

**OFFICE OF THE HEALTH PROFESSIONAL
REGISTRATION BOARDS**

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Serving: *Chiropractors & Osteopaths Board of Qld*
Dental Board of Queensland
Dental Technicians & Dental Prosthetists Board of Qld
Medical Board of Qld
Occupational Therapists Board of Qld
Optometrists Board of Qld

Pharmacy Board of Qld
Physiotherapists Board of Qld
Podiatrists Board of Qld
Psychologists Board of Qld
Speech Pathologists Board

In reply please refer to:
FOI107A

Ref No.:
FOI 107A JG:JP:

19 October, 1999

Mr Gary Fenlon MLA
Chair,
Legal, Constitutional and Administrative Review Committee
Parliament House
George Street
Brisbane Qld 4000

Attention Ms Kerry Newton

Dear Mr Fenlon

**Re: Addendum to the Submission *Review of the Freedom of Information Act 1992*
from the Office of the Health Professional Registration Boards**

Further to this office's discussions with Ms Kerry Newton on 13 October 1999, I now attach an Addendum to the above Submission from the Office of the Health Professional Registration Boards for your Committee's consideration.

The Addendum discusses the concerns of the Health Professional Registration Boards regarding the recently Internet published decision by the Information Commission *Re Ronald John Price and Nominal Defendant* (no. 99003). This decision was made subsequent to the closing date for Submissions to your Committee. However, the implications arising from this decision are of considerable concern to the Boards.

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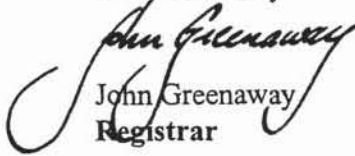
20 OCT 1999

LEGAL, CONSTITUTIONAL AND
ADMINISTRATIVE REVIEW
COMMITTEE

part of Submission 100,
originally.

If you have any queries pertaining to the attached document, please do not hesitate to contact either myself or Mr John Posner, who is the Board's appointed Freedom of Information Officer, on the above telephone/fax/email numbers.

Yours sincerely


John Greenaway
Registrar

**REVIEW OF THE
FREEDOM OF INFORMATION ACT 1992**

**ADDENDUM
TO THE SUBMISSION FROM
THE OFFICE OF THE HEALTH PROFESSIONAL
REGISTRATION BOARDS**

October 19, 1999

ISSUE

The Boards' concerns about the logistical and cost implications of the recent decision no 99003 by the Information Commissioner

1. BACKGROUND

On 11th May 1999, the Office of the Health Professional Registration Boards (OHPRB) submitted to Mr Gary Fenlon, the Chair of the Legal, Constitutional and Administrative Review Committee of the Queensland Legislative Assembly, a document containing the views of the 11 health professional registration boards of Queensland concerning Parliament's *Review of the Freedom of Information Act 1992 (Qld)*.

Subsequent to this, on 30th June 1999, the Information Commissioner of Queensland published on the Internet a new decision *Re Ronald John Price and Nominal Defendant* (no. 99003). This new decision by the Information Commissioner dealt with the interpretation of the definition of "document of an agency" or "document of the agency" under section 7 of the *Freedom of Information Act 1992*. This definition in the Act reads as follows:-

"*document of an agency*" or "*document of the agency*" means a document in the possession or under the control of an agency, or the agency concerned, whether created or received in the agency, and includes-

- a) a document to which the agency is entitled to access: and
- b) a document in the possession or under the control of an officer or the agency in the officer's official capacity."

2. INFORMATION COMMISSIONER'S INTERPRETATION

The Information Commissioner has determined that the crucial wording of the definition in this section is "*a document in the possession of or under the control of an agency*". The Information Commissioner has interpreted this to mean not only documents in the physical possession of the agency (i.e. in its own records), but also those documents which an agency is entitled to access in the records of a third party acting on its behalf.

The Information Commissioner has based this on the concept of an agency's *legal ownership* of a document, and hence a right to its possession, even if the document is not in the physical possession of the agency. This may well include documents in the possession of an agency's external Legal Advisors, even if these documents were not created by the agency, because the words "*under the control*" conveys the concept of a present legal entitlement to control the use or physical possession of a document held on behalf of an agency by its agent (i.e. its Legal Advisors).¹

¹. The Information Commissioner has drawn on the judgement of the New South Wales Court of Appeal in *Wentworth v De Montfort & Ors* (1988) 15NSWLR348.

3. IMPLICATIONS OF THIS INTERPRETATION TO THE HEALTH PROFESSIONAL REGISTRATION BOARDS

The cost and administrative implications of the Information Commissioner's interpretation to the Boards are considerable.

One of the primary roles of the Boards is the statutory responsibility to investigate complaints made against registered health practitioners and then to take disciplinary action against those registrants if there is *prima facie* evidence to support the complaints. Under the current and proposed new Health Practitioners Legislation, disciplinary action includes the possible suspension or de-registration of a registrant. The legislative processes of such disciplinary action requires the Boards to engage the services of solicitors and counsel.

In the Medical Board's case, such disciplinary action currently involves the charging of the registrant before the Medical Assessment Tribunal (chaired by a Supreme Court Judge). When the proposed *Health Practitioners (Professional Standards) Bill 1999* becomes law (expected now to be January 2000), all of the Boards will charge registrants before the Health Practitioners Tribunal (to be chaired by a District Court Judge), if a suspension or de-registration from the Register is sought.

The Information Commissioner has always made it clear that the onus is on an agency, not the FOI applicant, to identify and locate those documents affected by the scope of the FOI application. The FOI applicant does not need to specify that documents in the records of an agency's Legal Advisors are also to be included in the scope of application. Prior to this decision, a document not in the *physical* possession of an agency has been considered to be outside the scope of the FOI application.

The *Freedom of Information Act 1992* grants the right to members of the community to apply for access to documents held by government agencies. It has always been taken that this means the Act does not extend to records in the possession of non-government organizations. Although the Information Commissioner has stipulated in his decision that the only documents affected by an FOI application are those *legally* possessed by an agency, the practical implication of locating these documents will require access to records possibly outside government control and ownership.

This means a Board will now have to gain access to and sift through the files of their Legal Advisors to be able to determine whether a document held on them is the legal property of the Board. The question then arises as to whether an officer from the Board has the right to view the files of a private legal firm. The Boards engage the services of a number of major private legal firms, such as Minter Ellison, Phillips Fox, Gilshenan & Luton.

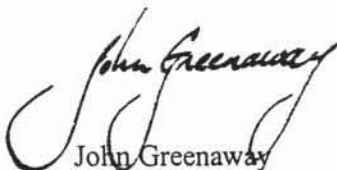
Recently the Chiropractors & Osteopaths Board received an FOI application which requires the processing of documents held on the records of its private legal advisors. Considerable discussion and negotiation have had to be undertaken between the Board's office and the private legal firm to develop a protocol to deal with this access. The private legal firm was not prepared to release or grant access of their files to a Board officer. A major concern of the private legal firm, notwithstanding issues of legal professional privilege and privacy, was that the *physical* possession of the file by the Board would then mean that all of the documents would have to be included in the scope of the FOI application. At the same time the private legal firm accepted that the Board's FOI Officer had a statutory right to have access to the relevant documents for processing.

The only practical way the Board could gain access to these documents was to delegate the responsibility on the private legal firm to determine which of the documents on the firm's own file are the legal property of the Board. However, the Board will be **charged** for all of the time and photocopying expenses incurred by the private legal firm in its location and collation of these documents.

Most of the files dealing with matters of the Boards, especially the Medical Board, contain substantial numbers of documents. Indeed, this same private legal firm is often engaged by the Medical Board and the point was made by its representative, a senior partner, that the relevant files of a recent matter of the Medical Board filled an entire storeroom. The registrant concerned had made numerous FOI applications to the Medical Board. Were the same FOIs made now, subsequent to the Information Commissioner's new decision, the extra processing costs to the Medical Board from the private legal firm to locate and collate documents would be very considerable.

The imposition of these potentially very expensive FOI processing costs on an agency as a result of the Information Commissioner's decision is of great concern to the Boards. The current provisions of the *Freedom of Information Act 1992* do not allow for recouping of FOI processing expenses (save photocopying and then only in non-personal applications). All such costs will have to be borne solely by the agency.

The Boards therefore submit this as further argument in favour of the Queensland FOI Act being amended to include fees and charges in relation to processing costs associated with non-personal applications.



John Greenaway
Registrar
October 19, 1999

October 19, 1999