

OFFICE OF THE INFORMATION )  
COMMISSIONER (QLD) )

S 84 of 1994  
(Decision No. 94028)

Participants:

"S"  
Applicant

- and -

THE MEDICAL BOARD OF QUEENSLAND  
Respondent

### **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - letter from a psychiatrist to the Medical Board of Queensland containing information of a medical or psychiatric nature concerning the applicant - whether disclosure of the information to the applicant might be prejudicial to the physical or mental health or wellbeing of the applicant - application of s.44(3) of the *Freedom of Information Act 1992 Qld* (the FOI Act).

*Freedom of Information Act 1992 Qld* s.44(3), s.44(4), s.46(1)(a), s.52  
*Freedom of Information Act 1982 Cth* s.41(3)  
*Freedom of Information Amendment Act 1991 Cth*

*K and Director-General of Social Security, Re* (1984) 6 ALD 354

## **DECISION**

The decision under review (being the decision made on behalf of the respondent by Dr Diana Lange, on 3 May 1994, directing that access to the document in issue should not be given to the applicant but should be given to a qualified medical practitioner nominated by the applicant and approved by Dr Lange, in accordance with s.44(3) of the *Freedom of Information Act 1992 Qld*) is affirmed.

Date of Decision: 12 October 1994

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F N ALBIETZ  
**INFORMATION COMMISSIONER**

Participants:

"S"  
Applicant

- and -

THE MEDICAL BOARD OF QUEENSLAND  
Respondent

### REASONS FOR DECISION

#### Background

1. The applicant seeks review of the respondent's decision to refuse her direct access to a letter forwarded to the respondent by the applicant's former psychiatrist. The respondent's principal officer has decided, in accordance with s.44(3) of the *Freedom of Information Act 1992 Qld* (the FOI Act), that access to the document in issue should not be given to the applicant, but should be given instead to a qualified medical practitioner nominated by the applicant and approved by the respondent's principal officer.
2. By letter dated 24 February 1994, the applicant applied to the Medical Board of Queensland (the Board) for access to all documents from her file, held by the Board. The relevant file relates to a complaint which the applicant had lodged with the Board in respect of her former psychiatrist. The applicant had complained to the Board about the delay involved in the preparation by her former psychiatrist of a report which she had requested in support of a claim which she had made for workers' compensation. The applicant complained that she had been disadvantaged by both the delay in the report being furnished, and by the content of the report, and further complained that her claim for workers' compensation was subsequently refused.
3. By letter dated 14 April 1994, Mr B Ridsdill-Kenny, Freedom of Information Decision-Maker for the Board, advised the applicant that the Board's file comprised eleven folios. He decided to grant access to nine folios and to refuse access to two folios (comprising the letter to the Board from the applicant's former psychiatrist, responding to the applicant's complaint) on the ground that those folios comprised exempt matter under s.46(1)(a) of the FOI Act.
4. On 15 April 1994, the applicant applied, in accordance with s.52 of the FOI Act, for internal review of Mr Ridsdill-Kenny's decision to refuse access to two folios. The internal review was undertaken by Dr Diana Lange, the President of the Medical Board of Queensland, who decided to vary the initial decision. Dr Lange did not refuse access to the document in issue on the basis of s.46(1) of the FOI Act. Instead, after referring to s.44(3) of the FOI Act, Dr Lange decided as follows (the extract is from her letter to the applicant dated 3 May 1994):

*The documents contained information of a psychiatric nature concerning you which was provided to the Board by [the applicant's former psychiatrist]. It appears to me that the disclosure of the information to you may have a prejudicial effect on your physical or mental health. Accordingly, I have decided that access to the documents may be given to a medical practitioner nominated by you and approved by me. ...*

5. By letter dated 7 May 1994, the applicant applied to me for review of Dr Lange's decision, under

Part 5 of the FOI Act, stating:

*I feel my basic human rights are being put in a category based on [the applicant's former psychiatrist's] opinion.*

*I will take full responsibility for my actions - which are presumed might take place after my reading of these documents.*

*I feel I should assure you no harm is ever going to come, because of any report. I have read many reports and heard many opinions about my character. They don't matter because it is mostly irrelevant but these specific reports are important as I want to learn from the knowledge of each report.*

*Please allow me the right to be in control of my own ability. I would like to lodge an appeal for all documents from these doctors.*

### **The External Review Process**

6. On 27 May 1994, the Board provided me with a copy of the document in issue, plus records of consultations (undertaken in accordance with s.51 of the FOI Act) with the author of the document in issue, which record the author's views on the issue of whether or not the applicant should be given direct access to the document in issue.
7. By letter dated 1 August 1994, I advised the applicant that it was my preliminary view that the Board was correct in deciding that access to the document in issue should be given to a nominated medical practitioner in accordance with s.44(3) of the FOI Act. However, I also informed the applicant as follows:

*If you do not accept my preliminary view in relation to the application of s.44(3) to the document in issue, I invite you to provide me with evidence, from a suitably qualified medical practitioner, that there is no basis upon which to draw the conclusion that there is a real and tangible possibility that granting you access to the information would prejudice your physical or mental health.*

*I note from your discussion with Mr Ryan of 22 July 1994, that you are currently under the care of another Psychiatrist [who will be referred to in these reasons for decision as Dr K. I have decided to omit references to the names of psychiatrists who have treated the applicant, to assist in preserving the applicant's anonymity]. It would seem that [Dr K] would be the most suitably qualified person to support your contention that you should be given direct access to the document. Would you please advise me whether you propose to provide me with evidence from [Dr K] in relation to this issue. If this is your intention, then I will negotiate with the Medical Board for [Dr K] to review the information contained in [the document in issue] in order to assist the formulation of his opinion.*

*On the other hand, you may simply wish to resolve this matter quickly by obtaining [Dr K's] consent to be the medical practitioner whom you will nominate to receive [the document in issue] and discuss its contents with you, as contemplated by s.44(3) of the FOI Act. If that is what you would prefer, you should withdraw your application for review by the Information Commissioner and make arrangements with [Dr K] and the Board, accordingly.*

8. I subsequently received a letter, dated 19 August 1994, from Dr K in the following terms:

[the applicant] has asked me to write to you regarding her request to you to be allowed to read a report of [the applicant's former psychiatrist].

*In my opinion [the applicant] does not suffer from any Psychiatric Disorder - Illness at the present time. She is angry that she has been labelled as being mentally ill, in the past, rather than being distressed by situational events. (A normal reaction understandable in those particular circumstances).*

*I am of the opinion that no harm would occur to her mental health if she read any kind of report about her.*

9. On 25 August 1994, I wrote to Dr Lange, forwarding (with the applicant's consent) a copy of Dr K's letter of 19 August 1994. I also conveyed to Dr Lange that the applicant had informed me that she had been under the care of Dr K for some time after being in the care of her former psychiatrist, but that she was no longer under the care of a psychiatrist, and that she had resumed employment. I requested that Dr Lange reconsider whether the applicant could safely be given direct access to the document in issue.
10. By letter dated 21 September 1994, Dr Lange, who is herself a qualified psychiatrist, responded as follows:

*I have reviewed the correspondence and remain of the view that direct access to [the document in issue] should not be provided to [the applicant] but that it can be provided through a medical practitioner who will be able to counsel and support her. I base my decision on my experience as a psychiatrist as well as general principles of internal review.*

...

*I have noted the opinion of [the applicant's] most recent psychiatrist, [Dr K] - "I am of the opinion that no harm would occur to her mental health if she read any kind of report about her", of some concern, although he may not have had available to him the [the document in issue], which may well have changed his perspective.*

*I did not read [the document in issue] as labelling [the applicant] as having a mental illness, but rather that she has had reactive depression to a situation which was beyond her capacity to manage. This does not mean that such a person does not suffer serious distress.*

*My further concern is that she has not resolved the transference relationship which clearly developed with [the applicant's former psychiatrist]. It is these unsolved feelings about [the applicant's former psychiatrist] which are likely to mean that she needs some support when she reads his report.*

...

*If I am specifically responding to the case Re K and Director-General of Social Security (1984) 6 ALD 354, I would advise as follows:*

1. *The document does contain information of a psychiatric nature concerning the applicant, however, there is nothing in the diagnostic formulation that*

*should be a problem.*

2. *I consider, based on my training and expertise in this area, that the provision of [the document in issue] to [the applicant] in a direct manner, without any support, would mean an exacerbation of her anger and depression, and inability to sort out her thoughts in a therapeutic manner.*
3. *Given this I remain of the view that a medical practitioner ... should be identified to go through the report with her, and assist with any concerns and feelings that may arise from the report.*

### **The application of s.44(3) to the document in issue**

11. Section 44(3) and (4) of the FOI Act provide as follows:

*44.(3) If -*

- (a) *an application is made to an agency or Minister for access to a document of the agency or an official document of the Minister that contains information of a medical or psychiatric nature concerning the person making the application; and*
- (b) *it appears to the principal officer of the agency or the Minister that the disclosure of the information to the person might be prejudicial to the physical or mental health or wellbeing of the person;*

*the principal officer or Minister may direct that access to the document is not to be given to the person but is to be given instead to a qualified medical practitioner nominated by the person and approved by the principal officer or Minister.*

*(4) An agency or Minister may appoint a qualified medical practitioner to make a decision under subsection (3) on behalf of the agency or Minister.*

12. The terms of s.44(3) of the FOI Act are almost identical to the terms in which s.41(3) of the *Freedom of Information Act 1982 Cth* (the Commonwealth FOI Act) was framed, prior to its amendment by the *Freedom of Information Amendment Act 1991 Cth*. In its former terms, s.41(3) of the Commonwealth FOI Act was considered by Deputy President Smart QC (now His Honour Mr Justice Smart of the New South Wales Supreme Court) in the decision of the Commonwealth Administrative Appeals Tribunal in *Re K and Director-General of Social Security* (1984) 6 ALD 354. Deputy President Smart observed (at pp.356-7) that the provision raised these matters for consideration:

1. *Does the document in issue contain information of a medical or psychiatric nature concerning the applicant?*
2. *If the information were disclosed direct to the applicant is there a real and tangible possibility as distinct from a fanciful, remote or far-fetched possibility of prejudice to the physical or mental health or well-being of the applicant? This is what the words "might be prejudicial" mean. Well-being has a wide import and a phrase "physical or mental health or well-being" indicates that a broad approach is to be taken. The general health, welfare and good of the person of the person is to be considered.*

3. *If there is a real and tangible possibility of such prejudice the decision-maker is called upon to exercise his discretion whether to direct that access which would otherwise be given to the applicant should be given to a medical practitioner nominated by him. In the exercise of such discretion the decision-maker should consider the nature and extent of any real and tangible possible prejudice and the likelihood of it occurring. A number of situations could arise:*
- (a) *The possible prejudice may be small and not such as to justify giving a direction.*
  - (b) *The possible prejudice may be sufficient to be of concern, but not major concern. In such a case if the likelihood of such prejudice eventuating was small, the decision-maker may not give a direction.*
  - (c) *The possible prejudice, if it eventuated, may be great but the likelihood of it occurring may be small. In such a case the gravity of possible consequences might prove decisive in exercising the discretion whether to give a direction.*

*In the exercise of his discretion the decision-maker has to carefully consider all the circumstances and balance the relevant factors.*

13. I consider that this passage should be accepted and applied in Queensland as correctly stating the general approach to be taken by decision-makers when considering the application of s.44(3) of the FOI Act.
14. The document which is in issue in the present external review consists of a two page letter, written by a psychiatrist to the Registrar of the Board in response to a complaint which the applicant made to the Board about that psychiatrist. The letter set out the history of the applicant's treatment by that psychiatrist including details of medication which the applicant was prescribed. The letter also set out the psychiatrist's response to the applicant's complaint. I am satisfied that the document does contain information of a medical or psychiatric nature concerning the applicant.
15. The next question which I have to determine is whether the release of the document directly to the applicant might be prejudicial to her physical or mental health or wellbeing. The applicant asserts that no adverse consequences would follow release of the document to her. In that regard she is supported by Dr K, a consultant psychiatrist, who is the specialist who has dealt with the applicant most recently. However, it is necessary to balance this against the opinions of two other psychiatrists (the author of the document and Dr Lange), both of whom are aware of the precise contents of the document in issue (whereas the applicant and Dr K are not).
16. The information provided to me by Dr Lange has persuaded me that there is a real and tangible possibility (as distinct from a fanciful, remote or far-fetched possibility) of prejudice to the applicant's physical or mental health or wellbeing if the applicant were to be given direct access to the document in issue. Doing my best on the material before me, to weigh the nature of the possible prejudice and the likelihood of its occurrence, I consider that, notwithstanding the applicant's wish to have direct access to the document in issue, it is preferable that the discretion conferred by s.44(3) of the FOI Act be exercised, and that access to the document in issue not be given to the applicant, but be given instead to a qualified medical practitioner nominated by the applicant and approved by Dr Lange.

**Conclusion**

17. I am satisfied that this was an appropriate case for Dr Lange to exercise the discretion conferred by s.44(3) of the FOI Act, and I affirm the decision under review.

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F N ALBIETZ  
**INFORMATION COMMISSIONER**