

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

**File Ref: F2012185
Decision Ref: D0242012**

Participants:

Giglietto Pisano
Complainant

- and -

**Health Solutions (WA) Pty Ltd trading
as Peel Health Campus**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal to deal with an access application – right of access to the documents of an ‘agency’ – meaning of ‘agency’ – meaning of ‘public body or office’ – whether respondent was a ‘public body or office’ – contractual obligation to establish, operate and maintain a policy allowing access by public patients to their personal information consistent with the spirit and intent of the FOI Act.

Freedom of Information Act 1992: sections 10 and 65(1)(c); Glossary.

Hospitals and Health Services Act 1927: sections 2(1), 3 and 26D

Privacy Act 1988 (Cth)

Court Security and Custodial Services Act 1999

Prisons Act 1981

Corporations (Western Australia) Act 1990

Interpretation Act 1984

Channel 31 Community Educational Television Ltd v Inglis [2001] WASCA 405

DECISION

The respondent's decision to refuse to deal with the access application is confirmed. I find that the respondent is not an agency as defined in the Glossary to the *Freedom of Information Act 1992* and, as a result, the complainant has no right of access to the requested document under the *Freedom of Information Act 1992*.

Sven Bluemmel
INFORMATION COMMISSIONER

11 September 2012

REASONS FOR DECISION

1. This complaint arises from a decision made by Health Solutions (WA) Pty Ltd trading as Peel Health Campus ('PHC') to refuse to deal with an access application made by Dr Giglietto Pisano ('the complainant') under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. By letter dated 30 March 2012, the complainant applied to PHC under the FOI Act for access to a copy of a letter, memorandum or email sent by a named senior clinician to staff at the medical facility known as Peel Health Campus ('the Facility') instructing them in relation to certain matters. The complainant stated that the document would have been sent in the first three weeks of March 2012.
3. Following further correspondence from the complainant to PHC, to which no response was received, the complainant wrote to this office on 15 May 2012 requesting assistance. In response, one of my officers sought information from PHC and wrote to the complainant setting out the standard procedure in respect of access applications under the FOI Act.
4. On 21 May 2012 the complainant wrote to this office requesting an external review of the decision made by PHC on his access application. He enclosed a copy of a letter from PHC to him dated 18 May 2012. The letter was signed by Martin Feckie, Principal Officer, Freedom of Information, PHC and said:

"I am writing to advise you that after review your application for this information does not fall under the Freedom of Information Act."

REVIEW BY THE INFORMATION COMMISSIONER

5. Following the receipt of this complaint and initial inquiries, on 11 July 2012 I wrote to PHC and to the complainant advising that I had decided to deal with this matter as a complaint made under section 65(1)(c) of the FOI Act against a decision of PHC to refuse to deal with an access application. I also sought and obtained further submissions and material from PHC.
6. On 6 August 2012, after considering the material then before me, I informed the complainant and PHC in writing of my preliminary view of the complaint and my reasons. It was my preliminary view that PHC was not an 'agency' as defined in the Glossary to the FOI Act. As a result, the complainant had no right of access to the requested document under the FOI Act and PHC was entitled to refuse to deal with the access application.
7. In light of my preliminary view, I invited the complainant to withdraw his complaint or provide me with further submissions relevant to the matter for my determination, which he did by letter dated 19 August 2012.

THE REQUESTED DOCUMENT

8. As described in the access application, the document to which the complainant seeks access from PHC under the FOI Act is an internal communication from a senior clinician to staff at the Facility in respect of administrative matters concerning admissions and referrals.

IS PHC AN ‘AGENCY’ FOR THE PURPOSES OF THE FOI ACT?

9. The question for my determination is whether PHC is an ‘agency’ as defined in the Glossary to the FOI Act. Pursuant to section 10 of the FOI Act a person has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with the FOI Act.

10. The term ‘agency’ is defined in the Glossary to the FOI Act to mean:

*“(a) a Minister; or
(b) a public body or office”.*

11. The Glossary further defines ‘public body or office’ to mean:

*“(a) a department of the Public Service;
(b) an organisation specified in column 2 of Schedule 2 to the Public Sector Management Act 1994;
(c) the Police Force of Western Australia;
(d) a local government or a regional local government;
(e) a body or office that is established for a public purpose under a written law;
(f) a body or office that is established by the Governor or a Minister;
(g) any other body or office that is declared by the regulations to be a public body or office being –
(i) a body or office established under a written law; or
(ii) a corporation or association over which control can be exercised by the State, a Minister, a body referred to in paragraph (a), (b), (e), (f) or (g)(i), or the holder of an office referred to in paragraph (f) or (g)(i); or
(h) a contractor or subcontractor.”*

12. The further definitions of the terms ‘contractor’ and ‘subcontractor’ in the Glossary make it clear that it is only persons who provide services within the prison system

under the *Court Security and Custodial Services Act 1999* and the *Prisons Act 1981* who are covered by paragraph (h) above.

13. To be an ‘agency’ for the purposes of the FOI Act, PHC must come within one of the categories in paragraphs (a)-(h) of the definition of ‘public body or office’ in the Glossary to the FOI Act. In my view, in the circumstances of this matter, the only categories which could apply are paragraphs (e) and (f).

Background to PHC

14. I understand that the Facility is operated by Health Solutions (WA) Pty Ltd (‘Health Solutions’), which is a private Australian proprietary company, limited by shares, registered in Western Australia since 1994. As such, Health Solutions was established under the *Corporations (Western Australia) Act 1990* (‘Corporations Act’). That is, the company was ‘set up’ or ‘constituted’ as a result of the provisions of the Corporations Act. The term ‘Peel Health Campus’ is the business name registered at the Australian Securities and Investments Commission by Health Solutions.
15. For the purposes of this decision, I have treated the complainant’s references in his submissions to “*Peel Health Campus*” (when he is not referring to the Facility) as being submissions in relation to either Health Solutions or PHC.
16. From my examination of relevant extracts from *Hansard*, I understand that Health Solutions took over management of the old Mandurah Hospital on 1 September 1997 and the Facility was commissioned in August 1998.
17. PHC operates the Facility in accordance with, among other documents, the terms of the ‘Peel Health Campus Health Services Agreement’ (‘the Agreement’), dated 18 June 1997, made between Health Solutions and a former Minister for Health on behalf of the State of Western Australia. The recitals of the Agreement state that, after a public request for expressions of interest from private companies interested in developing and operating the Facility and the short listing of companies, the State had selected Health Solutions as the preferred proponent to operate the Facility.
18. Pursuant to the Agreement, Health Solutions – as a private company – is required to provide specified services to public patients at the Facility. By providing those services Health Solutions is entitled to receive from the State a service charge. To that extent the Facility was, and continues to be, open for use by both private and public patients.
19. Under the Agreement, Health Solutions is also obliged to “*establish, operate and maintain at the Hospital a policy permitting access by Public Patients to their **Personal Information** (as defined in the Privacy Act 1988 (WA)[sic]) which is consistent with the spirit and intent of the Freedom of Information Act 1992 (WA).*” [I note that the *Privacy Act 1988* is, in fact, a Commonwealth statute].

The complainant’s submissions

20. The complainant submits that PHC is an ‘agency’ for the purposes of the FOI Act.

21. As I understand the complainant's submissions provided to me on 26 June 2012 and 19 August 2012, the complainant considers that PHC is a public body, office or agency for the purposes of the FOI Act for the following reasons:
- PHC was granted a private hospital licence ('the Licence') under a written law, namely section 26D of the *Hospitals and Health Services Act 1927* ('Hospitals Act');
 - the Licence supports both private and public patient services and, therefore, the written law underwrites or supports PHC's obligation to deliver services to public patients consistent with the duties and status of a public office, body or agency;
 - PHC utilises the Licence to provide services to private patients and, as a contractor or subcontractor under the Agreement, to deliver public patient services;
 - in the same way, a licence issued to a public hospital supports the provision of services to private patients and, therefore, although there is only one licence, the public hospital has both private and public agency status;
 - additional verifying information would be available in the Licence;
 - certain provisions within the Licence and Agreement support the conclusion that PHC is a sub-contractor, contractor or an agent for and on behalf of the State Government;
 - the relevant provisions under the Agreement are that the State Government must monitor the provision of services by PHC (item 4.2(c)(i)); PHC makes representations and warranties in the Agreement for the benefit of the State (item 25.1); PHC provides services on the State's behalf to uninsured 'public' patients; the State pays PHC on a defined fee structure and is authorised to take control of PHC;
 - the authority of the State to take control under its "*Step in rights*" referred to in the Agreement satisfies paragraph (g)(ii) of the definition of 'public body or office' in the Glossary to the FOI Act; and
 - if PHC was not acting as an agent or contractor to the State Government in its provision of public patient services there is no other capacity in which it could be providing those services.

Submissions from PHC

22. PHC submits that it is not an 'agency' for the purposes of the FOI Act. In its letter to the complainant dated 18 May 2012, PHC advised as much and stated that the "*memo you seek a copy of forms part of the internal communications within the private operations of Peel Health Campus, and therefore your application has not been granted.*"
23. PHC advises me that it has two policies relevant to the management of health information. One relates specifically to the confidentiality, privacy and release of health information about patients (both public and private) and is stated, on its face, to comply with (but not be subject to) the FOI Act. The other, entitled "*Confidentiality – Personnel Information and Records*", is for the purpose of protecting staff "*from unwanted intrusion or harassment*" and "*to comply with provisions of the Privacy Act 1988*".

24. By email to this office dated 13 July 2012, the Principal Officer of the Facility clarified that what the complainant is seeking does not relate to a particular patient or staff member but rather relates to an internal communication to campus staff. In other words, the requested document would not be covered by either of the two policies.

Consideration

25. I understand that the Director General of the Department of Health first issued a licence under section 26D of the Hospitals Act to Health Solutions on 17 August 1998 to conduct a private hospital at the premises on which the Facility is located. Thereafter, a licence has been issued annually from 1 January to Health Solutions.

26. Section 2(1) of the Hospitals Act distinguishes between a ‘public hospital’ and a ‘private hospital’, the former being any hospital that is –

“(a) *conducted or managed by –*

(i) *a board constituted under this Act; or*

(ii) *the Minister under this Act;*

or

(b) *declared to be a public hospital under section 3”*

and the latter being “*a hospital that is not a public hospital.*”

27. The Facility is not conducted or managed by either the Minister for Health or a board constituted under the Hospitals Act, nor has the Facility been declared to be a public hospital under section 3 of the Hospitals Act. Accordingly, I consider that the Facility satisfies the definition of a private hospital under the Hospitals Act.
28. The complainant submits that because PHC is obliged by the Licence issued under the Hospitals Act to deliver services to public patients, PHC is, therefore, a public office, body or agency. I understand this submission to assert that PHC was established under section 26D of the Hospitals Act.
29. The term ‘established’ is not defined in either the FOI Act or the *Interpretation Act 1984*. I accept that ‘established’ in the context of both paragraphs (e) and (f) of the definition of ‘public body or office’ in the Glossary to the FOI Act bears its ordinary meaning of “*set up or consolidate*” (*The Australian Concise Oxford Dictionary* (Fourth Edition, 2004)). The term ‘under’ is defined in the *Interpretation Act 1984* as “*in relation to a written law or a provision of a written law, includes ‘by’, ‘in accordance with’, ‘pursuant to’ and ‘by virtue of’.*”
30. As stated earlier, as an Australian proprietary company, limited by shares, registered in Western Australia, Health Solutions was established under the Corporations Act. In my view, the granting of a licence to Health Solutions pursuant to section 26D of the Hospitals Act neither ‘sets up’ nor ‘constitutes’ PHC. Such action is merely a process under the regulatory framework contained in the Hospitals Act to enable a natural person or body corporate to conduct a private hospital. In the event that such a licence

was no longer in force, PHC would not, as a result, cease to exist. Accordingly, I reject the view that PHC was established under section 26D of the Hospitals Act.

31. There is nothing in the information or material before me to show that PHC was established by the Governor or a Minister. Upon consideration of the above factors, I am of the opinion that PHC does not satisfy the definition of “*a body or office that is established by the Governor or a Minister*” in paragraph (f) of the definition of ‘public body or office’ in the Glossary to the FOI Act.
32. I have also considered whether PHC is a “*body or office that is established for a public purpose under a written law*” as provided for in paragraph (e). The Supreme Court of Western Australia in *Channel 31 Community Educational Television Ltd v Inglis* [2001] WASCA 405, provides guidance on the interpretation of that definition. In that case, Hasluck J stated at [43]:

“it is not simply a question of whether there is a written law... which enables the body to function. The crucial question is whether the establishment of the body and the public purpose for which it exists is explicitly referable to and carried into effect by or pursuant to a written law.”

33. In that case the body under consideration, namely Channel 31, was a company limited by guarantee and registered under the Corporations Act. It had been issued a licence relating to community broadcasting under the *Broadcasting Services Act 1992*. Channel 31 had, in its memorandum and articles, the objects of its establishment as being public educational purposes, not private commercial purposes; it established and operated a broad-based community educational television station with active community participation; and benefits flowed to the relevant tertiary institutions associated with Channel 31 (those institutions also being established for public purposes). Ultimately, the Supreme Court in *Inglis* found that Channel 31 was not a body “*established for a public purpose under a written law*” because its operations were not determined by the nature of the enabling legislation and, therefore, it was not an agency as defined in the Glossary to the FOI Act.
34. In the present matter, Health Solutions was established under the Corporations Act. An examination of that legislation does not reveal a public purpose for the establishment of a proprietary company. Rather, it is through the terms of the Agreement that Health Solutions is required to provide hospital services to public patients. In my view, on the basis of the principles expressed in *Inglis*, the existence of an obligation to provide hospital services to public patients, arising as it does, outside the enabling legislation (that is, the Corporations Act) does not satisfy the definition contained in paragraph (e), as the ‘public purpose’ is not contained in a written law.
35. Although it may be argued that the provision of hospital services is for a general ‘public purpose’, as Hasluck J stated at [47] in *Inglis*:

“the object of the [FOI] Act is not to provide a general right of access to incorporated bodies that have a public purpose. Providing access to the documents of such bodies does not enable the public to participate more effectively in governing the State or making the persons and bodies that are

responsible for State and local government more accountable to the public. The Act is concerned with agencies that are involved in government.”

36. In view of the above, I am not persuaded that PHC comes within paragraph (e) of the definition of ‘public body or office’ in the Glossary to the FOI Act.
37. The complainant contends that PHC comes within paragraphs (g)(ii) and (h) of the definition of ‘public body or office’ in the Glossary to the FOI Act.
38. With regard to the latter, the complainant submits, in effect, that because PHC is “*a contractor or subcontractor under contract or agreement with the WA Government*” it is a ‘public body or office’ pursuant to the definition of that term in paragraph (h).
39. As previously stated, the terms ‘contractor’ and ‘subcontractor’ in paragraph (h) of the definition of ‘public body or office’ are further defined and are limited to services connected to the prison system under the *Court Security and Custodial Services Act 1999* and the *Prisons Act 1981*. As a result, notwithstanding that Health Solutions has contracted with the State of Western Australia, it does not satisfy paragraph (h) of the definition of a ‘public body or office’ in the Glossary to the FOI Act.
40. In referring to the provisions within the Agreement relating to “*Step in rights*” as supporting his submission that paragraph (g)(ii) of the definition of ‘public body or office’ in the Glossary to the FOI Act is satisfied, the complainant has failed to establish the precondition to paragraph (g)(ii), namely that the “*body or office has been declared by the regulations to be a public body or office*”. PHC has not been declared by the regulations to be a public body or office and therefore, even assuming the “*Step in rights*” contained in the Agreement amounted to an exercise of control by the State over PHC, the definition of a ‘public body or office’ in paragraph (g) has not been satisfied.
41. Insofar as the complainant has submitted that additional verifying information would be available in the Licence to satisfy the definitions in paragraphs (e), (g)(ii) and (h) of ‘public body or office’ in the Glossary to the FOI Act, I do not agree. In my opinion, the contents of the Licence do not lend any assistance to an assessment of whether PHC was a body or office that is established for a public purpose under a written law as the Licence is not a written law as defined in the *Interpretation Act 1984*. Also, the contents of the Licence would not establish that PHC had been “*declared by the regulations to be a public body or office*” nor that it had contracted to provide services connected to the prison system.
42. Furthermore, I have been unable to find any information to support the complainant’s submission that, in the provision of hospital services to public patients, PHC is acting as an agent of the WA Government. On the contrary, clause 32 of the Agreement specifically provides that “*Nothing in this Agreement or in any of the Project Documents will be construed or interpreted as constituting the relationship of the State and Operator as that of partners, joint venturers or fiduciaries.*”
43. In respect of the complainant’s submission regarding licences issued to public hospitals (which also provide services to private patients), I note that no licence is required or

contemplated under the Hospitals Act to operate a public hospital. Accordingly, I do not consider that the complainant's submission is relevant to the facts of this matter.

44. In my view, the existence of policies at the Facility relating to the confidentiality, privacy and release of health information stated to comply with the FOI Act is not relevant to the determination of whether PHC is an 'agency' as defined in the Glossary to the FOI Act. In the context of paragraphs (e), (g) and (h) of the definition of 'public body or office', for example, the existence of those policies does not, of itself, alter the nature of how PHC was established, whether it has been "*declared by the regulations to be a public body or office*" or whether it provides services to the prison system. The requirement to operate a policy consistent with the spirit and intent of the FOI Act is not contained within a written law relating to the establishment of PHC. That requirement appears to operate parallel to, but outside, the FOI Act.
45. In any event, as PHC submits, the document to which the complainant has sought access does not fall within the contractual obligation imposed upon Health Solutions in respect of the FOI Act. The obligation arising from the Agreement specifically refers to "*access by Public Patients to their **Personal Information** (as defined in the Privacy Act 1988 (WA) [sic])*". For the purpose of his access application, the complainant is not a public patient seeking access to his personal information. On the basis of the description of the document contained in his access application, the complainant is seeking access to an operational document advising staff in respect of admissions and referrals. To the extent to which Health Solutions is bound by any obligation to comply with the "*spirit and intent*" of the FOI Act, such obligation relates only to access by public patients to their personal information and would not extend to documents of the kind to which the complainant is seeking access.
46. In light of all the above considerations, I am of the opinion that PHC does not come within the definition of 'agency' in the Glossary to the FOI Act.

CONCLUSION

47. I find that PHC is not an agency as defined in the Glossary to the FOI Act. As a result, the complainant has no right of access to the requested document under the FOI Act and PHC is entitled to refuse to deal with his access application.
