



## Decision and Reasons for Decision

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**Application Numbers:** 210015 and 210141

**Applicant:** BDP

**Respondent:** Medical Board of Queensland

**Third Party:** WNK

**Decision Date:** 19 December 2007

**Catchwords:** **FREEDOM OF INFORMATION - section 46(1)(b) of the *Freedom of Information Act 1992* (Qld) - matter communicated in confidence - prejudice to future supply - complaint against medical practitioner - public interest balancing test**

**FREEDOM OF INFORMATION - section 44(1) of the *Freedom of Information Act 1992* (Qld) - matter concerning personal affairs - public interest balancing test**

**FREEDOM OF INFORMATION - section 43(1) of the *Freedom of Information Act 1992* (Qld) - legal professional privilege - confidential communications between agency and legal advisors**

**FREEDOM OF INFORMATION - section 22(a) of the *Freedom of Information Act 1992* (Qld) - whether documents can reasonably be accessed under another enactment or by administrative arrangements**

**FREEDOM OF INFORMATION - section 27(3) and section 27(4) of the *Freedom of Information Act 1992* (Qld) - release of documents - deletion of irrelevant matter - whether it is reasonably practicable to give access to documents with irrelevant matter deleted**

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## REASONS FOR DECISION

### Summary

1. I find that:

- the Category 1 Matter is exempt from disclosure pursuant to section 46(1)(b) of the *Freedom of Information Act 1992 (Qld)* (FOI Act)
- the Category 2 Matter is exempt from disclosure pursuant to section 44(1) of the FOI Act
- the Category 3 Matter is exempt from disclosure pursuant to section 43(1) of the FOI Act
- the Medical Board of Queensland (MBQ) is entitled to refuse access to the Category 4 Matter pursuant to section 22(a) of the FOI Act
- the MBQ is entitled to delete the Category 5 Matter deleted from the relevant documents pursuant to section 27(3) and (4) of the FOI Act, prior to their release to the applicant.

### Background

2. The relevant background to reviews 210015 and 210141 is as follows:

- On 12 December 2005, the applicant submitted a number of freedom of information (FOI) applications to the MBQ for access to documents under the FOI Act, including the FOI access application that is the subject of reviews 210015 and 210141.
- In a meeting on 5 January 2006, the applicant and the MBQ agreed to amend the scope of the FOI access applications.
- By letter dated 9 January 2006, the MBQ wrote to the applicant and set out its understanding of the amended scope of the FOI access applications.
- By letter dated 11 January 2006, the applicant agreed with the MBQ's understanding of the amended scope of the FOI access applications.
- The MBQ dealt with the FOI access application that is the subject of this review in three parts, and issued decisions regarding each of those three parts.
- The applicant made three separate applications for external review of the MBQ's decisions.
- This Office commenced three separate reviews regarding those applications—including reviews 210015 and 210141.
- On 15 January 2007, the applicant provided this office with an authority stating '*I give [...] authority and permission to represent me in attending to my matters concerning my Freedom of Information applications including any external reviews until further notice due to my present ill health*'.

### **Review 210015**

3. The relevant background to review 210015 is as follows:

- On 27 June 2006, Dr Cohn (the MBQ's principal officer for the purposes of the FOI Act) issued a part decision regarding the FOI access application, advising that the MBQ had:
  - located 245 folios responsive to the FOI access application
  - decided to release 186 folios in their entirety
  - decided to release folios 22-58 under the conditions specified in section 44(3) of the FOI Act, except for:
    - folios 49-50 and parts of folios 24, 48, 51 and 56 claimed to be exempt from disclosure pursuant to section 44(1) of the FOI Act
    - folios 26-27 and parts of folios 23, 25, 28, 52, 55 and 56 claimed to be exempt from disclosure pursuant to section 46(1)(b) of the FOI Act
  - decided to refuse to release folios 59-66 claimed to be exempt from disclosure pursuant to section 46(1)(b) of the FOI Act
  - decided to release folios 253-266 under the conditions specified in section 44(3) of the FOI Act, except for parts of folios 254 and 256 claimed to be exempt from disclosure pursuant to section 44(1) of the FOI Act.
- On 4 August 2006, the applicant applied for external review of the MBQ's part decision dated 27 June 2006 which resulted in this office commencing review 210015.

### **Review 210141**

4. The relevant background to review 210141 is as follows:

- On 7 September 2006, the applicant applied to this office for external review of a number of deemed decisions by the MBQ to refuse access to matter regarding a number of FOI access applications made by the applicant. One of the deemed decisions related to the matter that Dr Cohn had not considered in her part decision that resulted in review 210015.
- The MBQ applied for further time to deal with such matter and, on 20 October 2006, I decided to allow the MBQ further time.
- On 10 November 2006, Mr J Posener (the MBQ's Manager of Information Services) issued a part initial decision regarding the FOI access application. Mr Posener advised as follows regarding seven collections of matter:
  - Collection 1
    - located 54 folios responsive to the FOI access application
    - decided to release seven folios in their entirety
    - decided to refuse to deal with the FOI access application insofar as it related to folios 172-178 and 314-317, pursuant to section 29B of the FOI Act
    - decided to refuse to deal with the FOI access application insofar as it related to folios 179-214, pursuant to section 22(a) of the FOI Act
  - Collection 2
    - located 44 folios responsive to the FOI access application
    - decided to release one folio in its entirety

- decided to refuse to deal with the FOI access application insofar as it related to folios 105-111, pursuant to section 29B of the FOI Act
- decided to refuse to deal with the FOI access application insofar as it related to folios 112-147, pursuant to section 22(a) of the FOI Act
- Collection 3
  - located 23 folios responsive to the FOI access application
  - decided to release 16 folios in their entirety
  - decided to release folio 2, except for parts of that folio claimed to be exempt from disclosure pursuant to section 46(1)(b) or, alternatively, section 42(1)(ca) of the FOI Act
  - decided to release folio 3, except for parts of that folio deleted pursuant to section 27(3) and (4) of the FOI Act
  - decided to release folio 4, except for part of that folio claimed to be exempt from disclosure pursuant to section 43(1) of the FOI Act
  - decided to release folios 5, 21 and 268 except for parts of those folios claimed to be exempt from disclosure pursuant to section 44(1) of the FOI Act
  - decided to release folio 8, except for part of that folio claimed to be exempt from disclosure pursuant to section 45(1)(c) of the FOI Act
- Collection 4
  - located 164 folios responsive to the FOI access application
  - decided to release 44 folios in their entirety
  - decided to release folio 2, except for part of that folio claimed to be exempt from disclosure pursuant to section 44(1) of the FOI Act and part of that folio claimed to be exempt pursuant to section 45(1)(c) of the FOI Act
  - decided to refuse to release folios 3-77 claimed to be exempt from disclosure pursuant to section 44(1) of the FOI Act
  - decided to release folios 91, 105, 111, 112, 114 and 115 except for parts of those folios claimed to be exempt from disclosure pursuant to section 44(1) of the FOI Act
  - decided to refuse to deal with the FOI access application insofar as it related to folios 78-90, 92-103 and 122-128 pursuant to section 29B of the FOI Act
  - decided to refuse to release folio 354 claimed to be exempt from disclosure pursuant to section 43(1) of the FOI Act
- Collection 5
  - located 454 folios responsive to the FOI access application
  - decided to release 138 folios in their entirety
  - decided to release folios 1, 159, 380, 382, 426, 431, 439 and 440 except for parts of those folios claimed to be exempt from disclosure pursuant to section 46(1)(b) or, alternatively, section 42(1)(ca) of the FOI Act
  - decided to refuse to release folios 169, 378, 429-430, 434-435, 436 and 437-438 claimed to be exempt from disclosure pursuant to section 46(1)(b) or, alternatively, section 42(1)(ca) of the FOI Act
  - decided to refuse to deal with the FOI access application insofar as it related to folios 170-276, 277-375, 390-425 and 450-485 pursuant to section 22(a) of the FOI Act
  - decided to refuse to release folios 8-10 claimed to be exempt from disclosure pursuant to section 43(1) of the FOI Act

- decided to release folios 27-28, except for parts of those folios deleted pursuant to section 27(3) and (4) of the FOI Act
  - decided to release folios 383 and 427 except for parts of those folios claimed to be exempt from disclosure pursuant to section 44(1) of the FOI Act and parts of those folios deleted pursuant to section 27(3) and (4) of the FOI Act
  - decided to refuse to deal with the FOI access application insofar as it related to folios 384-389 and 443-449, pursuant to section 29B of the FOI Act
  - decide to refuse to release folio 432 claimed to be exempt from disclosure pursuant to section 45(1)(c) of the FOI Act
- o Collection 6
    - located 177 folios responsive to the FOI access application
    - decided to refuse to deal with the FOI access application insofar as it related to the 177 folios, pursuant to section 29B of the FOI Act
  - o Collection 7
    - located 1 folio responsive to the FOI access application
    - decided to release the folio except for parts of that folio claimed to be exempt from disclosure pursuant to section 46(1)(b) or, alternatively, section 42(1)(ca) of the FOI Act.
- On 24 November 2006, the applicant applied for an internal review of the MBQ's part initial decision dated 10 November 2006.
  - On 14 December 2006, Mr J O'Dempsey (the MBQ's Executive Officer) issued a part internal review decision regarding the FOI access application (MBQ reference 2005-075/2) affirming the initial part decision dated 10 November 2006.
  - On 8 January 2007, the applicant applied for external review of the MBQ's part internal review decision dated 14 December 2006 which resulted in this Office commencing review 210141.

### **Decisions under review**

5. Pursuant to section 88(1) of the FOI Act, the Information Commissioner has power to:
  - review any decision made by the MBQ regarding the applicant's FOI access application
  - decide any matter in relation to the applicant's FOI access application that could, under the FOI Act, have been decided by the MBQ.
6. This decision reviews:
  - the decision of Dr Cohn dated 27 June 2006 that resulted in review 210015
  - the internal review decision of Mr O'Dempsey dated 14 December 2006 that resulted in review 210141.

### **Steps taken in the external review process**

7. Copies of the documents in issue were obtained from the MBQ and examined by this Office.

8. By letter dated 29 September 2006, I consulted with a relevant third party. The third party provided a response dated 23 October 2006. Further consultation issues were considered throughout the review.
9. By letter dated 8 November 2006, I advised the applicant that it was my preliminary view that the matter in review 210015 that the MBQ claimed was exempt from disclosure pursuant to section 44(1) of the FOI Act—that is, folios 49-50 and parts of folios 24, 48, 51, 56, 254 and 256—qualified for exemption under that section of the FOI Act.
10. By letter dated 27 November 2006, the applicant:
  - accepted my preliminary view that portions of matter on folios 254 and 256 are exempt from disclosure pursuant to section 44(1) of the FOI Act
  - contested by preliminary view regarding the balance of the matter, submitting that such matter is not exempt from disclosure pursuant to section 44(1) of the FOI Act.
11. By letter dated 17 September 2007, I:
  - requested further information from the MBQ regarding some matter in issue in review 210141
  - advised the MBQ of my preliminary view regarding other matter in issue in review 210141.
12. By letter dated 27 September 2007, the MBQ:
  - provided further information as requested by this Office
  - advised that it accepted my preliminary view regarding all matter except portions of matter on folio 8 in Collection 3 and folio 2 in Collection 4, in respect of which it requested further information.
13. By letter dated 10 October 2007, I advised the MBQ of my further preliminary view regarding the portions of matter on folio 8 in Collection 3 and folio 2 in Collection 4.
14. By letter dated 12 October 2007, the MBQ accepted my preliminary view regarding the portions of matter on folio 8 in Collection 3 and folio 2 in Collection 4.
15. On 22 October 2007, I advised the applicant of my preliminary view regarding:
  - the matter in review 210015 that the MBQ claimed was exempt from disclosure pursuant to section 46(1)(b) of the FOI Act—that is, folios 26-27 and 59-66 and parts of folios 23, 25, 28, 52, 55 and 56
  - all of the matter in issue in review 210141.
16. In doing so, I informed the applicant that it was my preliminary view (as accepted by the MBQ) that:
  - Portions of matter on folio 8 in Collection 3 and folio 2 in Collection 4 that the MBQ, in its internal review decision that resulted in review 210141, claimed are exempt from disclosure pursuant to section 45(1)(c) of the FOI Act are not so exempt and should be released to the applicant.

- Folio 432 in Collection 5 that the MBQ, in its internal review decision that resulted in review 210141, claimed are exempt from disclosure pursuant to section 45(1)(c) of the FOI Act is not so exempt and should be released to the applicant, except for portions of matter that should be exempted pursuant to section 46(1)(b) of the FOI Act and portions of matter that should be deleted pursuant to sections 27(3) and (4) of the FOI Act.
  - Folios 78-90 and 92-103 in Collection 4 are the same as folios 254-266 and 256-266 respectively in review 210015 (except that folio 103 in Collection 4 is an additional blank folio). While the MBQ, in its internal review decision that resulted in review 210141, refused to deal with folios 78-90 and 92-103 in Collection 4 pursuant to section 29B of the FOI Act, those folios should be released to the applicant under the conditions specified in section 44(3) of the FOI Act, except for matter regarding Dr Campbell on folios 78, 89 and 92 that should be exempted pursuant to section 44(1) of the FOI Act:
    - consistent with the MBQ's release of folios 254-266 in review 210015 under the conditions specified in section 44(3) of the FOI Act, except for portions of matter on folios 254 and 256 that are exempt pursuant to section 44(1) of the FOI Act (as accepted by the applicant in the letter dated 27 November 2006)  
and
    - as enabled by the applicant's nomination, on 31 August 2006, of a medical practitioner to receive all matter released under the conditions specified in section 44(3) in the applicant's various FOI access applications.
  - Folios 1-177 in Collection 6 are the same as folios 83-252 in review 210015 (except that folios 1-177 in Collection 6 include some additional blank folios). While the MBQ, in its internal review decision that resulted in review 210141, refused to deal with folios 1-177 in Collection 6 pursuant to section 29B of the FOI Act, those folios should be released to the applicant under the conditions specified in section 44(3) of the FOI Act:
    - consistent with the MBQ's release of folios 83-252 in review 210015 under the conditions specified in section 44(3) of the FOI Act  
and
    - as enabled by the applicant's nomination, on 31 August 2006, of a medical practitioner to receive all matter released under the conditions specified in section 44(3) in the applicant's various FOI access applications.
17. Otherwise, I advised the applicant that it was my preliminary view that matter that MBQ claimed was exempt from disclosure pursuant to section 46(1)(b) of the FOI Act in review 210015 and all of the matter in issue in review 210141 (except for the portions of matter on folio 8 in Collection 3 and folio 2 in Collection 4, folios 78-90 and 92-103 in Collection 4 and folios 1-177 in Collection 6) is:
- exempt from disclosure pursuant to section 46(1)(b) of the FOI Act
  - exempt from disclosure pursuant to section 44(1) of the FOI Act
  - exempt from disclosure pursuant to section 43(1) of the FOI Act
  - matter that the MBQ was entitled to refuse to deal with pursuant to section 29B of the FOI Act  
or
  - matter that is irrelevant to the applicant's FOI access application that may be deleted pursuant to sections 27(3) and (4) of the FOI Act.
18. By letter dated 28 November 2007, the applicant:



- contested my preliminary view dated 22 October 2007
- relied upon the submissions dated 27 November 2006
- made further submissions and attached documents in support of those contentions.

19. In making this decision, I have taken into account the following:

- applicant's FOI application dated 12 December 2005
- decision of the MBQ's principal officer, Dr Cohn, dated 27 June 2006
- initial decision of Mr Posener dated 10 November 2006
- internal review decision of Mr O'Dempsey dated 14 December 2006
- applicant's applications for external review dated 4 August 2006 and 8 January 2007
- file notes of conversations held between the applicant's representative, the MBQ, the third party and this Office during the course of this review
- correspondence exchanged between the applicant's representative, the MBQ, the third party and this Office during the course of this review
- applicant's submissions dated 27 November 2006 and 28 November 2007
- documents in issue
- relevant legislation and case law

### **Matter in issue**

20. I have divided the matter in issue into five categories. My findings regarding each category of matter are set out below.

### **Findings**

#### **Category 1 Matter**

21. The Category 1 Matter is the following matter that the MBQ:

- claimed is exempt from disclosure pursuant to section 46(1)(b) of the FOI Act in the decision that resulted in review 210015—folios 26-27 and 59-66 and parts of folios 23, 25, 28, 52, 55 and 56
- claimed is exempt from disclosure pursuant to section 46(1)(b) and/or section 42(1)(ca) of the FOI Act in the internal review decision that resulted in review 210141:
  - parts of folio 2 in Collection 3,
  - folios 169, 378, 429-430, 434-435, 436 and 437-438, and parts of folios 1, 159, 380, 382, 426, 431, 439 and 440 in Collection 5
  - part of folio 1 in Collection 7
- claimed is exempt from disclosure pursuant to section 45(1)(c) of the FOI Act in the internal review decision that resulted in review 210141—parts of folio 432 in Collection 5
- refused to deal with pursuant to section 29B of the FOI Act in the internal review decision that resulted in review 210141:
  - folios 172-178 in Collection 1, 105-111 in Collection 2, 122-128 in Collection 4 and 443-449 in Collection 5—that each constitute folios that are the same as folios 60-66 in review 210015

- folios 384-389 in Collection 5—that constitute folios that are the same as folios 61-66 in review 210015.
22. The Category 1 Matter constitutes or records a complaint regarding the treatment of the applicant by Dr Young.

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

23. 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.*

24. Matter will be exempt under section 46(1)(b) of the FOI Act if all of the following requirements are satisfied:

- (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 consideration favouring disclosure.

***Is the Category 1 Matter exempt from disclosure pursuant to section 46(1)(b)?***

**Requirement (a) – information of a confidential nature**

25. The requirement that the matter consist of information of a confidential nature calls for a consideration of whether the information has the requisite degree of relative secrecy or inaccessibility, and is not trivial or useless information—see *'B' and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (*'B'*)<sup>1</sup>.

***The applicant's submissions***

26. The applicant submitted, via a representative in various telephone conversations with this Office, that as the applicant has not been provided with any express written evidence which indicates that the complaint was made on a confidential basis, the Category 1 Matter is not confidential.

27. In this respect, I note the Information Commissioner's statement in *'B'*<sup>2</sup> that:

71. ...  
(h) *"The question of confidentiality is to be determined by reference to the substance of the information for which protection is sought. An express marking*

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<sup>1</sup> At paragraph 148.

<sup>2</sup> See also page 366 of *Thwaites and Department of Health and Community Services* (1995) 8 VAR 361; paragraph 17 of *Perth Radiation Oncology Centre and the Department of Health* [2002] WAICmr 5; and paragraph 88 of *Petroulias and Others and Commissioner of Taxation* [2006] AATA 333.

*of 'confidential' on a physical record of information will not confer confidentiality on the information if it has been made generally available... Confidentiality depends on the availability of the information in question and, at most, a 'confidential' marking will be useful only in helping to establish that the recipient of a document is affected by an obligation of confidence.” (Gurry, page 85)*

28. On the information available to me, I am satisfied that:

- a marking of 'confidential' on the complaint does not determine whether or not it is confidential
- confidentiality is determined by reference to the substance of the complaint
- the applicant's submission does not establish that the Category 1 Matter is not confidential.

29. The applicant also submitted, via a representative in various telephone conversations with this Office, that:

- it is the applicant's understanding that the complainant obtained the information for the complaint from tribunal proceedings regarding the applicant
- those proceedings were open to the public
- on this basis the Category 1 Matter is not confidential.

30. In relation to this submission, I note the Information Commissioner's statement in 'B'<sup>3</sup> that:

71. ...

- (e) *“All information required to produce a product or required result may be in the public domain or even obvious, but what remains secret is how the plaintiff combined that public information to produce that result or product. The information is present in the public domain but remains inaccessible without effort and labour ... The secret could exist purely in the way that public knowledge has been utilised.” (Dean, page 113)*
- (f) *“... Most information is composed of particular elements which are already generally known. A customer list, for example, may be composed of names which are all available in a number of trade directories, but the list as a discrete entity will nevertheless be confidential if it assembles those names in a way which are not otherwise available.” (Gurry, page 71)*
- (g) *“While the general rule is that information must be inaccessible in order to be confidential, in certain cases information which is generally available may be considered as confidential between two parties because of the context in which it appears. In these cases, confidentiality inheres not so much in the information itself, but in the association of the information with a particular context which the parties know attaches a special significance to the information (citing Cranleigh Precision Engineering Ltd v Bryant [1966] RPC 81, Schering Chemicals Ltd v Falkman Ltd [1981] 2 All ER 321, and G v Day [1982] 1 NSWLR 24).” (Gurry, page 78)*

31. After careful consideration of the circumstances relevant to this review, I find that:

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<sup>3</sup> See also paragraph 79 of *Drabsch and Collector of Customs and Another* (unreported, No. Q84/77 AAT No. 6328, 5 November 1990).

- the documents arising from the tribunal's proceedings (such as documents filed or tendered, transcripts, decisions and orders) are in the public domain and therefore not confidential
  - in the event that the information for the complaint was obtained from the tribunal proceedings regarding the applicant, the way in which the complainant utilised the information (for example, arranged, discussed and focussed upon the information) renders the Category 1 Matter confidential
  - the applicant's submissions do not establish that the Category 1 Matter is not confidential.
32. In conclusion, after careful consideration of the Category 1 Matter, the circumstances of this review and the applicant's submissions, I find that the Category 1 Matter:
- has the requisite degree of relative secrecy or inaccessibility
  - is not trivial or useless information
  - is information of a confidential nature.

### **Requirement (b) – communicated in confidence**

33. Whether or not matter is 'communicated in confidence' is a question of fact. Relevantly, in 'B' the Information Commissioner stated<sup>4</sup> that:

*152. I consider that the phrase "communicated in confidence" is used in this context to convey a requirement that there be mutual expectations that the information is to be treated in confidence. One is looking then for evidence of any express consensus between the confider and confidant as to preserving the confidentiality of the information imparted; or alternatively for evidence to be found in an analysis of all the relevant circumstances that would justify a finding that there was a common implicit understanding as to preserving the confidentiality of the information imparted.*

34. Where a mutual understanding exists that certain information is confidential, it is necessary to consider whether there are any implicit conditions attached to that understanding. In *McCann*<sup>5</sup>, the Information Commissioner noted that selective, restricted disclosure of some of the information in a communication ought to be reasonably contemplated by the parties to the communication when such disclosure is 'considered necessary for the more effective conduct of relevant investigations'.

### **The applicant's submission**

35. The applicant submitted, via a representative in various telephone conversations with this Office, that even if the complaint was initially confidential:
- it is the applicant's understanding that:
    - the complainant sent the complaint to a recipient other than the MBQ
    - the recipient then forwarded the complaint to the MBQ
    - the MBQ then forwarded the complaint to the MBQ's investigators
  - as the complaint has been passed on from its original recipient, it can no longer be confidential.
36. In relation to that submission, I note the Information Commissioner's statement in 'B' that:

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<sup>4</sup> See also paragraph 34 of *McCann and Queensland Police Service* (1997) 4 QAR 30 (*McCann*).

<sup>5</sup> At paragraph 58.

71. ...
- (b) *"The law does not require information to be absolutely inaccessible before it can be characterised as confidential. ... It is clear that the publication of information to a limited number of persons will not of itself destroy the confidential nature of information ... On the other hand, it is equally clear that the disclosure of information to the public at large will destroy the confidentiality of the information. ... Whether the publication which information has received is sufficient to destroy confidentiality is 'a question of degree depending on the particular case' (citing Franchi v Franchi [1967] RPC 149, at 153 per Cross J)." (Gurry, pages 73-4)*
  - (c) *"It is quite possible that information which is given to a limited group on a confidential basis will not be held to have entered the public domain so long as that group maintains the confidentiality and the group is small enough." (Dean, page 112)*

37. Further, I note the following comments of Information Commissioner in *Coventry and Cairns City Council* (1996) 3 QAR 191<sup>6</sup> that appear relevant to the applicant's submission:

- 3. *The letter in question is dated 7 January 1994 and was written by a Mr Don Hall, Joint Managing Director of Professionally Directed Fundraising Associates Pty Ltd, a firm which had just completed a feasibility study report assessing the potential fundraising capacity of the Cairns Regional Gallery. The letter was addressed to the then Mayor of Cairns, Alderman Kevin Byrne, who was ex officio a member of the Board of the Cairns Regional Gallery, and was at that time the Chairman of the Board.*
- ...
- 14. ... *[I]t is either admitted in the respondent's submissions, or is clearly established by other material before me, that the letter in issue:*
    - (i) *was read to a closed meeting of the Board of Directors of the Cairns Regional Gallery (the Gallery Board) on 17 January 1994, at which those present were requested to keep the information confidential, and the Gallery Board decided to recommend that the office of Gallery Director be made redundant (paragraphs 12 and 16 of the respondent's submission dated 21 February 1995);*
    - (ii) *was discussed during a confidential meeting of Cairns City Council on 18 January 1994, in connection with the Council's consideration of the recommendation of the Gallery Board that the office of Gallery Director be made redundant (paragraphs 13 and 16 of the respondent's submission dated 21 February 1995)...*
- 16. *Nor, in my opinion, have incidents (i) and (ii) deprived the letter in issue of the "necessary quality of confidence". As I noted at paragraph 71(b) and (c) of my reasons for decision in Re "B", publication of confidential information to a limited number of persons on a confidential basis will not necessarily, of itself, destroy the confidential nature of the information: see also Attorney-General's Department and Australian Iron & Steel Pty Ltd v Cockcroft (1986) 64 ALR 97 at p.108. Disclosure to closed meetings of the Gallery Board, and the Cairns City Council, for the limited purpose of considering a recommendation to make Mr Coventry's office as Director of the Regional Gallery redundant, did not, in my opinion, result in the loss of the necessary degree of secrecy or inaccessibility which information must possess if its*

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<sup>6</sup> See also page 108 of *Attorney-General's Department and Australian Iron & Steel Pty Ltd v Cockcroft* (1986) 64 ALR 97 and pages 219-220 of *Joint Coal Board v Cameron* (1989) 90 ALR 208.

*unauthorised use or disclosure by a confidant is found an action for breach of confidence.*

38. On the information available to me, I find that:

- in the event that the complainant sent the complaint to a recipient other than the MBQ, who then forwarded it to the MBQ, the fact that the complaint was passed on to the MBQ for the limited purpose of responding to it would not destroy its confidential character for other purposes and in relation to other persons
- in the event that the MBQ provided the complaint to its investigators, the fact that it was passed on to the investigators for the limited purpose of responding to it would not destroy its confidential character for other purposes and in relation to other persons
- the applicant's submission in paragraph 35 of this decision does not establish that the Category 1 Matter is no longer confidential.

39. Further, on careful consideration of the Category 1 Matter and the circumstances of this review, I find that:

- the actions of the complainant indicate that the complaint was made on a confidential basis
- the actions of the MBQ (including its investigators) indicate that the complaint was received on a confidential basis, except to the extent that selective, restricted disclosure was necessary in order to enable the appropriate investigator to investigate the complaint
- in the event that the complainant sent the complaint to a recipient other than the MBQ, who then forwarded it to the MBQ, the actions of the original recipient would indicate that the complaint was received on a confidential basis, except to the extent that selective, restricted disclosure was necessary in order to enable the appropriate investigator to investigate the complaint
- due to the nature and sensitivity of the complaint, it is reasonable to expect that the complaint was made and received on a confidential basis, except to the extent that selective, restricted disclosure was necessary in order to enable the appropriate investigator to investigate the complaint.

40. In conclusion, I find that:

- the relevant circumstances indicate that there was a common implicit mutual understanding that the complaint was confidential, and that the confidentiality should be preserved
- the complaint was communicated in confidence.

**Requirement (c) – prejudice to the future supply of such information**

41. The requirement that disclosure of the matter could reasonably be expected to prejudice the future supply of such information is discussed in 'B'<sup>7</sup>.

42. I note that:

- this requirement involves consideration of prejudice to the future supply of information by a substantial number of sources available or likely to be available to the agency in question—not just the complainant in the review

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<sup>7</sup> At paragraphs 154-156.

- the phrase *'could reasonably be expected to'* requires an expectation that is based on reason—that is, an expectation for which real and substantial grounds exist
- grounds which are merely speculative, imaginable or theoretically possible are not sufficient
- accordingly, I must consider whether there are real and substantial grounds to expect that disclosure of the Category 1 Matter would prejudice the future supply of complaints regarding medical practitioners by a substantial number of sources available or likely to be available to the MBQ.

43. I have considered the following relevant circumstances:

- in Queensland, there is no legal requirement that a person who has concerns about conduct (similar to that of Dr Young) must report that conduct
- the complainant has indicated that if the Category 1 Matter is disclosed, the complainant:
  - will not, in future, make further complaints regarding conduct similar to that of Dr Young, if the confidentiality of such complaints could not be guaranteed
  - believes that a substantial number of persons in similar positions would not, in future, make complaints regarding conduct similar to that of Dr Young, if the confidentiality of such complaints could not be guaranteed
- the MBQ is also of the view that if the Category 1 Matter is disclosed, a substantial number of persons in positions similar to the complainant would not, in future, make complaints regarding conduct similar to that of Dr Young if the confidentiality of such complaints could not be guaranteed.

44. After careful consideration of these circumstances and the Category 1 Matter, I find that there are real and substantial grounds to expect that disclosure of the Category 1 Matter would:

- result in persons in positions similar to the complainant:
  - making a complaint regarding conduct similar to that of Dr Young, but providing only guarded, limited information that would be of little use to investigators
  - or
  - not making a complaint regarding conduct similar to that of Dr Young
- prejudice the future supply of complaints regarding conduct similar to that of Dr Young by a substantial number of sources available or likely to be available to the MBQ.

#### **Requirement (d) – public interest considerations**

45. Given my finding that the first three requirements necessary to establish that the information is exempt under section 46(1)(b) have been satisfied, I must now consider whether disclosure of the Category 1 Matter would, on balance, be in the public interest.

#### ***The applicant's submissions***

46. The applicant has submitted that it is very important that the applicant obtains the Category 1 Matter, as Dr Young did not keep any records regarding treatment of the

applicant, and the Category 1 Matter will provide the applicant with details of that treatment.

47. On inspection of the Category 1 Matter, I am satisfied that it does not contain any details regarding Dr Young's treatment of the applicant that:
  - have not already been provided to the applicant (for example, in the matter released to the applicant in reviews 210015) and/or
  - are not already in the public domain (for example, in the documents regarding the tribunal's proceedings).
48. Accordingly, in my view, I do not consider that the applicant's submission raises a public interest consideration favouring disclosure of the Category 1 Matter.
49. The applicant also submitted that this Office should take into account the fact that Dr Young is now deceased.
50. I note that the confidentiality of the complaint relates to the complainant, rather than Dr Young, who is subject of the complaint. Accordingly, it is my view that the applicant's submission in paragraph 49 of this decision does not raise a public interest consideration favouring disclosure of the Category 1 Matter.
51. The applicant also submitted that this Office should take into account the following:
  - the applicant is well aware of the importance of confidentiality
  - if the complaint was released, the applicant would maintain its confidentiality and would not disclose it to anyone but the applicant's treating psychiatrist.
52. I note that disclosure of matter under the FOI Act is considered to be 'disclosure to the world at large' rather than disclosure to the particular applicant. The considerations raised by the applicant in paragraph 51 of this decision challenge that public interest consideration— in paragraphs 56-58 of this decision I have examined this issue in more detail.

#### ***Public interest considerations favouring disclosure***

53. The general public interest in information held by government being accessible is a public interest consideration favouring disclosure of the matter to the applicant. However, this general public interest carries less weight when the matter constitutes information provided to the government by and/or about non-government entities or individuals, rather than information generated by the government about the government.
54. In this review, disclosure of the matter in issue would disclose a complaint made by a non-government person regarding Dr Young. Accordingly, while the general public interest in information held by government being accessible favours disclosure, it carries less weight regarding the Category 1 Matter than it might in other circumstances.
55. A more specific public interest is recognised at section 4(2)(c) of the FOI Act— the public interest '*that, in a free and democratic society ... members of the community should have access to information held by government in relation to their personal affairs*' [emphasis added].



56. In this regard, I note that disclosure of matter under the FOI Act is considered to be 'disclosure to the world at large' rather than disclosure to the particular applicant. However, section 6 of the FOI Act effectively relaxes this general principle, in that it requires that *'the fact that the document contains matter relating to the personal affairs of the applicant'* be taken into account as a public interest consideration.

57. Further, at paragraph 56 of *'KBN' and Department of Families, Youth and Community Care* (1998) 4 QAR 442, the Information Commissioner observed that

*...in an appropriate case, there may be a public interest in a particular applicant having access to information which affects or concerns that applicant to such a degree as to give rise to a justifiable "need to know" which is more compelling than for other members of the public.*

58. In this review, disclosure of the Category 1 Matter would disclose a complaint made regarding the professional conduct of Dr Young. However, as the Category 1 Matter relates to Dr Young's treatment of the applicant, it is my view that the Category 1 Matter also contains matter regarding the applicant's personal affairs. Accordingly, the applicant's interest in obtaining access to the Category 1 Matter is more compelling than the interest of members of the general public and this constitutes a public interest consideration favouring disclosure of such matter to the applicant.

#### ***Public interest considerations favouring non-disclosure***

59. Government agencies discharge important regulatory functions on behalf of the community. In discharging those functions, they frequently rely on information provided by non-government persons. If such persons are aware that their complaints will not be treated in a confidential manner, they may not provide information to regulatory authorities, or they may provide insufficiently detailed information to them.

60. Accordingly, there is a public interest in upholding the understanding of confidentiality for persons who provide information to regulatory authorities, in order to promote the continued supply of such information and enable those regulatory authorities to perform their functions. This is particularly so when there is no statutory power to compel mandatory reporting of concerns.

61. This public interest in upholding the understanding of confidentiality for persons who provide information to regulatory authorities is particularly significant when the information relates to the conduct of medical practitioners. As such conduct may be detrimental to patients' physical and mental health and well-being, it is imperative that the information is provided to the relevant regulatory authorities, so that they can investigate and take appropriate action.

#### ***Where does the balance of public interest considerations lie?***

62. In the circumstances of this review, I find that the public interest considerations favouring disclosure of the Category 1 Matter are insufficient to outweigh the significant public interest consideration in upholding the understanding of confidentiality for persons who provide information regarding the conduct of medical practitioners to the relevant regulatory authorities.

## **Conclusion**

63. I find that the Category 1 Matter is exempt from disclosure pursuant to section 46(1)(b) of the FOI Act.
64. As I have found that the Category 1 Matter is exempt from disclosure pursuant to section 46(1)(b) of the FOI Act, it is unnecessary for me to determine whether or not the Category 1 Matter is also exempt from disclosure pursuant to section 42(1)(ca) of the FOI Act.
65. As I have found that folios 60-66 in review 210015, which are the same as folios:
- 172-178 in Collection 1
  - 105-111 in Collection 2
  - 122-128 in Collection 4
  - 443-449 in Collection 5

and that folios 61-66 in review 210015, which are the same as folios:

- 384-389 in Collection 5

are exempt from disclosure pursuant to section 46(1)(b) of the FOI Act, it is unnecessary for me to determine whether the MBQ was entitled to refuse to deal with the applicant's FOI application, insofar as it relates to those folios, pursuant to section 29B of the FOI Act.

## **Category 2 Matter**

### **Matter claimed to be exempt pursuant to section 44(1) of the FOI Act**

66. The Category 2 Matter is the following matter that the MBQ:
- claimed is exempt from disclosure pursuant to section 44(1) of the FOI Act in the decision that resulted in review 210015—folios 49 and 50 and parts of folios 24, 48, 51 and 56
  - claimed is exempt from disclosure pursuant to section 44(1) of the FOI Act in the internal review decision that resulted in review 210141:
    - parts of folios 5, 21 and 268 in Collection 3
    - folios 3-77 and parts of folios 2, 91, 105, 111, 112, 114 and 115 in Collection 4
    - parts of folios 383 and 427 in Collection 5
  - refused to deal with pursuant to section 29B of the FOI Act in the internal review decision that resulted in review 210141:
    - part of folio 89 in Collection 4—that is the same as the part of folio 254 in review 210015 that the applicant accepted, by letter dated 27 November 2006, was exempt from disclosure pursuant to section 44(1) of the FOI Act
    - parts of folios 78 and 92 in Collection 4—that are the same as the part of folio 256 in review 210015 that the applicant, by letter dated 27 November 2006, accepted was exempt from disclosure pursuant to section 44(1) of the FOI Act.

### **Section 44(1) of the FOI Act**

67. Section 44(1) provides:

#### **44 Matter affecting personal affairs**

(1) *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*

68. Section 44(1) of the FOI Act requires satisfaction of the following two requirements:

- (a) would disclosure of the matter in issue disclose information concerning the personal affairs of an individual  
and
- (b) do public interest considerations favouring disclosure of the matter in issue outweigh public interest considerations favouring non-disclosure of the matter in issue.

### **Contact details of various medical practitioners**

69. The following matter constitutes the contact details of medical practitioners:

- Dr Campbell's residential address, telephone number, mobile telephone number and/or email address—parts of folio 2, 78, 89, 91, 92, 105, 111 and 112 of Collection 4 in review 210141
- Dr Rosen's telephone number and mobile telephone number—parts of folios 112, 114 and 115 of Collection 4 in review 210141
- Dr Geffen's residential address—parts of folios 383 and 427 of Collection 5 in review 210141.

70. In *Stewart and Department of Transport* (1993) 1 QAR 227 (*Stewart*)<sup>8</sup>, the Information Commissioner noted that:

- a person's name, address and telephone number were matters falling into the 'grey area' rather than within the 'core meaning' of the phrase 'personal affairs of a person'
- such matter must be characterised according to the context in which it appears.

71. On the information available to me, I find that:

- the contact details of the various medical practitioners are either residential contact details (address and telephone numbers) or contact details that are not publicly available (mobile telephone numbers and email addresses), and therefore each contact detail concerns the personal affairs of the relevant medical practitioner
- disclosure of the contact details would disclose information concerning the personal affairs of the various medical practitioners
- the public interest in the protection of the various medical practitioners' personal privacy is of a greater weight than any public interest considerations favouring disclosure of the matter.

72. Accordingly, I find that the contact details of medical practitioners are exempt from disclosure under section 44(1) of the FOI Act.

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<sup>8</sup> At paragraphs 86 to 90.

***Matter regarding Dr Young's state of health prior to his death***

73. Parts of folios 21 and 268 of Collection 3 in review 210141 constitute matter regarding Dr Young's state of health prior to his death.
74. It is my view that:
- the matter concerns Dr Young's state of health, and therefore concerns Dr Young's personal affairs
  - disclosure of the matter would disclose information concerning the personal affairs of an individual
  - the public interest in the protection of Dr Young's personal privacy is of a greater weight than any public interest considerations favouring disclosure of the matter.
75. Accordingly, I find that the matter regarding Dr Young's state of health prior to his death is exempt from disclosure under section 44(1) of the FOI Act.

***Matter regarding disciplinary proceedings against a medical practitioner other than the applicant who was also treated by Dr Young***

76. Folios 3-77 of Collection 4 in review 210141 constitute an application for review, transcripts, an order and a decision regarding disciplinary proceedings against a medical practitioner other than the applicant who was also treated by Dr Young.
77. Folios 49 and 50 and parts of folios 48 and 51 in review 210015 constitute a summary of the disciplinary proceedings, forming part of a draft preliminary investigation report prepared by the MBQ<sup>9</sup>.
78. The relevant parts of folios 24 and 56 in review 210015 and folio 5 of Collection 3 in review 210141 refer to the disciplinary proceedings.

**Would disclosure of the matter regarding the disciplinary proceedings against another medical practitioner disclose information concerning the personal affairs of individuals?**

79. The general position in *Stewart* about what constitutes personal affairs in the employment context is that:
- there are some matters which are incidental to the relationship of employee and employer which may concern the employee's personal affairs<sup>10</sup>
  - there is a distinction to be drawn between matters that relate to an employee as an individual such as an employee's personnel records relating to sick leave or annual leave which may constitute personal affairs versus matters that involve an employee as an agent or representative of the employer which do not constitute personal affairs<sup>11</sup>.

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<sup>9</sup> The draft preliminary investigation report prepared by the MBQ (constituted by folios 22 to 58 inclusive in review 210015) has been released to the applicant under the conditions specified in section 44(3) of the FOI Act, except for those folios considered to be exempt pursuant to section 46(1)(b) of the FOI Act—see the Category 1 Matter above—and folios 49 and 50 and parts of folios 24, 48 and 51.

<sup>10</sup> At paragraph 92.

<sup>11</sup> At paragraphs 92 and 93.

80. Depending on their nature, disciplinary proceedings may be characterised as information concerning their subject's employment affairs or their personal affairs<sup>12</sup>. Further, it is possible for information to be characterised as information concerning both employment affairs and personal affairs—see '*JSD*' and *Medical Board of Queensland* ('*JSD*')<sup>13</sup>, and in particular the following comments:

35. *There is no doubt that the MBQ is correct in asserting that most of the documents now under consideration concern the applicant's employment or professional affairs. However, that does not mean that they are incapable of also containing information which concerns the applicant's personal affairs.*

36. *The Information Commissioner's detailed examination in Re Stewart of the meaning of the term "personal affairs" in the many different contexts in which it is used in the FOI Act (see Re Stewart at paragraphs 9-11) drew heavily on judgments of the Federal Court of Australia interpreting the term "personal affairs" as it appeared in the Freedom of Information Act 1982 Cth (the Commonwealth FOI Act) prior to 1991. Those Federal Court judgments recognised a basic dichotomy in the scheme of the Commonwealth FOI Act between personal affairs and business or professional affairs. The Information Commissioner observed that the same basic dichotomy was present in the scheme of the Queensland FOI Act. However, it is also clear from those Federal Court authorities that the two categories are not necessarily and always mutually exclusive. Thus, in Department of Social Security v Dyrenfurth (1988) 80 ALR 533, a Full Court of the Federal Court of Australia observed (at pp.538-540):*

... it is not permissible to construe the phrase ["information relating to ... personal affairs" in s.41(1) of the Commonwealth FOI Act, as then in force], as the tribunal appears to have done, as being incapable of application to information contained in an assessment of capacity or work performance. We do not understand Beaumont J to have adopted, in *Young v Wicks* or *Re Williams*, supra, any such rigidly exclusionary interpretation of the phrase. ...

...

It is sufficient for present purposes to indicate our view that information relating to the personal affairs of a person, such as information concerning his or her state of health, the nature or condition of any marital or other relationship, domestic responsibilities or financial obligations, may legitimately be regarded as affecting the work performance, capacity or suitability for appointment or promotion of that person. In those circumstances, it is conceivable that an assessment of work performance, capacity or suitability for appointment or promotion might contain such information.

37. *In Bleicher v Australian Capital Territory Health Authority (1990) 20 ALD 625, Wilcox J of the Federal Court of Australia summarised the result in Dyrenfurth as follows (at pp.629-630):*

The members of the Full Court, in *Dyrenfurth* ... accepted that, ordinarily, statements in documents which relate to a person's work performance or capacity do not constitute information regarding that person's 'personal affairs'. But they pointed out, upon some occasions, such documents may contain information of a personal nature, of which they gave examples. It was not possible to say that, because a document related to work performance or capacity, it was necessarily not a document containing information about somebody's 'personal affairs'. ...

... The document's contents must be considered; it is not enough merely to characterise it as dealing with a person's work performance or capacity.

*(See also comments to the same effect by Lockhart J in Colakovski v Australian Telecommunications Corporation (1991) 100 ALR 111 at p.117.)*

<sup>12</sup> See paragraphs 94 to 102 of *Stewart*, paragraphs 108 to 116 of *Pope and Queensland Health* (1994) 1 QAR 616 (*Pope*), paragraphs 49 to 53 of *Griffith and Queensland Police Service* (1997) 4 QAR 110 and paragraph 29 of '*NHL*' and *University of Queensland* (1997) 3 QAR 436.

<sup>13</sup> At paragraphs 31 to 45.

38. Thus, in summarising the effect of relevant authorities in *Re Pope and Queensland Health (1994) 1 QAR 616 at p.660 (paragraph 116)*, the Information Commissioner made the important reservation (which I have underlined for emphasis) in the following passage:

Based on the authorities to which I have referred, I consider that it should now be accepted in Queensland that information which merely concerns the performance by a government employee of his or her employment duties (i.e., which does not stray into the realm of personal affairs in the manner contemplated in the *Dyrenfurth* case) is ordinarily incapable of being properly characterised as information concerning the employee's "personal affairs" for the purposes of the FOI Act.

81. After careful consideration of the matter regarding disciplinary proceedings against a medical practitioner other than the applicant who was also treated by Dr Young, I find that:
- a substantial amount of the matter concerns the medical practitioner's state of health, and therefore concerns the medical practitioner's personal affairs
  - the matter concerning the medical practitioner's personal affairs is inextricably interwoven throughout the remaining matter that does not concern the medical practitioner's personal affairs to the extent that severance under section 32 of the FOI Act is not practicable
  - disclosure of the matter would disclose information concerning the personal affairs of an individual
  - accordingly, the matter is *prima facie* exempt from disclosure pursuant to section 44(1) of the FOI Act.

#### **Public interest considerations**

82. As it is my view that the matter regarding disciplinary proceedings against a medical practitioner other than the applicant who was also treated by Dr Young is *prima facie* exempt from disclosure pursuant to section 44(1), it is necessary for me to determine if public interest considerations favouring disclosure of such matter outweigh public interest considerations favouring non-disclosure of the matter.

#### ***Public interest considerations favouring disclosure***

83. The general public interest in information held by government being accessible is a public interest consideration favouring disclosure of the matter to an applicant. However, this general public interest carries less weight when the matter constitutes information provided to the government by and/or about non-government entities or individuals, rather than information generated by the government about the government.
84. In this review, disclosure of the matter would disclose personal information regarding a medical practitioner other than the applicant. Accordingly, while the general public interest in information held by government being accessible favours disclosure, it carries less weight regarding the matter regarding disciplinary proceedings against a medical practitioner other than the applicant who was also treated by Dr Young than it might in other circumstances.

#### **The applicant's submissions**

85. By letter dated 27 November 2006, in response to my preliminary view dated 8 November 2006 regarding the matter claimed to be exempt from disclosure pursuant

to section 44(1) of the FOI Act in the decision that resulted in review 210015, the applicant made the following submissions regarding the applicant's personal interest in having access to personal information regarding a medical practitioner other than the applicant:

*... I would believe that my understanding of the report would naturally be improved by having access to all the evidence and information used during the investigation to arrive at the "Findings" and "Recommendation" on the last two pages of the report .*

*I am at the disadvantage of not knowing the specific details of the matter or material concerning Dr Young's treatment of this other medical practitioner. I would assume it must have been of great interest to the investigator and very relevant to the investigation of the Medical Board of Queensland into Dr Young considering more than two whole pages in the report ... relate to the matter.*

*If there is concerns relating to the name, address, telephone numbers, etc that would identify the medical practitioner concerned in this matter then these could be deleted from the material ... and then the remaining bulk of the material released to me...*

*There are other reasons I believe this material should be released and they are:*

- Dr Young failed to keep my medical records of his treatment of myself from on or about 2000 to 2002 ... Under these circumstances any material, evidence and other material concerning this investigation would be crucial to my understanding and as a record of his treatment of me...*
- There is a public interest concerns related to this matter, as at present investigations of Queensland medical practitioners and their treatment of patients and the disclosure of this information to the Queensland public to keep them informed has been highlighted widely in the media and parliament. This was also highlighted and exposed in the Bundaberg Hospital Royal Commission last year concerning the treatment of patients at the Bundaberg Hospital by Dr Patel. There were accusations of a coverup and nondisclosure of information to the public by the government in these matters related to and brought before to Royal Commission.*

*I would believe as a member of the Queensland public and a patient previously treated by Dr Edwin Young I should have access to this material ... This would be especially true concerning the fact that he was a witness in the ... Tribunal that [...]. He also allowed me to attend work at the Inala Community Health Centre as a treating doctor in 2001 though being very sick and unwell and a regulated, heavily sedated hospital inpatient at that time thus placing my life at risk and the health and safety of many patients I treated there.*

86. As mentioned above in relation to the Category 1 Matter, a more specific public interest recognised at section 4(2)(c) of the FOI Act—that is, the public interest *'that, in a free and democratic society ... members of the community should have access to information held by government **in relation to their personal affairs**'* [emphasis added].
87. I note that, in this context, it could be argued that the matter relates to the applicant's personal affairs, as the matter was considered by the MBQ in its part of its draft preliminary investigation report regarding the complaint made against Dr Young regarding his treatment of the applicant. On this basis, the applicant's interest in obtaining access to the matter is more compelling than the interest of members of the general public. This could possibly constitute a public interest consideration favouring disclosure to the applicant of personal information regarding a medical practitioner other than the applicant.

88. Also by letter dated 27 November 2006, the applicant submitted:

*There is a public interest concerns related to this matter, as at present investigations of Queensland medical practitioners and their treatment of patients and the disclosure of this information to the Queensland public to keep them informed has been highlighted widely in the media and parliament. This was also highlighted and exposed in the Bundaberg Hospital Royal Commission last year concerning the treatment of patients at the Bundaberg Hospital by Dr Patel. There were accusations of a coverup and nondisclosure of information to the public by the government in these matters related to and brought before to Royal Commission.*

89. In submissions dated 28 November 2007, the applicant, via a representative, repeated the submission set out in paragraph 88 of this decision. The applicant contended as follows:

*The issue of Public Interest here in Queensland especially the matter of the public's right to all information regarding any concerns related to their present or previous treating doctors and medical treatment. There have been very grave concerns expressed in the state media and in the Queensland community relating to the operation of the Queensland Health and Medical System. This includes the treatment, registration and investigation of medical practitioners especially in light of the Bundaberg Hospital scandal surrounding Dr Patel that led to the previous Royal Commission.*

90. However, on inspection of the matter in issue and in the circumstances of this review, I am not satisfied that comments made during the relevant Royal Commission<sup>14</sup> advance a public interest in disclosure of personal information regarding medical practitioners.

***Public interest considerations favouring non-disclosure***

91. Matter concerning a person's state of health is highly sensitive and, accordingly, ordinarily subject to a strong public interest in protecting the person's privacy.<sup>15</sup>

92. As the matter relates to disciplinary proceedings, it appears possible that the matter, or at least some of it, is in the public domain. The fact that information is publicly available, and the extent of any publicity attending the information, are factors that reduce the weight to be accorded to the privacy interest attaching to that information<sup>16</sup>.

93. Insofar as the matter is in the public domain, it is my view that:

- as it would be necessary to conduct searches at the disciplinary tribunal's registry in order to identify and locate it, the matter is not quickly or easily available
- the medical practitioner in question did not choose or consent to the matter being placed in the public domain— this occurred only as a result of the disciplinary proceedings against the medical practitioner
- the privacy interest attaching to the matter is somewhat reduced.

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<sup>14</sup> Regarding a 'culture of concealment'— see Chapter 6, Part F of Queensland Public Hospitals Commission of Inquiry Report by Hon G Davies AO, published on 30 November 2005 (Davies Report).

<sup>15</sup> See paragraph 18 of *Summers and Cairns District Health Service* (1997) 3 QAR 479 at paragraph 18; paragraph 110 of *Orth and Medical Board of Queensland and Another* (2003) 6 QAR 209; *Stiller and Department of Justice and Attorney-General* (S113/02, 12 January 2004) (*Stiller*); and paragraph 27 of *Watson and West Moreton District Health Service* (2005) 7 QAR 66.

<sup>16</sup> See paragraphs 20 and 22 of *Director-General, Department of Families, Youth and Community Care and Department of Education; Perriman (Third Party)* (1997) 3 QAR 459; *Stiller* and paragraphs 23 and 24 of *Lower Burdekin Newspaper Company Pty Ltd and Burdekin Shire Council and Ors* (2004) 6 QAR 328.



### **The applicant's submission**

94. In the submission dated 27 November 2006, the applicant also submitted:

*If there is concerns relating to the name, address, telephone numbers, etc that would identify the medical practitioner concerned in this matter then these could be deleted from the material ... and then the remaining bulk of the material released to me...*

95. It is my understanding that it is the applicant's view that:

- removal of the other medical practitioner's 'name, address, telephone numbers, etc' would prevent the applicant from being able to identify that medical practitioner
- as the other medical practitioner could not be identified, the public interest in the applicant having access to matter that the applicant considers relate to his/her personal affairs outweighs the public interest considerations related to the protection of the personal privacy of the other medical practitioner.

96. I agree with the applicant that it is necessary to consider whether disclosure of the Category 2 Matter—or an edited version thereof—would result in the applicant being able to identify the other medical practitioner

97. However, it is my view that this is not the only issue to be examined when considering the public interest in the protection of the personal privacy of the other medical practitioner. It is also necessary to consider that disclosure of the Category 2 Matter—or an edited version thereof—would:

- in and of itself disclose highly sensitive information concerning the other medical practitioner and constitute a significant incursion into the privacy of that medical practitioner—regardless of whether or not the applicant was able to identify the other medical practitioner
- result in the applicant being able to combine such information with other information already at his/her disposal, thereby enabling deduction of the other medical practitioner's identity and/or other further information regarding that medical practitioner<sup>17</sup>
- result in the applicant having control over the dissemination of information concerning the personal affairs of the other practitioner, potentially constituting further significant incursions into the privacy of that medical practitioner.

### **Where does the balance of public interest considerations lie?**

98. After careful consideration of the matter, I find that:

- while the public interest in the protection of the medical practitioner's personal privacy is reduced to the extent that the matter is in the public domain, that public interest remains a significant consideration that should be accorded substantial weight, given that matter regarding a person's state of health is highly sensitive

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<sup>17</sup> As contemplated by the 'mosaic theory'. The mosaic theory refers to circumstances where information that 'may appear innocuous when viewed in isolation, can have an entirely different character when considered in conjunction with other information already in the public domain, or already known to the access applicant'—at paragraph 32 of *Coulthart and Princess Alexandra Hospital and District Health Service* (2001) 6 QAR 94. See also paragraphs 21-22 of *O'Reilly and Queensland Police Service* (1996) 3 QAR 402.

- on balance, the public interest in the protection of medical practitioner's personal privacy is of greater weight than the public interest considerations favouring disclosure of the matter.

### **Conclusion**

99. On balance, and after carefully considering the information available to me, I find that the matter regarding disciplinary proceedings against a medical practitioner other than the applicant who was also treated by Dr Young is exempt from disclosure under section 44(1) of the FOI Act.

### **Category 3 Matter**

100. The Category 3 Matter is:

- the following matter that, in the internal review that resulted in review 210141, the MBQ claimed to be exempt from disclosure pursuant to sections 43(1) of the FOI Act:
  - part of folio 4 in Collection 3—a record of a telephone conversation between the MBQ's solicitors (DLA Phillips Fox) and the MBQ
  - folio 354 in Collection 4—a record of a telephone conversation between the MBQ's solicitors and the MBQ
  - folios 8-10 in Collection 5—correspondence from the MBQ's solicitors to the MBQ
- folios 314-317 in Collection 1—correspondence from the MBQ's solicitors to the MBQ—that the MBQ, in the internal review that resulted in review 210141, refused to deal with pursuant to section 29B of the FOI Act.

### **Section 43(1) of the FOI Act**

101. Section 43(1) provides:

#### **43 Matter affecting legal proceedings**

(1) *Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.*

102. The section 43(1) exemption turns on the application of those principles of Australian common law which determine whether matter is subject to legal professional privilege. It neither requires nor allows consideration of public interest issues.

103. In accordance with the decisions of the High Court in *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 and the Full Federal Court in *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217, legal professional privilege applies to the following types of communication:

- confidential communication between a client and the client's legal advisers, when the communication is made for the dominant purpose of obtaining or providing legal advice ('advice privilege')
- confidential communication between a client or a third party and the client's legal advisers, when the communication is made for the dominant purpose of using, or obtaining material for use, in litigation that had commenced or was reasonably anticipated at the time of the communication ('litigation privilege')

- confidential communication between a third party and a client or the client's legal advisers, when the communication is made for the dominant purpose of obtaining or providing legal advice.

***Is the Category 3 Matter exempt from disclosure under section 43(1) of the FOI Act?***

104. On the evidence before me, I find that:

- the Category 3 Matter constitutes or records communications between the MBQ and its legal advisers
- the communications are confidential in nature
- the dominant purpose of the communications is the MBQ obtaining and the MBQ's solicitors providing legal advice
- accordingly, the 'advice privilege' type of legal professional privilege attaches to the Category 3 Matter.

105. On this basis, I find that the Category 3 Matter is exempt from disclosure pursuant to section 43(1) of the FOI Act.

106. As I have found that folios 314-317 in Collection 1 are exempt from disclosure pursuant to section 43(1) of the FOI Act, I have not examined whether the MBQ was entitled to refuse to deal with the applicant's FOI application, in so far as it related to those folios, on the basis of section 29B of the FOI Act.

**Category 4 Matter**

107. The Category 4 Matter is the following matter that the MBQ, in the internal review that resulted in review 210141, refused access pursuant to section 22(a) of the FOI Act:

- folios 179-214 in Collection 1, folios 112-147 in Collection 2 and folios 390-425 and 450-485 in Collection 5—which constitute copies of a tribunal decision regarding the applicant
- folios 170-276 and 277-375 in Collection 5—which constitute copies of the transcripts of the tribunal proceedings regarding the applicant.

***Section 22(a) of the FOI Act***

108. Section 22(a) provides:

**22 Documents to which access may be refused**

*An agency or Minister may refuse access under this Act to—*

- (a) *a document the applicant can reasonably get access to under another enactment or arrangements made by an agency, whether or not the access is subject to a fee or charge.*

109. In '*JM*' and *Queensland Police Service* (1995) 2 QAR 516 ('*JM*')<sup>18</sup>, the Information Commissioner made the following comments regarding section 22(a) of the FOI Act:

21. *Section 22 is one of several provisions in the FOI Act which place qualifications on the legally enforceable right, conferred by s.21 of the FOI Act, to be given access*

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<sup>18</sup> At paragraphs 21 and 28-29.

*under the FOI Act to documents of an agency and official documents of a Minister. The use of the word "may" in s.22 of the FOI Act means that the power to refuse access under the FOI Act to documents which fall within the terms of s.22(a), [and] s.22(b)... may be exercised, or not exercised, at the discretion of the relevant agency or Minister...*

28. ... *In my opinion, s.22(a) and s.22(b) are not capable of being invoked in respect of a particular document requested by a particular applicant, unless it is certain that the particular document is reasonably open to access by the particular applicant under another enactment on payment of any applicable fee or charge (s.22(a), or the particular document is reasonably available for purchase by the particular applicant under arrangements made by an agency (s.22(b)). If that is not the case, there is no justification in the principle for interpreting s.22(a) or s.22(b) in a way that would detract from the right of a particular applicant to have a valid FOI access application for a particular document deal with under the relevant provisions of the FOI Act (other than s.22(a) or s.22(b)).*

29. *An important corollary to the above propositions is this. If –*

- (a) the terms of the other enactment contemplated by s.22(a), or the arrangements for purchase contemplated by s.22(b), place restrictions on the extent of access available to certain kinds of information under the particular specialised scheme of access; and*
- (b) those restrictions would operate to deny access to all or part of a particular document requested by an applicant for access under the FOI Act (even if the restrictions operate vis-à-vis that particular applicant, but not necessarily against other applicants for the same information);*

*then s.22(a) or s.22(b) would not be available, and the agency or Minister would be obliged to deal with the applicant's FOI access application for that particular document, or part thereof, in accordance with other relevant provisions of the FOI Act (i.e. other than s.22(a) or s.22(b)).*

110. While JM was decided prior to amendment of section 22(a) and (b) of the FOI Act in 2005, it is my view that it remains relevant to the operation of section 22(a) of the FOI Act in its current form.

***Can access to the Category 4 Matter be refused under section 22(a) of the FOI Act?***

111. Folios 179-214 in Collection 1, folios 112-147 in Collection 2 and folios 390-425 and 450-485 in Collection 5 constitute copies of a tribunal decision regarding the applicant.

112. I note that the tribunal decision regarding the applicant is available on the internet.

113. Folios 170-276 and 277-375 in Collection 5 constitute copies of the transcripts of the proceedings tribunal proceedings regarding the applicant.

114. I note that the transcripts of the proceedings regarding the applicant are available from the State Reporting Bureau (SRB) by:

- application and payment of a fee as prescribed in the Schedule to the *Recording of Evidence Regulation 1992* (Qld)
- reading copies held at no charge at SRB's offices.

115. On the information available to me, I find that:

- the applicant is able to reasonably access the Category 4 Matter by means other than under the FOI Act
- I should refuse the applicant access to the Category 4 Matter pursuant to section 22(a) of the FOI Act.

116. As I have found that the applicant should be refused access to the Category 4 Matter pursuant to section 22(a) of the FOI Act, it is unnecessary for me to consider whether the MBQ was entitled to refuse to deal with the applicant's FOI application, in so far as it relates to those folios, on the basis of section 29B of the FOI Act.

### **Category 5 Matter**

117. The Category 5 Matter is the following matter that, in the internal review decision that resulted in review 210141, the MBQ claimed:

- was irrelevant and may be deleted pursuant to sections 27(3) and (4) of the FOI Act:
  - parts of folio 3 in Collection 3
  - parts of folios 27-28, 383 and 427 in Collection 5
- is exempt from disclosure pursuant to section 45(1)(c) of the FOI Act—parts of folio 432 in Collection 5.

### **Sections 27(3) and (4) of the FOI Act**

118. Sections 27(3) and (4) of the FOI Act provide:

#### **27 How applications are dealt with**

...

(3) *If giving access to a document will disclose to the applicant matter the agency or Minister reasonably considers is not relevant to the application, the agency or Minister may delete the irrelevant matter from a copy of the document before giving access to the document.*

(4) *The agency or Minister may give access to a document by giving access to a copy of the document with the irrelevant matter deleted only if the agency or Minister considers, from the application or after consultation with the applicant—*

*(a) the applicant would accept the copy; and*

*(b) it is reasonably practicable to give access to the copy.*

...

119. Pursuant to sections 27(3) and (4) of the FOI Act, in circumstances where:

- part of the matter on a folio is irrelevant matter and
- the agency/Minister considers that the applicant would accept a copy of the folio with the irrelevant matter deleted (on the basis of FOI access application or after consultation with the applicant),

the agency/Minister may:

- give access to those parts of the folio that fall within the scope of the FOI access application

and

- delete those parts of the folio that constitute irrelevant matter.

### **Irrelevant matter**

120. The Commonwealth version of section 27(4) of the FOI Act permits the deletion of matter when it *'would reasonably be regarded as irrelevant to that request'*—see section 22(1)(a)(ii) of the *Freedom of Information Act 1982* (Cth).
121. In *Russell Island Development Association Incorporated and Department of Primary Industries and Energy* (1994) 33 ALD 683, Deputy President Forgie of the Commonwealth Administrative Appeals Tribunal analysed the phrase *'would reasonably be regarded as irrelevant to that request'* and concluded that what must be examined is *'... whether disclosure of certain information might reasonably, as opposed to irrationally or absurdly, be considered or looked on as irrelevant to the request for access made under the Act'*.<sup>19</sup>
122. For the purposes of section 27(4) of the FOI Act, irrelevant matter is matter that may reasonably be considered or looked on as irrelevant to an applicant's FOI access application—that is, matter that may reasonably be considered to be outside the scope of the applicant's FOI access application.

### **Agency/Minister's discretion— 'may'**

123. Section 27(4) of the FOI Act provides that an agency or Minister **may** give access to a folio with irrelevant matter deleted.
124. Section 88(1) of the FOI Act provides that the Information Commissioner has power to review any decision that has been made by an agency or Minister and decide any matter in that could, under the FOI Act, have been decided by the agency or Minister.
125. Therefore, I (as a delegate of the Information Commissioner) may review the MBQ's decision to delete parts of folios pursuant to section 27(3) and (4) of the FOI Act, and exercise the discretionary power to delete irrelevant matter on folios in the same way that agencies and Ministers exercise that discretion.

### **Parts of folio 3 in Collection 3**

126. The relevant parts of folio 3 in Collection 3 are entries recorded on the MBQ's 'Complaint Activity Summary Sheet' regarding the complaint against Dr Young.
127. This Office made further inquiries with the MBQ regarding those entries.
128. On the information available to me, I find that:
  - the entries relate to a fax received from a person attempting to locate a medical practitioner and a telephone call regarding the location of the medical practitioner
  - the entries do not relate to the complaint against the medical practitioner in question
  - the MBQ erroneously recorded the entries on their 'Complaint Activity Summary Sheet' regarding the complaint against the medical practitioner

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<sup>19</sup> See paragraph 32. See also paragraph 7 of *Albanese and Chief Executive Officer of the Australian Customs Service* [2006] AATA 900.

- the entries may reasonably be considered or looked on as irrelevant to the applicant's FOI access application
- the MBQ should give the applicant access to folio 3 in Collection 3 with those entries deleted pursuant to sections 27(3) and (4) of the FOI Act.

***Parts of folios 27-28 in Collection 5***

129. The relevant parts of folios 27-28 in Collection 5 relate to the applicant's complaint against a Dr Smith.

130. On the information available to me, I find that:

- the matter regarding the applicant's complaint against Dr Smith does not relate to the complaint against Dr Young
- the matter regarding the applicant's complaint against Dr Smith may reasonably be considered or looked on as irrelevant to the applicant's FOI access application
- the MBQ should give the applicant access to folios 27-28 in Collection 5 with the matter regarding the applicant's complaint against Dr Smith deleted pursuant to sections 27(3) and (4) of the FOI Act.

131. In any event, I note that the matter regarding the applicant's complaint against Dr Smith on folios 27-28 in Collection 5 was disclosed by the MBQ pursuant to another of the applicant's FOI access application.

***Parts of folios 383 and 427 in Collection 5***

132. Folio 383 in Collection 5 is a letter from the MBQ to a Dr Geffen dated 27 July 2004. Folio 427 is an unsigned version of the letter.

133. The relevant parts of folios 383 and 427 in Collection 5 relate to another complaint in which Dr Geffen had some involvement.

134. I find that:

- the matter regarding the other complaint does not relate to the complaint against Dr Young
- the matter regarding the other complaint may reasonably be considered or looked on as irrelevant to the applicant's FOI access application
- the MBQ should give the applicant access to folios 383 and 427 in Collection 5 with the matter regarding the other complaint deleted pursuant to sections 27(3) and (4) of the FOI Act.

***Parts of folio 432 in Collection 5***

135. Folio 432 in Collection 5 is a 'print screen' copy of a screen from the MBQ's complaints database displaying entries regarding four different complaints, including the complaint made against Dr Young regarding his treatment of the applicant.

136. The relevant parts of folio 432 in Collection 5 constitutes information regarding three complaints other than the complaint made against Dr Young regarding his treatment of the applicant.

137. I find that:

- the matter regarding the three other complaints does not relate to the complaint against Dr Young
- the matter regarding the three other complaints may reasonably be considered or looked on as irrelevant to the applicant's FOI access application
- the MBQ should give access to folio 432 in Collection 5 with the matter regarding the three other complaints deleted pursuant to sections 27(3) and (4) of the FOI Act.

## **DECISION**

138. I affirm the MBQ's decision that resulted in review 210015 and vary the MBQ's internal review decision that resulted in review 210141 by finding that:

- (a) the Category 1 Matter is exempt from disclosure pursuant to section 46(1)(b) of the FOI Act
- (b) the Category 2 Matter is exempt from disclosure pursuant to section 44(1) of the FOI Act
- (c) the Category 3 Matter is exempt from disclosure pursuant to section 43(1) of the FOI Act
- (d) access to the Category 4 Matter is refused pursuant to section 22(a) of the FOI Act
- (e) the Category 5 Matter should be deleted from the relevant documents pursuant to section 27(3) and (4) of the FOI Act.

139. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

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**F Henry**  
**Assistant Commissioner**

**Date: 19 December 2007**