LAWLESS AND MEDICAL BOARD

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: 94152** **Decision Ref: D01995**

Participants:

John Lindsay Lawless
Complainant

- and -

Medical Board of Western Australia
Respondent

- and -

Medical Practitioner 'X'
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - letters from medical practitioners to the agency in response to complaint lodged - clause 5(1)(a) - impair effectiveness of investigative methods or procedures - clause 8(2) - confidential communications - information of a confidential nature obtained in confidence - prejudice future supply - impair frankness of future responses - practitioner consents to release - clause 3 - personal information - public interest in maintaining privacy of third party - personal information about the complainant - public interest in complainant being informed of reasons for agency's decision - clause 4(3) - business, professional, commercial or financial information about the third party - whether disclosure of documents could reasonably be expected to prejudice future supply of that kind of information - whether disclosure of documents could reasonably be expected to have adverse effects on those affairs - practitioner objects to release.

FREEDOM OF INFORMATION - public interest immunity.

Freedom of Information Act 1992 (WA) ss. 13(1)(b); 21; 30; 68(1); 72(1)(b); 74(2); 75(1); Schedule 1 clauses 3(1), 4(3), 4(7), 5(1)(a), 7, 8(2); Glossary in Schedule 2.
Freedom of Information Act 1982 (C'wth) s. 43(1)(c)(ii).
Freedom of Information Act 1992 (Qld) s. 45(1).
Freedom of Information Act 1989 (NSW) ss. 32(1)(c); Schedule 1 clause 7(1)(c).
Freedom of Information Act 1991 (SA) ss. 27(1)(c); Schedule 1 clause 7(1)(c).
Freedom of Information Act 1989 (ACT) s. 3(1).
Medical Act 1894 (WA) ss. 9(3); 13(1).

Medical Amendment Act 1994 (WA) s. 7.
Re Boyd and Medical Board of Western Australia (Information Commissioner, WA, 31 October 1994, unreported).
Re Pau and Medical Board of Western Australia (Information Commissioner, WA, 7 December 1994, unreported).
Re Mickelberg and Australian Federal Police (1984) 6 ALN N176.
Re Manly and Ministry of the Premier and Cabinet (Information Commissioner, WA, 16 September 1994, unreported).
Attorney-General's Department v Cockcroft (1986) 10 FCR 180.
Ryder v Booth [1985] VR 869.
DSS v Dyrenfurth (1988) 15 ALD 232.
Re B v Medical Board of the ACT 105 AALB 3582.
Re Veale and Town of Bassendean (Information Commissioner, WA, 25 March 1994, unreported).
Re Barling and Medical Board of Victoria; the Ombudsman (Party Joined) (1992) 5 VAR 542.
Manly v Ministry of Premier and Cabinet (Supreme Court of Western Australia, Appeal No. SJA 1143 of 1994, unreported).
Re Maddock, Lonie and Chisholm and Department of State Services (Information Commissioner, WA, 2 June 1995, unreported).
Re Pope and Queensland Health and Hammond (Information Commissioner, QLD, Decision No. 94016, 18 July 1994, unreported).
ZZZ v JX (Supreme Court of Victoria No. 6426 of 1993, unreported).
Re Waterford and Department of Health (ACT) (Administrative Appeals Tribunal of the ACT, 6 February 1995, No. C94/75).

DECISION

The decision of the Medical Board of Western Australia of 14 December 1994 is varied. In substitution it is decided that:

(i) Document 1, being the third party's response to the Medical Board of Western Australia, dated 29 July 1994, is not exempt;

(ii) the attachments to Document 1 are exempt under clause 8(2) of Schedule 1 to the *Freedom of Information Act 1992*; and

(iii) Document 2, being a letter to the Medical Board of Western Australia, dated 27 September 1994, is not exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

5th July 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for review by the Information Commissioner arising out of a decision of the Medical Board of Western Australia ('the agency') to refuse Mr Lawless ('the complainant') access to documents, being the responses received by the agency from three medical practitioners, following a complaint made to the agency by the complainant.

2. On 15 July 1994, the complainant provided the agency with a statutory declaration containing a complaint against Medical Practitioner X, ('the third party'). The third party has been joined as a party to this complaint and has not sought suppression of his name. Normally, in those circumstances, he would therefore be named in this decision. However, in my opinion, disclosure of the third party's identity in this decision and these reasons for decision would necessarily disclose information that he claims to be exempt matter and which he objects to being disclosed. Given that, and my obligation under section 74(2) not to include exempt matter in my decision or reasons, I have decided to identify the third party only as 'Medical Practitioner X' and to refer to him in these reasons as 'the third party'.

3. On 22 July 1994, in accordance with its usual procedures for dealing with complaints about medical practitioners, the Registrar of the agency, Mr K Bradbury ('the Registrar'), provided a copy of the complainant's statutory declaration to the third party in order to give him the opportunity to comment upon the allegations. The Registrar also sought, and received, advice from two other medical practitioners who had previously provided medical treatment to the complainant ('practitioner A and practitioner B').

4. On 16 November 1994, the Registrar informed the complainant that the agency had sought, and received, from the third party a response to the allegations contained in his statutory declaration. The Registrar further informed the complainant that the agency had sought, and received, advice from practitioner A and practitioner B. The Registrar's letter to the complainant included a précis of the advice received from the third party and practitioner A and practitioner B.

5. On 23 November 1994, the complainant lodged an access application under the *Freedom of Information Act 1992* ('the FOI Act'), seeking access to copies of the responses received by the agency from each of the three medical practitioners ('the requested documents') following his complaint to the agency. On 5 December 1994, the Registrar refused the complainant access to one document, being the response received by the agency from the third party, on the grounds that that document is exempt under clauses 5(1)(a) and 8(2) of Schedule 1 to the FOI Act. However, the Registrar did not, in his decision, address that part of the access application relating to the responses from practitioners A and B.

6. On 6 December 1994, the complainant applied to the agency for internal review of the Registrar's decision. The complainant again requested copies of the three requested documents. However, on 14 December 1994, the then Chairman of the agency, Dr Peter Brine, confirmed the decision of the Registrar. Access to the response received by the agency from the third party was again refused, on the grounds that it was exempt under clauses 5(1)(a) and 8(2) of Schedule 1 to the FOI Act. Neither the Registrar nor Dr Brine made a decision in relation to the exempt status, or otherwise, of the responses received by the agency from practitioner A and practitioner B, as they were required to do under the provisions of the FOI Act.

7. The complainant remained dissatisfied with the decisions of the agency to deny him access to copies of the requested documents, and, on 20 December 1994, he sought external review by the Information Commissioner.

REVIEW BY THE INFORMATION COMMISSIONER

8. Pursuant to my statutory obligation under s.68(1) of the FOI Act, on 3 January 1995, I notified the agency that I had formally accepted this complaint for review. In accordance with my authority under ss.75(1) and 72(1)(b) of the FOI Act, I required the agency to produce for my inspection the requested documents together with the FOI file maintained by the agency in respect of the complainant's access application. As neither the letter from the Registrar nor the letter from Dr Brine, which purported to be the notices of decision required under s.13(1)(b) of the FOI Act, complied with the requirements of s.30 of the FOI Act, I also sought further information to justify the agency's claims that the requested documents are exempt under clauses 5(1)(a) and 8(2) of Schedule 1 to the FOI Act.

9. That action was necessary in spite of the fact that two of the agency's previous decisions, involving requests for access to copies of medical practitioners' responses to the agency, following complaints by members of the public, have been the subject of formal decisions by the Information Commissioner (see: *Re Boyd and Medical Board of Western Australia,* (31 October 1994, unreported) and *Re Pau and Medical Board of Western Australia,* (7 December 1994, unreported)). On this occasion, the reasons given to the complainant were similar to the reasons given to both Mrs Pau and Mr Boyd. In *Re Boyd* and *Re Pau,* I rejected those reasons, finding them insufficient to establish a claim for exemption under clauses 5(1)(a) and 8(2) of Schedule 1 to the FOI Act for similar documents.

10. On 6 January 1995, I received the requested documents and other information from the agency. On 18 January 1995, I wrote to the third party and to practitioner A and practitioner B and sought from each his views regarding release to the complainant of his response to the agency. Practitioner A informed me that he did not object to the release to the complainant of his response. However, practitioner B, who resides overseas, objected to the disclosure of his response. The third party also objected to the release of his response to the complainant and, following the receipt of a submission from solicitors acting on his behalf, he was joined as a party to this complaint.

11. On 13 March 1995, after examining the requested documents and considering the responses received from the parties and practitioners A and B, I informed the parties of my preliminary view on this complaint. In respect of practitioner B's response, it was my preliminary view that the ability of the agency in the future to obtain information from medical practitioners who reside beyond the jurisdiction of the agency could reasonably be expected to be prejudiced by the disclosure of such responses, in circumstances where the practitioner concerned objects to the disclosure of that document. Further, I was not persuaded that disclosure of that document would, on balance, be in the public interest.

12. It was, therefore, my preliminary view that practitioner B's response may be exempt under clause 8(2). However, in respect of the responses to the agency of practitioner A and the third party, it was my preliminary view that those documents were not exempt. When informed of my preliminary view, and the reasons for that view, the complainant withdrew that part of his complaint relating to the response of practitioner B.

13. On 22 March 1995, the agency responded to my preliminary view and maintained its claims that each of the requested documents was exempt under clauses 5(1)(a) and 8(2) of Schedule 1 to the FOI Act. The agency provided me with a statutory declaration from Dr Brine in support of its claims. I also received a submission from the solicitors representing the third party, in response to my preliminary view. The third party supported the claims of the agency that his response is exempt under clauses 5(1)(a) and 8(2) of Schedule 1 to the FOI Act. In addition, he also claimed that that document is exempt under clauses 3(1) and 4(3) of Schedule 1 to the FOI Act.

THE DISPUTED DOCUMENTS

14. There are two documents remaining in dispute between the parties. Those documents and the exemptions claimed for each of them are as follows:

Document	Description	Exemption clauses
1	Letter from the third party to the agency, dated 29 July 1994, being his response to the allegations of the complainant (plus 2 attachments).	3(1), 4(3), 5(1)(a), 8(2)
2	Letter from practitioner A to agency, dated 27 September 1994.	5(1)(a) and 8(2)

THE EXEMPTIONS

(a) Clause 5(1)(a)

15. The agency based one of its claims for exemption on clause 5(1)(a) of Schedule 1 to the FOI Act, which provides as follows:

> *"5. Law enforcement, public safety and property security*
>
> *Exemptions*
>
> *(1) Matter is exempt matter if its disclosure could reasonably be expected to-*
>
> *(a) impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law;"*

16. The exemption in clause 5(1)(a) is directed at investigative methods or procedures: *Re Mickelberg and Australian Federal Police* (1984) 6 ALN N176 cited in *Re Manly and Ministry of the Premier and Cabinet* (Information Commissioner (WA), 16 September 1994, unreported, at paragraph 29). As I have said before, the exemption is concerned with the means employed by agencies to investigate, detect, prevent and deal with contraventions or possible contraventions of the law. In my view, a unique or unusual investigative method or procedure may be impaired merely by disclosing the fact of its existence. However, the usual investigative methods and practices of agencies may also be impaired if disclosure could reasonably be expected to weaken or damage the effectiveness of those procedures. For example, the effectiveness of procedures used by police in dealing with breaches of the Road Traffic Code could be reduced if details about the location of random breath testing stations were to be disclosed.

17. The disputed documents are letters from medical practitioners to the agency in response to a complaint made to the agency by the complainant. Document 1 is a letter to the agency from the third party in response to the complaint made against him by the complainant. Attached to that letter are copies of two letters from the third party to other medical practitioners, concerning the complainant and his medical history. Document 2 is a letter to the agency from practitioner A, in response to the agency's request for information related to practitioner A's treatment of the complainant. From my examination of both documents, I am unable to conclude that either of them has any connection with investigative methods or procedures.

18. The essence of the agency's argument in support of this exemption appears to be, as it was in *Re Boyd* and *Re Pau*, that its ability under the *Medical Act 1894* to investigate complaints received from the public would be impaired by the disclosure of medical practitioners' responses to those complaints because disclosure could reasonably be expected to have the effect of discouraging medical practitioners from

responding to those complaints and that, as the agency has no power to compel practitioners to respond, its method of investigating complaints will be impaired.

19. Disclosure of Document 1 would reveal no more of its investigative methods or procedures than the fact that the agency employed a procedure of seeking a response from any medical practitioner who was the subject of a complaint. Disclosure of Document 2 would reveal no more than the fact that the agency employs a method of seeking advice from relevant parties who may be able to assist the agency in determining a complaint against a medical practitioner. Those procedures, in my view, are sufficiently well known, having been reported in the agency's Annual Report to the Minister, to be considered to be in the public domain. In addition, in his letter informing the complainant of the outcome of his complaint to the agency, the Registrar informed the complainant responses had been sought and received from practitioner A and the third party. Given these facts, in my view, disclosure could not reasonably be expected to impair that method by merely disclosing the fact of its existence.

20. That part of the agency's method of investigating complaints against medical practitioners accords with established principles of natural justice which require, *inter alia*, that a person be informed of the case against him or her and that he or she be given an opportunity to respond to those allegations. A medical practitioner would place his or her own interests in jeopardy by not responding to a complaint from a member of the public. In my view, that result is not one that could reasonably be expected.

21. Further, for the reasons given at paragraphs 36-50 below in respect of Document 1, and at paragraphs 59-63 below in respect of Document 2, I do not accept that disclosure of either of those documents could reasonably be expected to prejudice the future supply to the agency of information of that kind. Therefore, I do not accept that it is reasonable to expect that disclosure could impair the agency's methods or procedures for investigating complaints by damaging its ability to obtain such information. Based on the material before me, I am not persuaded that there are real and substantial grounds for expecting that disclosure of Documents 1 and 2 could impair the effectiveness of the agency's usual procedures for investigating complaints. I find that neither Document 1 and its attachments, nor Document 2, is exempt under clause 5(1)(a) of Schedule 1 to the FOI Act.

(b) Clause 8(2)

22. Exemption was also claimed for Documents 1 and 2 under clause 8(2) of Schedule 1 to the FOI Act. That clause provides:

> *"(2) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal information of a confidential nature obtained in confidence; and*

> *(b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.*
>
> ***Limits on exemption***
>
> *(3)...*
> *(4) Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest."*

23. To establish a *prima facie* claim for exemption under clause 8(2), the agency must not only show that the document contains a confidential communication of the type described in paragraph (a) of sub-clause (2), but that it also meets the requirements of paragraph (b) of sub-clause 2. That is, the agency must persuade me that disclosure of the disputed documents could reasonably be expected to prejudice the future supply to the agency of information of the relevant kind.

24. In my view, there are two "elements" of paragraph (b) of sub-clause 2. They are:

    (i) there must be an expectation of prejudice (harm or injury) to the ability of the agency in the future to obtain information of the general class or character under consideration in this case; and

    (ii) that prejudice or harm must be one that could **reasonably** be expected to result from disclosure of the requested document.

25. In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, at 190, the Full Federal Court said that the words *"could reasonably be expected to prejudice the future supply of information"* in s.43(1)(c)(ii) of the *Freedom of Information Act 1982* (Commonwealth) were intended to receive their ordinary meaning and required a judgement to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the relevant kind to the Commonwealth would decline to do so if the documents in question were disclosed.

26. On this point, I also agree with the comments of Young C.J. of the Victorian Supreme Court in *Ryder v Booth* [1985] VR 869. In that case the Full Court considered whether the Victorian equivalent of clause 8(2)(b) applied to medical reports provided in confidence to the State Superannuation Board. On the question of whether disclosure would be reasonably likely to impair the future supply of similar information, Young C.J. said, at p 872:

> *"The question then is, would disclosure of the information sought impair (i.e. damage) the ability of the Board to obtain similar information in the future. Put in terms of the present appeals this means that the question is, would the disclosure of the information damage the ability of the Board to obtain frank medical opinions in the future. It may be noted that it is the ability of the Board that must be impaired. The paragraph is not concerned with the question whether the particular doctor whose report is disclosed will give similar information in the future but with whether the agency will be able to obtain such information. There may well be feelings of resentment amongst*

those who have given information "in confidence" at having the confidence arbitrarily destroyed by the operation of the legislation, but it is another thing altogether to say that they or others will not provide such information in the future. It is not sufficient to show that some people may be inhibited from reporting so frankly if they know that their report may be disclosed. More is required to satisfy the onus cast upon the agency by s.55(2) of the Act."

Does Document 1 contain confidential information obtained in confidence?

27. Document 1 is the third party's response to the complaint against him made by the complainant. It includes, *inter alia*, an account of the treatment provided to the complainant by the third party. The agency has previously informed me that it has a practice of treating such responses as confidential and that it has always been understood by the agency and the practitioner concerned that the response to the agency is treated in confidence.

28. On this occasion, the agency's letter of 22 July 1994 to the third party was also marked "Personal and Confidential" and Document 1 is clearly marked "Confidential and Without Prejudice". Although the third party was consulted by my office, he did not claim that his response to the agency contained confidential information, given in confidence. However, he stated that he considered that the complainant should not have access to any part of his response to the agency.

29. From my examination of Document 1, I am satisfied that the information it contains is inherently confidential, because that information is known only to a limited number of people. On the basis of my examination of Document 1, the third party's objection to disclosure, and the submission of the agency that its usual practice is to receive such responses in confidence, I accept the claim that Document 1 is of a type as described in subclause 8(2)(a) of Schedule 1 to the FOI Act.

What is the nature of the expected prejudice?

The agency's claims

30. It is my understanding that the agency claims two kinds of expected prejudice, namely:

    (i) a reduction in the number of substantive responses from medical practitioners to complainants; and

    (ii) responses to the agency that are that are less frank and open.

31. In a statutory declaration submitted to me in support of the agency's claims for exemption for the disputed documents, Dr Brine stated:

    "In my assessment, based upon my experience as Chairman of the Medical Board, if medical practitioners the subject of a complaint and other persons knew that their responses could be given to others, including the complainant

and potentially used for a different purpose (such as a civil action against a medical practitioner), then the respondents;

(a) are likely to be less frank and open in the information and opinions provided; or

(b) may decline to provide substantive responses to the issues the subject of the complaint."

32. The agency claims that, because there is no legislative requirement for medical practitioners to respond to allegations made to the agency, it relies totally on the goodwill of the profession in obtaining responses from medical practitioners. It also claims that the responses to me from practitioner B and the third party, objecting to disclosure of their responses to the agency, support its claim that disclosure may prejudice the agency's ability to obtain such responses in the future.

33. The agency further submitted, in support of its claims for exemption, *inter alia*, that *"...[i]t is necessary to look not only at whether disclosure of the contents of the document under consideration would have adverse consequences, but also at whether disclosure of a document of that kind would have the effect."* In support, the agency referred me to the cases of *DSS v Dyrenfurth* (1988) 15 ALD 232 and *Re B v Medical Board of the ACT* 105 AALB 3582.

The third party's claims

34. The third party's claims for exemption also support the argument of the agency that disclosure may cause future responses to be less candid and frank. The third party's solicitors submit that, if the third party were to believe that his response to the agency in respect of the complaint made against him would be released to the complainant, he would be extremely wary of providing more than the bare minimum of information to the agency and that he would be reluctant to provide further information in the future to the agency.

35. The third party submits that the disclosure of Document 1 to the complainant may result in litigation against him. It was argued that the expense and publicity resulting from litigation of this nature would significantly and detrimentally affect his professional practice. His solicitors submitted that the risk of litigation arising out of each complaint to the agency concerning their client would lead them to advise their client against full disclosure to the agency in future.

Is the expected prejudice of a kind that could reasonably be expected to result from disclosure of the disputed documents?

36. The agency has previously informed me (see paragraph 23 of *Re Boyd*) that, if a doctor, the subject of a complaint to the agency, were to refuse to provide information to the agency in response to the complaint made, then the agency may consider that to be "infamous or improper conduct" warranting disciplinary action and the agency may commence an inquiry under s.13 of the *Medical Act 1894.* In those circumstances, I consider that it is difficult to establish a reasonable

expectation of a prejudice to the future supply of information of that kind to the agency which is sufficient to establish a valid claim for exemption under clause 8(2).

37. However, in his statutory declaration Dr Brine stated that on only one occasion has the agency taken action under s.13 of the *Medical Act 1894* against a medical practitioner for failing to respond to the agency in response to a complaint. Dr Brine also submitted that it would now be a possible defence to a charge of failing to respond to the agency if the refusal was because the documents provided to the agency may be available to third parties under the FOI Act and used for purposes not connected with the agency's exercise of its statutory responsibilities.

38. I attach little weight to Dr Brine's statement that fear of disclosure to a complainant of a practitioner's response to the agency may be a defence to a charge of unprofessional conduct for refusal to respond to the agency in answer to a complaint. It is a self-serving statement that is mere conjecture.

39. Further, even if it were the case that the agency would not take action against a doctor for failing or refusing to respond to it in answer to a complaint against him or her, I do not accept that it could therefore, be reasonably expected that doctors will refuse or fail to respond to complaints against them in the future. Section 13(1) of the *Medical Act 1894* provides:

> *"13(1) Where it appears to the Board that a medical practitioner, not being a body corporate, may be -*
>
> *(a) guilty of infamous or improper conduct in a professional respect;*
> *(b) affected by a dependence on alcohol or addiction to any deleterious drug;*
> *(c) guilty of gross carelessness or incompetency;*
> *(d) guilty of not complying with or contravening a condition or restriction imposed by the Board with respect to the practice of medicine by that medical practitioner; or*
> *(e) suffering from physical or mental illness to such an extent that his or her ability to practise as a medical practitioner is or is likely to be affected,*
>
> *the Board shall hold an inquiry into the matter."*

40. Sections 13(2)-(9) inclusive set out the powers and obligations of the agency when conducting such an inquiry. Such inquiries are formal in nature and required to be in public (*Medical Act 1894*, s.9(3) (inserted by *Medical Amendment Act 1994*, s.7)). I am informed by the agency that, when it receives a complaint against a practitioner from a member of the public, in order, *inter alia*, to assist it to form a view as to whether the practitioner may be guilty of any of the conduct described in paragraphs (a), (c) or (d) or suffering from an illness or addiction as described in paragraphs (b) or (e) of subsection (1) of section 13, the usual practice is to seek the practitioner's response.

41. I do not accept that the possibility of disclosure of a doctor's response to the person who has complained could be reasonably expected to cause medical practitioners in general to refuse to respond to such allegations, when to do so may result in the agency - faced with uncontroverted allegations against a practitioner - forming the view that the practitioner may be guilty of one or more of the matters specified in s.13(1) of the *Medical Act 1894* and initiating a formal inquiry into the complaint, with all that that entails.

42. The "candour and frankness" argument has been rejected as being without foundation in relation to the quality of information provided by public servants and other senior personnel in government (see my comments in my decision in *Re Veale and Town of Bassendean* (25 March 1994, unreported, at paragraph 21)). I can see no reason why it should not also be rejected in relation to medical practitioners who are, after all, members of a recognised professional group. Further, the agency's submissions and Dr Brine's evidence on this point are not supported by the evidence before me. In their submissions on behalf of the third party, his solicitors informed me that his response to the agency did not specifically deal with each of the allegations contained in the complainant's letter of complaint to the agency and that it is less than emphatic in relation to certain aspects of that complaint. In other words, the third party did not, on this occasion, respond fully and frankly to each aspect of the subject matter comprising the complaint before the agency.

43. The third party has not stated that he would not provide information to the agency in the future. His solicitors have informed me that they would advise him to provide no more than a bare minimum of information to the Board in his responses to any further complaints. Further, his solicitors stated that it is impossible for him to rule out the future supply of information to the agency under any circumstances. In my opinion, the views of the solicitors of the third party about how they may advise their client to respond to the agency in the future are insufficient to persuade me either that the future supply of information of that kind to the agency could reasonably be expected to be prejudiced or that the third party's claims in this regard are justified.

44. Notwithstanding the agency's claims, neither Dr Brine nor the agency has provided me with any evidence that a single medical practitioner has refused to provide a response to the agency in response to a complaint made against the medical practitioner by a member of the public, following the advent of the FOI Act. Nor is there material before me to support its claims that there has been any decline in the standard of responses received. The FOI Act has ushered in a new era of accountability for this agency and others. The implications of this change have yet to be accommodated within the culture of the agency and to be reflected in its practices, including its responsibilities under the FOI Act when dealing with access applications.

45. I do not accept the agency's claim that the views of practitioner B and the third party, objecting to disclosure of their responses to the agency, support its claim that the disputed documents are exempt under clause 8(2) of Schedule 1 to the FOI Act. The argument, firstly, does not take into account the different nature of each response.

46. Practitioner B was not the subject of the complaint to the agency. Practitioner B resides overseas and is not subject to the agency's jurisdiction. Practitioner B's response to the agency was provided voluntarily and, as already noted in paragraph 11 above, when I considered the advice I received from practitioner B in response to my inquiries, it was my preliminary view that the agency may have been justified in claiming that its ability to obtain that kind of information from medical practitioners who reside beyond the jurisdiction of the agency could reasonably be expected to be prejudiced by the disclosure of such responses, in circumstances where the practitioner concerned objects to the disclosure of his or her response.

47. However, I do not accept the argument that practitioner B's objection lends any support to the agency's claim that disclosure of the third party's response to the agency could reasonably be expected to prejudice the future supply to the agency of information of that kind. The third party is the practitioner the subject of the complaint to the agency and, as I have indicated above, different considerations apply to responses from practitioners who are the subject of complaint to the agency.

48. Finally in this regard, I turn to the agency's argument that I should consider not only the effect of the disclosure of the particular documents but also of documents "of that kind". I have, in considering the possible effects of disclosure of the disputed documents in this matter, taken into account the nature of each document. The decision-makers in the agency clearly did not. In reaching a view as to whether disclosure of Document 1 may have the claimed effect, I have considered the potential effect of disclosing the response to the agency of a medical practitioner who is the subject of a complaint to the agency. In considering Document 2, I have considered the potential effect of disclosing the response of a doctor who is not the subject of complaint to the agency. I have also considered the potential effect of disclosure of the particular contents of each of the disputed documents. The agency, however, has not. It has merely made what is in effect a "class claim" for exemption for all responses of practitioners to the agency.

49. As I said in *Re Boyd*, at paragraph 33, the provisions of the FOI Act clearly exclude "blanket claims" of exemption for all documents of a particular type. In order to properly deal with an access application under, and in accordance with, the provisions of the FOI Act, it is necessary that each document be examined and a decision made in relation to each document, or part thereof. In this matter, as in *Re Boyd* and *Re Pau*, the agency has not properly dealt with the access application in accordance with the provisions of the FOI Act, by examining each of the requested documents and making a decision in relation to each document or part of a document. The evidence before me in this matter discloses, *inter alia*, that on both occasions when the agency considered and dealt with the complainant's access application, a decision was made only in respect of Document 1, notwithstanding the fact that the complainant specifically requested access to three documents.

50. The issue in this matter is whether disclosure of the particular documents in dispute could reasonably be expected to cause a prejudice to the future supply of the particular kind of information to the agency. In that respect, I agree with the

comments of the Commonwealth Administrative Appeals Tribunal in *Re Barling and Medical Board of Victoria; the Ombudsman (Party Joined)* (1992) 5 VAR 542, at 564, where the Tribunal said:

> *"...it would, we think, be necessary for the Board carefully to consider the contents of each particular document in order to determine whether there is any matter in them which is of such a sensitive nature that it could fairly be said that it is unlikely to be provided in the future if it were to be disclosed. We further emphasise that each case is to be judged on its own facts and circumstances. No two cases are identical."*

Findings in relation to Document 1

51. For the reasons set out in paragraphs 36-50 above, neither the agency nor the third party has persuaded me that the agency's ability to obtain responses from medical practitioners who are the subject of a complaint in the future could reasonably be expected to be prejudiced by the disclosure of Document 1. The agency has not provided me with any material to support its claims in this regard, nor is there material from which I could conclude that there are real and substantial grounds for expecting some prejudice in the future to the agency's ability to obtain information from medical practitioners in response to complaints from members of the public.

52. I accept that the views of the agency and Dr Brine on the effect of disclosure may be genuinely held. However, the opinions of a decision-maker and the unsubstantiated assessment of the former Chairman of the agency about what may happen in the future are not sufficient to support the agency's claims, in the absence of some probative material. In this regard I respectfully refer to the comments of Owen J. in *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, Appeal No. SJA 1143 of 1994). His Honour said at p.44:

> *"How can the Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had "real and substantial grounds for thinking that the production of the document could prejudice that supply" or that disclosure could have an adverse effect on business or financial affairs? In my opinion it is not sufficient for the original decision-maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision-maker."*

53. The third party's submissions are directed to the third party's own concerns and his particular circumstances. Those submissions establish only that the third party objects to the disclosure of his response to the complainant, primarily because of his, or his solicitors, contention that the release of Document 1 will inevitably lead to litigation. The third party's submissions are not directed at the matter in issue. That is, those submissions do not establish that the disclosure of the third party's response

to the agency could reasonably be expected to prejudice the ability of the agency to obtain similar information in the future.

54. Neither the agency nor the third party has persuaded me that Document 1 contains any information of a particularly sensitive nature, such that disclosure would prejudice the ability of the agency to obtain such information in the future. Other than some information about the third party, discussed at paragraphs 62-65 below, the document contains no information about anyone other than the complainant. It appears to be a largely factual account of the treatment administered to the complainant and of certain professional judgements made by the third party, together with his professional opinion in respect of the complainant's condition.

55. The agency has, on this occasion, provided the complainant with some of the information contained in that response. However, the entire contents of the third party's response have not been provided to the complainant, nor have all the separate issues of complaint been adequately addressed by either the third party or the agency. From my examination of that document, much of the information in it is "personal information" about the complainant and, by virtue of s.21 of the FOI Act, that is a factor in favour of its disclosure to him. The agency appears to have taken no account of that factor, when considering the public interest factors for and against disclosure of Document 1.

56. For the reasons I have given at paragraphs 36-50 above, I am not satisfied that disclosure of Document 1 (other than the attachments thereto) could reasonably be expected to cause doctors against whom complaints are made not to respond to the agency in their own defence. Accordingly, I do not consider that the future supply to the agency of that kind of information could reasonably be expected to be prejudiced by disclosure of Document 1. I find that Document 1 is not exempt under clause 8(2).

The attachments to Document 1

57. However, the attachments to Document 1 are, in my opinion, in a different category. Those attachments consist of copies of private correspondence between medical practitioners which have been supplied to the agency by the third party as background information to the complaint. In responding to the matters of complaint in this manner, the third party provided the agency with information over and above that which is necessary to respond to the complaint to the agency. In my view, although that background material contains personal information about the complainant, it is of the nature of private correspondence between doctors. I am satisfied, from my examination of those attachments, that they comprise information which is useful for the agency's consideration of the complaint against the third party and which may not be voluntarily provided to the agency in the future in that form if those attachments were to be disclosed.

58. Therefore, I am of the view that the ability of the agency in the future to obtain such additional background material of that nature, which has been volunteered, could reasonably be expected to be prejudiced by the disclosure of those attachments. Whilst that private correspondence contains some personal information about the

complainant which, by virtue of s.21 of the FOI Act, is a factor in favour of disclosure to the complainant, I consider that, in the circumstances I have described, the public interest in the agency's ability to obtain additional relevant information when dealing with complaints outweighs the public interest in disclosure in this instance. Accordingly, I find that the two attachments to Document 1 are exempt under clause 8(2).

Is Document 2 exempt under clause 8(2)?

59. Document 2 was prepared by practitioner A in response to a request from the agency for assistance in considering the complaint against the third party. Practitioner A was not the subject of the complaint to the agency and, as such, his response to the agency's request for assistance was entirely voluntary. The Registrar's letter of 22 September 1994 to practitioner A is not marked "confidential", nor does it indicate that any response received by the agency would be treated in confidence. Similarly, practitioner A's response to the agency bears no indication that it was given in confidence.

60. The agency's submissions and arguments in support of its claims for exemption do not address the distinct differences between Document 2 and Document 1. The two documents are each quite different in nature to the other. The third party is the practitioner the subject of complaint and his response to the agency is his answer to allegations made against him by the complainant. Practitioner A is not the subject of the complaint and his response is merely for the assistance of the agency in dealing with a complaint against another practitioner.

61. The agency made no attempt to seek practitioner A's views in relation to disclosure. Instead it simply relied upon the same arguments that I had previously rejected in *Re Pau* and in *Re Boyd.* However, in response to my inquiries, practitioner A informed me, not only that he does not object to the release of his letter to the complainant, but also that the release of his response would not have any effect on his future responses to the agency. Practitioner A's views on this aspect of the matter were conveyed to the agency. In spite of that fact, and the adverse finding against the agency on a similar point in *Re Boyd*, the agency maintained its claim for exemption under clause 8(2).

62. In circumstances where a medical practitioner does not object to the disclosure of his or her response to the agency, the agency claims that it is not primarily concerned with medical practitioners consenting to the release of copies of their correspondence to complainants because those practitioners may not be aware of or concerned with the implication on the agency if patients were to receive copies of responses from practitioners. The consent of individual practitioners does not, the agency argues, *"...take into account the potential effect on the Board's ability to properly administer the Medical Act."* However, the agency has not explained how its ability to properly administer the Medical Act may be affected, other than its assertion that the disclosure of medical practitioners' responses to the agency may prejudice its future ability to obtain information from practitioners in response to complaints.

63. In my view, taking into account the views of practitioner A, and on the evidence before me, the agency has not satisfied me that the professional relationship between medical practitioners and the agency, which the agency claims is the basis for its present ability to obtain responses to complaints, will suffer harm from the disclosure of Document 2. Nor am I satisfied that the agency's ability to obtain such information in the future could reasonably be expected to be prejudiced if it were to become known that responses of doctors will be released where the circumstances are such that the practitioner concerned consents to the release. For that reason, I find that Document 2 is not exempt under clause 8(2) of Schedule 1 to the FOI Act.

(c) Clause 3

64. The third party claimed that the disclosure of Document 1 would disclose "personal information" about him. Clause 3 provides as follows:

> *"**3. Personal information***
>
> ***Exemption***
>
> *(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*
>
> ***Limits on exemption***
>
> *(2) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.*
>
> *(3)...*
> *(4)...*
> *(5)...*
>
> *(6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."*

65. In some cases I accept that "personal information", as defined in the Glossary in Schedule 2 to the FOI Act, may include information relating to the professional affairs of a person. The third party's solicitors submitted that Document 1 contains "personal information" about him, including his name, business address, specialist occupation and signature and information about the third party's treatment of the complainant. The third party's solicitors argued that there was no public interest in the disclosure of that personal information, because it did not relate to a public matter such as the workings of government.

66. However, from my examination of Document 1, it appears to me that the majority of the information within that document is a factual account of the treatment administered to the complainant by the third party together with third party's professional opinions in relation to the complainant's condition. In my view, little of that information is personal information about the third party and much of it is personal information about the complainant. Section 21 of the FOI Act provides that this is a factor in favour of disclosure of Document 1 to the complainant. In my

view, there is a strong public interest in a person being able to gain access to information relating to his or her medical treatment.

67. As Document 1 contains a considerable amount of information that is "personal" to the complainant together with some information that may be "personal" to the third party, the public interest in the complainant being able to exercise his right of access to this information under the FOI Act must be balanced against the public interest in the third party's right to privacy. Most of the information which may be "personal" to the third party in Document 1 is information which is available publicly, including the third party's name, business address, specialist occupation and the like. In my opinion, that information is not information of the type which is essentially "private" to a person and it is not the type of "personal information" that clause 3 seeks to protect.

68. In my opinion, the public interest in the complainant obtaining access to a document of the agency containing a significant amount personal information about him outweighs the public interest in protecting from disclosure the personal information about the third party which is already in the public domain. Accordingly, I find that Document 1 is not exempt under clause 3(1) of Schedule 1 to the FOI Act.

(d) Clause 4(3)

69. The third party also submitted, through his solicitors, that his response to the agency was exempt under clause 4(3) of Schedule 1 to the FOI Act because the disclosure of his response to the agency would reveal information about his professional affairs. Clause 4(3) provides:

> ***"4. Commercial or business information***
>
> ***Exemptions***
>
> *(1)...*
> *(2)...*
> *(3) Matter is exempt matter if its disclosure -*
> *(a) would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and*
>
> *(b) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.*
>
> ***Limits on exemptions***
>
> *(4) Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.*

> *(5) Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of the applicant.*
>
> *(6) Matter is not exempt matter under subclause (1), (2) or (3) if the applicant provides evidence establishing that the person concerned consents to the disclosure of the matter to the applicant.*
>
> *(7) Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest."*

70. To establish that matter is exempt matter under clause 4(3), both parts of clause 4(3) must be established. That is, it must be shown that disclosure of the documents in question would reveal information of the kind specified in paragraph (a) of clause 4(3), being information about the business, professional, commercial or financial affairs of a person, and also that disclosure of that information could reasonably be expected to produce some adverse effect on those affairs, or could reasonably be expected to prejudice the future supply of information of that kind, paragraph (b) of clause 4(3). However, the "public interest" test in clause 4(7) also envisages that some kinds of business or commercial information may be disclosed if, on balance, it would be in the public interest to disclose it.

The meaning of the term "professional affairs"

71. The term "professional affairs" is also used in s.43(l) of the *Freedom of Information Act 1982 (C'wth);* s.45(1) of the *Freedom of Information Act 1992 (Qld);* s.32(l)(c) and Sch.1 cl.7(i)(c) of the *Freedom of Information Act 1989 (NSW);* and s.27(i)(c) and Sch.1 cl.7(l)(c) of the *Freedom of Information Act 1991 (SA).*

72. As I said at paragraph 27 of my recent decision in *Re Maddock, Lonie and Chisholm and Department of State Services* (2 June 1995, unreported), the exemption provided by clause 4(3) is general in its terms and is directed at protecting from adverse effects the business, professional, commercial or financial affairs of a person. Thus, clause 4(3) provides a means by which the general right of access to documents in the possession or control of government agencies can be prevented from causing unwarranted commercial disadvantage to persons and business entities engaged in private sector commercial activities (who supply information to government or about whom government collects information) and to government agencies which carry on commercial activities.

73. In *Re Pope and Queensland Health and Hammond,* (Information Commissioner Qld, Decision No. 94016, 18 July 1994, unreported) the Queensland Information Commissioner ('the Commissioner') analysed the meaning of the term "professional affairs" at paragraphs 21-32 of that decision. Because s.45(l) of the Queensland FOI Act is substantially similar to clause 4(3) of Schedule 1 to the FOI Act, in my opinion, the Commissioner's analysis of the term "professional affairs" is of some

assistance in determining the meaning of that term, when considering a claim for exemption under clause 4(3) of the FOI Act.

74. In *Re Pope,* the Commissioner said, at paragraphs 28-29:

> *"...the object of s.45(l)(c) and the objects of the FOI Act as a whole, are best served by giving the word "professional" a meaning which takes its colour from the words "business", commercial and "financial" which surround it in the context of s.45(l)(c)... The four adjectives in the phrase "business, professional, commercial or financial affairs" were clearly not intended, because of the substantial overlap between them, to establish distinct and exclusive categories, but rather the phrase was intended to cover, in a compendious way, all forms of private sector commercial activity, and thereby to also cover commercial activities carried on by government agencies. The use of the words "professional affairs"* was, *in my opinion, intended to cover the work activities of persons who are admitted to a recognised profession, and who ordinarily offer their professional services to the community at large for a fee, i.e. to the running of a professional practice for the purpose of generating income."*

75. In my view, that interpretation of the term "professional affairs" is the correct interpretation of the term "professional affairs" in the FOI Act.

Does Document 1 contain information about the professional affairs of the third party?

76. The third party's solicitors submit that disclosure of Document 1 would reveal information about the professional affairs of the third party because that document contains information about his profession as an orthopaedic and spinal disorders surgeon and because the document describes the results of medical treatment provided by the third party to the complainant, in his capacity as a specialist surgeon.

77. I accept that the third party is a person admitted to a recognised profession and that he is a person who ordinarily offers his services to the community for a fee. I also accept that Document 1 contains, *inter alia,* an account of the treatment provided to the complainant by the third party and his professional assessment of the outcome of that treatment. In my view, information obtained from a medical practitioner about his treatment of a particular patient and his professional opinions and assessment of the outcome of that treatment is, *prima facie,* information about the professional affairs of that practitioner. Document 1 contains information of that kind and, accordingly, I accept that Document 1 contains information about the professional affairs of the third party.

What is the nature of the adverse effect on the professional affairs of the third party which it is claimed will result from disclosure of the document?

78. It is the submission of the solicitors for the third party that disclosure of Document 1 would have both the effects described in clause 4(3)(b). I was informed by his solicitors that the third party has received numerous threats of court action against

him from former patients and that many of those threats have been carried out. The third party's solicitors claimed that the resulting publicity, costs and demands on the third party's time can reasonably be expected to have an adverse effect on his professional practice is self-evident. The third party's solicitors then submitted that the disclosure of Document 1 (and others like it) will substantially contribute to this adverse effect because of the frankness required when responding to a complaint to the agency.

79. However, as previously noted, the third party's solicitors have also stated, in the submissions made on behalf of the third party, that his response does not specifically deal with each of the many allegations contained in the complainant's letter to the agency and that it is less than emphatic in relation to certain aspects of that complaint. Taking into account those circumstances, and my own examination of the document, I do not accept that the third party's response to the agency is either particularly frank or that it contains information of such a sensitive nature that it should not be disclosed to the complainant.

80. I accept the claim that if disclosure of Document 1 would lead to the third party having to defend himself against civil action, that may constitute an adverse effect on his professional affairs. However, in this matter, the third party has not put before me any evidence that would persuade me that disclosure of Document 1 to the complainant could reasonably be expected to produce that result. The only information provided to me consists of the statements that adverse effects will almost certainly follow from the disclosure of Document 1. I do not accept the third party's claim that disclosure of Document 1 could reasonably be expected to increase the number of civil actions against him by his former patients. There is no evidence or other material me before that would enable me to conclude that such a result could reasonably be expected in the circumstances of this complaint.

81. It was also submitted, on behalf of the third party, that disclosure of Document 1 could reasonably be expected to prejudice the future supply of information to the agency. That alternative ground for claiming exemption under clause 4(3)(b) is substantially in the same terms as that under clause 8(2), which I have rejected for the reasons given in paragraphs 36-50 above. For similar reasons, I reject it in respect of the claim under clause 4(3), and I find that Document 1 is not exempt under clause 4(3).

Public Interest Immunity

82. The agency also sought to persuade me that Document 1 was exempt from disclosure on the ground of public interest immunity. In support of that claim, I was referred to an unreported decision of the Supreme Court of Victoria, *ZZZ v JX*, (No. 6426 of 1993). The agency submitted that the fact that the author of a document might consent to the disclosure of that document is irrelevant, since the immunity cannot be displaced by consent to disclosure.

83. The case of *ZZZ v JX* concerned civil proceedings instituted by a former patient of a psychiatrist. Between January 1987 and December 1989, the plaintiff ZZZ, was a patient of JX. During part of that time, JX engaged in a sexual relationship with ZZZ. The Medical Board in Victoria conducted a disciplinary inquiry into the conduct of JX and suspended him from practice for 9 months. In the civil matter, ZZZ sought an order from the Supreme Court requiring the Medical Board to give non-party discovery of the transcript, findings and any other documents which were material to the disciplinary proceedings against JX. The Medical Board resisted the application on the grounds of confidentiality and public interest immunity.

84. The Supreme Court decided that public interest immunity applied to the information and evidence provided by other witnesses, and protected from discovery the evidence of the medical practitioner, the complainant and the witnesses given during the disciplinary hearing against JX.

85. That case is clearly distinguishable from the complaint before me. In dealing with a complaint, the Information Commissioner is concerned with determining whether decisions made by agencies that certain document are exempt under one of the 15 exemption clauses in Schedule 1 to the FOI Act. In order to justify a decision to refuse to grant an applicant his or her legal right to access particular documents of the agency, the agency must establish that the documents are exempt under one or more of the clauses in Schedule 1 to the FOI Act. Public interest immunity is not a specific exemption clause within Schedule 1 to the FOI Act (*contra*. clause 7 of Schedule 1 to the FOI Act which provides exemption for documents that attract legal professional privilege). Therefore, a claim by the agency that documents are exempt from disclosure because they may attract public interest immunity in some circumstances is irrelevant to my consideration of the complaint before me.

86. Further, in this matter, Document 1 is not a response from a medical practitioner given to the agency as part of a formal investigation under s.13 of the *Medical Act 1894*. No disciplinary inquiry has been instituted in this instance, the agency having informed the complainant that there was insufficient evidence for it to form the view that the third party may be guilty of a breach of the *Medical Act 1894*.

87. The third party's solicitors also referred me to a decision of the Administrative Appeals Tribunal of the Australian Capital Territory ('the ACT') in *Re Waterford and Department of Health (ACT)* (6 February 1995, No C94/75). It was claimed that that case is authority for the proposition that the relevant interest in disclosure of a document must be a public interest and that the public interest exception does not confer on individuals a private right of access to information..

88. In my opinion, the decision in *Re Waterford* is not authority for the proposition put to me by the third party's solicitors. In discussing matters relevant to the consideration of factors for and against the disclosure of the documents in question, the Administrative Appeals Tribunal of the ACT said that *"[s]ection 3(1) of the Act refers to the 'right of the Australian community and, in particular, the citizens of the Territory, to access to information in the possession of the Territory'. The Act provides for the exercise of this general right in the community by giving an entitlement to individual members of the community to have access to information.*

That entitlement is not given by the Act as an individual right, but as a means of exercising the general community right.". In my view, that interpretation of s.3(1) of the ACT FOI Act is not applicable to the interpretation of the FOI Act in Western Australia, and I reject it.

89. The decision in *Re Waterford* involved an access application by a journalist for documents containing statistics and other information, including the names of obstetricians, showing their intervention rates in hospital deliveries of infants including caesarean deliveries. It is clearly distinguishable on its facts from the matter before me, which arises from an application essentially for access to information about the applicant.

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