



Decision and Reasons for Decision

Application Number: 210139

Applicant: RFY

Respondent: Medical Board of Queensland

Decision Date: 28 April 2008

Catchwords: **FREEDOM OF INFORMATION - section 43(1) of the *Freedom of Information Act 1992 (Qld)* - legal professional privilege - reference to the existence of legal advice**

FREEDOM OF INFORMATION - section 45(1)(c) of the *Freedom of Information Act 1992 (Qld)* - business, professional, commercial or financial affairs - whether disclosure could reasonably be expected to have an adverse effect on those affairs

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REASONS FOR DECISION

Summary

1. I find that the first paragraph in each of the following folios is not exempt from disclosure under section 43(1) or section 45(1)(c) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**):

- folio 134 on Registrant File Vol. 2
- folio 277 on HAM File Vol. 4.

Background

2. The relevant background to this review is as follows:

- on 12 December 2005, the applicant submitted a freedom of information (**FOI**) application to the Medical Board of Queensland (**Board**) for access to documents under the FOI Act
- in a meeting on 5 January 2006, the applicant and the Board agreed to amend the scope of the FOI access application
- by letter sent on 9 January 2006¹, the Board informed the applicant of its understanding of the amended scope of the applicant's FOI access application
- by letter dated 11 January 2006, the applicant confirmed that she agreed with the Board's understanding of the amended scope of her FOI access application
- on 30 October 2006, Mr J Posener, the Board's Manager, Information Services, issued a decision (**Initial Decision**)
- on 24 November 2006, the applicant applied for internal review of the Initial Decision
- on 12 December 2006, Mr J O'Dempsey, Executive Officer of the Board issued an decision affirming the Initial Decision (**Internal Review Decision**)
- on 10 January 2007, the applicant applied to this Office for external review of the Internal Review Decision.

Scope of the FOI access application

3. The scope of the applicant's FOI access application is as follows²:

- *Copies of all documents etc concerning [the applicant] and [her] complaints about*
 - a. the Board, Qld Health, Inala Community Health Centre and Dr Jane Smith;*
 - b. Dr Wendy Francis and the Royal Australian College of General Practitioners to the Anti-Discrimination Commissioner of Qld (ADCQ) and the hearing in the Anti-Discrimination Tribunal Qld.*
- *This includes documents in the possession of the Board's lawyers.*

¹ I note that this letter was incorrectly dated 9 January 2005.

² As set out in the Board's letter sent to the applicant on 9 January 2006 and accepted by the applicant by letter dated 11 January 2006.

- *This scope excludes any documents or material previously provided to [the applicant] by [the Board] under FOI from 2002 to 2004.*
4. At a meeting held between the Board and staff members of this Office on 4 October 2006, it was agreed that all documents in the possession of the Board's lawyers fell within the scope of external review no. 210177.³ As those documents are currently being processed as part of external review no. 210177, they have been excluded from the scope of this external review.

Decision under review

5. The decision which is the subject of this external review is the Internal Review Decision of Mr O'Dempsey dated 12 December 2006.

Steps taken in the external review process

6. Copies of the documents to which the applicant was refused access by the Board under the Initial Decision were obtained from the Board and examined by this Office.
7. By letter dated 14 November 2007, this Office sought further information from the Board in respect of matter that the Board:
- claimed was irrelevant to the applicant's FOI application and could be deleted pursuant to section 27(3) and section 27(4) of the FOI Act
 - refused to deal with pursuant to section 29B of the FOI Act.
8. By letter dated 14 December 2007, the Board provided this Office with submissions concerning section 27 and section 29B of the FOI Act
9. By letter dated 13 March 2008, I informed the applicant and the Board of the preliminary view that:
- the matter in issue in folios 291, 294, 295-298 and 300-303 in HAM File Vol. 4 could be deleted prior to the release of those folios to the applicant pursuant to section 27(3) and section 27(4) of the FOI Act on the basis that it constitutes irrelevant matter
 - the Board is entitled to refuse to deal with the applicant's FOI application in respect of folios 20-21 and 24-29 in Registrant File Vol. 2 and folios 292-293 in HAM File Vol. 4 on the basis of section 29B of the FOI Act
 - the whole of folios 49, 51, 137, 138, 166, 167-171, 172-178 and 179-187 and parts of folios 48, 50 and 134 on Registrant File Vol. 2 are exempt from disclosure under section 43(1) of the FOI Act
 - the whole of folios 57-58, 63-68, 82-96, 328-329, 330, 331-334 and 351-358 and parts of folios 277, 296 and 313-314 on HAM File Vol. 4 are exempt from disclosure under section 43(1) of the FOI Act.
10. On 28 March 2008, the applicant's representative informed this Office that the applicant accepts all aspects of the preliminary view.
11. By letter dated 4 April 2008, the Board informed this Office that it accepts the majority of the preliminary view but maintains its contention that the whole of folio 134 on Registrant File Vol. 2 and the whole of folio 277 on HAM File Vol. 4 are exempt from

³ An external review currently before this Office also involving the applicant and the Board.

disclosure under section 43(1) and section 45(1)(c) of the FOI Act. The Board provided submissions in support of its exemption claim.

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

- the applicant's initial FOI access application dated 12 December 2005
- Mr Posner's Initial Decision dated 30 October 2006
- Mr O'Dempsey's Internal Review Decision dated 12 December 2006
- the applicant's external review application dated 10 January 2007
- the documents in issue
- correspondence exchanged between this Office, the Board and the applicant during the course of this review
- file notes of telephone conversations held between this Office and the Board during the course of this review
- the Board's submissions dated 14 December 2007 and 4 April 2008
- relevant sections of the FOI Act, case law and previous decisions of this Office.

Matter in issue

13. In light of the applicant's acceptance of the preliminary view, the matter remaining in issue in this review is limited to:

- the first paragraph in folio 134 on Registrant File Vol. 2
- the first paragraph in folio 277 on HAM File Vol. 4.⁴

14. The documents in which the matter in issue appears are minutes of a meeting held by the Board on 25 January 2005.

Findings

Section 43(1) of the FOI Act

15. This section 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.

Requirements for exemption

16. Following the decision of the High Court of Australia in *Esso Australia Resources Ltd v Commission of Taxation*,⁵ legal professional privilege applies to the following two types of communications:

- confidential communication between a client and the client's legal advisor, 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 advisor, when the communication is made for the dominant purpose of use, or

⁴ These two folios are duplicates.

⁵ (1999) 201 CLR 49.

obtaining material for use, in litigation that has commenced or is reasonably anticipated at the time of the communication ('litigation privilege').

17. The legal professional privilege exemption set out in section 43(1) of the FOI Act reflects the requirements for establishing legal professional privilege at common law. In other words, it protects communications passing between a lawyer and a client where:
 - a) the communication is made in the course of a professional relationship of lawyer and client; and
 - b) the communication is confidential; and
 - c) the communication is:
 - (i) from the client to the lawyer for the dominant purpose of seeking legal advice; or
 - (ii) from the lawyer to the client for the dominant purpose of providing legal advice; or
 - (iii) from a third party at the client's request for the dominant purpose of use in assisting the lawyer to provide legal advice;⁶ or
 - (iv) from the lawyer or the client, or a third party at the request of the lawyer or the client, for the dominant purpose of use in or in relation to existing or anticipated legal proceedings.
18. Paragraphs (c)(i)-(iii) above refer to the 'advice limb' of legal professional privilege, while paragraph (c)(iv) describes the 'litigation limb' of privilege. Importantly, all communications must be made in the lawyer's capacity as a lawyer and not in any other capacity.
19. Australian court decisions have established that legal professional privilege may also protect communications between salaried employee legal advisers of a government department or statutory authority and his/her employer as client (including communications through other employees of the same employer) provided there is a professional relationship of solicitor and client, which secures to the advice an independent character notwithstanding the employment.⁷

Application to the matter in issue

20. The Board contends that the matter in issue is exempt from disclosure under section 43(1) of the FOI Act.
21. As stated in paragraph 14 of this decision, the matter in issue appears in the first paragraph of a record of minutes of a meeting of the Board held on 25 January 2005 and refers to two pieces of correspondence that were considered by the Board at that meeting. The documents referred to are subject to legal professional privilege but are no longer in issue in this review due to the applicant's acceptance of the preliminary view with respect to those documents.
22. By letter dated 4 April 2008, the Board made submissions including that:
 - the matter in issue records confidential communications between the relevant parties during the course of litigation
 - the matter in issue refers to correspondence which itself is protected by client privilege.

⁶ *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357.

⁷ *Waterford v Commonwealth of Australia* (1987) 163 CLR 54.

23. In support of its submissions, the Board relies upon the decision in *Alexandria Holdings Pty Ltd and the Department of Local Government, Planning, Sport and Recreation*⁸. In this decision, the Information Commissioner found that a reference to the existence of legal advice in a Minister's decision concerning a development application did not constitute waiver of legal professional privilege in respect of the advice.

24. The Board also referred to *Bennett v Chief Executive Officer, Australian Customs Service*⁹. In that case, Gyles J stated as follows with respect to waiver of legal professional privilege:

*... the voluntary disclosure of the gist or conclusion of the legal advice amounts to waiver in respect of the whole of the advice to which reference is made including the reasons for the decision.*¹⁰

25. Similarly, in *AWB v Cole (No 5)*¹¹, a case also relied upon by the Board in its submissions, Young J concluded:

*It is no doubt correct that a **mere reference** to the **existence** of legal advice in a disclosed document **will not** be regarded as waiver of its contents, albeit a different conclusion would follow if the gist, substance or conclusion of the legal advice is voluntarily disclosed.*¹²

[my emphasis]

26. I have carefully considered the Board's submissions dated 4 April 2008 and accept that the matter in issue refers to documents which are protected by legal professional privilege. However, I do not consider that matter which merely refers to the existence of privileged documents can itself be afforded the protection of legal professional privilege.

27. Consistent with Young J's conclusion in *AWB v Cole (No. 5)* as set out in paragraph 25 of this decision, I do not consider that disclosure of the matter in issue in this review would amount to waiver of legal professional privilege in the documents which were considered by the Board at the meeting.

Summary

28. Accordingly, after carefully considering the submissions, the matter in issue and the relevant case law, I am satisfied that the matter in issue:

- does not constitute a confidential communication between a lawyer and client
- was not prepared for the dominant purpose of seeking or giving legal advice
- was not prepared for the dominant purpose of use in current or anticipated legal proceedings
- is not exempt from disclosure under section 43(1) of the FOI Act.

29. Given this finding, it is necessary for me to examine the Board's alternative exemption claim under section 45(1)(c) of the FOI Act.

⁸ Unreported, 2006/F0164, 22 August 2006.

⁹ (2004) 140 FCR 101.

¹⁰ At paragraph 65.

¹¹ (2006) 155 FCR 30

¹² At paragraph 167.

Section 45(1)(c) of the FOI Act

30. This section provides:

45 Matter relating to trade secrets, business affairs and research

(1) *Matter is exempt matter if –*

...
(c) *its disclosure –*

- (i) *would disclose information (other than trade secrets or information mentioned in paragraph (b)) concerning the business, professional, commercial or financial affairs of an agency or another person; and*
- (ii) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government;*

unless its disclosure would, on balance, be in the public interest.

Requirements for exemption

31. Matter will be exempt under section 45(1)(c) of the FOI Act if it satisfies the following requirements:

- (a) it concerns the business, professional, commercial or financial affairs of a person, including a company or agency (but not trade secrets or information that has an intrinsic commercial value)
- (b) disclosure of the information could reasonably be expected to have either of the following effects:
 - an adverse effect on the business, professional, commercial or financial affairs of the person which the information in issue concerns
 - prejudice to the future supply of such information to government
- (c) the public interest considerations favouring disclosure of the information outweigh public interest considerations favouring non-disclosure of the matter in issue.

Application to the matter in issue

32. The Board claims that the matter in issue is exempt under section 45(1)(c) of the FOI Act.

33. I have carefully considered the Board's submissions dated 4 April 2008 and am satisfied that the matter in issue:

- refers in general terms to two pieces of correspondence that were considered by the Board at its meeting on 25 January 2005
- does not describe the nature or content of those pieces of correspondence
- does not disclose any professional or commercial arrangements involving the Board.

Summary

34. Accordingly, after carefully considering the submissions, the matter in issue and the relevant case law, I am satisfied that:
- the matter in issue does not concern the business, professional, commercial or financial affairs of the Board or another person
 - disclosure of the matter in issue could not reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the Board or another person.
35. Given my finding that the first and second requirements for exemption under section 45(1)(c) of the FOI Act are not satisfied, it is unnecessary for me to consider the public interest balancing test.
36. Accordingly, I find that the matter in issue is not exempt under section 45(1)(c) of the FOI Act.

Conclusion

37. I find that the matter in issue contained in the first paragraph of each of the following folios:
- folio 134 on Registrant File Vol. 2
 - folio 277 on HAM File Vol. 4

is not exempt from disclosure under either section 43(1) or section 45(1)(c) of the FOI Act.

DECISION

38. I vary the decision under review, being the Internal Review Decision of Mr O'Dempsey dated 12 December 2006, and find that the first paragraph in each of the folios listed below is not exempt from disclosure under section 43(1) or section 45(1)(c) of the FOI Act:
- folio 134 on Registrant File Vol. 2
 - folio 277 on HAM File Vol. 4.
39. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

Assistant Commissioner Henry

Date: 28 April 2008