

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

**File Ref: F2008271
Decision Ref: D0412008**

Participants:

D
Complainant

- and -

**Department of Agriculture and
Food**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - medical and psychiatric reports -
s.28 - meaning of substantial adverse effect - meaning of suitably qualified person -
whether at the relevant time the principal held the opinion that disclosure would have a
substantial adverse effect

Freedom of Information Act 1992: section 28

Freedom of Information Regulations 1993

Medical Act 1894: section 3(1)

Re R and Ministry of Justice [1996] WAICmr 37

Re Hassell and Health Department of Western Australia [1994] WAICmr 21

Harris v Australian Broadcasting Corporation (1983) 78 FLR 236

Re James and Australian National University (1984) 2 AAR 327

Re Jones and Shire of Swan [1994] WAICmr 6

DECISION

The agency's decision to give access to the requested documents in accordance with s.28 of the *Freedom of Information Act 1992* is set aside. I find that the agency should give the complainant direct access to the requested documents by providing the complainant with copies of those documents.

JOHN LIGHTOWLERS
A/INFORMATION COMMISSIONER

22 September 2008

REASONS FOR DECISION

1. This complaint arises from a decision of the Department of Agriculture and Food ('the agency') to give D ('the complainant') access to documents under the *Freedom of Information Act 1992* ('the FOI Act') in the manner referred to in section 28 of the FOI Act. Section 28 provides that, in certain circumstances, access to documents should be given indirectly through a qualified medical practitioner.
2. In this case, I have exercised my discretion to identify the complainant only by the initial 'D'.

BACKGROUND

3. The complainant is an employee of the agency. On 9 June 2008, the complainant's lawyers applied on behalf of their client to the agency under the FOI Act for access to documents relating to their client's employment with the agency including, among other things, "...*the Department's human resources file in relation to our client generally*" and "*any documents in relation to any medical conditions our client may have*".
4. On 29 July 2008, the agency gave the complainant a notice of decision which identified 258 documents as coming within the scope of his application. The agency agreed to give the complainant access in full to 249 documents, access in edited form to 7 documents and access to two documents (Documents 236 and 245) in accordance with s.28 of the FOI Act.
5. On 13 August 2008, the complainant's lawyers applied to the agency for internal review of that decision insofar as it pertained to Documents 236 and 245. The agency confirmed its original decision in respect of those two documents by notice dated 18 August 2008.
6. On 25 August 2008, the complainant applied to the Information Commissioner, by way of his lawyers, for external review of that decision. In their letter, the complainant's lawyers said;

"These are the background facts:

- (a) *On 22 April 2008, [a consultant psychiatrist] examined [D] (the examination).*
- (b) *The examination was arranged by the Department. [D] is an employee of the Department.*
- (c) *The Department subsequently deemed [D] unfit to work and placed him on compulsory sick leave. He remains on compulsory sick leave.*
- (d) *The assertion that [D] is unfit to work is premised upon medical information that [the consultant psychiatrist] supplied to the Department following the examination.*
- (e) *[D] objects to not being allowed to read the documents personally.*

We ask for the opportunity to make submissions regarding this complaint in due course. However, in the interim, we advise that:

- (a) our client has received a recent report from his psychiatrist stating that he is not suffering from any form of delusional disorder and has been assessed as fit for work by his General Practitioner;*
- (b) the report from the psychiatrist has been forwarded to the Department by our client.”*

The disputed documents

7. The agency’s schedule of documents - which was provided to the complainant on 29 July 2008 – describes the disputed documents as follows:

*“236 5/5/2008 [D] – Wongan RSU 5 [pages] ... MLCOA report
...
245 10/4/2008 [D] – Wongan RSU 3 [pages] ... Workplace support
progress”.*

8. Document 236 is a report of an assessment of the complainant conducted on 22 April 2008 by an independent consultant from MLCOA, which is a group of independent medical consultants.
9. Document 245 is a report of a meeting held on 22 February 2008 between the complainant and an independent provider of counselling, trauma and Human Resource consulting services.
10. Having examined those documents, I note that Document 236 consists of 4 pages. The additional page is an invoice from MLCOA to the agency which, in my view, is outside the scope of the complainant’s application and, consequently, I am not required to deal with it. I also note that Document 236 is dated 2 May 2008 and not 5 May 2008, which is the date stamp on the invoice.

Review by the A/Information Commissioner

11. Following the receipt of this complaint, I required the agency to produce the originals of the documents in dispute in this matter, together with the agency’s FOI file created in the course of dealing with the complainant’s access application. I also sought further information from the agency concerning the reasons for its reliance on s.28 of the FOI Act.
12. On 5 September 2008, my Legal Officer wrote to the parties and advised that, in her opinion, on the information currently before me, the agency’s decision to give access to Documents 236 and 245 in the manner referred to in s.28 of the FOI Act was not justified. The parties were invited to provide me with further information and submissions and a proposal to conciliate the matter was also put forward.
13. In response to that letter, both parties made further submissions to me and it became clear that the complaint could not be conciliated. My Legal Officer then

contacted MLCOA directly to obtain its view as to whether the disclosure of Document 236 would have the effect claimed by the agency.

Section 28 of the FOI Act

14. Section 28 of the FOI Act provides as follows:

“28. Medical and psychiatric information

If –

(a) a document to which the agency has decided to give access contains information of a medical or psychiatric nature concerning the applicant; and

(b) the principal officer of the agency is of the opinion that disclosure of the information to the applicant may have a substantial adverse effect on the physical or mental health of the applicant,

it is sufficient compliance with this Act if access to the document is given to a suitably qualified person nominated in writing by the applicant and the agency may withhold access until a person who is, in the opinion of the agency, suitably qualified is nominated.”

15. In the present case, the agency’s principal officer is its Director General.
16. A “suitably qualified person” for the purposes of s.28 is defined in regulation 7 of the *Freedom of Information Regulations 1993* to mean a medical practitioner within the meaning of the *Medical Act 1894* (‘the Medical Act’). Section 3(1) of the Medical Act defines “medical practitioner” as a person or a body corporate who is registered under that Act. In essence, “a suitably qualified person” means a registered medical practitioner. I note that – under the Medical Act – psychiatrists are medical practitioners with additional qualifications.
17. In *Re R and Ministry of Justice* [1996] WAICmr 37, the former Information Commissioner said, at [13-15]:

“The grant of access in accordance with s.28 of the FOI Act does not necessarily mean that an applicant will not obtain copies of the requested documents. If an agency decides to provide an applicant with indirect access to documents by making them available to a registered medical practitioner, the medical practitioner concerned may decide the form of access, including, but not limited to, reading the contents, or part of the contents to an applicant; summarising and explaining the contents; allowing inspection; providing copies or providing copies in an edited form.

In reviewing a decision of an agency to give access in accordance with s.28 of the FOI Act, I consider that my role is to decide whether, in the

circumstances of the particular case, the use of s.28 was justified. The agency bears the onus under s.102(1) of satisfying me in that regard. I do not consider it my role to decide the manner in which the registered medical practitioner deals with the provision of access once the use of s.28 has been justified.

In my view, I must be satisfied about three matters. Firstly, I must be satisfied that the requested documents contain information of a medical or psychiatric nature concerning the access applicant. Secondly, I must be satisfied that the principal officer of the agency, at the relevant time, held the view that direct disclosure of the documents may have a substantial adverse effect on the physical or mental health of the access applicant. Thirdly, I must be satisfied that the view was held on reasonable grounds.”

I agree with those comments and regard them as a useful guide when considering the application of s.28.

The agency’s submissions

18. In its notices of decision, the agency advised the complainant that it was relying on section 28 on the basis that *“it has been decided by the principal officer of the department that the information contained within these documents falls under section 28”* and *“[section 28] allows for the documents to be released ... through a suitably qualified person – such as a general practitioner or psychiatrist – who will be able to explain the contents of the documents to you appropriately.”*
19. On 1 September 2008, in response to my notice seeking further information as to why the agency’s principal officer had formed the opinion that the direct disclosure of Documents 236 and 245 would have a substantial adverse effect on the complainant’s physical or mental health, the agency said:

“Access to documents 236 and 245 in the manner referred to in s.28 of the FOI Act has been withheld because:

- (a) Both reports are private and confidential reports of a medical or psychiatric nature to the Department of Agriculture and Food.*
- (b) [D] was advised through his lawyers in a letter dated 18 August 2008 from the Department of Agriculture and Food, that the exemption allows for the documents to be released to him through a suitably qualified person - such as a general practitioner or psychiatrist – who will be able to explain the content of the documents to him appropriately. He was requested to advise in writing the contact details of a nominated suitably qualified person to whom the documents could be released, but this information has not yet been provided.”*

The complainant's submissions

20. From the complainant's letter dated 25 August 2008 seeking external review, I understand that the complainant objects *"to not being allowed to read the documents personally"* and submits that *"he is not suffering from any form of delusional disorder and has been assessed as fit for work by his General Practitioner"*.
21. On 9 September 2008, the complainant's lawyers responded to my Legal Officer's letter of 5 September 2008 and made the following submissions:
 - (1) Section 28 of the FOI Act was intended to operate for the benefit of applicants and not for the benefit of agencies but in this case, it appears that the agency considers that s.28 operates for its benefit. *"The references to the reports being "private and confidential" and having been "to" the agency suggest that the agency is reluctant to provide disclosure in the ordinary way because:*
 - a) *of a privacy concern; and*
 - b) *the reports were not "to" the applicant but "to" the agency."*
 - (2) The complainant has received a report from his own psychiatrist, dated 15 July 2008, which states that he is not suffering from any delusional disorder and has tendered a copy of that report as evidence in this case.
 - (3) The complainant sent a copy of that report to the agency, although the officer to whom it was directed advised that he had chosen not to read it. Nonetheless, that report was available to the agency at the time that it confirmed its original decision.

Consideration

22. I have carefully considered the information provided to me by the agency and by the complainant's lawyers. I note the complainant's submission in (1) and accept that the wording of s.28 indicates that it operates for the benefit of the applicant. However, I understand the agency's comments to be a statement of fact rather than an indication that the agency is putting its own concerns before the welfare of the complainant.
23. From my examination of the disputed documents, I am satisfied that they contain information of a medical and psychiatric nature concerning the complainant.
24. However, there is nothing on the agency's FOI file or in the information provided to me by the agency to establish that, at the time the agency decided to give access to the disputed documents, the agency's principal officer was of the opinion that the disclosure of Documents 236 and 245 would have a 'substantial adverse effect' on the physical or mental health of the complainant. In response to my direct request for information on that point, the agency simply stated that

the reports were directed to it on a private and confidential basis and that they were of a medical or psychiatric nature.

25. I have carefully considered the disputed documents. In my opinion, the information in Documents 236 and 245 does not appear to support the conclusion that their disclosure would have a substantial adverse effect on the complainant's physical or mental health – I note, for example, the response to point 3 on page 3 of Document 236 and paragraph 6 on page 2 of Document 245.
26. I also note that the agency consulted with the author of Document 236 who recommended - by email of 28 July 2008 - that the document be released to a medical practitioner nominated by the complainant. However, the penultimate paragraph of that email does not appear to me to indicate that the disclosure of Document 236 would have a 'substantial adverse effect' on the complainant. As I understand it, that paragraph indicates only the possibility that there could be some adverse effect. My Legal Officer's consultation with MLCOA supports my conclusion in that regard.
27. In *Re Hassell and Health Department of Western Australia* [1994] WAICmr 21, the former Information Commissioner, at [24], noted that the Federal Court in *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236 had considered the meaning of the words "*substantial adverse effect*" in s.40(b) of the *Freedom of Information Act 1982* (Cth), which provision is similar in its terms to clause 11 (effective operation of agencies) of Schedule 1 to the FOI Act.
28. In *Harris's* case Beaumont J. said, at p. 249:

"...In my view, the insertion of a requirement that the adverse effect be "substantial" is an indication of the degree of gravity that must exist before this exemption can be made out."
29. In *Re Hassell*, the former Information Commissioner accepted that this requirement applies to the words 'substantial adverse effect' wherever they appear in the exemptions in the FOI Act (see also *Re James and Australian National University* (1984) 2 AAR 327 at 341 and *Re Jones and Shire of Swan* [1994] WAICmr 6 at [35]). Although the words 'substantial adverse effect' in those cases related to exemption clauses concerning financial and property affairs, I agree with the former Information Commissioner that the meaning given to those words in *Harris* applies wherever they appear in the exemptions to the FOI Act including, in my view, where they appear in s.28.
30. As noted in paragraph 17 above, I consider that, in dealing with decisions concerning section 28, I must be satisfied that the principal officer of the agency, at the relevant time, held the view that direct disclosure of the documents may have a substantial adverse effect on the physical or mental health of the access applicant. In the event that I am satisfied that the principal officer held that view, I must also be satisfied that the view was held on reasonable grounds.

31. In the present case, on the information before me, I am not satisfied that, at the time the decision on access was made, the agency's principal officer held the opinion that any adverse effect on the complainant caused by the disclosure of the two disputed documents would be 'substantial'.
32. Moreover, there is nothing in the information currently before me which indicates that the disclosure of the disputed documents may have a substantial adverse effect on the physical or mental health of the complainant.
33. In this case, the agency has not provided me with sufficient evidence that would tend to show that disclosure of the disputed documents to the complainant may have a substantial adverse effect on the physical or mental health of the complainant, as required by s.28. Neither the documents themselves, nor the consultations with MLCOA, nor the agency's submissions are sufficient, in my opinion, to establish that it is more likely than not that disclosure may have a substantial adverse effect on the complainant's physical or mental health.
34. At best, the information before me shows that the principal officer was advised that there could be some adverse effect but there is nothing to indicate that it was a "substantial" adverse effect or that, at the relevant time, the agency's principal officer held the opinion that the disclosure of the disputed documents to the complainant may have a substantial adverse effect on his physical or mental health.

Conclusion

33. I find that the agency's decision to give the complainant access to the disputed documents in accordance with s.28 of the FOI Act is not justified.
