FOY AND MEDICAL BOARD

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: 95116** **Decision Ref: D04295**

Participants:

Kieran Francis Foy
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), 21, 30, 68(1), 72(1)(b), 75(1), 102(3); Schedule 1 clauses 3(1), 5(1)(a), 8(2), 8(4).
Freedom of Information Act 1992 (Qld) s. 42(1)(e).
Freedom of Information Act 1982 (C'wlth) s. 43(1)(c)(ii).

Re Egan and Medical Board of Western Australia (Information Commissioner, WA, 28 September 1995, unreported).
Re "T" and Queensland Health (1994) 1 QAR 386.
Manly v Ministry of Premier and Cabinet (Supreme Court of Western Australia, 15 June 1995, unreported).
Attorney-General's Department v Cockroft (1986) 10 FCR 180.
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).
Ryder v Booth [1985] VR 869.

DECISION

The decision of the agency is set aside. In substitution it is decided that, other than the parts of the document described in paragraph 37 of these reasons for decision, which parts I find are exempt under clause 3 of Schedule 1 to the *Freedom of Information Act 1992*, the remainder is not exempt under clause 5(1)(a), nor is it exempt under clause 8(2).

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

18th October 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 Mr Foy ('the complainant') access to a document, being the response received by the agency from a medical practitioner following a complaint made to the agency by the complainant.

BACKGROUND

2. On 7 April 1995, the complainant lodged an application with the agency seeking access under the *Freedom of Information Act 1992* ('the FOI Act') to evidence tendered to the agency by a medical practitioner in response to a complaint made to the agency in April 1993 by the complainant about that practitioner. On 11 April 1995, Mr K Bradbury, the Registrar of the agency, refused the complainant access to the documentation held by the agency pertaining to his complaint, including the medical practitioner's response to the agency. The Registrar claims that the requested documents are exempt documents under clauses 5(1)(a) and 8(2) of Schedule 1 to the FOI Act.

3. On 19 April 1995, the complainant applied to the agency for internal review of the Registrar's decision. On 16 June 1995, the Chairman of the agency, Dr L G Blake, confirmed the Registrar's decision and refused access to the requested documents on the grounds that those documents are exempt under clauses 5(1) and 8(2) of Schedule 1 to the FOI Act. The complainant remained dissatisfied with the decisions of the agency and, on 27 June 1995, he sought external review by the Information Commissioner.

REVIEW BY THE INFORMATION COMMISSIONER

4. On 30 June 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 for review. In accordance with my authority under ss.75(1) and 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 FOI file maintained by the agency in respect of this matter. As neither the letter from the Registrar nor the letter from Dr Blake, 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 the FOI Act, I also required the agency to provide further explanation for its claims for exemption under clauses 5(1)(a) and 8(2) of Schedule 1 to the FOI Act.

5. On 7 July 1995, I received the requested documents and the other information requested from the agency. Prior to receiving the requested documents, on 5 July 1995, I wrote to the medical practitioner concerned and sought his views regarding the release to the complainant of his response to the agency. I received the medical practitioner's response on 10 July 1995, in which he informed me that he objected to the release of his response to the complainant.

6. The agency initially claimed exemption for three documents, being the agency's letter to the medical practitioner dated 7 May 1993, requesting a response to the complaint; the medical practitioner's letter of response to the agency dated 20 May 1993; and the agency's letter to the medical practitioner dated 10 June 1993, informing him of the agency's decision on the complaint. However, the complainant confirmed with my office that he is seeking access to one document only, namely, the medical practitioner's letter of response to the agency dated 20 May 1993 ('the disputed document').

7. On 18 September 1995, I advised the parties to this complaint that it was my preliminary view, based upon my examination of the disputed document and on evidence then before me, that the disputed document is not exempt under clause 5(1)(a) nor under clause 8(2) of Schedule 1 to the FOI Act. However, I further informed the parties that it was also my preliminary view, based upon my examination of the disputed document, that certain matter contained within the disputed document consists of "personal information" about persons other than the complainant, and that matter is, *prima facie*, exempt matter under clause 3 of Schedule 1 to the FOI Act.

8. On 21 September 1995, the agency responded to my preliminary view and maintained its claims that the requested document is exempt under clauses 5(1)(a) and 8(2) of Schedule 1 to the FOI Act. However, the agency declined to provide any further submissions to me in support of its claim for exemption. On 21 September 1995, I also received a submission from the complainant in response to that preliminary view.

9. There is only one document in dispute between the parties, namely, the response of the medical practitioner to the agency dated 20 May 1993. In this instance, as in the previous instances involving complaints between the agency and access applicants under the FOI Act over access to similar documents, I am not persuaded by the agency's claims that the disputed document is exempt. My reasons in this instance are as follows.

THE EXEMPTIONS

(a) Clause 5(1)(a)

10. 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:

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

11. In my latest decision involving the agency, *Re Egan and Medical Board of Western Australia* (28 September 1995, unreported), I considered the agency's claims for exemption under clause 5(1)(a) in some detail. At paragraphs 13-15 of that decision, I referred to a decision of the Queensland Information Commissioner in which he considered the meaning of s.42(1)(e) of the Queensland FOI Act, the Queensland exemption equivalent to clause 5(1)(a). I again refer to my learned colleague's views of the scope and meaning of s.42(1)(e), since I am of the view that clause 5(1)(a) has the same meaning as s.42(1)(e) of the Queensland FOI Act.

12. In *Re "T" and Queensland Health* (1994) 1 QAR 386, after concluding that the exemption in s.42(1)(e) of the Queensland FOI Act 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 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."*

13. Further, at paragraph 24 of that decision, the 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."*

14. In the light of those views of the Commissioner, my previous decisions involving access to similar documents of this agency, and my consideration of the claims for exemption submitted by the agency in this instance, I remain of the 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 in clause 5(1)(a) that disclosure could reasonably be expected to impair the effectiveness of methods or procedures, it requires a judgement to be made by a decision-maker as to whether 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.

15. The evidence before me in support of the claim for exemption under clause 5(1)(a) in this instance, is almost identical to the evidence that was put before me by the agency in *Re Egan,* and in my other decisions involving similar documents of the agency. I have found, and still find, that evidence to be insufficient to establish a *prima facie* claim for exemption under clause 5(1)(a). 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. As I have said before, 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.

16. Essentially, it is the submission of the agency that the effectiveness of its methods or procedures for dealing with complaints received from the public about medical practitioners would be impaired by the disclosure of the disputed document. The agency submits that disclosure could reasonably be expected to have the effect of discouraging medical practitioners from responding to those complainants and, as the agency has no power to compel medical practitioners to respond and it relies upon the co-operation of practitioners in order to carry out its functions, its method of investigating complaints would be impaired. However, the agency has not provided me with any evidence that any doctor has refused to respond to its requests following the receipt of a complaint, nor has the agency provided me with any evidence that medical practitioners in general have been less than frank in those responses because of the likelihood of disclosure of those documents under the FOI Act.

17. The only material before me in support of the agency's claims in this regard consists of the claims of the Registrar and the Chairman of the agency. Whilst I acknowledge that the Chairman is an experienced medical practitioner, in my view, without some probative material against which I am able to assess whether there are real and substantial grounds for the beliefs of the Chairman and the Registrar on that point, the assertions of the agency are insufficient to discharge the onus of proof upon the agency. The agency has not provided me with any propbative material supporting its claims, nor is there material from which I could conclude that there are real and substantial grounds for expecting some impairment to the investigative methods or procedures of the agency. On that point, I again 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 *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, 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."*

18. As I said at paragraph 18 of my decision in *Re Egan*, in my view, clause 5(1)(a) requires 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. In several of my previous formal decisions I have rejected the agency's argument 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: (*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, nor has the agency provided any material in this case to satisfy me that its expectation of impairment is reasonably based.

20. 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, since the FOI Act was enacted in November 1992. 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

21. 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". The matters of complaint in this instance, concerned alleged unethical behaviour by the medical practitioner concerned. I am not certain that the matters the subject of the complaint to the agency by the complainant comprise a contravention of any law in the sense that those words are used in clause 5(1)(a). 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.

22. Therefore, on the basis of the material before me, I am not satisfied that clause 5(1)(a) is an exemption that can be relied upon in this instance, for the reasons given. The agency has not established that the disputed document is exempt under clause 5(1)(a). Accordingly, I find that the disputed document is not exempt under clause 5(1)(a) of Schedule 1 to the FOI Act.

(b) Clause 8(2)

23. Exemption was also claimed for the disputed document 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."

24. I discussed the meaning of the exemption in clause 8(2) in my decision in *Re Egan* at paragraphs 25 and 26. I repeat my views on the meaning of that clause. 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.

25. In *Cockcroft* (supra), the Full Federal Court said, at 190, 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.

26. As a matter of practice, I seek the views of practitioners concerned in disputes of this nature in order to attempt to effect a conciliation between the parties if possible. In this case, the practitioner objected to the disclosure to the complainant of his response to the agency. The medical practitioner also informed my investigations officer that he could not state that he would refuse to respond to the agency in the future, if the occasion arose. However, the practitioner did state that, in the future he would respond with the FOI Act in mind and that he would only address the issues of complaint and provide a purely objective, concise response to any complaint made by a member of the public against him.

27. The agency's arguments for exemption under clause 8(2) are substantially the same as those submitted in relation to clause 5(1)(a). The agency claims it relies totally upon the goodwill of the medical practitioners in order to obtain their responses to complaints received. In addition, it is the submission of the agency that if medical practitioners knew their responses to complaints could be released

to complainants and to other persons and possibly used for other reasons (such as taking civil action against the medical practitioner), then medical practitioners would likely to be less frank and open in their responses to the agency or they would decline to respond at all. In relation to this claim of the agency, I repeat the comments made at paragraphs 19-20 above.

28. The agency also claims 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.

29. From the material before me and my own examination of the disputed document, I am satisfied that it contains information of a confidential nature obtained in confidence by the agency. That is, I am satisfied that paragraph (a) of clause 8(2) is established by evidence before me. However, I am not satisfied that the requirements of paragraph (b) are established by evidence before me. The assertions of the agency as to the effects of disclosure of the disputed document do not provide real and substantial grounds for enabling me to conclude that the agency's expectations are reasonably based.

30. However, if I were satisfied that the exemption in clause 8(2) had been established on the evidence before me, which I am not, there is the limitation on 8(4) to consider. That is, matter is not exempt under clause 8(2) if its disclosure would, on balance, be in the public interest. The onus of persuading me that disclosure would, on balance, be in the public interest lies on the complainant under s.102(3) of the FOI Act.

31. In his letter of complaint to my office dated 26 June 1995, the complainant informed me that since 1993 he had been seeking reasons from the agency in an attempt to understand why the agency had decided to take no action in relation to his complaint. He also informed me that one of the reasons for his FOI application is as follows:

> *"I am concerned that the Medical Board, which is supposed to act on behalf of person like myself, who have complaints against doctors, has no degree of accountability to either advise me as to the reasons of their decisions, or to accord me the same level of hearing as given to Dr..."*

32. On 10 June 1993, in response to the complainant's complaint to the agency, the Registrar informed the complainant of the decision of the agency in the following terms:

> *"...the Board has directed me to inform you that it has investigated your allegations against Dr...and has resolved to take no further action under the Act.*

The Board's powers under the Act are limited to investigating allegations of infamous or improper conduct in a professional respect, professional misconduct or gross carelessness or incompetency. The allegations contained in your letter would not, in the Board's view, justify disciplinary action against the doctor concerned.

In the circumstances, the Board will take no further action in this matter."

33. In view of the response from the Registrar, I consider there is some substance to the complainant's claim that he has not been given any the reasons for the decision of the agency and that he is entitled to an explanation of what the agency did in response to his complaint and why the agency determined his complaint in the manner in which it did. In my decision in *Re Pau* at paragraphs 28 and 29, I also considered the matter of the public interest and where the balance should lie if I were to consider it necessary to weigh the competing public interests. In that decision I made the following comments:

*"**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 practitioner's 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."

34. In my view, the complainant is entitled to expect that the agency would deal with his complaint in a manner that includes him being given reasons for the decision of the agency. That did not occur and, in those circumstances, I consider that the public interest shifts in favour of disclosure. However, as I am not satisfied that the agency has established a valid claim for exemption under clause 8(2) of Schedule 1 to the FOI Act, it is unnecessary that I decide the question of where the balance of the public interest should lie.

Matter exempt as personal information about third parties

35. Clause 3(1) of Schedule 1 to the FOI Act exempts matter that contains personal information about a third party. In the Glossary in the FOI Act, "**personal information**" is defined as meaning "...*information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead -*

    (a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or

    (b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample."

36. From my examination of the disputed document, I am satisfied that it contains personal information about the complainant. I recognise that there is a public interest in the complainant being able to have access to his personal information and the fact that the disputed document contains personal information about the complainant is, under s.21 of the FOI Act, a factor in favour of disclosure of the document to the complainant.

37. However, the disputed document also contains personal information about third parties other than the complainant. The complainant informed my office that he would accept access to an edited copy of the disputed document from which personal information about third parties that is exempt under clause 3(1), had been deleted. Some information that is personal about the applicant is inextricably wound up with personal information about those third parties and it is not practicable to sever the complainant's personal information from matter that is otherwise exempt. However, in the main, I consider that it is practicable for the agency to delete personal information about third parties from the disputed document and to provide the complainant with access to an edited copy of that document. Further, taking into account the complainant's advice to me, I consider that he would wish to be given access to an edited copy of the disputed document. The personal information about third parties which should be deleted consists of the following:

Page 1, second paragraph
***** the third and fourth sentences**;**

Page 1, third paragraph -
***** the first five words in the second line;
* all the words after the date 28/12/92 in line three, all of lines 4-9 and the first two words in line 10;

Page 2, second paragraph
* all except the first two sentences and the last sentence;

Page 2, third paragraph
***** all of the third paragraph

Page 2, fourth paragraph
* the last three sentences

38. With the deletion of the matter described in paragraph 37 above, I find that the disputed document is not exempt under clause 5(1)(a), nor is it exempt under clause 8(2) of Schedule 1 to the FOI Act.

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