

Determination

External review - section 39 *Freedom of Information Act 1991*

Applicant	[Applicant]
Agency	Registrar of the Veterinary Surgeons Board
Ombudsman reference	2011/02791
Determination	The determination of the agency is confirmed.

REASONS

Background

1. The Veterinary Surgeons Board (**the Board**) is established under the *Veterinary Practice Act 2003 (the VP Act)*.
2. By application under the *Freedom of Information Act 1991 (the FOI Act)* received by the Board on 24 February 2011 the applicant requested access to:

All documents about [Applicant] or referring to him in the possession of the VSBSA, its officers, employees or agents. Specifically including but not limited to all documents and materials about: any complaints about [Applicant]'s health, conduct and registration arising from same or including thereto.

The application requested access in the form of inspection of the documents.

3. Principal Officer of the Board, Ms Debra Lane made a determination on 30 March 2011 to grant full access to 90 documents, part access to 2 documents and to refuse access to 14 documents and 31 extracts from Board minutes. The determination also states that the applicable fee for the determination is \$920.00
4. The Registrar of the Board, Ms Sue Millbank wrote to the applicant in a separate letter dated 30 March 2011. The letter advised that the Board has a number of functions under the VP Act, some of those functions bring the Board outside the application of the FOI Act, and as such the Board is not obliged to provide access to documents that relate to those functions. Ms Millbank indicated that the letter was not a determination and therefore did not attract the rights of appeal identified in the FOI Act.

External review

5. By application dated 12 April 2011, the applicant requested my external review of the Board's determination under section 39 of the FOI Act.
6. By letter dated 9 May 2011, I notified the Board of my review. I requested all relevant documents, including any additional evidence and argument which the Board considered justified its determination, in light of the provisions of section 48 of the FOI Act.

7. In the course of my review the applicant advised by email on 22 May 2012 that he was willing to reduce the scope of his application to:

any written report submitted in relation to [Applicant] to the Veterinary Surgeons Board pursuant to section 59 of the Veterinary Practice Act 2003.

8. I have conducted my review on the basis of this revised request.

Provisional determination

9. I provided my tentative view about the agency's determination to the parties by my provisional determination dated 17 August 2012. I informed the parties that subject to my receipt and consideration of submissions from the parties, I proposed to confirm the agency's determination pursuant to section 39(11) of the FOI Act.
10. The applicant and the agency provided submissions in response to my provisional determination. I have considered these submissions in my reasons for my determination.

The relevant agency

11. As a preliminary issue, I would like to clarify the identity of 'the agency' in these circumstances. I am of the opinion that the Board is not an agency for the purposes of the FOI Act by virtue of section 6(2)(a) of that Act which provides:

For the purposes of this Act -

(a) neither a tribunal nor an officer vested with power to determine questions raised in proceedings before a tribunal is to be regarded as an agency or part of an agency.

12. 'Tribunal' is defined in section 4(1) of the FOI Act as 'any body (other than a court) invested by the law of the State with judicial or quasi-judicial powers'. I have considered the reasoning of Smith J in *Moore v The Registrar of The Medical Board of South Australia*¹ in determining that some of the powers and functions vested in the former Medical Board to determine disciplinary hearings were of a judicial or quasi-judicial nature. I am satisfied that the VP Act vests powers and functions in the Board of such a nature and I point in particular to those relating to proceedings before the Board set out in Part 2, Division 5 of the Act. I therefore consider the Board falls within the definition of 'tribunal' under the FOI Act and accordingly is not an 'agency'.
13. In my opinion, the Registrar is the agency in these circumstances. The definition of 'agency' in the FOI Act includes 'a person who holds an office established by an Act', and section 10 of the VP Act provides that there 'will be a Registrar of the Board'. This reasoning is consistent with *Moore v The Registrar of the Medical Board of South Australia*.²

Are the documents accessible under the FOI Act?

14. Subsection 6(2)(b) of the FOI Act provides that:
- b) neither a registry or other office of a tribunal nor the members of staff of such a registry or other office are, in relation to matters relating to the determination of proceedings before the tribunal, to be regarded as an agency or part of an agency.

¹ [2001] SADC 106 (8 August 2001)

² *Ibid*

15. If the requested documents can be characterised as 'relating to the determination of proceedings before the tribunal' then in relation to those documents the Registrar is not an agency under the Act.
16. The documents requested by the applicant are 'any written report' submitted pursuant to section 59 of the VP Act to the Board in relation to him. Section 59 of the VP Act provides as follows:

Obligation to report medical unfitness of veterinary surgeon

59(1) If-

- (a) a health professional who has treated, or is treating, a patient who is a veterinary surgeon; or
- (b) a person who provides veterinary treatment through the instrumentality of a veterinary surgeon

is of the opinion that the veterinary surgeon is or may be medically unfit to provide veterinary treatment, the person must submit a written report to the Board setting out his or her reasons for that opinion and any other information required by the regulations.

17. Section 60 of the VP Act provides as follows

Medical fitness of veterinary surgeon

60 If-

- (a) on the application of-
 - (i) the Registrar; or
 - (ii) the Minister; or
- (b) after an investigation under section 59 has been conducted,
the Board is satisfied, after due inquiry, that a veterinary surgeon is medically unfit to provide veterinary treatment and that it is desirable in the public interest that an order be made under this section, the Board may, by order-
 - (c) suspend the person's registration until further order of the board or for a specified period determined by the Board; or
 - (d) impose conditions on the person's registration restricting the person's right to provide veterinary treatment; or
 - (e) impose conditions on the person's registration requiring the person to undergo counselling or treatment or to enter into any other undertaking.

18. On this point the Board submitted that documents that constitute reports for the purposes of section 59 of the VP Act form part of its function of causing an investigation for the purposes of a hearing into a practitioner's fitness to practice under section 60. The Board submits that this is a quasi-judicial function.
19. The Board submitted that the nature of its process includes an inquisitorial approach to proceedings. The Board instructs the Registrar to investigate possible breaches of the Act. In this context, the Board submits that the evidence-gathering phase is properly characterised as part of the quasi-judicial function. It is clearly distinct from the administrative function of the Registrar.
20. I am of the opinion that actions of the Board for the purposes of section 60 of the VP Act can be properly characterised as 'relating to the determination of proceedings

before the tribunal'. In relation to documents held by the Registrar that relate to those proceedings, the Registrar is not an agency under the FOI Act.

21. However I am of the opinion that documents received under section 59 of the VP Act cannot be characterised as relating to the determination of proceedings before the Board. I consider the receipt of those documents is an administrative function and as such the Registrar holds those documents as an agency under the Act.

The documents

22. There is one document (**the document**) that can be characterised as a written report under section 59 of the VP Act.

The FOI Act

23. Section 12 of the FOI Act provides that a person has a legally enforceable right to be given access to an agency's documents in accordance with the Act.
24. The FOI Act provides that upon receipt of an application for access to documents, an agency is entitled to make a determination to refuse access where the documents are 'exempt'. The term 'exempt document' is defined as 'a document which is an exempt document by virtue of Schedule 1.'³ Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusal of access.
25. In this matter the following clauses from Schedule 1 are relevant:
 - clause 4(2)(a)(ii) which provides that a document is an exempt document if it contains matter the disclosure of which could reasonably be expected to enable the existence or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be ascertained
 - clause 12 which provides that a document is an exempt document if it contains matter the disclosure of which would constitute an offence under an Act
 - clause 13(1)(b) which provides that a document is an exempt document if it contains matter obtained in confidence the disclosure of which might reasonably be expected to prejudice the future supply of such information to the agency; and would, on balance, be contrary to the public interest.
26. Under section 48 of the FOI Act, the onus is on the agency to justify its determination 'in any proceedings'. In my opinion, this includes the external review process.
27. To justify its determination, the agency must give reasons for its determination and show the findings on any material questions of fact underlying these reasons, together with a reference to the sources of information on which those findings are based. This is a requirement of an agency in the determination process under the FOI Act; and in my opinion, it is equally applicable in an external review.
28. Section 39(11) of the FOI Act provides that I may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

³ See section 4 and section 20(1)(a), FOI Act

The agency's submissions

29. The agency submits, in the alternative to the argument that the document is not held by 'an agency', that documents created under section 59 of the VP Act are exempt.
30. The agency submits that the documents are exempt pursuant to clause 4(2)(a)(ii) of Schedule 1 to the FOI Act insofar as they identify the person whom the agency is communicating, because they could reasonably be expected to enable the identification of a confidential source of information in relation to the administration of the VP Act, and the release of the document would be contrary to the public interest.
31. The agency advised that the detail and the substance of the allegations and concerns regarding the applicant's fitness to practice have been conveyed to him. [Applicant]'s health issues have been the subject of medical reports that are in the possession of both the applicant and the Board. There is no allegation or evidence that the concerns conveyed to the Board were actuated by malice or were vexatious.
32. The agency further submits that the document is exempt pursuant to clause 13(1)(b) of Schedule 1 to the FOI Act. The agency submits that the information was obtained in confidence and its release might reasonably be expected to prejudice the future supply of such information to the Board, and would be contrary to the public interest.
33. The agency is of the view that release of the information provided to the Board may actively discourage members of the profession from coming forward with disclosures if it is known that the agency is unable to protect the discloser's identity from being revealed.
34. The agency submits that it would be an offence under section 74 of the VP Act to disclose the document and as such the document is exempt pursuant to clause 12 of Schedule 1 to the FOI Act. Section 74 of the VP Act provides that a person engaged in the administration of the VP Act must not divulge personal information obtained in the course of official duties except in the circumstances listed.

The applicant's submissions

35. The applicant submitted that he should have a right to access any written report submitted to the Board under section 59 of the VP Act. He argues that a report written about him and sent to the Board is not part of the Board's quasi-judicial process and therefore any such report should not be outside the application of the FOI Act.
36. The applicant argues that the information in any written report concerns information relating to him and as such should be made available to him. In particular he considers it unfair that a document which has been used to trigger an investigation into his medical fitness should be held secret from him. The applicant disputes 'in the strongest possible manner' the assertion that the details and substance of the allegations concerning his fitness to practice have been conveyed to him. He states that 'at no time since August 2008 have I been presented with any document (or even told verbally) by the Board outlining the allegations and concerns'.
37. The applicant also disputes the statement in my provisional determination that 'there is no allegation or evidence that the concerns conveyed to the Board were actuated by malice or were vexatious'. The applicant submits:

If the report was written out of genuine concern for me the person should have no issues with being named. However, if it was written out of malice that would show their obvious lack of genuine concern. I don't particularly want to know who wrote

the report, just what their concerns were and the grounds they had for their concerns.

Consideration of the submissions and the agency's determination

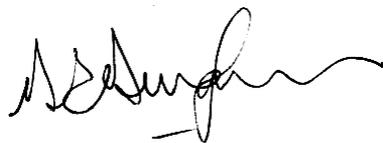
38. Clause 12 of Schedule 1 to the FOI Act provides that a document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act.
39. Section 74 of the VP Act provides, inter alia, that a person engaged in the administration of the VP Act must not divulge personal information obtained in the course of official duties except as required or by any other Act.
40. I am satisfied having read the document that it is plain that it does not contain personal information. I am therefore of the opinion that it would not be an offence under the VP Act for the Registrar to disclose the information in the document. As such I do not consider the document is exempt pursuant to clause 12 of Schedule 1 of the FOI Act.
41. I have also considered the agency's submission that the document is exempt pursuant to clause 13(1)(b) of Schedule 1 to the FOI Act. In order to claim a document is exempt under clause 13(1)(b) it must be established that:
 - (i) the document contains matter obtained in confidence, and
 - (ii) the disclosure of that matter might reasonably be expected to prejudice the future supply of such information to the agency, and
 - (iii) disclosure would, on balance, be contrary to the public interest.
42. Having read the document I am satisfied that the person who gave the information to the agency did so on an understanding that their identity would not be revealed to the applicant. I am therefore satisfied that the information in the document was obtained in confidence.
43. While there may be grounds to withhold the identity of a person who makes a notification under section 59 of the VP Act, I am not persuaded that, generally, there would be grounds to withhold the information contained in a notification. I disagree with the agency's views that the disclosure of such information would prevent future reports being made. Section 59 of the VP Act creates a mandatory obligation on practitioners. I consider it most likely that veterinary surgeons would take this obligation seriously and would continue to fulfil their statutory obligation. I also note that generally disclosure of the contents of a notification is an important aspect of affording the subject of the notification procedural fairness.
44. In light of this I do not consider that the document is exempt pursuant to clause 13(1)(b). That being said, as discussed below, I consider the applicant has been afforded procedural fairness in that he has been made aware of the allegations against him.
45. I have considered the agency's submission that the document is exempt pursuant to clause 4(2)(a)(ii). In order to claim a document is exempt pursuant to clause 4(2)(a)(ii) it must be established:
 - (i) that the information relates to a confidential source of information,
 - (ii) the information relates to the enforcement or administration of the law,
 - (iii) the disclosure of the information could reasonably be expected to enable the identity of the confidential source of information to be ascertained, and

(iv) would, on balance, be contrary to the public interest to be disclosed.

46. I am satisfied that the information relates to the enforcement or administration of the VP Act. In forming this opinion I considered section 12 of the VP Act which provides that the agency must exercise its function with the object of 'protecting animal health, safety welfare and the public interest by achieving and maintaining high professional standard both of competence and conduct in the provision of veterinary treatment in this State'.
47. I also considered section 59 of the VP Act which creates a mandatory statutory obligation on professionals providing veterinary treatment and treating medical practitioners to notify the Board if they are of the opinion that a veterinary surgeon is medically not fit to practice. To fail to notify results in the commission of an offence.
48. Having read the document in question I am of the view that in this matter disclosing the information, even without the name of the discloser, could reasonably be expected to enable the identity of that person to be ascertained.
49. I have taken into account a range of factors to form the view that disclosure of the document would, on balance, be contrary to the public interest. I have considered the applicant's submission that he has not been made aware of the allegations against him and as such it is a breach of natural justice for him not to have the information presented to him. I do not agree with that submission. A number of medical reports have been prepared in relation to the applicant and his fitness to practice as a veterinary surgeon. The applicant has received copies of those medical reports. There is no information in the document that has not been presented to the applicant. I am satisfied that there is no information in the document about which the applicant has not been made aware.
50. I consider there is a strong public interest in the maintenance of high professional standards both of competence and conduct in the provision of veterinary treatment in South Australia. Section 59 of the VP Act creates a mandatory obligation on members of the veterinary profession and medical practitioners to report to the Board if they form the opinion that a veterinary surgeon is not medically fit to practice.
51. In considering whether disclosure would, on balance, be contrary to the public interest I have also taken into account the fact that no direct consequence flows from a practitioner being reported under section 59. Consequences for a practitioner can only flow from a decision by the Board pursuant to section 60 of the VP Act. That section provides that the Board must be satisfied, after due inquiry, that a veterinary surgeon is medically unfit to provide veterinary treatment and that it is desirable in the public interest that an order be made.
52. I note that there is no obligation for the notifier to disclose their identity when making a mandatory notification under section 59. In considering the circumstances of this case I have formed the view that if the identity of a notifier were to be revealed, it may discourage other notifiers from disclosing their identity. This may hinder adequate investigation of such notifications. On this basis, there is an argument that disclosing the identity of notifiers would be contrary to the public interest. On the facts relevant to this case, I find this argument persuasive.
53. Having weighed up all the factors I am of the opinion that the document is exempt pursuant to clause 4(2)(a)(ii).

Determination

54. In light of the above, I confirm the agency's determination pursuant to section 39(11) of the FOI Act.

A handwritten signature in black ink, appearing to read 'Richard Bingham', with a long horizontal flourish extending to the right.

Richard Bingham
SA OMBUDSMAN

24 September 2012