

MCKIBBIN AND HEALTH DEPT

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: 95168
Decision Ref: D00696**

Participants:

Michael Robert McKibbin
Complainant

- and -

Health Department of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - submission to Premier regarding proposed legislation - clause 8(2) - confidential communications - whether information is information of a confidential nature obtained in confidence - whether disclosure could reasonably be expected to prejudice future supply - public interest in disclosure.

Freedom of Information Act 1992 (WA) ss.68(1), 69(4), 72(1)(b), 75(1); Schedule 1 clause 8(2), 8(4).

DECISION

The decision of the agency is set aside. In substitution it is decided that the matter deleted from the disputed document is not exempt under clause 8(2) of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

17th January 1996

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Health Department of Western Australia ('the agency') to refuse Mr McKibbin ('the complainant') access to certain documents requested under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 13 January 1995, the complainant applied to the agency under the FOI Act for access to documents described as "*Submissions to the WA government by the AMA (state or federal bodies) regarding chiropractic during 1964 to 1994[sic]*". Following consultation between the agency and the complainant, the ambit of the request was narrowed so that it related to "*documents from the WA Department of health...concerning AMA (state or federal bodies) submissions relating to legislation regarding chiropractic[sic]*."
3. The agency consulted with the Australian Medical Association ('the AMA') and, on 15 May 1995, granted the complainant access to a number of documents, including access to edited copies of two documents. The agency claimed that the matter deleted from two documents was exempt matter under clauses 3(1) and 8(2) of Schedule 1 to the FOI Act.
4. On 25 July 1995, the complainant sought internal review by the agency of its initial decision. On 11 August 1995, the agency's decision-maker confirmed the initial decision and, on 28 August 1995, the complainant sought external review by the Information Commissioner.

REVIEW BY THE INFORMATION COMMISSIONER

5. On 8 September 1995, I notified the agency that I had received this complaint. I obtained the disputed documents and the agency's FOI file maintained in respect of this matter. One of my investigations officers confirmed with the complainant that he was not seeking access to personal information about third parties that may appear in the disputed documents.
6. In the course of my dealing with this matter the agency informed my office that one of the disputed documents, namely a memorandum of the AMA dated 7 August 1980, was in fact, located on a file which has been held at the State Archives since 1990 and to which open access is granted. Accordingly, the agency withdrew its claims for exemption in respect of that document and a copy was released to the complainant.

7. On 22 December 1995, after examining the one document remaining in dispute and considering the submissions of the parties, I provided the parties with my preliminary view and reasons for that view. A copy of my preliminary view was also provided to the AMA as a party that might be affected by a decision made on this complaint. It was my view, on the material before me, that the matter deleted from the disputed document was not exempt matter under clause 8(2) of Schedule 1 to the FOI Act. After receiving my preliminary view neither the agency nor the complainant responded to that view.

THE DISPUTED DOCUMENT

8. There is one document remaining in dispute between the parties. That document is a letter dated 24 November 1992 from the then President of the AMA in Western Australia, Dr O'Halloran, to the then Premier of Western Australia, Hon Carmen Lawrence MLA. The agency granted the complainant access to an edited copy of that document from which certain matter claimed by the agency to be exempt matter under clause 8(2) of Schedule 1 to the FOI Act, had been deleted.

THE EXEMPTION

9. Clause 8, so far as is relevant, provides:

“8. Confidential communications

(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."*

10. To establish a *prima facie* claim for exemption under clause 8(2) for the matter deleted from the disputed document the agency must establish that the deleted matter is information of a confidential nature obtained in confidence and that its disclosure could reasonably be expected to prejudice the ability of the agency to obtain information of that kind in the future. Further, if the requirements of both paragraphs (a) and (b) are established, the limitation in clause 8(4) must be considered.
11. The agency claims that the relationship of confidence between the AMA and the agency is very important and, if jeopardised, could have significant consequences for the ability of the agency to function as effectively in certain areas, including the development of legislation. In a submission of the AMA dated 10 May 1995 to the agency, the AMA said:

“...the Association wishes to reaffirm its grave concern at the release of this document. The Association wrote this letter to Dr Carmen Lawrence in the strictest confidence intending it as a communication solely between the Association and the Premier and not to be released to the public domain. The Association believes that public access to this document is entirely inappropriate and unacceptable. The Association believes that release of this document would potentially prejudice the willingness of the Association to provide future sensitive and confidential information to the Health Department for its exclusive use. However, we understand that the FOI Commissioner may well ignore our concerns and release the document. We therefore request that should the FOI Commissioner be considering such a proposal that the paragraphs highlighted within the document be deleted as we believe this information should remain confidential.”
12. The submission from the AMA was received by the agency prior to its initial decision being made on the complainant’s access application. The agency granted the complainant access to an edited copy of the disputed document in accordance with the advice received from the AMA.
13. In my view, although there is some evidence to support the agency’s claim that the disputed document was sent in confidence to the then Premier, there is no evidence before me to establish that the document was received in confidence. The disputed document is a letter sent to Dr Carmen Lawrence, in her capacity as Premier, in which the AMA expresses its concerns about aspects of proposed legislation then before Parliament, namely, the *Chiropractors and Osteopaths Bill 1992*. There is nothing on the face of the disputed document that suggests that it was received in confidence. In any case, the forwarding of the disputed document to the agency may well reflect the view that the document was not regarded by Dr Lawrence as confidential between her and the AMA.
14. However, even if I were satisfied that the requirements of paragraph (a) had been established, which I am not, I do not consider that the agency has satisfied the requirements of paragraph (b) of that clause. In my view, in submitting the disputed document to the former Premier, the AMA was acting in the capacity of

a representative body presenting submissions to the Government on behalf of its members. I do not consider that such a representative body would cease to present to the government or the agency on behalf of its members, its views on proposed legislation that may impact upon its members. Information provided to the agency and the government from time to time by the AMA may be of assistance in ensuring that new legislation addresses the concerns of professional groups such as the medical profession. Accordingly, I do not consider that it is reasonable to expect a representative body such as the AMA to not make its views known, particularly if the proposed legislation is likely to impact upon its members. In this instance, taking into account the contents of the document and the initial submission provided to me by the agency, there is a complete absence of any probative material upon which I can assess the agency's claim that there are real and substantial grounds for believing that the future supply of that kind of information to the agency or to the government could reasonably be expected to be prejudiced by the disclosure of the deleted matter.

15. I am not satisfied that the agency has established a *prima facie* claim for exemption under clause 8(2) of Schedule 1 to the FOI Act. In any case, I am also of the view that there may be a public interest in the disclosure of competing views about proposed legislation so that informed public debate can take place. It is certainly clear to me that the AMA wrote to Dr Lawrence for the purpose of having its views reflected in the proposed Bill. Where new legislation is proposed, or is before Parliament, I consider there to may be a public interest in the disclosure of submissions received by the Government from persons or organisations which may have an interest in the proposed legislation. However, I need not decide the issue of whether there is any public interest in the disclosure of the deleted matter, since that question does not arise in this instance.
16. For the reasons give, I find the matter deleted from the disputed document is not exempt under clause 8(2) of Schedule 1 to the FOI Act.
