of its claim for exemption for that document. Accordingly, the response of the medical practitioner dated 25 November 1994 remains the only document in dispute in this matter.

THE EXEMPTIONS

(a) Clause 5(1)(a)

9. The agency claims that the response of the medical practitioner is exempt under clause 5(1)(a) of Schedule 1 to the FOI Act. Clause 5(1)(a) provides:

> ***"5. Law enforcement, public safety and property security***
>
> ***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;"*

10. Similar provisions to clause 5(1)(a) exist in FOI legislation in other Australian jurisdictions, although there are differences in the wording of the equivalent provisions. In my view, s.42(1)(e) in the Queensland *Freedom of Information Act 1992* is the closest equivalent to clause 5(1)(a) of the FOI Act. Section 42(1)(e) provides that matter is exempt if its disclosure could reasonably be expected to prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law). Apart from the inclusion of the reference to "revenue law" which does not appear in the FOI Act, s.42(1)(e) differs from clause 5(1)(a) only in so far as clause 5(1)(a) exempts from disclosure matter that would "impair" rather than "prejudice" the effectiveness of the relevant method or procedure.

11. In my decision in *Re Simonsen and Edith Cowan University* (13 July 1994, unreported), at paragraphs 22-24 of that decision, a similar distinction concerning the application of clause 11(1)(a) arose. In that case, I considered that the word "impair" where it appears in clause 11(1)(a) means substantially the same as the word "prejudice" where it appears in the corresponding provision of the Commonwealth *Freedom of Information Act 1982*, being s.40(1)(a).

12. In considering the application of the exemption in clause 5(1)(a), I am of the view that the word "impair" has the same meaning as the word "prejudice" in s.42(1)(e) in the Queensland FOI Act, and following from that, clause 5(1)(a) has the same meaning as s.42(1)(e) of the Queensland FOI Act.

13. The meaning of s.42(1)(e) was considered by the Queensland Information Commissioner in the decision of *Re "T" and Queensland Health* (1994) 1 QAR 386. In *Re "T" and Queensland Health*, after concluding that the exemption was capable of applying to any law which imposes an enforceable legal duty to do or refrain from doing some thing, and not merely to a contravention of the criminal law, the Information Commissioner made the following comments, at paragraph 32, which I consider as relevant to the interpretation of the exemption in clause 5(1)(a):

> *"Disclosure of methods and procedures adopted by law enforcement agencies which are obvious and well known to the community (e.g. interviewing and taking statements from witnesses to a crime) is not likely to prejudice their effectiveness, for the purposes of s.42(1)(e) of the Queensland FOI Act. In respect, however, of methods and procedures that are neither obvious nor a matter of public notoriety, the mere fact that evidence of a particular method or procedure has been given in a proceeding before the courts would not preclude an agency from asserting, in the appropriate case, that disclosure under the FOI Act could reasonably be expected to prejudice the effectiveness of that method or*

procedure in the future...If, however, the revelation of a law enforcement method or procedure in open court in a particular case has been so widely reported as to become a matter of public notoriety, there may be a real question as to whether its disclosure under the FOI Act could be capable of prejudicing its effectiveness."

14. Further, at paragraph 24 of that decision, the Information Commissioner discussed the onus on agencies to establish the elements of the exemption and said:

"There may be cases where the disclosure of particular matter will so obviously prejudice the effectiveness of law enforcement methods or procedures that the case for exemption is self-evident, but ordinarily in a review under Part 5 of the FOI Act it will be incumbent on an agency to explain the precise nature of the prejudice to the effectiveness of a law enforcement method or procedure that it expects to be occasioned by disclosure, and to satisfy me that the expectation of prejudice is reasonably based."

15. In the light of those comments from the Queensland Information Commissioner and my previous decisions involving access to documents of this agency, and a consideration of the claims for exemption put forward by the agency, I reiterate my view that the exemption in clause 5(1)(a) is directed at investigative methods and procedures which themselves must be lawful to attract the exemption. Further, in order to satisfy the requirement of clause 5(1)(a) that disclosure could reasonably be expected to impair the effectiveness of the methods or procedures, it must be established that it is reasonable, as opposed to something that is irrational or absurd, to expect that disclosure of the matter claimed to be exempt would result in impairment of the investigative methods or procedures.

16. In this instance, I am of the view that the methods or procedures adopted by the agency in investigating complaints made by members of the public is well known to the community. The method or procedure adopted by the agency of seeking a response from the medical practitioner who is the subject of the complaint, has been disclosed not only to the complainant but is reported in the agency's Annual Report for the years 1992/93 and 1993/94. In my view, disclosure of that procedure could not reasonably be expected to impair the methods or procedures of the agency by which it seeks a response to the complaint from the medical practitioner concerned.

17. The agency submitted that a broader interpretation of clause 5(1)(a) was more appropriate and submitted that the exemption should apply in circumstances where the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law could be impaired by means other than disclosure of those methods or procedures. It is the submission of the agency that the impairment of such methods and procedures could reasonably be expected to occur where individuals upon whom the methods and procedures rely for their

effectiveness are dissuaded from co-operating for fear of having their documents disclosed.

18. In my view, clause 5(1)(a) requires that an agency must establish that the disclosure of the matter claimed to be exempt could reasonably be expected to impair the effectiveness of the agency's investigative methods or procedures, with there being a causal connection between disclosure of the matter and the resulting impairment. For example, a document may contain details of planned locations of mobile random breath testing stations. Disclosure of that document could reasonably be expected to reduce the effectiveness of procedures used by police in dealing with breaches of the Road Traffic Code during a particular road safety campaign if details about those locations were to be disclosed prior to the campaign since motorists would be able to avoid those locations. However, if the same document is disclosed after the campaign, whilst the information is the same, it could hardly be said that disclosure of that document could reasonably be expected to impair the effectiveness of that procedure.

19. Even accepting the submission of the agency that the effectiveness of its methods and procedures could reasonably be expected to be impaired by the disclosure of the result of the application in the circumstances of particular methods or procedures, the agency has not provided any material in this case to satisfy me that its expectation of impairment is reasonably based. In respect of this, as in other complaints to me involving the agency, the essence of the agency's argument is that its investigative methods and procedures could be impaired by disclosure in that medical practitioners would either not respond at all or would be less full and frank when requested by the agency to respond to a complaint.

20. The agency claims that, as it has no legal power to compel practitioners to respond - other than when it is conducting a formal inquiry under s.13 of the *Medical Act 1894* - its method of investigation will be impaired because it will not be able to obtain the information it requires to form a view as to whether the practitioner may have been engaged in any of the behaviours described in s.13(1)(a)-(e) inclusive of the *Medical Act 1894*.

21. In several of my previous formal decisions I have rejected that argument (*Re Lawless and Medical Board of Western Australia* (5 July 1995, unreported), at paragraph 21; *Re Pau and Medical Board of Western Australia* (7 December 1994, unreported), at paragraphs 14 and 15; *Re Boyd and Medical Board of Western Australia* (31 October 1994, unreported), at paragraphs 10 and 11). I consider there to be other influences upon whether and how openly and frankly medical practitioners respond to complaints received by the agency (see *Re Lawless* at paragraphs 36-44), and to date the agency has provided no evidence that there are real and substantial grounds to expect that disclosure of practitioners' responses to complaints may impair the agency's ability to obtain such information.

22. It is now almost two years since the FOI Act was enacted in Western Australia. During that period, as Information Commissioner, I have received and dealt with a number of complaints concerning decisions of the agency to refuse access applicants access to documents of the agency including responses from medical practitioners the subject of complaints by those applicants. Some of those decisions have been reported in the newspaper. I also expect those decisions have been brought to the attention of the medical profession, either by word of mouth or by the Australian Medical Association. The agency has not been able to provide me with evidence of a single instance of a refusal by a practitioner to respond to a complaint or evidence of an instance where the response of the practitioner has not been as full and frank as one would expect. In other words, there is no material before me that supports the opinions and belief of the agency as to the effects on the agency of disclosure of documents under the FOI Act. There is simply no evidence before me that medical practitioners are likely to be dissuaded from cooperating with the agency's procedures by not responding to a complaint in the manner determined by the agency.

23. Further, I am not entirely satisfied that, in seeking a response from a medical practitioner, it can be said that the agency is employing a method or procedure for "investigating a contravention or possible contravention of the law". I am not certain that the matters the subject of the complaint to the agency by the complainant comprise a contravention of any law, including the *Medical Act 1894*. However, it is unnecessary that I decide that point since I find that the exemption in clause 5(1)(a) is not established by the evidence before me.

(b) Clause 8(2)

24. The agency also submitted that the disputed document is exempt under clause 8(2) of Schedule 1 to the FOI Act. Clause 8, so far as is relevant, provides:

> *"**Confidential communications***
>
> ***Exemptions***
>
> *(1)...*
>
> *(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."

25. In my previous decisions in *Re Boyd* at paragraphs 12-16; *Re Pau* at paragraphs 16-20; and *Re Lawless* at paragraphs 22-26, I discussed the meaning of clause 8(2). To establish a *prima facie* claim for exemption under clause 8(2), the agency must not only show that the document contains a confidential communication of the type described in paragraph (a) of sub-clause 2, but also that it meets the requirements of paragraph (b) of sub-clause 2. That is, once I am satisfied that the matter is of a type referred to in sub-clause 8(2)(a), the agency must persuade me that disclosure of the disputed document could reasonably be expected to prejudice the future supply to the agency of information of the relevant kind.

26. In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, at 190, the Full Federal Court said that the words *"could reasonably be expected to prejudice the future supply of information"* in s.43(1)(c)(ii) of the Commonwealth FOI Act were intended to receive their ordinary meaning and required a judgement to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the relevant kind to the Commonwealth would decline to do so if the documents in question were disclosed. I accept that as the correct test to be applied in the interpretation of clause 8(2). Further, I consider that part (b) of the exemption in clause 8(2) is directed at the ability of the agency to obtain similar information from medical practitioners in general in the future, and is not concerned with whether the particular medical practitioner whose report is disclosed will give similar information in the future: *Ryder v Booth* [1985] VR 869, at 872 per Young C.J.

27. The agency submits, and I accept, that the disputed document may, *prima facie,* contain information of a confidential nature obtained in confidence. However, I also note that, at the time that a response was sought from the medical practitioner, the agency advised the practitioner that the agency is subject to the FOI Act and asked him to indicate whether he would be willing for his response to be released to the complainant. It appears that the medical practitioner gave no indication to the agency that he objected to such disclosure of his response. I also note that a substantial portion of the disputed document contains a summary of the contents of the two reports which have previously been released to the complainant. The remainder is the medical practitioner's response to the specific issues of complaint.

28. Even if I were satisfied that the requirements of paragraph (a) of clause 8(2) have been established, I am not persuaded that the agency has satisfied the requirements of paragraph (b) of that exemption. The agency has not provided any new material that was not before me in *Re Boyd, Re Pau* and *Re Lawless,* in which similar issues arose for my consideration. In those cases, on the material then before me, I rejected the sufficiency of the material put before me by the agency to establish a claim for exemption under clause 8(2). I also reject it in this instance.

29. The agency claims that, because there is no legislative requirement for medical practitioners to respond to allegations made to the agency, it relies totally on the goodwill of the profession in obtaining responses from medical practitioners. It is the submission of the Chairman of the agency, based on his experience as Chairman and as a member of the Board, that if medical practitioners the subject of a complaint and others knew that their responses could be given to others, including the complainant, and potentially used for a different purpose (such as civil action against the medical practitioner) then the practitioners would be likely to be less frank and open in the information and opinions provided or may decline to provide a substantive response to the issues the subject of the complaint.

30. Further, it is the submission of the agency that it is in the public interest that there be the fullest possible disclosure to the agency of all relevant information and material relating to the conduct of a registered medical practitioner the subject of a complaint and particularly so because the agency does not have compulsory investigative powers. It is the view of the agency that unless it can guarantee confidentiality of responses, then that would impede the public interest in the fullest possible disclosure to the agency to enable it to reach properly informed decisions in relation to complaints made to it.

31. I repeat the comments I made in paragraph 22 above. In spite of the operation of the FOI Act on the agency over the past two years, and the publicity that the FOI Act has received, including the publicity in relation to its effect on the agency, the agency has not been able to provide any evidence to support its claims that medical practitioners are being less open in their responses to the agency when responding to a complaint as a result of the possible disclosure of their responses under the FOI Act. On this point, I respectfully refer to the observations of Owen J. in *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, 15 June 1995, unreported). In referring to the judgment of Sheppard J in *Cockcroft*, His Honour said at page 44:

> *"How can the* [Information] *Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had "real and substantial grounds for thinking that the production of the document could prejudice that supply" or that disclosure could have an adverse effect on business or financial affairs? In my opinion it is not sufficient for the original decision-maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision-maker."*

32. Without some material that provides real and substantial grounds for enabling me to conclude that the agency's expectations are reasonably based, I must find that the claim for exemption is not established. Therefore, on the material before me and for the reasons give, I find that the disputed document is not exempt under clause 5(1)(a) nor under clause 8(2) of Schedule 1 to the FOI Act.

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