OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 97006
Application S 114/95

Participants:

PETER JOHN BAYLISS
Applicant

MEDICAL BOARD OF QUEENSLAND
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - jurisdiction of Information Commissioner - whether the respondent is excluded from the application of the *Freedom of Information Act 1992* Qld, in respect of documents obtained for the purposes of an investigation under the *Medical Act 1939* Qld, by the application of s.11(1)(i) of the *Freedom of Information Act 1992* Qld, read in conjunction with s.13(1) of the *Medical Act 1939* Qld.

Freedom of Information Act 1992 Qld s.4, s.7, s.8, s.8(1), s.9(1)(a)(i), s.11(1)(h), s.11(1)(i), s.25, s.27(2), s.52, s.71(1)(b), s.73, s.73(3)
Acts Interpretation Act 1954 Qld s.14A
Architects Act 1985 Qld s.43
Beach Protection Act 1968 Qld s.34(2)
Casino Control Act 1982 Qld s.91(2)
Chiropractors and Osteopaths Act 1979 Qld s.25(2)
Commissions of Inquiry Act 1950 Qld s.3, s.4, s.20
Corrective Services Act 1988 Qld s.159
Dental Act 1971 Qld s.26(4)
Education (Teacher Registration) Act 1988 Qld s.44(1)
Gaming Machine Act 1991 Qld s.183(2)
Medical Act 1939 Qld s.8, s.10, s.13, s.13(1), s.13(2), s.37(3A), s.37(3A)(c)
Medical Act Amendment Act 1987 Qld s.8
Occupational Therapists Act 1979 Qld s.25(2)
Optometrists Act 1974 Qld s.24(5)
Parliamentary Commissioner Act 1974 Qld s.19
Pharmacy Act 1976 Qld s.25(5)
Physiotherapists Act 1964 Qld s.21(5A)
Podiatrists Act 1969 Qld s.22(2)
Psychologists Act 1977 Qld s.24(2)

Speech Pathologists Act 1979 Qld s.25(2)
Tow Truck Act 1973 Qld s.29(1)
Veterinary Surgeons Act 1936 Qld s.29

Christie and Queensland Industry Development Corporation, Re (1993) 1 QAR 1
Council of the Shire of Redland v Stradbroke Rutile Pty Ltd (1974) 133 CLR 641
East End Dwellings Co Ltd v Finsbury Borough Council [1952] AC 109
Hunter Douglas Australia Pty Ltd v Perma Blinds (1970) 122 CLR 49
Muller v Dalgety & Co Ltd (1909) 9 CLR 693
News Corporation Ltd and Ors, Re (1987) 70 ALR 419
Polydor Ltd and RSO Records Inc v Harlequin Record Shops Ltd and Simons Records Ltd [1980] 1 CMLR 669
Queensland Law Society Inc v F N Albietz and Ors [1996] 2 Qd R 580
R v County Council of Norfolk (1891) 60 LJQB 379
Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor (1992) 36 FCR 111
Victorian Public Service Board v Wright (1986) 160 CLR 145
Wainer v Rippon (1979) 29 ALR 643
Woodlock & Ors v Commissioner of Land Tax (NSW) (1974) 5 ATR 57

DECISION

I find that the respondent is not a commission of inquiry issued by the Governor in Council, within the terms of s.11(1)(i) of the *Freedom of Information Act 1992* Qld, and that neither the respondent, nor the documents of the respondent to which the applicant seeks access, are excluded from the application of the *Freedom of Information Act 1992* Qld, by s.11(1)(i) of the *Freedom of Information Act 1992* Qld.

Date of decision: 28 April 1997

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. By letter dated 27 June 1995, the applicant applied to me for review, under Part 5 of the *Freedom of Information Act 1992* Qld (the FOI Act), of the respondent's decision to refuse him access to a large number of documents which concern complaints to the respondent about the applicant. The respondent had refused access on the basis that the documents comprised exempt matter under the provisions of the FOI Act. My review commenced in July 1995, without objection by the respondent. The mediation phase of my review had resulted in significant concessions by both the applicant (in abandoning pursuit of certain documents) and the respondent (in agreeing to give the applicant access to certain documents and parts of documents), which had reduced the number of documents in issue. In December 1996, the respondent had agreed to release to the applicant further documents and parts of documents, and I had authorised it to do so. Before this could occur, however, I received a letter dated 3 January 1997 from Dr L A Toft, the then Deputy President (now President) of the Medical Board of Queensland, which relevantly stated:

> ...
>
> *The Medical Board desires at this late stage (for which any inconvenience is sincerely regretted) to lodge with you an objection to a continuation of the external review proceedings.*

The Board lodges the objection at this late stage in proceedings simply because the legal advice on which the objection is based was only obtained by the Board prior to the Christmas-New Year break.

Proceeding on the legal advice obtained, the Medical Board objects to your exercising jurisdiction to accept and deal with the external review application. With the benefit of hindsight, the Board also now contends that the original application for access made to the Board was itself misconceived and ought to have been refused.

The Medical Board submits that when s.11(1)(i) [the exclusion provision] of the Freedom of Information Act 1992 *[FOI Act] is read (as it must be) with both s.13 of the* Medical Act 1939 *and the definition of "commission" in s.3 of the* Commissions of Inquiry Act 1950*, the Board is to be taken to be another commission of inquiry as referred to in the exclusion provision.*

It follows in the Medical Board's submission that the provisions of the FOI Act do not apply to the Board with respect to access to documents which relate to its investigations or inquiries respectively conducted or held, or for that matter which relate to the hearing of any application made to the Board, under or in pursuance of the provisions of the Medical Act 1939*.*

The Board submits that it is solely a matter for the Queensland Parliament to revoke by Act of Parliament the immunity which has been conferred on it by the exclusion provision and that the immunity so conferred has not abated or been lost by reason of not hitherto having been asserted.

2. This decision deals solely with the jurisdictional objection raised by the respondent. In *Re Christie and Queensland Industry Development Corporation* (1993) 1 QAR 1, at pp.4-7 (paragraphs 5-16), I discussed my role and powers with respect to determining my jurisdiction as Information Commissioner. For the reasons there stated, I consider that I have the power, and a duty, to embark upon a consideration of issues relating to the limits of my jurisdiction, when they are raised as an issue in an application for review lodged with me. The respondent has taken the same objection to jurisdiction in respect of two other applications for review lodged by the applicant against decisions of the respondent (my reference numbers: S 146/95 and S 16/97). I intend my findings in the present case to apply to other cases in which the same objection to jurisdiction is raised.

3. By letter dated 22 January 1997, I responded to Dr Toft's letter, conveying my preliminary view that s.11(1)(i) of the FOI Act does not apply in the manner suggested in Dr Toft's letter. I invited the respondent, should it wish to proceed with its objection to jurisdiction, to lodge a written submission and/or evidence in support of its case. The respondent provided a written submission dated 10 February 1997, a copy of which was provided to the applicant for response. The applicant lodged a written submission dated 25 February 1997. It was provided to the respondent, which lodged a reply dated 12 March 1997. There appear to be no factual issues in dispute, with the jurisdictional issue turning on the correct interpretation of the relevant statutory provisions.

Relevant statutory provisions

4. I set out below the statutory provisions on which reliance has been placed by the respective participants.

5. Section 11(1) of the FOI Act provides (so far as relevant for present purposes):

> ***11.(1)*** *This Act does not apply to—*
>
> *...*
>
> *(h) the Fitzgerald commission of inquiry, that is, the commission of inquiry that is "the Commission" within the meaning of the* Commission of Inquiry Continuation Act 1989*; or*
>
> *(i) another commission of inquiry issued by the Governor in Council; ...*

6. Section 13 of the *Medical Act 1939* Qld provides:

> ***13.(1)*** *For the purpose of hearing any application or making any investigation or holding any inquiry into any matter under this Act, the board shall be deemed to be a commission of inquiry within the meaning of the* Commissions of Inquiry Act 1950 *and the provisions of that Act, other than sections 4, 4A, 10(3) and 13, shall apply accordingly.*
>
> ***(2)*** *For the purpose of applying the provisions of the* Commissions of Inquiry Act 1950*, each member of the board shall be deemed to be a commissioner, and the president shall be deemed to be the chairperson, within the meaning of that Act.*

7. Section 37(3A) of the *Medical Act 1939* Qld provides:

> ***(3A)*** *Where the board appoints a complaints investigation committee and refers a complaint to it under subsection (3)(c), the following provisions shall apply—*
>
> *(a) the Board may give such directions from time to time to the complaints investigation committee as it thinks fit concerning the exercise by the committee of its powers and the committee shall comply with the directions;*
>
> *(b) the complaints investigation committee shall have the same powers as the board has to investigate the complaint as provided for in subsection (3)(a) and (b), and sections 12, 13(1), 13B, 13C, 37B and 40 shall apply as if references therein to the board were references to the complaints investigation committee;*

> *(c) for the purposes of applying the provisions of the* Commissions of Inquiry Act 1950, *each member of the complaints investigation committee shall be deemed to be a commissioner, and the chairperson of the complaints investigation committee shall be deemed to be the chairperson, within the meaning of that Act;*
>
> *(d) without limiting the effect of paragraph (a), the complaints investigation committee shall investigate the complaint and shall deliver its findings and recommendations to the board, which may act on the findings as if they were its own; and*
>
> *(e) the board may continue to exercise all of its powers in the investigation of the complaint notwithstanding the reference, and it shall not be bound by the findings and recommendations of the complaints investigation committee.*

8. The definition of "commission" in s.3 of the *Commissions of Inquiry Act 1950* Qld, is:

> ***"commission"*** *means any commission of inquiry issued by the Governor, by and with the advice of the Executive Council of this State, under the Governor's hand and the public seal of the State, and includes the members of the commission, or a quorum thereof, or the sole commissioner in cases where the commission is constituted of a sole commissioner, sitting for the purposes of the inquiry and, where by an instrument other than a commission of inquiry as aforesaid the Governor in Council appoints a person or persons to make an inquiry into or with respect to any matter or matters and declares in that instrument of appointment or in a separate instrument that this Act or specified provisions of this Act shall be applicable for the purposes of that inquiry, then for the purposes of so applying this Act or, as the case may be, the provisions of this Act specified as aforesaid, includes that instrument of appointment and the person, or persons, or a quorum of the persons thereby appointed sitting for the purposes of the inquiry thereunder.*

9. Section 4 of the *Commissions of Inquiry Act 1950* Qld provides*:*

> ***4.(1)*** *Wherever a commission of inquiry is issued by the Governor, by and with the advice of the Executive Council of this State, under the Governor's hand and the public seal of the State, the provisions of this Act shall apply to and with respect to the inquiry.*
>
> ***(2)*** *Wherever this Act or specified provisions of this Act are declared by the Governor in Council to be applicable for the purposes of an inquiry under a commission, other than a commission of inquiry as referred to in subsection (1), then the provisions of this Act or, according as declared by the Governor in Council, those specified provisions of this Act shall apply to and with respect to the inquiry.*

The respondent's submission

10. The substance of the respondent's case is contained in the following extracts from its written submission dated 10 February 1997, and its reply dated 12 March 1997:

> *From the words of sections 13 and 37(3A)(c) of the* Medical Act *and the definition of "commission" in the* [Commissions of Inquiry Act], *when the Board* [i.e., the respondent] *is investigating any matter under the former Act, it is deemed to be, within the meaning of the latter Act, "a commission of inquiry issued by the Governor by or with the advice of the Executive Council of this State, under the Governor's hand and the public seal of the State".*
>
> *There are two possible views open on the question of which commissions of inquiry are exempt from the FOI Act. The words "issued by the Governor in Council" in s.11(1)(i) may exclude from the FOI Act only those commissions actually issued by an Order in Council. The better view, in our submission, is that a body corporate, such as the Board, which is deemed to be a "commission of inquiry" within the meaning of the* [Commissions of Inquiry Act] *is also deemed to have been issued by the Governor in Council by reason of the definition of 'commission' in that Act. The Board thus falls squarely within the exclusion.*
>
> ...
>
> *Support can also be found in the careful definition of "commission" in the* [Commissions of Inquiry Act], *s.3. That definition contemplates the appointment, by the Governor in Council, of "a person or persons to make an inquiry into or with respect to any matter or thing" by "an instrument other than a commission of inquiry". It is submitted that the* Medical Act*, s.13 is such an instrument by which the Governor in Council appoints the Board to carry out the functions specified therein. If s.13 had the narrow effect of merely granting the powers of a commission with nothing more, s.37(3A)(c) would be rendered otiose.*
>
> ...
>
> *Furthermore, it must be presumed that, in enacting the FOI Act, Parliament knew the terms of s.13 of the* Medical Act*. Therefore, if Parliament had intended that the Board should have only the powers of a commission of inquiry with none of the privileges or immunities, it would have been simple and easy to amend s.13 to expressly grant such powers and avoid the much broader legislative act of deeming unqualified equality between the Board and a "commission of inquiry issued by the Governor by or with the advice of the Executive Council of this State, under the Governor's hand and the public seal of the State".*
>
> ...

... the deeming by s.13 is a direction to conclude that the Board is a commission of inquiry within the meaning of the [Commissions of Inquiry Act] *when it carries out certain functions. ... the deeming provision here mandates a conclusion which would be impossible but for the provision. ...*

In our submission, the sense of the usage here is governed by the following:

> "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it." [per Lord Asquith in *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109 at p.132]

...

There is no statutory prohibition of the conclusion that, despite the absence of an instrument of commission issued by the Governor in Council other than s.13 itself, it is submitted that the combined effect of the provisions of the [Medical Act and the Commissions of Inquiry Act] *discussed above is to mandate the conclusion that when performing the functions of hearing an application or making an inquiry or investigation, the Board is for all purposes at law a commission of inquiry.*

(from the respondent's submission dated 10 February 1997)

... the purpose of deeming the Board to be a commission of inquiry is to grant to the Board the various rights and privileges which are given to commissions which fall within the definition of the term "commission" in the [Commissions of Inquiry Act]. *Significantly, Dr Bayliss makes no submission as to what should be found to be the purpose of the deeming or the scope of the Board's rights and privileges.*

The Board submits that, in the absence of statutory prohibition, one of those privileges is to refuse to disclose documents held by it during the conduct of a hearing, investigation or inquiry.

Conclusion

While the Board is hearing any application or making any investigation or holding any inquiry into any matter under the Medical Act, *the FOI Act does not apply to the Board.*

(from the respondent's submission in reply dated 12 March 1997)

Application of s.11(1)(i) of the FOI Act to the respondent

11. The respondent was established by an enactment (the *Medical Act 1939* Qld) for the public purpose of regulating the medical profession in Queensland (*cf. Queensland Law Society Inc v F N Albietz and Ors* [1996] 2 Qd R 580). The respondent clearly falls within the definition of

"public authority" in s.9(1)(a)(i) of the FOI Act, and hence is a body subject to the application of the FOI Act, unless excluded by an applicable statutory provision.

12. Section 13(1) of the *Medical Act* provides that, for the purposes described in the opening words of that provision (which is reproduced at paragraph 6 above), the respondent shall be deemed to be a commission of inquiry within the meaning of the *Commissions of Inquiry Act 1950*, and the provisions of that Act, other than s.4, s.4A, s.10(3) and s.13, shall apply accordingly.

13. In my opinion, this provision was intended simply as a convenient drafting device to incorporate by reference a set of powers and immunities, which the legislature had already specified in another statute as powers and immunities appropriate for a body intended to conduct hearings, investigations or inquiries, and which the legislature considered were appropriate powers and immunities to confer on the respondent for the purpose of conducting hearings, investigations or inquiries under the *Medical Act*.

14. At the time of enactment of s.13(1) of the *Medical Act* in its present form (by s.8 of the *Medical Act Amendment Act 1987* Qld), exclusion of the respondent from the application of the FOI Act was clearly not an immunity which the legislature had in its contemplation as necessary or appropriate, since the FOI Act was not enacted until 1992.

15. When the legislature, in enacting the FOI Act in 1992, turned its attention to the bodies which ought to be excluded from the application of the FOI Act, it provided, in s.11 of the FOI Act, for some bodies to be excluded entirely from the application of the FOI Act, and for some bodies to be excluded in respect of documents relating to particular functions or activities.
The legislature did not specify the respondent as a body to be excluded from the application of the FOI Act, either wholly, or in respect of documents relating to particular functions or activities of the respondent.

16. The legislature did specify that the FOI Act does not apply to *another* [i.e., other than the Fitzgerald commission of inquiry, dealt with in s.11(1)(h) of the FOI Act] *commission of inquiry issued by the Governor in Council*. The words "issued by the Governor in Council" must, in my opinion, have been employed by the legislature to delimit the kinds of commission of inquiry that it intended should be excluded from the application of the FOI Act. (It is a basic canon of statutory interpretation that all words in a statutory provision must, *prima facie*, be given some meaning and effect: see DC Pearce and RS Geddes, Statutory Interpretation in Australia, 3rd ed, 1988, at p.18, paragraph 2.7, and the cases there cited.) In my opinion, the short answer to the respondent's submission is that the respondent is not a commission of inquiry issued by the Governor in Council. The respondent is a body corporate established by statute (see s.8 and s.10 of the *Medical Act*), and does not, in my opinion, fall within the ordinary and natural meaning of the words used by the legislature in s.11(1)(i) of the FOI Act.

17. In the second paragraph which I have quoted (at paragraph 10 above) from its submission, the respondent acknowledges that, even if one accepts its initial premise (as to which, see my comments at paragraphs 24-25 below), there are two possible views open on the question of which commissions of inquiry are excluded from the application of the FOI Act by s.11(1)(i) of the FOI Act. In my opinion, there is no ambiguity in the words of s.11(1)(i) of the FOI Act, and they exclude from the application of the FOI Act only commissions of inquiry actually

issued by the Governor in Council. However, if one accepts the respondent's initial premise, and its acknowledgement that this leaves open two possible views as to the correct interpretation of s.11(1)(i) of the FOI Act, then, in my opinion, relevant legal principles require that the ambiguity be resolved by preferring a construction which is opposite to that contended for by the respondent.

18. Section 14A of the *Acts Interpretation Act 1954* Qld relevantly provides:

> ***14A (1)*** *In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.*
>
> ...
>
> ***(3)*** *To remove any doubt, it is declared that this section applies to an Act passed after 30 June 1991 despite any presumption or rule of interpretation.*

19. Section 4 of the FOI Act states: *The object of this Act is to extend as far as possible the right of the community to have access to information held by Queensland government*. The word "government" is defined in s.7 of the FOI Act to include "an agency and a Minister". The respondent is a "public authority" within the meaning of s.9(1)(a)(i) of the FOI Act (see paragraph 11 above) and hence also an agency as defined by s.8(1) of the FOI Act. The respondent is a statutory body corporate with perpetual succession (see s.10 of the *Medical Act*) which routinely carries on a significant public regulatory function in the interests of the wider Queensland public. I do not think there is any doubt that preferring an interpretation of s.11(1)(i) of the FOI Act which preserves the application of the FOI Act to a public authority like the respondent would best achieve the object stated in s.4 of the FOI Act. (By way of contrast, commissions of inquiry issued by the Governor in Council occur infrequently, are usually set up to deal with a crisis of public confidence in a matter of substantial public importance, and usually conduct part of their proceedings in public and furnish a report of their findings which is available to the public. One can see logic in the legislature choosing to relieve commissions of inquiry issued by the Governor in Council of the burdens of compliance with the FOI Act, given the urgency and public importance of the issues they are usually established to deal with, and given that there is ordinarily sufficient accountability to the general public inherent in their usual methods of operation.)

20. In addition, I note that it has been accepted by both the High Court of Australia, and a Full Court of the Federal Court of Australia, that, in the context of freedom of information legislation, it is proper to resolve a genuine ambiguity in the words of the legislation in favour of an interpretation which would further, rather than hinder, access to information: see, respectively, *Victorian Public Service Board v Wright* (1986) 160 CLR 145 at p.153, and *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor* (1992) 36 FCR 111 at p.115.

21. Thus, even if one accepts the initial premise of the respondent's submission, it at best raises an ambiguity which ought properly to be resolved by finding that s.11(1)(i) of the FOI Act does not apply to the respondent.

22. For the foregoing reasons, I find that the respondent is not a commission of inquiry issued by the Governor in Council, within the terms of s.11(1)(i) of the FOI Act, and that neither the respondent, nor the documents of the respondent to which the applicant seeks access, are excluded from the application of the FOI Act, by s.11(1)(i) of the FOI Act.

Other difficulties with the respondent's submission

23. I consider that there are a number of further difficulties with the respondent's submission, which I will note for the sake of completeness.

24. The respondent's primary argument (as set out in the first two paragraphs quoted from its written submission at paragraph 10 above) depends on the proposition that the words "... the board shall be deemed to be a commission of inquiry within the meaning of the *Commission of Inquiry Act 1950* ...", in s.13(1) of the *Medical Act*, are to be read as though they provided that the respondent shall be deemed to be a "commission", as defined in s.3 of the *Commissions of Inquiry Act*. That definition is reproduced at paragraph 8 above. In essence, it provides that the word "commission" in the *Commissions of Inquiry Act* -

(a) means any commission of inquiry issued by the Governor, by and with the advice of the Executive Council of the State, under the Governor's hand and the public seal of the State; and

(b) includes -

(i) the members of the commission (referred to in (a) above), or a quorum thereof, or the sole commissioner in cases where the commission is constituted of a sole commissioner; and

(ii) an instrument, other than a commission of inquiry as defined in (a) above, by which the Governor in Council appoints a person or persons to make an inquiry into or with respect to any matter or matters, if the Governor in Council also declares in that instrument of appointment, or in a separate instrument, that the *Commissions of Inquiry Act*, or specified provisions of it, shall be applicable for the purposes of the inquiry; and

(iii) the person, or persons, or a quorum of the persons appointed as per (ii) above, sitting for the purposes of the inquiry under the instrument of appointment referred to in (ii) above.

25. The respondent asserts (see the second paragraph of the extract from its submission quoted at paragraph 10 above) that not only is it deemed to be a commission of inquiry within the meaning of the *Commissions of Inquiry Act*, but it is also deemed to have been issued by the Governor in Council by reason of the definition of "commission" in that Act. However, in my opinion, the definition of "commission" in s.3 of the *Commissions of Inquiry Act* has no relevance to the position of the respondent. To achieve its purpose in enacting s.13 of the *Medical Act* (being, in my opinion, the purpose which I have identified in paragraph 13 above), the legislature did not need to, and did not (in the words it actually employed), deem the respondent to be any particular kind of commission within the definition of "commission" in s.3 of the *Commissions of Inquiry Act*. It was sufficient for its purposes for the legislature

simply to deem the respondent to be a commission of inquiry within the meaning of the *Commissions of Inquiry Act*, and to go on to provide that the provisions of that Act (with specified exceptions) were to apply to it accordingly. The respondent is deemed to be a commission of inquiry (for certain purposes), and conferred with powers and immunities accordingly, by provision made in the terms of s.13 of the *Medical Act* itself, not because of, or by reference to, anything in the definition of "commission" in the *Commissions of Inquiry Act*.

26. In the third paragraph of the extract from its submission quoted at paragraph 10 above, the respondent argues that s.13 of the *Medical Act* is an instrument by which the Governor in Council appoints the respondent to carry out the functions specified therein, and also declares that certain provisions of the *Commissions of Inquiry Act* will apply to the respondent, and hence that the respondent falls within parts (b)(ii) and (iii) of my paraphrasing (see paragraph 24 above) of the definition of "commission" in s.3 of the *Commissions of Inquiry Act*.

27. However, s.13 of the *Medical Act* is a provision of an Act of Parliament, not an instrument by which the Governor in Council has appointed any persons to make an inquiry, or declared anything about the application to an inquiry of the provisions of the *Commissions of Inquiry Act*. The only involvement of the Governor, in s.13 of the *Medical Act* becoming an operative law enacted by the Queensland Parliament, would have been in attending to technical matters relating to the royal assent and promulgation of the *Medical Act Amendment Act 1987*. The respondent itself is constituted by an Act of Parliament, and the functions and duties which it is obliged to undertake are specified by that Act of Parliament. The respondent was not appointed by the Governor in Council to investigate the particular cases which resulted in the respondent obtaining possession or control of the documents to which the applicant seeks access under the FOI Act. I consider that there is no substance in this submission by the respondent.

28. The respondent also argues that if the provisions are not interpreted in the way it suggests, s.37(3A)(c) of the *Medical Act* would be rendered otiose. The applicant made the following point in response to this submission:

> *... with respect, subparagraph (c) of s.37(3A) must be read in conjunction with subparagraph (b). The latter states that the complaints investigation committee shall have the same powers as the Board as provided for in,* inter alia, *s.13(1). The purpose of subparagraph (b) is to construe the members of the complaints investigation committee as being in the same position as members of the Board in relation to the conduct of an inquiry.*

29. I agree with the applicant's contention. Section 37(3A) of the *Medical Act* refers to the appointment by the respondent of a complaints investigation committee, and clarifies that, for the purposes of its investigations, the complaints investigation committee will also be deemed to be a commission of inquiry. Section 37(3A)(c) serves the same purpose as s.13(2) - it deems each member of the complaints investigation committee to be a commissioner *et cetera*, for the purposes of applying the provisions of the *Commissions of Inquiry Act*. Section 13 deals with the respondent. Section 37(3A) deals with a complaints investigation committee appointed by the respondent. I do not consider that s.37(3A) of the *Medical Act* affords any support for the respondent's case.

30. As to the argument made in the fourth paragraph of the extract from the respondent's submission quoted at paragraph 10 above, I consider that it contains two false premises.
I have already explained (see paragraphs 24-25 above) why I consider that s.13(1) of the *Medical Act* does not deem the respondent to be a commission of inquiry issued by the Governor in Council, or any particular kind of "commission" within the definition of that word in s.3 of the *Commissions of Inquiry Act*. Moreover, it is not the case that, in enacting s.13 of the *Medical Act*, Parliament intended the respondent to have only the powers of a commission of inquiry with none of the privileges or immunities. Clearly, Parliament intended that (for the purposes delimited by the opening words of s.13(1) of the *Medical Act*) the respondent should have the powers, privileges and immunities (as to the latter, see s.20 of the *Commissions of Inquiry Act*) of a commission of inquiry that are provided for in the *Commissions of Inquiry Act*, except for sections 4A, 10(3) and 13 of that Act. It is equally clear, however (as explained in paragraph 14 above), that in enacting s.13(1) of the *Medical Act*, Parliament had no occasion to consider conferring an exclusion from the application of the FOI Act. It may be presumed that, in enacting the FOI Act, Parliament knew the terms of s.13 of the *Medical Act*; but I am satisfied (for the reasons explained at paragraphs 16-21 above) that in enacting s.11(1)(i) of the FOI Act, Parliament employed language that, according to its ordinary and natural meaning, was not intended to apply to a body established for a public purpose by a statute, merely because the statute also deems the body, for certain specified purposes, to be a commission of inquiry.

31. I consider that the purpose of enacting s.13(1) of the *Medical Act* was that which I have identified in paragraph 13 above. This is a drafting device which has been used in Queensland legislation as a shorthand method for conferring powers and immunities on a body which is given a function of conducting investigations, inquiries or hearings. Two forms of a clause intended to procure the same result are evident in Queensland legislation. The first, of which s.13(1) of the *Medical Act* is an example, deems a body to be a commission of inquiry within the meaning of the *Commissions of Inquiry Act*, for the purpose of providing that the provisions of that Act (often with specified exceptions) are to apply to the relevant body, when it is performing specified functions. The purpose of the deeming is limited and context-specific. In my opinion, the intended operation of this clause would be correctly paraphrased in these terms: for certain nominated purposes, the provisions of the *Commissions of Inquiry Act* (subject to any nominated exceptions) are to apply to body x, as if body x were a commission of inquiry subject to the application of the *Commissions of Inquiry Act*. Clauses of this kind also apply, for example, to a corrections board under s.159 of the *Corrective Services Act 1988* Qld, to the relevant Board under s.44(1) of the *Education (Teacher Registration) Act 1988* Qld, to the relevant tribunal under s.29 of the *Veterinary Surgeons Act 1936* Qld, and to the relevant appeal tribunal under s.29(1) of the *Tow Truck Act 1973* Qld.

32. The second, and more common type of clause, is drafted in a slightly different form, providing that the relevant body shall have, and may exercise, the powers, privileges and protection *et cetera* of a commission of inquiry under the *Commissions of Inquiry Act*. Examples include s.43 of the *Architects Act 1985* Qld, s.34(2) of the *Beach Protection Act 1968* Qld, s.91(2) of the *Casino Control Act 1982* Qld, s.25(2) of the *Chiropractors and Osteopaths Act 1979* Qld, s.26(4) of the *Dental Act 1971* Qld, s.183(2) of the *Gaming Machine Act 1991* Qld, s.25(2) of the *Occupational Therapists Act 1979* Qld, s.24(5) of the *Optometrists Act 1974* Qld, s.19 of the *Parliamentary Commissioner Act 1974* Qld, s.25(5) of the *Pharmacy Act 1976* Qld, s.21(5A) of the *Physiotherapists Act 1964*, Qld, s.22(2) of the *Podiatrists Act 1969* Qld,

s.24(2) of the *Psychologists Act 1977* Qld and s.25(2) of the *Speech Pathologists Act 1979* Qld.

33. I consider that no materially different result was intended to be procured by the different wording employed in the two clauses. The respondent submits that it must be presumed that, in enacting the FOI Act, Parliament knew the terms of s.13 of the *Medical Act*. It must equally be presumed that Parliament knew the terms of the other statutory provisions referred to above. To accept the respondent's submissions would require an acceptance that, in enacting s.11(1)(i) of the FOI Act, Parliament contemplated and intended that documents relating to disciplinary investigations in respect of medical practitioners and veterinary surgeons should be excluded from the application of the FOI Act because the relevant investigating bodies are deemed to be commissions of inquiry for the purpose of facilitating the conduct of their investigations, while documents relating to disciplinary investigations in respect of architects, dentists, occupational therapists, optometrists, pharmacists, physiotherapists, psychologists and *et cetera* should be subject to the FOI Act because the relevant investigating bodies are merely conferred with the powers and immunities of a commission of inquiry under the *Commissions of Inquiry Act*. I do not accept that Parliament contemplated or intended such an illogical and inequitable (as between bodies performing comparable functions) result. Rather, a consideration of the consequences of accepting the respondent's submissions reinforces my view that, in enacting s.11(1)(i) of the FOI Act, Parliament intended that only commissions of inquiry actually issued by the Governor in Council were to be excluded from the application of the FOI Act.

34. As to the respondent's arguments on the consequences of the use of the word "deemed" in s.13(1) of the *Medical Act*, I agree with those parts of its submission which are reproduced in the fifth, sixth and eighth (but not the seventh, ninth and tenth) paragraphs of the extract at paragraph 10 above. The word "deemed" may be used in legislation in a number of different senses, and its intended use in any particular instance must be determined from the particular statutory context: see, generally, *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693 at p.696 (per Griffith CJ); *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49 at pp.65-67 (per Windeyer J); *Council of the Shire of Redland v Stradbroke Rutile Pty Ltd* (1974) 133 CLR 641 at p.655 (per Gibbs J); *Woodlock & Ors v Commissioner of Land Tax (NSW)* (1974) 5 ATR 57 at p.59 (per Samuels J); *Wainer v Rippon* (1979) 29 ALR 643 at p.650 (per O'Bryan J), and *Re The News Corporation Ltd and Ors* (1987) 70 ALR 419 at pp.431-432 (per Bowen CJ). I do not think there is any doubt (and the respondent has conceded) that the word "deemed" is used in s.13(1) of the *Medical Act* in a sense which requires the respondent to be treated, for certain purposes, as though it were something that it plainly is not. This was the meaning of "deemed" referred to by Cave J in *R v County Council of Norfolk* (1891) 60 LJQB 379 at p.380 (quoted with approval by Barton J in *Muller v Dalgety & Co Ltd* at p.705) where he said:

> *Generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is to be deemed to be that thing.*

35. I accept the correctness of the statement, quoted in the respondent's submission (see paragraph 10 above), from Lord Asquith's judgment in *East End Dwellings Co Ltd v Finsbury Borough Council*, provided it is understood in the context of the equally valid (and not inconsistent) statements which I have quoted at paragraphs 37 and 38 below. I do not accept, however, that exclusion of the respondent from the application of the FOI Act is a consequence or incident that must inevitably have flowed from, or accompanied, the deeming provision in s.13(1) of the *Medical Act*.

36. The purpose of s.13 of the *Medical Act* is to facilitate the respondent's conduct of hearings, investigations or inquiries under the *Medical Act* by giving it certain powers and immunities which are conveniently codified in the *Commissions of Inquiry Act*. I do not accept the respondent's contention that s.13 of the *Medical Act* has the effect of deeming unqualified equality between the Board and a "commission of inquiry issued by the Governor ...". The purpose of deeming the respondent a commission of inquiry was to facilitate the conduct of its hearings, investigations or inquiries under the *Medical Act*, and nothing more. Hence the use of the words "For the purposes of ..." to introduce s.13 of the *Medical Act*. It is only for those purposes that the respondent is deemed to be a commission of inquiry, and not for the purpose of dealing with an access application made to it as a body falling within the definition of "agency" in s.8 of the FOI Act.

37. The following comments by the learned authors of Pearce and Geddes, Statutory Interpretation in Australia, 3rd ed, 1988 (at pp.85-86), are apposite in this context:

> *This use of the expression "deemed" was described by Griffith CJ in* Muller v Dalgety & Co Ltd *(1909) 9 CLR 639 at p.696 as a 'statutory fiction'; a device for extending the meaning of a term to a subject matter which it does not properly designate. When 'deemed' is used in this way, Griffith CJ pointed out that it is important to consider the purpose for which the fiction has been introduced. Care must be taken to observe that the extended meaning of the word is applied, but equally the reader must be aware that it is a fictitious use of the word and is only applicable in its particular context*. (my underlining)

38. To like effect is the statement by Megarry V-C in *Polydor Ltd and RSO Records Inc v Harlequin Record Shops Ltd and Simons Records Ltd* [1980] 1 CMLR 669 at p.673, who described a deeming provision as a "hypothetical" and said: *The hypothetical must not be allowed to oust the real further than obedience to the statute compels.* The intention of a deeming provision, in laying down a hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further (see F Bennion, Statutory Interpretation, 2nd ed, Butterworths, 1992 at p.664).

39. The consequences and incidents which flow from deeming the respondent to be a commission of inquiry for the purposes set out in s.13 of the *Medical Act* are that the respondent possesses the powers and immunities codified in the *Commissions of Inquiry Act* to facilitate its conduct of hearings, investigations or inquiries under the *Medical Act*. It is not a natural or inevitable consequence or incident of that deeming that the respondent should be excluded from the application of a beneficial/remedial statute intended to promote greater scrutiny and accountability of the performance of agencies of government in Queensland, and intended to apply generally to agencies, as defined in s.8 of the FOI Act, unless a particular agency is specifically excluded. Nor, for reasons explained above, do I accept that s.11(1)(i) of the FOI

Act, even when read in conjunction with s.13 of the *Medical Act*, has the effect of excluding the respondent from the application of the FOI Act.

40. The respondent's initial submission contained a detailed analysis of the words "hearing", "application", "investigation" and "inquiry" as used in s.13 of the *Medical Act*. That analysis may have been relevant to determining the scope or extent of the respondent's exclusion from the FOI Act, in the event that its primary submission was successful. Given the decision I have reached, however, it is not necessary for me to deal with that issue.

Conclusion

41. I find that the respondent is not a commission of inquiry issued by the Governor in Council, within the terms of s.11(1)(i) of the FOI Act, and that neither the respondent, nor the documents of the respondent to which the applicant seeks access, are excluded from the application of the FOI Act, by s.11(1)(i) of the FOI Act.

.....
F N ALBIETZ
INFORMATION COMMISSIONER