



Decision and Reasons for Decision

Application Number: 210676

Applicant: CJR

Respondent: Medical Board of Queensland

Decision Date: 13 May 2009

Catchwords: **FREEDOM OF INFORMATION – section 46(1)(b) of the *Freedom of Information Act 1992 (Qld)* – whether matter communicated in confidence – whether complainant’s identity is exempt**

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REASONS FOR DECISION

Summary

1. I find that the matter in issue in this review is exempt from disclosure under section 46(1)(b) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**).

Background

2. By letter dated 2 September 2008, the applicant applied to the Medical Board of Queensland (**MBQ**) for access to:

*..the recent complaint made to the Medical Board about me.
I also wish to obtain a copy of the minutes of the Fitness to Practice Committee meeting held on August 12th in relation to the complaint.*

3. On 17 October 2008, Mr V Catchpoole of MBQ advised the applicant that:
 - 4 responsive folios had been located
 - partial access was granted to 1 folio and access to the remaining 3 folios was denied as they qualified for exemption from disclosure under section 46(1)(b) of the FOI Act (**Original Decision**).
4. By letter dated 22 October 2008, the applicant applied for internal review of Mr Catchpoole's decision (**Internal Review Application**).
5. By letter dated 20 November 2008, Ms K Pullsford advised the applicant that she had decided to affirm the Original Decision (**Internal Review Decision**).
6. By letter dated 4 December 2008, the applicant applied, under Part 5 of the FOI Act, for external review of the Internal Review Decision (**External Review Application**).

Decision under review

7. The decision under review is the Internal Review Decision referred to at paragraph 5 above.

Steps taken in the external review process

8. By letter dated 10 December 2008, I asked MBQ to provide me with the documents which it claims are exempt. MBQ provided the requested documents and made further submissions in a letter dated 12 January 2009.
9. By letter dated 1 April 2009 I advised the applicant of my preliminary view that the matter remaining in issue was exempt from disclosure under section 46(1)(b) of the FOI Act. I also asked the applicant to provide me with further submissions in support of his case by 17 April 2009 if the preliminary view was not accepted.
10. By letter dated 7 April 2009, the applicant advised that he did not accept the preliminary view and provided further submissions in support of his case.

Matter in issue

11. The matter in issue in this review is as follows:

- file note dated 29 July 2008 (with the exception of a small amount of information which the MBQ is prepared to release) (folios 1-3) and
- segment of minutes of MBQ's Health Assessment and Monitoring Committee dated 12 August 2008 (on folio 4) (**Matter in Issue**).

Findings

Section 46(1)(b) of the FOI Act

12. Section 46(1)(b) of the FOI Act provides:

46 Matter communicated in confidence

(1) *Matter is exempt if—*

...

(b) *it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*

Section 46(2) of the FOI Act

13. Under section 46(2) of the FOI Act, if the information in issue consists of deliberative process matter¹ (under section 41(1)(a) of the FOI Act²), the information will not qualify for exemption from disclosure under section 46(1)(b) of the FOI Act.

14. Section 46(2) of the FOI Act provides:

...

(2) *Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless it consists of information communicated by a person or body other than—*

(a) *a person in the capacity of—*

(i) *a Minister; or*

(ii) *a member of the staff of, or a consultant to, a Minister; or*

(iii) *an officer of an agency; or*

(b) *the State or an agency.*

15. Section 41(1)(a) of the FOI Act provides:

41 Matter relating to deliberative processes

(1) *Matter is exempt if its disclosure -*

(a) *would disclose -*

(i) *an opinion, advice or recommendation that has been obtained, prepared or recorded; or*

(ii) *a consultation or deliberation that has taken place;*

(iii) *in the course of, or for the purposes of, the deliberative processes involved*

¹ Described as being the policy forming processes and decision-making functions of an agency which occur towards the end stage of a larger process following investigations of various kinds and obtaining inputs from relevant sources – see *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at paragraphs 28 and 30.

² As communicated by a person/entity identified in section 46(2) of the FOI Act.

in the functions of government; and

...

16. On the information available to me, I am satisfied that the application of section 46(1)(b) of the FOI Act to the Matter in Issue is not excluded by section 46(2) of the FOI Act as the Matter in Issue does not comprise deliberative process matter.

Requirements for exemption under section 46(1)(b)

17. Matter will be exempt from disclosure under section 46(1)(b) of the FOI Act if all four of the following requirements are met:³

- a) it consists of information of a confidential nature
 - b) it was communicated in confidence
 - c) its disclosure could reasonably be expected to prejudice the future supply of such information
- and
- d) the weight of the public interest considerations favouring non-disclosure equals or outweighs that of the public interest considerations favouring disclosure.

18. I will consider each of these requirements below.

a) Information of a confidential nature

19. The Information Commissioner has stated that matters including the following are relevant in determining whether information is of a confidential nature or contains the necessary quality of confidence:⁴

- the basic requirement is inaccessibility
- it is not necessary to demonstrate absolute secrecy or inaccessibility
- secrecy may attach to a way in which publicly available information has been utilised
- the question of confidentiality is to be determined by assessing the substance of the information rather than by reference to any express marking of 'confidential' on a document
- confidentiality may be lost with the passage of time
- the confider's own attitude and conduct toward preserving the secrecy of allegedly confidential information may be relevant to whether it should properly be characterised as confidential information.

20. The content of the Matter in Issue can be described as follows:

- a file note of a telephone conversation in which concerns about the applicant's health were raised with MBQ's Health Assessment and Monitoring Unit
- a segment of information contained in the minutes of a meeting of the Health Assessment and Monitoring Committee and
- the identity of the person who raised the stated concerns.

³ *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (B) at paragraphs 146 to 147.

⁴ B at paragraph 71.

21. On the information available to me, I am satisfied that:
- the content of the Matter in Issue is not known to the applicant, nor is it commonly known
 - the content of the Matter in Issue establishes that the clear intention of the parties to the relevant telephone conversation was that the information was provided on a confidential basis and that it should remain confidential.
22. Accordingly, I am satisfied that the matter which comprises the Matter in Issue
- is of a confidential nature⁵ and
 - requirement a) of the test for exemption is satisfied.

b) Communicated in confidence

23. Whether this second requirement is satisfied is a question of fact to be determined by a consideration of all relevant circumstances including but not limited to:
- the nature of the relationship between the parties
 - the nature and sensitivity of the information
 - the circumstances relating to its communication⁶.
24. The test inherent in the phrase "communicated in confidence" in section 46(1)(b) requires a decision-maker to be satisfied that a communication of confidential information has occurred in circumstances where the information supplier's need or desire for confidential treatment (of the supplier's identity, or information supplied, or both) has been expressly or implicitly conveyed (or otherwise must have been apparent to the recipient) and has been understood and accepted by the recipient, giving rise to an express or implicit mutual understanding that the relevant information would be treated in confidence.⁷
25. MBQ submits that the information provider sought and was given an assurance that their identity and so far as possible, the content of the complaint would be kept confidential. On the information available to me, it is clear that an understanding was reached by the parties to the relevant conversation that the information provided and the identity of the information provider would be kept confidential so far as was possible.
26. I acknowledge that it is often necessary to provide information about the nature of a complaint to the subject of the complaint to enable that person to respond and that promises of confidentiality cannot always be upheld. However, in the circumstances, I am satisfied that:
- the specific concerns about the applicant's health (which formed the basis of the complaint) were put to the applicant in order to allow him to respond
 - this is not a case where it was necessary to reveal the identity of the complainant in order to properly investigate the matters raised.

⁵ In other words, it has the necessary quality of confidence.

⁶ Such as those referred to by a Full Court of the Federal Court of Australia in *Re Smith Kline and French Laboratories (Aust) Limited and Ors ats Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at paragraph 46 (see *B* at paragraph 82).

⁷ *Re McCann and Queensland Police Service* (1997) 4 QAR 30 at paragraph 34.

27. I have carefully considered the matter in issue and all of the relevant submissions. On the information available to me, I am satisfied that:
- the relevant information was communicated in circumstances in which both the supplier and recipient understood and accepted that the information was to be treated in confidence
 - the matter in issue was communicated in confidence
 - requirement b) of the test for exemption is satisfied.
- c) Disclosure could reasonably be expected to prejudice the future supply of such information***
28. Requirement (c) asks whether disclosing the Matter in Issue could reasonably be expected to prejudice the future supply of similar information to the MBQ.
29. The phrase 'could reasonably be expected to' requires the decision maker applying section 46(1)(b) of the FOI Act to discriminate between:
- unreasonable expectations and reasonable expectations
 - what is merely possible and expectations which are reasonably based.⁸
30. MBQ submits that release of the Matter in Issue will prejudice the future supply of similar information to the Health Assessment and Monitoring (**HAM**) Program. The HAM Program assesses and monitors registrants who may suffer from an illness which impacts on their professional performance. The aim of the HAM Program is to have practitioners with an illness or impairment practice in such a way that neither patient nor practitioner is at risk. The HAM Program is separate from the Board's disciplinary procedures, with the focus being on support and recovery for the medical practitioner⁹.
31. In summary, MBQ submits that:
- it fulfils its statutory requirement to protect the public through the work carried out by the HAM program
 - the success of the program relies on the willingness of people to notify MBQ of any concerns about the health of medical practitioners
 - release of the Matter in Issue would deter people from providing important information about the health of medical practitioners and
 - if people were deterred from providing information about concerns held about medical practitioners' health, the efficacy of the HAM program would be at risk and the health and safety of patients would be jeopardized.
32. I note that the *Health Practitioners (Professional Standards) Act 1999* (Qld)¹⁰ allows MBQ to request information to assist it in assessing whether registrants are impaired. It does not, however, allow MBQ to compel people to provide information. The system consequently relies on the free flow of voluntary information.
33. In the circumstances, I am satisfied that it is reasonable to expect that release of the Matter in Issue would dissuade people from providing information to the board regarding concerns about the health of medical practitioners in the future.

⁸ B at paragraph 73.

⁹ Medical Board of Queensland, *Doctor's Health*, <<http://www.medicalboard.qld.gov.au/dr-health/index.html>>, at 12 May 2009.

¹⁰ Section 270.

34. On this basis, I am satisfied that:

- disclosure of the matter in issue could reasonably be expected to prejudice the future supply of such information to MBQ and
- requirement c) of the test for exemption is satisfied.

35. As a consequence of having satisfied requirements a), b) and c) of the test for exemption under section 46(1)(b) of the FOI Act, the matter in issue is *prima facie* exempt from disclosure, subject to the public interest balancing test which I will consider next.

d) Public interest balancing test

36. I must now determine whether there are sufficient public interest considerations favouring disclosure of the Matter in Issue to justify a finding that disclosure of the Matter in Issue is, on balance, in the public interest.

Public interest considerations in favour of disclosure

37. On the information available to me, the following public interest considerations favouring disclosure are relevant in the circumstances:

- accountability of government
- fair treatment of the individual.

Accountability of government

38. Facilitating the accountability of government is a public interest consideration recognised by section 4¹¹ of the FOI Act. The question in this case is whether disclosure of the matter in issue would actually enhance this public interest consideration.

39. I accept that there is a general public interest in enhancing the accountability of MBQ in respect of its actions taken in relation to monitoring the health and competence of its registrants under the HAM Program. In this respect, I note that the applicant has been provided with most of the minutes of the meeting of MBQ's Health Assessment and Monitoring Committee at which the applicant's case was discussed. These minutes set out the steps which were taken in relation to investigating the information received in relation to the applicant, as well as the documents it considered.

40. On this basis, I am satisfied that:

- the applicant was provided with details of the manner in which MBQ dealt with the investigation
- this is not a case where access to the Matter in Issue, which identifies the person who raised the issue with MBQ, would materially enhance assessment of:
 - the reasonableness of MBQ's actions in response to the notification
 - MBQ's effectiveness in carrying out its investigations.

41. On the basis of the matters set out above, I consider that this public interest consideration should be afforded little or no weight in the circumstances.

¹¹ Object of Act and its achievement.

Fair treatment of the individual

42. In his letter dated 7 April 2009, the applicant submits that:
- the complaint was made to damage and defame the applicant
 - the complainant was not acting in the public interest and abused the confidential process in order to defame the applicant
 - in the circumstances, the identity of the complainant should be made known
 - the subjects of complaints are offered no protection against malicious complainants.
43. I accept that there is a public interest in the applicant being able to access information about concerns which have been raised regarding his health, and consequent ability to practice. However, on the information before me, I am satisfied that:
- the concerns raised about the applicant's health were put to him as part of the HAM Program process
 - the outcome of the process was not adverse to the applicant
 - it was not necessary to provide the applicant with any further information in order to afford him procedural fairness in the circumstances.
44. In respect of the applicant's submission that the complaint made to MBQ was malicious and intended to damage and defame the applicant and it is therefore not in the public interest that the information provider be afforded the protection of anonymity, I note the Information Commissioner's statement in *McEniery and Medical Board of Queensland*¹² that Australian law places great importance on encouraging the flow of information to law enforcement and regulatory agencies, even though this may lead to some people having to endure an agency investigation of false and malicious allegations.
45. On the basis of the matters set out above, I consider that this public interest consideration should be afforded little or no weight in the circumstances.

Public interest considerations in favour of non-disclosure

46. Against considerations favouring disclosure of the Matter in Issue, I must balance considerations favouring non-disclosure which include:
- prejudice to future supply of like information if the Matter in Issue were disclosed
 - disclosure of confidential information.
47. I consider that there is a strong public interest in maintaining the efficacy of a program which allows people to raise concerns about the health of medical practitioners without fear of retribution or detriment to their personal or professional affairs.
48. As set out above, the HAM Program relies on the voluntary provision of information for it to be effective and comply with its obligations under the *Health Practitioners (Professional Standards) Act 2006* (Qld). As one of the objects of that Act is to protect the public by ensuring health care is delivered by registrants in a professional, safe and competent way, I consider the prejudice to the supply of relevant voluntary information if the Matter in Issue were disclosed, to be a public interest consideration which should be afforded significant weight in the circumstances.

¹² (1994) 1QAR 349 at paragraphs 56-64

49. Given my findings that the public interest considerations favoring disclosure should be afforded little or no weight in the circumstances and that there is a strong public interest in maintaining the efficacy of a program which operates to protect the public, I am satisfied that:
- the weight of public interest considerations favoring non-disclosure outweighs those favoring disclosure
 - requirement d) of the test for exemption is satisfied in the circumstances.
50. On the basis of the matters set out above, I find that the Matter in Issue is exempt from disclosure under section 46(1)(b) of the FOI Act.

DECISION

51. I affirm the decision under review by deciding that the Matter in Issue is exempt from disclosure under section 46(1)(b) of the FOI Act.
52. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

F Henry
Assistant Commissioner

Date: 13 May 2009