

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

**File Ref: F2007070
Decision Ref: D0082008**

Participants:

Mark Preston
Complainant

- and -

Murdoch University
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access – section 26 – whether reasonable grounds to believe that a document exists or should exist – sufficiency of searches.

FREEDOM OF INFORMATION - clause 3(1) - personal information – personal information of third parties - the application of the limits on the exemption in clauses 3(3), 3(4) and 3(6) - whether disclosure would, on balance, be in the public interest.

Freedom of Information Act 1992: sections 24, 26(1), 102(3); Schedule 1, clauses 3(1) - 3(6), Schedule 2, Glossary

Freedom of Information Regulations 1993: regulations 9(1) and 9(2)

Police Force of Western Australia and Winterton (Supreme Court of Western Australia, 27 November 1997, unreported, Library No. 970646).

DECISION

The decisions of the agency to refuse access on the following grounds are confirmed:

- the information deleted from the disputed documents and claimed to be exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992* is exempt under clause 3(1).
- all reasonable steps have been taken to find the requested documents and any further documents either do not exist or cannot be found.

JOHN LIGHTOWLERS
A/INFORMATION COMMISSIONER

13 March 2008

REASONS FOR DECISION

1. This complaint arises from a decision made by Murdoch University ('the agency') to give Mr Preston ('the complainant') access to an edited copy of a document and to refuse him access to certain other documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. The complainant is an employee of the agency. In March 2006, he was associated with an Equal Opportunity Grievance ("EO Grievance") together with another employee of the agency, who is now no longer with the agency.
3. By email dated 3 January 2007, the complainant applied to the agency under the FOI Act seeking access to copies of all documents relating to the EO Grievance.
4. By letter dated 11 January 2007, the agency's FOI Coordinator confirmed receipt of the complainant's access application and advised him that, as his application was for personal information, no fee was required.
5. By letter dated 9 February 2007, the agency's FOI Coordinator gave the complainant her decision on access and her reasons for her decision. The agency's FOI Coordinator identified one document as falling within the scope of the complainant's access application and she gave him access to an edited copy of that document with information about a third party deleted. Although the agency's FOI Coordinator did not cite the exemption provision of the FOI Act she claimed was applicable, or give detailed reasons for her decision, it appears to me that her decision was to refuse access to the deleted information on the ground that it was personal information about a third party and, therefore, exempt under clause 3 of Schedule 1 to the FOI Act.
6. On 12 February 2007, the complainant sought internal review of the FOI Coordinator's decision. However, the agency did not make its decision on internal review within the 15-day prescribed period.
7. Thereafter, on 28 February 2007, the complainant applied to this office for external review by the Information Commissioner of the agency's decision, on the basis that the agency's initial decision was deemed to have been confirmed.
8. By letter dated 2 March 2007, the General Counsel at the agency confirmed the initial decision on internal review.
9. On 31 July 2007, the agency provided the complainant with a supplementary Notice of Decision relating to additional documents identified as falling within the scope of his access application. A claim for exemption for those additional documents was made under clause 3 of Schedule 1 to the FOI Act.

THE DISPUTED DOCUMENTS

10. The agency described the documents in dispute in this matter in its supplementary Notice of Decision, as follows:
 1. External Consultant Client Contact & Data Collection Sheet;
 2. Email between Murdoch University HR and External Consultant giving brief overview of the situation;
 3. Handwritten note;
 4. Handwritten notes by External Consultant detailing discussion with Third Party;
 5. Handwritten notes by External Consultant detailing discussion with Murdoch University personnel;
 6. Handwritten notes by External Consultant detailing discussion with complainant. Document provided to complainant, (not in dispute);
 7. Handwritten notes by External Consultant – summary of meetings between involved parties;
 8. Handwritten notes by External Consultant – Feedback to Third Party;
 9. Handwritten notes by External Consultant detailing summary discussion with Murdoch University personnel; and
 10. Printed final Mediation Report from External Consultant. Edited document provided to the complainant, (not in dispute).
11. The agency advised the complainant of the processes it followed to search for documents within the scope of his application. The agency also advised the complainant that, after taking additional steps to find all documents that fall within the scope of the application, the agency was of the view that no further documents exist that it could find.
12. By letter dated 28 May 2007, the complainant withdrew his request for access to the information deleted from the edited copy of Document 10 that was given to the complainant by the agency. The complainant also received a full unedited copy of Document 6 from the agency. Therefore, Document 6 is no longer in dispute.

REVIEW BY THE A/INFORMATION COMMISSIONER

13. This complaint consists of two parts. The first part relates to the complainant's claim that the agency has not identified all of the documents covered by the terms of his access application. The second part relates to the agency's decision to refuse access to Documents 1-5 and 7-9.

(1) Documents that do not exist or cannot be found

14. Section 26(1) of the FOI Act deals with the obligations of the agency in circumstances where it is unable to locate the documents sought by an access applicant or where those documents do not exist.

15. Section 26 provides as follows:

“(1) The agency may advise the applicant, by written notice, that it is not possible to give access to a document if—

(a) all reasonable steps have been taken to find the document; and

(b) the agency is satisfied that the document –

(i) is in the agency’s possession but cannot be found;

or

(ii) does not exist.

(2) For the purposes of this Act the sending of a notice under subsection (1) in relation to a document is to be regarded as a decision to refuse access to the document, and on a review or appeal under Part 4 the agency may be required to conduct further searches for the document.”

16. When dealing with such an issue, there are two questions that must be answered. The first question is whether there are reasonable grounds to believe that the requested documents exist or should exist and are, or should be, held by the agency. In circumstances where the first question is answered in the affirmative, the next question is whether the agency has taken all reasonable steps to find those documents.

17. It is well established by past decisions and practices of this office that it is not my function or that of my officers to physically search for requested documents on behalf of a complainant. Provided I am satisfied that the requested documents exist, or should exist, I consider that it is my responsibility to inquire into the adequacy of the searches conducted by an agency and to require further searches to be conducted if necessary.

18. In this case, the complainant has sought access to copies of all documents regarding the EO Grievance, including documents created during and after the initial complaint and documents relating to third parties other than the party who made the complaint. The agency, however, identified only one document as a result of its initial searches. That document is identified as Document 10.

19. The complainant submits that there are additional documents which, in his view, could reasonably be expected to exist as documents of the agency, but that the agency has not identified. For example, the complainant describes a black folder containing a number of copy documents which he says he gave to an officer of the agency at the time inquiries were being conducted in respect of the EO Grievance. He also describes certain documents that may have been created when the matter was referred by the agency to the external consultant - for example, documents such as a briefing on the background of the matter before interviews were conducted and internal notes and memos relating to the manner in which the various officers dealt with the matter at the time.

20. My Senior Investigations Officer considered, based on the submissions of the complainant, that there were reasonable grounds to believe that other documents of the kind described by the complainant either exist or may once have existed as documents of the agency. Therefore, my officer asked the agency to conduct additional searches for the requested documents, and to explain the searches it had already undertaken.

Searches and inquiries made

21. In response to those inquiries, the agency advised that the FOI Coordinator had examined the complainant's personal file and the file of a third party, page by page but found no relevant documents. The FOI Coordinator also made inquiries with the senior HR team member who produced what the agency described as "*a pile of filing*" that had not been completed since the departure from the University of the HR adviser who had handled the EO Grievance. In the pile was an original copy of the Mediation Report, dated 30 March 2006 and signed by the external consultant.
22. The FOI Coordinator met and made inquiries with a senior manager who advised that he had spoken with the manager who handled the incident at the time. That manager had given a verbal assurance that there were no notes or documents retained on the issue other than the Mediation Report. The manager at the time confirmed that the complainant had handed a folio of documents to him but he believed that those documents had been destroyed once the matter went to mediation. On the basis that further action was not taken against any party nor was the EO Grievance noted on the personal files of any party, the senior manager states that they were not surprised that there were no documents existing on this issue, apart from the Mediation Report.
23. In addition, the internal reviewer made inquiries with the relevant manager who advised him that he did recall a black plastic folder and that he passed on this folder to the HR adviser who was handling the complaint at the time and who no longer works for the agency. He also recalled that the HR adviser clearly instructed him not to keep any documentation in relation to the EO Grievance, and confirmed that he did not have any such documentation. The internal reviewer understood this to be consistent with the approach that had been outlined to him previously by the senior manager, HR, and consistent with the approach of having finally resolved the matter.
24. The internal reviewer spoke with the senior HR manager again. Having reviewed the personnel files, the internal reviewer confirmed that there was no additional documentation within the scope of the application on either of the personnel files. The senior HR manager advised that there remained some loose documentation (i.e., not filed) that the relevant HR adviser (who had since left the employ of the agency) had left behind, and that this was where the Mediation Report had been located. The internal reviewer reviewed the loose documentation and confirmed that there was no further material relevant to the FOI request.

25. The internal reviewer contacted the external consultant. She advised that the only documents she has are her personal notes from interviewing all parties, and the final report that was produced for the agency. She did recall that the complainant had a black folder containing e-mails that the complainant had collected. She did not retain a copy of the documents in this folder, and she recalls that the complainant's manager at the time did not retain a copy either. The internal reviewer also requested a further search of the agency's Central Records Database for additional files under the complainant's name and that of the other party, and this located no records of relevance.
26. The external consultant provided a copy of her interim notes with the complainant to the agency. After receipt of the interview notes, which now fall within the scope of the complainant's application, a copy of those notes that relate to the interview with the complainant has now been given to him by the agency.
27. There are some grounds to expect, as a matter of administrative practice, that there would have been created some further documentation concerning the matter. For example, given the submissions that a meeting did take place, I would consider it reasonable to expect that there would exist some documentation such as file notes or minutes recording; the fact that a meeting took place between the relevant parties – their names – the date of the meeting; what was discussed at that meeting; and the decisions taken at that meeting. In addition, as an external consultant was engaged, it is reasonable to expect there to be documentation relating to the terms of that engagement. However, despite inquiries by my office, there is no evidence before me that any documents exist within the agency other than those that have now been identified which have been obtained from the external consultant.
28. In my view, the dearth of documentation at the agency relating to the manner in which the recording and documentation of the EO Grievance was dealt with by the agency raises questions about the agency's record-keeping practices, as do the difficulties experienced by the agency in identifying and locating all relevant documents in response to the complainant's access application and in response to the complaint to my office. In my view, this complaint further highlights the fundamental importance of proper record keeping in terms of agencies' accountability for their processes, actions and decisions, particularly decisions that directly and significantly affect individuals.
29. Having considered the submissions of the complainant and having reviewed the steps taken by the agency to search for documents within the scope of the application, I consider that the additional searches undertaken by the agency have been reasonable. In my view, the additional requested documents may once have existed, but cannot now be found. In my opinion, it now appears that all documents that could reasonably be found have been found and that there are not any other documents in existence that relate to the request in the possession or control of the agency. I confirm the agency's decision to refuse access under section 26(1) of the FOI Act on the ground that additional requested documents cannot be found.

30. As I have indicated above, the fact that documents of the type requested by the complainant cannot be found raises a number of questions about the adequacy of the administrative processes and/or record-keeping practices of the agency in this instance. I will raise these with the agency.

(2) **Clause 3 – Personal Information**

31. The agency claims that Documents 1-5 and 7-9 are exempt under Clause 3(1). Clause 3 provides, insofar as it is relevant:

“(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).

Limits on exemption

- (2) ...
- (3) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to -*
- (a) *the person;*
 - (b) *the person’s position or functions as an officer; or*
 - (c) *things done by the person in the course of performing functions as an officer.*
- (4) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, prescribed details relating to -*
- (a) *the person;*
 - (b) *the contract; or*
 - (c) *things done by the person in performing services under the contract.*
- (5) ...
- (6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*

32. The phrase “personal information” is defined in the Glossary in Schedule 2 to the FOI Act to mean –

“ ...information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead –

- (a) *whose identity is apparent or can reasonably be ascertained from the information or opinion; or.*
- (b) *who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample;”*

33. I have examined Documents 1-5 and 7-9. I am satisfied that they contain personal information about a number of third parties. In my view, the disputed matter is, on its face, exempt under clause 3(1).
34. The purpose of the exemption in clause 3 is to protect the privacy of individuals. That exemption is recognition by Parliament of the fact that government agencies collect and hold private information about individual citizens and that information of that kind should not generally be accessible by other persons without good cause.

Limits on exemption

35. Clause 3(1) of Schedule 1 to the FOI Act is subject to the limits on exemption set out in clauses 3(2)-3(6). In the circumstances of this complaint, I consider that only clauses 3(3), 3(4) and 3(6) are relevant.

Clause 3(3)

36. There are number of third parties who are or were once officers of the agency. Clause 3(3) provides that information is not exempt as personal information under clause 3(1) merely because its disclosure would reveal certain prescribed details about a person who is or has been an officer of an agency. In my opinion, the use of the term 'merely' in clause 3(3), according to its ordinary dictionary meaning, means 'solely' or 'no more than' prescribed details about an officer.
37. The prescribed details for the purposes of clause 3(3) are set out in regulation 9(1) of the Regulations as follows:

"In relation to a person who is or has been an officer of an agency, details of -

- (a) the person's name;*
 - (b) any qualifications held by the person relevant to the person's position in the agency;*
 - (c) the position held by the person in the agency;*
 - (d) the functions and duties of the person, as described in any job description document for the position held by the person; or*
 - (e) anything done by the person in the course of performing or purporting to perform the person's functions or duties as an officer as described in any job description document for the position held by the person".*
38. The personal information can take on meaning and colour in addition to mere prescribed detail from the context in which it appears. Having examined the disputed documents, and having considered the submissions made by the complainant, I consider that the disclosure of the personal information about the officers or former officers would not reveal 'merely' prescribed details. The documents are, on their face, of a sensitive nature. In view of that context, I consider that the personal information about the officers or former officers of the

agency is not information which is “prescribed details” because it goes beyond the kind of information set out in regulation 9(1). In my opinion the limit on exemption in clause 3(3) does not apply in this case.

Clause 3(4)

39. One of the third parties (the external consultant) is a person who performed services for the agency under an arrangement with a former HR advisor at the agency. However, the agency advised that other than the information contained in the disputed documents, there is no written contract for services or any other documents that record the agreed arrangement between the agency and the external consultant. Clause 3(4) provides that information is not exempt as personal information under clause 3(1) merely because its disclosure would reveal certain prescribed details about a person who performs, or has performed, services for an agency under a contract for services. In my opinion, the use of the term ‘merely’ in clause 3(4), according to its ordinary dictionary meaning, means ‘solely’ or ‘no more than’ prescribed details about a person who performs, or has performed, services for an agency under a contract for services.
40. The prescribed details for the purposes of clause 3(4) are set out in regulation 9(2) of the Regulations as follows:

“In relation to a person who performs or has performed services for an agency under a contract for services, details of –

- (a) the person’s name;*
 - (b) any qualifications held by the person relevant to the person’s position or the services provided or to be provided pursuant to the contract;*
 - (c) the title of the position set out in the contract;*
 - (d) the nature of services to be provided and described in the contract;*
 - (e) the functions and duties of the position or the details of the services to be provided under the contract, as described in the contract or otherwise conveyed to the person pursuant to the contract; or*
 - (f) anything done by the person in the course of performing or purporting to perform the person’s functions or duties or services, as described in the contract or otherwise conveyed to the person pursuant to the contract”.*
41. Having examined the disputed documents, and the submissions made by the complainant, it is clear that the agency has already disclosed to the complainant, by giving access to an edited copy of Document10, the name of the external consultant who dealt with the EO Grievance, the qualifications of the external consultant and the name of the business for which the external consultant is employed. The agency has also disclosed the “things done by the external consultant” apart from details of the information obtained from a third party. I consider that the disclosure of the other personal information about the external consultant - the notes taken by the external consultant relating to third parties - would not reveal ‘merely’ prescribed details. The documents are, on their face, of a sensitive nature. In view of that context I consider that the other personal information about the external consultant is not information which is “prescribed

details” because it goes beyond the kind of information set out in regulation 9(2). In my opinion the limit on exemption in clause 3(4) does not apply in this case to that information.

Clause 3(6)

42. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Section 102(3) of the FOI Act provides:

“If, under a provision of Schedule 1, matter is not exempt matter if its disclosure would, on balance, be in the public interest, the onus is on the access applicant to establish that disclosure would, on balance, be in the public interest.”

43. Consequently, the onus is on the complainant, to persuade me that, on balance, it would be in the public interest to disclose personal information – which is prima facie exempt under clause 3(1) – about the third parties in the disputed documents. The complainant made written submissions and I have considered those submissions.
44. Determining whether or not disclosure would, on balance, be in the public interest involves identifying those public interests that favour disclosure of the particular matter and those that favour non-disclosure, weighing them against each other and making a judgment as to where the balance lies.
45. Favours non-disclosure in this case, I recognise that there is a strong public interest in maintaining personal privacy. That public interest is recognised by the inclusion in the FOI Act of the exemption in clause 3(1). Former Commissioners have, in past decisions, recognised the very strong public interest in maintaining the personal privacy of individuals. In my view, that public interest may only be displaced by some other, considerably stronger, public interest that requires the disclosure of private information about another person.
46. As I have said, the exemption in clause 3(1) is designed to protect the privacy of third parties. As I am satisfied that the disputed matter is personal information about third parties, the question is whether the public interest in maintaining the privacy of these individuals is outweighed by some other public interest that favours the disclosure of that personal information.
47. Favours disclosure, there is a public interest in the openness and accountability of government agencies. To that end, there is a public interest in people being able to exercise their legal rights to access documents of an agency, particularly documents that contain personal information about themselves, and being able to respond to that information. However, in this case I consider that that particular public interest is satisfied by the complainant having been given a copy of the handwritten notes detailing the external consultant’s interview with the complainant (Document 6) and an edited copy of the Mediation Report (Document 10).

48. On the material presently before me, I am not persuaded that the general right of access and the regime of openness and accountability inherent in the FOI Act requires the disclosure to the complainant of personal information about other people in this instance. Having weighed the competing public interests, I do not consider that those favouring disclosure outweigh the very strong public interest in the protection of the personal privacy of third parties in this instance.
49. Accordingly, I find that the disputed matter is exempt under clause 3(1) of Schedule 1 to the FOI Act.

Section 24

50. I have also considered whether it would be possible to delete exempt information and give the complainant access to edited copies of documents.
51. Section 24 of the FOI Act states:

"If -

- (a) the access application requests access to a document containing exempt matter; and*
- (b) it is practicable for the agency to give access to a copy of the document from which the exempt matter has been deleted; and*
- (c) the agency considers (either from the terms of the application or after consultation with the applicant) that the applicant would wish to be given access to an edited copy,*

the agency has to give access to an edited copy even if the document is the subject of an exemption certificate."

52. The application of s.24, and particularly the qualification contained in s.24 (b), was discussed in *Police Force of Western Australia and Winterton* (Supreme Court of Western Australia, 27 November 1997, unreported, Library No. 970646). In that case, Scott J stated, at p.16:

"It seems to me that the reference to the word "practicable" is a reference not only to any physical impediment in relation to reproduction but also to the requirement that the editing of the document should be possible in such a way that the document does not lose either its meaning or its context. In that respect, where documents only require editing to the extent that the deletions are of a minor and inconsequential nature and the substance of the document still makes sense and can be read and comprehended in context, the documents should be disclosed. Where that is not possible, however, in my opinion, s24 should not be used to provide access to documents which have been so substantially altered as to make them either misleading or unintelligible."

53. In the present case, I do not consider it to be practicable to edit Documents 1-5 and 7-9 because, although they contain some personal information about the complainant, it is inextricably interwoven with personal information about other people. In my view, it is not possible to give the complainant access to information about him without also giving him access to information about other people. To delete the information about other people would require the deletion of almost all of the record and such deletion would not be of a minor or inconsequential nature. The balance of the material would, in my view, be misleading or unintelligible and could be described in similar terms to those used by Scott J as "*making little or no sense*".
