

CLEMENTS AND HEALTH

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

**File Ref: S0893 & 94004
Decision Ref: D00194**

Participants:

David D'Arcy Clements
Applicant

- and -

**Health Department of Western
Australia**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - Refusal of access - reports and letter - Schedule 1 clause 14(1)(c) - matter of a kind mentioned in s.23(1) of the *Parliamentary Commissioner Act 1971*.

FREEDOM OF INFORMATION - agencies' discretion whether to claim exemption - consultation with exempt agency.

Freedom of Information Act 1992 (WA) ss.3, 8, 13, 15(8), 20, 23, 24, 30, 64, 68(1), 70(4), 72(1)(b), 74(1), 75(1), 76(3), Schedule 1 clauses 8(2), 14.

Parliamentary Commissioner Act 1971 (WA) s.23.

DECISION

1. The decision of the agency under review is confirmed in respect of **Documents 1 and 2.**
2. The decision of the agency in respect of **Document 3** is varied and an edited copy in accordance with the discussion in paragraph 29, is to be provided to the applicant if he so wishes.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

16th March 1994

REASONS FOR DECISION

BACKGROUND

1. This is an application to the Information Commissioner under the Western Australia *Freedom of Information Act 1992* ('the FOI Act'), for external review of a decision of the Health Department of Western Australia ('the agency'), to refuse Mr Clements ('the applicant') access to certain documents held by the agency relating to an investigation by the Parliamentary Commissioner for Administrative Investigations ('the Ombudsman') of a complaint made by the applicant against the agency.
2. On 2 November 1993 the applicant applied to a particular unit of the agency for access to notes, reports documentation and correspondence held by the agency about himself. On 20 December 1993 the agency advised the applicant that a partial transfer of his application had been effected to another agency being a hospital to which the applicant had previously been admitted. In the interim the applicant was granted access to certain documents, copies of which had been supplied to him, but others had been withheld on the basis that they were exempt under certain secrecy provisions in clause 14 schedule 1 of the FOI Act.
3. The applicant applied for internal review of the decision to deny access to the remaining documents. This review confirmed the original decision to deny access and the applicant was notified on 10 January 1994. On 12 January 1994 the applicant applied to my office for external review of the agency's decision of 10 January 1994.

THE REVIEW PROCESS

4. Upon receipt of the request for external review, the agency was notified pursuant to my responsibilities under section 68(1) of the FOI Act. In the same letter I required the agency to produce the original copies of the documents in dispute together with the agency's FOI file on this matter and a schedule listing the documents sequentially by number and providing the following details with respect to each document:
 - * the date of the document;
 - * the author of the document and the person or persons to whom it was directed;
 - * a brief but sufficient description of its contents to show a *prima facie* claim for exemption;
 - * where applicable, a brief statements as to the grounds of public interest to support the claim for exemption; and

- * where the claim for exemption related to only parts of the document, a clear indication of the part or parts involved (e.g. paragraph 6 or line 3 in paragraph 5 etc.)
5. The procedure of requiring the production of the original documents in dispute, the agency FOI file and a schedule in the form described, is a standard practice in my office for dealing with complaints. The FOI Act provides the Information Commissioner with a general power to do all things necessary or convenient to be done in connection with the Commissioner's functions (s.64) and specific powers under sections 72(1)(b) and 75(1). These powers are exercised so that the review function can be conducted as expeditiously as circumstances allow and in accordance with the statutory time frame for decision-making of 30 days.
 6. During the review of all complaints received to date, it has been necessary for my office to remind agencies of their responsibilities under the FOI Act, particularly in relation to the statement of reasons required under section 30. This complaint was no exception and consequently it was not practicable for me to make a formal decision within 30 days as required by s 76(3).
 7. Except in limited circumstances, the FOI Act does not allow "class claims" or "blanket exemptions" to be claimed for all documents on a file. It is necessary for decision-makers to examine the contents of *each* discrete document on a file and to decide whether it is exempt and if so, why. If the process of dealing with an application commences from an understanding of these requirements, the preparation of a schedule early on rather than in response to a request from my office, would assist decision-makers with the administration of the FOI Act and facilitate the process of external review within the time frame allowed.
 8. The documents in dispute in this instance were delivered to my office on 18 January 1994 together with the schedule in the form described. The schedule listed fifteen documents which were all said to be exempt under clause 14, Schedule 1 of the FOI Act. However, a preliminary examination showed that some of these documents did not appear to attract the particular exemption claimed and the agency was invited to reconsider its claims based on clause 14. The agency declined to do so.
 9. On 10 February 1994, I formally advised the agency in writing, that its claim for exemption based on clause 14 required them to show a basis for such claim and directed the agency, pursuant to s. 70(4), to provide further reasons, including findings on material questions of fact underlying those reasons, referring to the material on which those findings were based. I strongly suggested that the agency consult with the Ombudsman in this process.
 10. On 15 February 1994, the agency responded to this request in the following terms:

"This Department's decision maker found that documents which contained information already obtained by the Parliamentary Commissioner in the course of his investigations should be treated as documents which

contained exempt matter pursuant to clause 14(1)(c) of schedule 1 of the Freedom of Information Act 1992.

This finding was based on the wording of the Parliamentary Commissioner Act 1971, section 23(1), ("Secrecy") which provides that:

"Information obtained by the Commissioner or his officers in the course of, or for the purpose of an investigation under this Act, shall not be disclosed except

(a)...

(b)..."

Specifically, the extremely wide scope of that provision when the term "information" is read with "in the course of...an investigation", appears to include all documentation which is obtained by the Ombudsman in the course of an investigation which contains any "information". The documents which were the subject of the internal review were found to be documentation obtained by the Parliamentary Commissioner in the course of an investigation which contained information, therefore falling within the scope of section 23(1) of the Parliamentary Commissioner Act 1971.

In addition, the decision-maker found that the broad definition of "personal information" under the Freedom of Information Act, and the way in which the term "information" has been interpreted in other legislative contexts, does not allow a review of the decision based on the substance of the matters contained in the documentation. That is, the decision maker found that it was not open to an applicant to require that a decision maker should deem certain kinds of information obtained in the course of (the Ombudsman's) investigation, not to be "information" for the purposes of application for access.

A decision maker is not competent, nor has any objective basis, to judge what kind of information, if any, would not be "of a kind mentioned...section 23(1)..." . Therefore the wording of section 23(1) should be, and was, given its plain meaning, which supports the claim of an exemption of all documents.

Given this view, and with due respect, there would seem to be nothing to be gained by consulting the Parliamentary Commissioner for Administrative Investigations."

11. This argument conveniently ignores the requirements under section 30 of the FOI Act which specifically describe the manner in which reasons for a refusal of access, should be framed. In my view it is not competent for any decision maker to ignore his or her responsibilities under FOI to explain why a certain decision has been made, by resorting to an argument based on a literal interpretation of legislation when the legislation requires findings of fact to be made. Furthermore, consultation with the Ombudsman may have assisted the agency's decision-making process as subsequent events proved.

12. On 18 February 1994 I provided the Ombudsman with a copy of the agency's schedule and invited him to make submissions on this matter. The applicant was also informed of the steps taken in relation to his complaint and he was invited to respond to the agency's additional reasons for decision in their correspondence of 15 February 1994. The applicant responded to this invitation with a further submission discussed at paras 24 and 25.
13. The agency was reminded of its obligations under s.30 and the onus of proof under s.102. In my view the "further reasons" provided by the agency did not allude to any material findings of fact found by the decision-maker to apply to each document on the schedule, nor did there appear to be justification for the exemption claimed with respect to all documents. The agency did not respond to this invitation.
14. On 24 February 1994 the Deputy Ombudsman, in the absence of the Ombudsman, provided written comments on the documents in dispute. The Deputy Ombudsman did not express a view as to whether all the documents were exempt under clause 14(c), other than to say that the Ombudsman did not necessarily hold the same view as the agency that all documents were exempt under that clause. He did, however, comment that in the Ombudsman's view a number of the documents were not sensitive and he had no objection to access being given to those. The Deputy Ombudsman discussed in some detail, three documents considered sensitive and advised me that the Ombudsman supported the claim for exemption for part of one document but queried the claim in relation to the balance of that document and to the other two documents. The Deputy Ombudsman recognised that the Ombudsman may not be privy to all of the sensitivities of the matter and that arguments against release were ultimately matters for the agency.
15. In view of the response from the Office of the Ombudsman, I expressed a preliminary view to the agency, that a number of the documents were not exempt and queried the claim in relation to others. The agency was invited to re-consider its claims in light of these comments. Subsequently the agency advised my office that it had abandoned its claim in respect of 12 documents but maintained it in relation to the remaining 3 documents. This decision therefore applies only to those 3 documents remaining in dispute at the conclusion of this conciliation process.

THE DISPUTED DOCUMENTS

16. In describing the documents in dispute it is necessary that I avoid disclosure of any exempt matter. This requirement includes matter which may touch upon the personal privacy of the applicant. As a result, two of the documents must be described only by reference to their date since additional information as to author or addressee may breach the requirements of s.74(1) of the FOI Act. The disputed documents are as follows:

Document 1 - Report dated 22 December 1992

Document 2 - Report dated 23 December 1992

Document 3 - Letter dated 27 April 1993 from the Ombudsman to the Commissioner of Health.

THE EFFECT OF THE LEGISLATION

17. The objects and intent of the FOI Act are set out in s.3 in the following terms:

- "3. (1) *The objects of this Act are to -*
- (a) *enable the public to participate more effectively in governing the State; and*
 - (b) *make the persons and bodies that are responsible for State and local government more accountable to the public.*
- (2) *The objects of this Act are to be achieved by -*
- (a) *creating a general right of access to State and local government documents;*
 - (b) *providing means to ensure that personal information held by State and local governments is accurate, complete, up to date and not misleading; and*
 - (c) *requiring that certain documents concerning State and local government operations be made available to the public.*
- (3) *Nothing in this Act is intended to prevent or discourage the publication of information, or the giving of access to documents (including documents containing exempt matter), or the amendment of personal information, otherwise than under this Act if that can properly be done or is permitted or required by law to be done."*

18. Section 10 of the FOI Act creates a right for any person to access documents of an agency (other than an exempt agency). The Act does, however, provide exemptions to protect certain sensitive information where it is in the public interest to do so. Some of the exemptions in Schedule 1 require the application of a "public interest" test. In its usual form the public interest test is a separate element that must be considered before access can be denied. In some

exemptions there is no public interest test since the public interest in access to the type of documents described by the exemption, is outweighed by the greater public interest in maintaining their exempt status.

19. Upon receiving an access application, an agency must deal with the application in accordance with the procedures in Part 2 Division 2. Section 23 provides that an agency "**may**" refuse access if, *inter alia*, the document is an exempt document. The word "**may**" in that section means that the agency has a discretion to refuse access to documents for which the agency, if it so chooses, may claim an exemption. The agency is not obliged to claim an exemption and s.3(3) recognises that in some instances, access may rightfully be provided to a document that is technically exempt. In my view, an agency should exercise its discretion in accordance with the objects of the Act, and only claim an exemption when there are good reasons to do so and when the public interest requires non-disclosure, rather than merely because an exemption is available to be claimed.
20. In the application of Mr Clements, it appeared that an exemption was claimed for all the relevant documents merely because the Act allowed this and not by virtue of a careful consideration of the applicant's rights under the Act nor from an appreciation of the agency's duties in giving effect to these rights. A number of the documents were administrative letters from the Ombudsman to other parties and it could not be said that these documents contained *information obtained by the Ombudsman in the course of, or for the purpose of his investigation*. Others were described as a letter of complaint from solicitors acting for the applicant and a response from the Ombudsman to these solicitors. In both cases it was more than likely that the applicant had previous access to these documents and I queried the applicability of the exemption for this reason.
21. The agency was not obliged under the FOI Act to consult with the Ombudsman, although it was obliged to notify his office under s.15(8). It is apparent that such consultation would have been of assistance to the agency, and in this instance, the applicant, to do so. The views of the Ombudsman would not necessarily have prevailed, but they would have provided the agency with additional grounds to justify the claim for exemption.

THE CLAIMS OF EXEMPTION

22. Each of the three documents described is claimed to be exempt under clause 14 (1)(c)(**Information protected by certain secrecy provisions**) and clause 8(2) (**Confidential Communications**) of Schedule 1 of the FOI Act. Clause 14 (1)(c) provides that matter is exempt if it is "*matter of a kind mentioned in...section 23(1) of the Parliamentary Commissioner Act 1971.*" Section 23(1) of the *Parliamentary Commissioner Act 1971* provides:

"(1) *Information obtained by the Commissioner or his officers in the course of, or for the purpose of, an investigation under this Act, shall not be disclosed except-*

(a) for the purposes of the investigation and of any report or recommendations to be made thereon under this Act; or

(b) for the purposes of any proceedings for any perjury or any offence under the Royal Commissions act 1968, or under this act alleged to have been committed in any proceedings upon such an investigation."

23. There is no public interest test attached to this exemption. Hence the claim for exemption is established on being satisfied that the documents contain information of the kind described. The purpose of this exemption and others contained in the same clause, is to protect certain secrecy provisions in other Acts, bearing in mind that the Western Australia legislation in s.8 effectively over-rides such provisions. Clause 14 itself is subject to a "sunset clause" expiring on 1 November 1994 thus indicating that restrictions on the disclosure of information in this State should be found in the one Act, if at all.
24. In his submission to me the applicant sought to argue that because the words "personal information" are specifically defined in the FOI Act, the omission of these words from clause 14 somehow indicates that the type of "information" described in s. 23 of the *Parliamentary Commissioner Act 1971* does not include "personal information". With respect to the applicant, I do not accept this argument. The definitions in the FOI Act are for the purposes of that Act only and cannot be imported into any other Act. The term "information" is not defined in the *Parliamentary Commissioner Act 1971* and hence the word must be given its ordinary and natural meaning. There is no distinction, for the purposes of that Act, between personal and non-personal information.
25. The applicant also identified a number of public interest factors in favour of disclosure. However, as previously mentioned, clause 14 is not limited by a public interest test and the exemption is established if the relevant documents contain matter of the type described in that clause.
26. It is apparent from the documents themselves, that Documents 1 and 2 as described in paragraph 16, were prepared and provided to the Ombudsman in response to the Ombudsman's letter of 12 November 1992 to the Commissioner of Health. In that letter the Ombudsman informed the Commissioner of Health that he had received a complaint on behalf of the applicant and that it was his intention to investigate the matter. The Ombudsman requested the Commissioner of Health provide him with a report on certain issues and it is clear from the terms of the Ombudsman's letter that such report was required for the purposes of his intended investigation into the applicant's complaint.

27. It is apparent from the contents of the reports that they were prepared in response to this request from the Ombudsman. Furthermore, the letter of 7 January 1993 from the Acting Commissioner of Health to the Ombudsman clearly indicates that the reports were provided in response to the request of the Ombudsman and the authors provided them in confidence on that basis.
28. I am satisfied that **Documents 1 and 2** contain matter of a kind mentioned in s.23(1) of the *Parliamentary Commissioner Act 1971*, being information obtained by the Ombudsman in the course of, or for the purpose of, his investigation into a complaint of the applicant. These documents are therefore exempt in their entirety under clause 14(1)(c) of Schedule 1 of the FOI Act. Having decided that they are exempt for that reason, it is not necessary to consider the claim for exemption based on clause 8(2).
29. I am also satisfied that paragraphs 2, 3, 4 and 5 of **Document 3** are exempt for the same reason. The balance of this letter, consisting of the letterhead, references, date, address, salutations and the first and last sentences is not information of the type described in clause 14(1)(c), nor, in my view, is it exempt under clause 8(2) and therefore the balance as described, is not exempt at all. Whilst this information may be of little use or concern to the applicant, it is practicable for the agency to provide an edited copy of Document 3 and if the applicant wishes to be provided with an edited version of this document, then the agency must provide him with access in this form.