

**OFFICE OF THE INFORMATION  
COMMISSIONER (W.A.)**

**File Ref: F1032000  
Decision Ref: D0532000**

Participants:

**Grace Evelyn Barrett**  
Complainant

- and -

**Agriculture Western Australia**  
Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – documents relating to an investigation under the *Veterinary Surgeons Act 1960* – clause 5(1)(b) – whether disclosure would reveal the investigation of a possible contravention of the law.

*Freedom of Information Act 1992 (WA)* ss. 3(3), 102(3); Schedule 1 clauses 5(1)(a), 5(1)(b), 5(4), 5(5), 8(2) and 8(4).

*Veterinary Surgeons Act 1960* s.23(2a), 23(4).

*Re Police Force of Western Australia v Kelly and Smith* (1997) 17 WAR 9

## DECISION

The decision of the agency to refuse access to the disputed documents on the ground that they are exempt under clause 5(1)(b) of Schedule 1 to the *Freedom of Information Act 1992* is confirmed.

B. KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

20 October 2000

## REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by Agriculture Western Australia ('the agency') to refuse Mrs Barrett ('the complainant') access to documents requested by her under the *Freedom of Information Act 1992* ('the FOI Act').
2. In October 1998, the complainant made a complaint to the Registrar of the Veterinary Surgeons' Board, ('the Board') about the treatment given to her cat by a veterinary surgeon in August 1998. The Board investigated her complaint and, at the conclusion of its investigation, determined that the evidence was not sufficient to sustain a charge of "unprofessional conduct" against the veterinary surgeon.
3. On 17 February 2000, the complainant made an application to the Board for access under the FOI Act to documents relating to her complaint. The complainant's application was dealt with by the agency because, for FOI purposes, the Board is considered part of the agency. The complainant was granted access, either in full or in part, to some documents, and was refused access to other documents on the ground that they are exempt under clauses 5(1)(a), 5(1)(b) and 8(2) of Schedule 1 to the FOI Act. Following an internal review, the complainant was granted access to 1 additional document.
4. On 29 May 2000, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

## REVIEW BY THE INFORMATION COMMISSIONER

5. I obtained the disputed documents from the agency. In the course of my dealing with this complaint, various documents were released to the complainant and other aspects of her complaint were resolved. On 5 October 2000, I informed the parties in writing that it was my preliminary view that the documents remaining in dispute may be exempt under clause 5(1)(b), and gave my reasons.
6. I received written submissions in response from the complainant. Most of those submissions were not, in my view, relevant to the issue for my determination as they went, in the main, to the treatment of her cat, the actions of the veterinary surgeon and the quality of the investigation carried out by the Board.

## THE DISPUTED DOCUMENTS

7. There are six disputed documents:
  - Letter dated 20 October 1998 from Registrar of the Board to veterinary surgeon.

- Letter dated 1 November 1998 from veterinary surgeon to Registrar of the Board.
- Letter dated 20 November 1998 from Registrar of the Board to veterinary surgeon.
- Letter dated 27 November 1998 from veterinary surgeon to Registrar of the Board.
- File note, undated, summarising aspects of the complaint and the response of the veterinary surgeon to each of those points.
- Letter dated 8 February 1999 from Registrar of the Board to veterinary surgeon.

### THE EXEMPTION

8. The agency claims that the disputed documents are exempt under clause 5(1)(b). Clause 5(1)(b) provides that matter is exempt matter if its disclosure could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted.
9. Documents which reveal the fact of a particular investigation of a particular incident involving certain people will be exempt under clause 5(1)(b): *Police Force of Western Australia v Kelly and Smith* (1997) 17 WAR 9 at p13. The term “the law” in clause 5 of Schedule 1 to the FOI Act is used in a broad sense and is not limited in its application to the criminal law only. The terms of clause 5(1)(b) clearly contemplate investigations that may lead to disciplinary proceedings, as well as those potentially leading to prosecutions. Further, the term “contravention” in clauses 5(5) of the FOI Act includes a failure to comply.
10. The Board is established under the *Veterinary Surgeons Act 1960* (‘the Veterinary Act’). The Registrar of the Board is empowered, either on his own motion or at the direction of the Board, to make inquiries to determine, among other things, whether or not registered veterinary surgeons, veterinary nurses or other persons subject to the Veterinary Act are complying with the requirements of that Act.
11. The Board is empowered to conduct an enquiry into whether a veterinary surgeon has been guilty of unprofessional conduct. After an inquiry under the Veterinary Act, if a registered veterinary surgeon is found guilty of unprofessional conduct, the Board may, among other things, reprimand, fine, suspend registration, remove the name of the surgeon from the register and impose conditions on registration (s.23(2a)).

12. Clearly, the Veterinary Act is a relevant law for the purpose of clauses 5(1)(b) being a statute enacted by the Parliament of Western Australia. Taking into account the requirements of the Veterinary Act, the contents of the disputed documents and other documents before me, I am satisfied that the Board conducted an investigation into the complainant's complaint. The investigation conducted by the Board involved it seeking written responses from the particular veterinary surgeon and making inquiries about the treatment given to the complainant's cat.
13. Under s.23(4) of the Veterinary Act, a veterinary surgeon may be guilty of "unprofessional conduct" if that person, among other things, does not observe the standards of professional conduct required by registered veterinary surgeons. A finding by the Board that a veterinary surgeon is guilty of unprofessional conduct, clearly, has disciplinary implications for that veterinary surgeon. I am satisfied that the action taken and the inquiries made by the Board constituted the first stage of an investigation into whether the veterinary surgeon might have been guilty of unprofessional conduct if the complaint had been substantiated. I am satisfied that the investigation was an investigation into a possible contravention of the law.
14. The complainant submits, among other things, that there was no investigation because the Board did not proceed to a formal inquiry. As I understand the Veterinary Act, if the Board had decided to charge the veterinary surgeon, a formal hearing would have ensued. However, the fact that that did not eventuate does not, in my view, mean that the inquiries that led to the decision by the Board not to charge the veterinary surgeon did not amount to an investigation. In my opinion, they did.
15. Further, having examined the disputed documents, I am satisfied that disclosure of those documents could reasonably be expected to reveal the fact that there was an investigation, the identity of the person being investigated and, not only generally but specifically, the subject matter of the investigation.
16. Clearly, the complainant has certain knowledge about the investigation conducted by the Board. However, Anderson J made it clear in *Kelly's* case that that does not affect the question of whether or not matter is exempt under clause 5(1)(b). At pages 10 and 11, His Honour said:

*"I do not think that it could have been intended that exemption should depend on how much the applicant already knows or claims to know of the matter...[Clause] 5(1)(b) is not limited to new revelations but covers all matter that of itself reveals the things referred to, without regard for what other material might also reveal those things, or when that other material became known, and without regard to the actual state of knowledge that the applicant may have on the subject or the stage that the investigation has reached."*

17. Whilst an agency may consider and take into account the state of knowledge that an access applicant might have about a particular investigation, before making a decision to either claim exemption for the documents under clause

5(1)(b) or to exercise its discretion under s.3(3) and disclose documents that may be technically exempt, the Information Commissioner does not have that discretion.

18. The complainant raised some “public interest” arguments in support of her claim for access to the disputed documents. However, clause 5(1)(b) is not limited by a public interest test, except in the circumstances where clause 5(4) applies. In the circumstances of this complaint, I am satisfied that clause 5(4) does not apply to the disputed documents.
19. Accordingly, I find that the disputed documents are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act and confirm the decision of the agency to refuse access to those documents.
20. As I have found that the disputed documents are exempt under clause 5(1)(b), I need not consider whether they are also exempt under clauses 5(1)(a) or 8(2).

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