SANFEAD AND MEDICAL BOARD

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)

File Ref: 95110
Decision Ref: D05095

Participants:

Terence John Sanfead
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. 21, 68(1), 72(1)(b), 75(1); Schedule 1 clauses 5(1)(a), 7, 8(2).
Medical Act 1894 s. 13.
Freedom of Information Act 1992 (Qld) s. 42(1)(e).

Re Egan and Medical Board of Western Australia (Information Commissioner, WA, 28 September 1995, unreported).
Re Foy and Medical Board of Western Australia (Information Commissioner, WA, 18 October 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 varied. In substitution it is decided that:

(i) Document 1 is not exempt; and

(ii) Documents 2 and 3, the attachments to Document 1, are exempt under clause 8(2) of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

15th November 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 Sanfead ('the complainant') access to certain documents held by the agency relating to a complaint concerning a medical practitioner.

2. In 1992 the complainant lodged a statutory declaration with the agency containing a complaint about a medical practitioner. After making initial inquiries and seeking a response to the matters of complaint from the doctor concerned, the agency resolved to take no further action against that doctor under the *Medical Act 1894*, and the complainant was advised accordingly. At that time, the *Freedom of Information Act 1992* ('the FOI Act') had not been proclaimed. However, the FOI Act was eventually proclaimed on 1 November 1993 and, some two and a half years later, on 28 April 1995, the complainant lodged with the agency an access application under the FOI Act seeking access to copies of all documents held by the agency relating to the complaint that he had made to the agency in 1992.

3. On 19 May 1995, Mr K I Bradbury, the Registrar of the agency granted the complainant access to copies of his own letters to the agency. However, the Registrar refused him access to copies of other documents held by the agency on the grounds that those documents are exempt under clauses 5(1)(a) and 8(2) of Schedule 1 to the FOI Act. On 26 May 1995, the complainant sought internal review of that decision and on 2 June 1995, the Chairman of the agency, Dr Blake, confirmed the Registrar's decision that the requested documents are exempt under clauses 5(1)(a) and 8(2). The complainant remained dissatisfied with the decision of the agency and, on 16 June 1995, lodged a complaint with the Information Commissioner.

REVIEW BY THE INFORMATION COMMISSIONER

4. On 23 June 1995, in accordance with my statutory authority under s.68(1) of the FOI Act, I notified the agency that I had received and accepted this complaint. In accordance with my usual practice, pursuant to my authority under ss.75(1) and 72(1)(b) of the FOI Act, I obtained the originals of the requested documents from the agency, together with the FOI file maintained by the agency with respect to this matter. I also required the agency to provide further explanation and reasons to justify its claims that the requested documents are exempt under clauses 5(1)(a) and 8(2) of Schedule 1 to the FOI Act. On 4 July 1995, my office contacted the medical practitioner who was the subject of the complainant's complaint to the agency regarding the release to the complainant of his response to the agency. I was informed by that practitioner that he objected to its release

to the complainant because he considered that it had been provided to the agency in confidence.

5. After examining the documents in dispute and considering the submissions of the parties, on 12 September 1995, I provided the parties with my preliminary view and reasons for that view. It was my preliminary view that, as there were three documents attached to the medical practitioner's response to the agency, there were six documents in dispute. In my view, three of the requested documents were not exempt as the complainant had obtained copies of those documents from another source. The agency accepted my preliminary view in relation to those documents and withdrew its claims for exemption.

6. Of the three documents remaining in dispute, it was my preliminary view, on the basis of the material then before me, that one document, namely, the letter from the medical practitioner to the agency in response to the complainant's complaint to the agency was not exempt, but that two of the three attachments to that letter may be exempt under clause 8(2) of Schedule 1 to the FOI Act. It was also my preliminary view that one of those attachments may also be exempt under clause 7 of Schedule 1 to the FOI Act. Following receipt of my preliminary view, both parties provided a further submission to me in support of their respective claims.

THE DISPUTED DOCUMENTS

7. Three documents remain in dispute between the parties. Those documents consist of a letter dated 14 May 1992, from the medical practitioner to the agency containing his response to the matters of complaint (Document 1), plus two of the attachments to that letter. The first attachment is a copy of a letter dated 16 April 1992, from a firm of solicitors to the medical practitioner (Document 2). The second attachment is a copy of a letter dated 10 February 1987, concerning the complainant, that passed between two other medical practitioners in the course of the complainant being treated for injuries he sustained in 1986 (Document 3). Documents 2 and 3 both contain handwritten patient notes written by the medical practitioner against whom the complainant lodged a complaint with the agency in 1992.

8. The agency initially claimed that Document 1 is exempt under clauses 5(1)(a) and 8(2) of Schedule 1 to the FOI Act. After receiving my preliminary view on this complaint, the agency informed me that it maintained its claim for exemption for Documents 1, 2 and 3 under clauses 5(1)(a) and 8(2) of Schedule 1 to the FOI Act. The Chairman of the agency made further submissions to me about the agency's claims for Document 1 under clause 5(1)(a), but made no additional submissions to me in respect of Documents 2 and 3.

THE EXEMPTIONS

(a) Clause 5(1)(a)

9. Clause 5, so far as is relevant, provides:

> ***"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;"*

10. In my most recent decisions involving the agency, *Re Egan and Medical Board of Western Australia* (28 September 1995, unreported), and *Re Foy and Medical Board of Western* Australia (18 October 1995, unreported), I considered the agency's claims for exemption under clause 5(1)(a) in some detail. In those decisions, 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 repeat those comments on the Commissioner's views on the scope and meaning of s.42(1)(e), since I remain of the view that clause 5(1)(a) of the FOI Act has the same meaning as s.42(1)(e) of the Queensland FOI Act.

11. 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."

12. 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, the requirement in clause 5(1)(a) that disclosure *"could reasonably be expected"* to impair the effectiveness of methods or procedures, 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 could result in impairment of the investigative methods or procedures used by the agency.

What is the investigative method or procedure employed by the agency?

13. The investigative method or procedure employed by the agency in this instance is the same method that is employed by the agency on previous occasions when it received a complaint from a member of the public about a medical practitioner. It is the same procedure that is described in the agency's Annual Report for the years 1992/93 and 1993/94. The procedure adopted by the agency is one that the agency claims is designed to provide procedural fairness between the parties. It involves the agency sending a copy of the statutory declaration containing the complaint to the medical practitioner concerned and seeking his or her response to the matters of complaint.

14. The claims of the agency in this instance are substantially the same as those submitted to me on each of the previous occasions that I have been required to deal with a complaint about a decision of the agency. My reasons for rejecting those claims have been explained to the agency in some detail on no less than five previous occasions. In the absence of any probative material to justify the agency's claims for exemption, my view of those claims has not changed. Although in my decisions I necessarily run the risk of repeating myself, that outcome appears to be the inevitable consequence of my dealings with the agency on these matters.

15. The agency also submitted in this case, as it did in *Re Egan*, that a broad interpretation of the exemption in clause 5(1)(a) should be adopted. Specifically, the Chairman of the agency said:

"A broader and more appropriate interpretation of clause 5(1)(a) would enable the clause to apply where the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contraventions or possible contravention of the law could be impaired by means other than disclosure of those methods or procedures. In my submission, 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. That is the position the Board has submitted to you in relation to responses from medical practitioners regarding the complaints made about them to the Board."

Is it reasonable to expect that the agency's investigative method or procedure could be impaired if the disputed documents were disclosed?

16. 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.

17. 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*. 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 documents. 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.

18. As in each of the previous complaints involving this agency, 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. I acknowledge that the Chairman is an experienced medical practitioner. However, 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 probative material supporting its claims, nor is there any material before me 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.

19. 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."*

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 medical practitioners respond to complaints received by the agency and how open and frank those responses may be (see *Re Lawless* at paragraphs 36-44). To date the agency has provided no evidence to support its claims of a relationship between disclosure of documents under the FOI Act and the quality or usefulness of the responses it receives from medical practitioners.

22. I have received and dealt with a number of complaints concerning decisions of the agency to refuse access to documents of the agency, including responses from medical practitioners, 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

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". The matters of complaint in this instance, concerned alleged unethical behaviour by the medical practitioner. I am not certain that unethical behaviour comprises a contravention of any law in the sense that those words are used in clause 5(1)(a). From my examination of the disputed documents, I am unable to conclude that any of them has any connection with investigative methods or procedures. Therefore, I am not satisfied that clause 5(1)(a) is an exemption that can be relied upon in this instance, for the reasons given.

24. 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. There is no evidence that constitutes real and substantial grounds for accepting the agency's claims about the expected impairment to its methods or procedures. Accordingly, I find that the disputed documents are not exempt under clause 5(1)(a) of Schedule 1 to the FOI Act.

(b) Clause 8(2)

25. Exemption is also claimed for Documents 1, 2 and 3 under clause 8(2) of Schedule 1 to the FOI Act. However, as noted at paragraph 8 above, whilst the agency maintained its claim for exemption for those documents, the agency made no further submissions to me in support of those claims. Clause 8(2) 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."*

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

27. Document 1 is the medical practitioner's response to the complaint made against him by the complainant. The medical practitioner informed me that he provided his response to the matters of complaint to the agency, in confidence. There is also material before me which establishes that the usual practice of the agency is to receive that kind of information from medical practitioners in confidence.

28. Document 2 is a letter from a firm of solicitors addressed to the medical practitioner. It contains the hand-written notes of the medical practitioner taken during his examination of the complainant. Document 3 is a copy of a letter between two other medical practitioners who are not involved in the dispute between the parties to this complaint. That document also contains hand-written notes of the medical practitioner which were also taken during his examination of the complainant. In my view, those hand-written notes are the private notes of the medical practitioner and they are inherently confidential. Whilst the complainant has obtained a copy of Document 3, he does not have a copy of that document which contains the medical practitioner's hand-written notes.

29. Taking into account the foregoing, I am satisfied that the three disputed documents contain information of a type described in paragraph (a) of clause 8(2). However, the agency must also satisfy the requirements of paragraph (b) of clause 8(2) in order to establish an exemption under that clause.

30. In that regard, the agency's arguments that Document 1 is exempt under clause 8(2) are substantially the same as those it 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.

31. In the absence of any probative material to support the claims of the agency, in so far as they apply to Document 1, I reject those claims for reasons similar to those given in my decisions in *Re Egan*, at paragraphs 29-32, and in *Re Foy*, at paragraphs 24-29. Accordingly, I do not consider that the future supply of that kind of information to the agency could reasonably be expected to be prejudiced by the disclosure of document 1. I find that document 1 is not exempt under clause 8(2) of Schedule 1 to the FOI Act. However, in my view, different considerations apply to Documents 2 and 3.

32. I consider that paragraph (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. Documents 2 and 3 were additional material provided by the medical practitioner to the agency. In responding to the matters of complaint in this manner, the medical practitioner provided the agency with information, over and above that which was necessary to respond to the complaint to the agency. It was not, in my view, essential for that additional information to be provided for the practitioner to satisfactorily respond to the complainant's complaint to the agency.

33. I am satisfied, from my examination of Documents 2 and 3, that they contain information which is useful for the agency's consideration of the complaint against the medical practitioner concerned. That information was voluntarily provided to the agency and, in my view, it is reasonable to expect that medical practitioners may not voluntarily supply additional information of that kind to the agency in the future, if it were to be disclosed to the complainant. Therefore, I am of the view that the ability of the agency in the future to obtain such additional background information, which has been volunteered, could reasonably be expected to be prejudiced by the disclosure of Documents 2 and 3.

34. I recognise a public interest in the agency being able to obtain additional information that is useful and relevant to its deliberations when dealing with complaints from members of the public. I also recognise a public interest in the complainant being able to exercise his rights under the FOI Act, particularly as Documents 2 and 3 contain some personal information about him which, by virtue of s.21 of the FOI Act, is a factor to be taken into account in deciding whether it is in the public interest for that matter to be disclosed.

35. Weighing those competing interests, it is my view that the public interest in the agency's ability to obtain additional relevant information, for its deliberations when dealing with complaints, that is volunteered by medical practitioners, being information that is over and above that normally provided in response to complaints, outweighs the public interest in the disclosure of Documents 2 and 3. Therefore, I find Documents 2 and 3 are exempt under clause 8(2) of Schedule 1 to the FOI Act.

36. Although, in my preliminary view, Document 2 may also be exempt under clause 7 of Schedule 1 to the FOI Act, my finding that that document is exempt under clause 8(2) necessarily means that I need not consider whether that document is also exempt under clause 7.

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