



## **Decision and Reasons for Decision**

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**Application Number:** 210207

**Applicant:** Kerin & Co Lawyers

**Respondent:** Office of Health Practitioner Registration Board

**Decision Date:** 23 January 2008

**Catchwords:** **FREEDOM OF INFORMATION – Section 35 of the *Freedom of Information Act 1992 (Qld)* - Section 42 of the *Freedom of Information Act 1992 (Qld)***

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## REASONS FOR DECISION

### Summary

1. The decision of the Office of the Health Practitioner Registration Board (OHPRB), under section 35 of the *Freedom of Information Act 1992* (Qld) (FOI Act), to neither confirm nor deny the existence or non-existence of documents in respect of the applicant's freedom of information application of 28 November 2006 is affirmed on the basis that, if the documents sought in the application did in fact exist, they would contain matter that would be exempt from disclosure under section 42 of the FOI Act.

### Background

2. In a letter dated 28 November 2006 to the OHPRB (FOI Application) the applicant sought access under the FOI Act to:

*...all the information you hold in relation to the practitioner [name of practitioner], Registrant Number [.....], specifically, in relation to conditions imposed on his registration.*

3. In a decision dated 2 February 2007 (Initial Decision), J Posner, Manager, Information Services, OHPRB, '*decided under section 35 of the FOI Act to neither confirm nor deny the existence or non-existence of the documents*' to which the applicant sought access '*on the basis that if such documents did in fact exist they would be exempt from disclosure under section 42 of the FOI Act*'.
4. In a letter dated 20 February 2007, the applicant sought internal review of the Initial Decision.
5. In a decision dated 16 March 2007 (Internal Review Decision), J O'Dempsey, Executive Officer, OHPRB, affirmed the Initial Decision.
6. In a letter dated 12 April 2007 (External Review Application), the applicant sought external review of the Internal Review Decision and provided submissions in support of its case.

### The external review process

7. During the course of this review this Office has communicated with the OHPRB to obtain information and clarify issues relating to the claim that if the documents sought in the FOI Application did in fact exist, they would contain matter that would be exempt from disclosure under section 42 of the FOI Act.
8. In a letter dated 6 November 2007, I communicated to the applicant my preliminary view that the OHPRB is entitled to invoke section 35 of the FOI Act in respect of the FOI Application.
9. In a letter dated 21 November 2007, the applicant indicated that it did not accept my preliminary view at 8 above and provided further submissions in support of its case.
10. In a letter dated 21 January 2008, the OHPRB indicated to this Office that:

- a) four documents that do not qualify for exemption under section 42 of the FOI Act would be administratively released to the applicant at the conclusion of this external review<sup>1</sup>
- b) notwithstanding a) above, the OHPRB neither confirms nor denies the existence or non-existence of any other documents in respect of the FOI Application on the basis that if such documents did in fact exist, they would contain matter that would be exempt from disclosure under section 42 of the FOI Act.

### Decision under review

11. The decision under review is the Internal Review Decision.

### Findings

#### Section 35 of the FOI Act

12. Section 35 of the FOI Act provides that:

#### **35 Information as to existence of certain documents**

- (1) *Nothing in this Act requires an agency or Minister to give information as to the existence or non-existence of a document containing matter that would be exempt matter under section 36, 37, 42 or 42A.*
- (2) *If an application relates to a document that includes exempt matter under section 36, 37, 42 or 42A, the agency or Minister concerned may give written notice to the applicant—*
  - (a) *that the agency or Minister neither confirms nor denies the existence of that type of document as a document of the agency or an official document of the Minister; but*
  - (b) *that, assuming the existence of the document, it would be an exempt document.*
- (3) *If a notice is given under subsection (2)—*
  - (a) *section 34 applies as if the decision to give the notice were the decision on the application mentioned in that section; and*
  - (b) *the decision to give the notice were a decision refusing access to the document because the document would, if it existed, be exempt.*

13. In conducting an external review the Information Commissioner has a statutory duty to adopt procedures that are fair, having regard to the obligations of the Information Commissioner under the FOI Act<sup>2</sup>.

14. In this case a relevant obligation of the Information Commissioner under the FOI Act is contained in section 87 of the FOI Act which provides, in part, that:

#### **87 Commissioner to ensure non-disclosure of particular matter**

- (1) *On a review, the commissioner may give the directions the commissioner considers necessary to avoid the disclosure to an access participant or an access participant's representative of—*

...

<sup>1</sup> Therefore, these documents are no longer in issue in this review.

<sup>2</sup> Section 83(3)(a) of the FOI Act.

- (b) *information that is claimed to be information of the kind mentioned in section 35.*
  - (2) *The commissioner may receive evidence, or hear argument, in the absence of an access participant or an access participant's representative if it is necessary to do so to prevent disclosure to that person of matter or information of that kind.*
  - (3) *The commissioner must not, in a decision on a review or in reasons for a decision on review, include matter or information of a kind mentioned in subsection (1)....*
15. The Information Commissioner's statutory obligation under section 87 of the FOI Act significantly constrains the procedures and processes that might otherwise be used in an external review where section 35 of the FOI Act is not invoked.
  16. The Information Commissioner has previously discussed the difficulties that arise in such a case, noting that<sup>3</sup>:

*In a review of an ordinary refusal of access decision, the applicant for access is necessarily disadvantaged, in the extent to which meaningful submissions can be made about the exempt status of matter in issue, by a lack of precise knowledge as to the nature of the matter in issue. That disadvantage is exacerbated in a review of a decision to invoke a s.35 "neither confirm or deny" response. The review must largely proceed in private between the Information Commissioner and the respondent. Where requested documents do exist, I will call for and examine them and where doubt exists, debate the merits of the claims for exemption with the respondent. If the requested documents do not exist, the debate will be over the merits of a claim for exemption of a notional document of the kind to which the applicant has requested access. The procedures adopted vis-à-vis the applicant should, so far as practical, not be varied according to whether a requested documents does or does not exist, as that may in effect give information as to the existence or non-existence of a requested document. **The applicant's opportunity to participate in the review must necessarily be limited to submitting evidence or arguments based on what the applicant knows or believes about the documents to which access has been requested, and/or in response to such information as is disclosed in the respondent's reasons for decision,** or in any evidence or submissions filed by the respondent which are able to be phrased in such a way that they give no indication as to the existence or non-existence of a requested document (where that is not practicable, the respondent's evidence and submissions necessarily have to be given in private, usually without reference to them being made in the Information Commissioner's subsequent reasons for decision) [My emphasis].*

17. In this external review I note that the applicant provided quite extensive submissions as part of the External Review Application and provided further submissions in its letter dated 21 November 2007.
18. I have carefully considered all of the submissions put forward by the applicant in light of the issues that are relevant in this review. On this point, I note that the applicant has made a number of submissions on public interest factors. However, I also note that public interest considerations in respect of section 42(1) of the FOI Act are only relevant in the limited circumstances specified in section 42(2) of the FOI Act.
19. I note the applicant's submission in the External Review Application, which was reiterated in its submissions dated 21 November 2007 that:

*On or about the 6 December 2006 our offices received a telephone call from the board about our request for disclosure of documents ... The board wanted to know exactly which documents we wanted because 'there were a lot of documents'.*

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<sup>3</sup> *EST and Department of Family Services and Aboriginal and Islander Affairs* (1995) 2 QAR 645 at paragraph 20.

20. In relation to this issue I note that an agency can invoke section 35 of the FOI Act provided that the precondition contained in the section is satisfied, that is, that the document, if it existed, would contain matter that would be exempt from disclosure under section 36, 37, 42 or 42A of the FOI Act.
21. I acknowledge the difficulty for the applicant in providing submissions in this review in circumstances where they are privy to little detail about the relevant issues.
22. As I am acutely aware of the applicant's position at 21 above, I have throughout the course of this review carefully considered whether any additional information could be provided to the applicant. However, in the particular circumstances of this review, I was satisfied that this was not possible.
23. I am similarly constrained in providing reasons for this decision in this review.
24. However, I have carefully considered the submissions of the applicant and the agency and I am satisfied that if the documents sought in the FOI Application did exist, they would contain matter that would be exempt from disclosure under section 42 of the FOI Act and accordingly, the OHPRB is entitled to neither confirm nor deny the existence or non-existence of documents in relation to the FOI Application under section 35 of the FOI Act.

## DECISION

25. I affirm J O'Dempsey's decision of 16 March 2007, under section 35 of the *Freedom of Information Act 1992* (Qld) to neither confirm nor deny the existence or non-existence of documents in relation to the applicant's freedom of information application of 28 November 2006 on the basis that if such documents did exist they would contain matter that would be exempt from disclosure under section 42 of the *Freedom of Information Act 1992* (Qld).
26. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

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**S Jefferies**  
**Acting Assistant Commissioner**

**Date: 23 January 2008**