

Kinder and Barristers' Board

(S 93/98, 31 March 2000, Information Commissioner)

(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)

1.-4. These paragraphs deleted.

REASONS FOR DECISION

Background

5. By letter dated 3 April 1998, the applicant applied to the Barristers' Board (the Board) for access, under the FOI Act to documents relating to his complaint to the Board concerning the conduct of a barrister. (Mr A J H Morris QC had investigated that complaint on behalf of the Board and prepared a report recommending that no further action be taken. A copy of Mr Morris' report had been provided to the applicant.)
6. By letter dated 9 April 1998, Mr R C Kent, Consultant to the Board, informed the applicant that the Board had received advice to the effect that it was not a "*public entity*" and was therefore not subject to the application of the FOI Act. By letter dated 10 June 1998, the applicant applied to me for review of the Board's refusal to grant him access to the requested documents.
7. Following inquiries by my Office, the Board provided copies of correspondence between it and the applicant, and contended that the applicant had not made a valid FOI access application. After considering that matter, I wrote to the Board advising that, in accordance with s.75 of the FOI Act, I had decided to make inquiries for the purpose of determining whether I had jurisdiction to deal with the applicant's application for external review. I invited the Board's submission as to whether the Board was a "*public authority*" under s.9 of the FOI Act, or caught by s.8(2) of the FOI Act.
8. By letter dated 24 August 1998, the Board submitted that it is a part of the Supreme Court of Queensland, and that, pursuant to s.11(1) of the FOI Act, it is not subject to the application of the FOI Act, since the Board's functions relate to the judicial functions of the Supreme Court, i.e., the making of decisions to admit persons to practice as barristers-at-law.
9. By letter dated 25 September 1998, I referred the applicant to s.11(1)(e) and (f) of the FOI Act and informed him of my preliminary view that the Board is an office of the Supreme Court and that the documents in issue were not subject to the

application of the FOI Act. On that basis, I indicated to the applicant my preliminary view that I had no jurisdiction to proceed further with this review. I invited the applicant, should he not accept my preliminary view, to lodge any submission and/or evidence on which he cared to rely in support of his case.

10. By letter dated 15 October 1998, the applicant lodged a submission directed *inter alia*, to the interpretation of s.11(1)(e) and (f) of the FOI Act. The Board was provided with a copy of the applicant's submission. The Board lodged a response dated 26 November 1998, which was in turn passed on to the applicant for reply. The applicant also lodged a number of further submissions.
11. I have taken into account the following material in making my decision in this review:
 1. the applicant's FOI access application dated 3 April 1998;
 2. the Board's letter dated 9 April 1998;
 3. the applicant's external review application dated 10 June 1998;
 4. the applicant's letters and submissions dated 15 October 1998, 9 November 1998,
 5. 7 December 1998, 25 January 1999, 8 March 1999 and 27 April 1999; and
 6. the Board's letters and submissions dated 19 June 1998, 24 August 1998 and
 7. 26 November 1998.
12. In its initial correspondence with the applicant, the Board suggested that it was not a public entity for the purposes of the FOI Act. Section 8(1) of the FOI Act defines "agency" to mean a "department, local government, or public authority". However, the Board has not pursued an argument that it is not a public authority, preferring to rely on the exclusionary provisions in s.11(1)(e) and (f) of the FOI Act. It appears clear to me that the Board is either an agency itself, or part of an agency, under the definitions in s.8 and s.9 of the FOI Act. However, given my finding in relation to the application of s.11(1)(f), it is not necessary for me to make a final determination on this point.
13. The Board argued that the documents requested by the applicant were created or received by it in the course of the Board carrying out judicial functions, and that the documents were therefore excluded from the application of the FOI Act by s.11(1)(e). My examination of the material before me on this issue causes me to doubt that the Board was carrying out any judicial function in dealing with the applicant's complaint. However, because of my finding in relation to the application of s.11(1)(f) of the FOI Act, it is not necessary for me to express a concluded view on that issue.

Application of s.11(1)(f) of the FOI Act

14. Section 11(1)(f) and s.11(2) of the FOI Act provide:

11(1) This Act does not apply to—

...

- (f) *a registry or other office of a court, or the staff of a registry or other office of a court in their official capacity, so far as its or their functions relate to the court's judicial functions;*

...

(2) *In subsection (1), a reference to documents in relation to a particular function or activity is a reference to documents received or brought into existence in performing the function or carrying on the activity.*

15. In *Re Christie and QIDC* (1993) 1 QAR 1 at p.8 (paragraphs 19-22), I explained that there is a drafting error in s.11(2) of the FOI Act, but that the legislature's clear intention can be given effect by reading s.11(2) as if it were in these terms:

In subsection (1), a reference to a particular function or activity means that this Act does not apply to documents received or brought into existence in performing the function or carrying on the activity.

16. The Board was created, pursuant to the *Supreme Court Act 1921*, by a Rule of Court promulgated by an Order in Council dated 4 December 1975 (the Barristers' Admission Rules). The Board's primary function is to oversee the rules relating to the admission of barristers, and to issue its certificate upon a person having satisfied the prescribed conditions for admission. It is not the Board, but the Supreme Court, which admits persons to the roll of Barristers-at-Law (who are then permitted to appear in the Supreme Court by right). Whether or not a person holds the certificate of the Board does not bind the Supreme Court, in its discretion, to admit a particular person to the roll of Barristers-at-Law: see *Re Julius* [1941] St.R.Qd. 247. While in the ordinary course of events, the certificate of the Board will be persuasive, nevertheless, the decision to admit a person as a Barrister-at-Law is a judicial function of the Supreme Court.

17. The applicant argued that the Board could not be regarded as an "office of a court", stating that it performed no judicial functions and merely happened to occupy offices within the court complex. However, I consider that the Board is an "office of a court", within the terms of s.11(1)(f) of the FOI Act. I consider that those words not only cover individual office holders, but also extend to offices constituted by a number of persons, such as the Board. The Board was established under the Barristers' Admission Rules in order to assist the Supreme Court in certain functions.

18. The applicant contends that the Board does not carry out any judicial functions in relation to the handling of complaints against barristers. As I have indicated above,

this may well be true. However, under the wording of s.11(1)(f), there is no requirement that the Board itself have any judicial function. The question which I must consider is whether the relevant functions of the Board "relate to the court's judicial functions".

19. I am satisfied that the Supreme Court has a function with respect to discipline of barristers-at-law, and that that function is a judicial function. In *Harrison's Law and Conduct of the Legal Profession in Queensland (2nd edition, 1984)*, at page 33, Williams J refers to the old case of *In Re Antigua Justices (1 Knapp 267)* [actually *Knapp's Appeal Cases, 1829-1836 in 12 E.R.*] as providing authority for the proposition that authority to impose disciplinary sanctions, such as suspension from practice, must be incidental to the function of admitting barristers-at-law to practice. Williams J stated that the effect of those authorities:

... appears to be that at common law the Court has an inherent power, as a necessary adjunct to its function of administering justice, to suspend a barrister from practice, and that where barristers are admitted by the Court, the Court also has the power to deprive a barrister of his formal status as such, i.e. to disbar him as distinct from suspending him from practice.

20. The Board has a specific function under the Barristers' Admission Rules to apply to the Full Court to have the name of a barrister-at-law, who has been convicted of an indictable offence, removed from the roll (Rule 42A). However, the Barristers' Admission Rules make no reference to applications to the Court in respect of the discipline of barristers in other circumstances.
21. I note that the Bar Association of Queensland (although having no statutory function to do so) can consider complaints made against its members in respect of alleged professional misconduct or unprofessional conduct, and has standing to bring an application before the Supreme Court: see *Re Clancy* [1970] QWN 8. However, while members of the Bar Association must undertake to abide by the constitution and rules of the Bar Association, membership is entirely voluntary. Therefore, not all barristers are members of the Bar Association. For example, many barristers employed by government, or those employed by corporations, are not members of the Bar Association. Similarly, barristers in private practice at the bar may elect not to join the Bar Association.
22. In *In re Swanwick* (1884) 2 QLR 1, which concerned a disbarred barrister's application for re-admission, Lilley CJ inferred that the Board of Examiners (effectively the forerunner of the Barristers' Board) had a duty to assist the Court in matters concerning the fitness of an applicant for admission or readmission. I also note the explanation by Mr Morris QC (at pages 7-15 of his report) of his understanding of the basis for the Board's authority to investigate the applicant's complaint.

23. In the absence of a statutory body expressly vested with authority to investigate and take action, including initiating proceedings, in respect of alleged professional misconduct or unprofessional conduct by barristers, the Board has, in the instant case, assumed that role. While I am not aware of any specific case where the Board has initiated court proceedings against a barrister, to my mind, there is little doubt that the Board would have standing to apply to the Supreme Court for an order that a barrister's name be removed from the roll, or for some lesser sanction to be imposed such as suspension or a fine.
24. In the instant case, the Board has taken on a role to assist the Supreme Court by undertaking initial investigation and assessment as to whether it would be appropriate to bring alleged professional misconduct, or unprofessional conduct, to the attention of the Supreme Court. The applicant himself prompted the action taken by the Board in the instant case, by making a complaint in respect of which he obviously wished the Board to take action. I am satisfied that the documents to which the applicant seeks access were received or brought into existence by the Board in the performance of functions which relate to the judicial functions of the Supreme Court. I find that those documents are excluded from the application of the FOI Act by the operation of s.11(1)(f) of the FOI Act.

DECISION

25. I decide that the documents sought by the applicant in his access application to the Board dated 3 April 1998 are not subject to the application of the FOI Act, by virtue of s.11(1)(f) of the FOI Act, and hence that -
 - (a) the Board was entitled to refuse to deal with the applicant's application dated 3 April 1998 for access to documents under the *Freedom of Information Act 1992 Qld*; and
 - (b) I do not have jurisdiction to deal further with the applicant's application for review dated 10 June 1998.