A AND HEATHCOTE

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: S0594 & 94001** **Decision Ref: D00894**

Participants:

A
Applicant

- and -

Heathcote Hospital
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - case notes, memos and reports relating to admission to Hospital of applicant in 1989 and 1992 whether disclosure contrary to the public interest - confidential communications - whether reasonable to expect prejudice for future supply of information of that kind - whether disclosure is in the public interest - factors relevant to the public interest - law enforcement, public safety and property security - whether real or substantial grounds for believing disclosure would endanger life or physical safety of any person.

FREEDOM OF INFORMATION - section 28 - validity of initial decision - whether made by "principal officer".

FREEDOM OF INFORMATION - definition of "agency" - whether Heathcote Hospital is an "agency" - whether Health Department of WA is an "agency".

Freedom of Information Act 1992 (WA) ss.28; 30; 45; 66(1)(f); 74(1)(a); 76(3); Schedule 1; clause 3; clause 5(e); clause 8(2).
Mental Health Act 1962 (WA) s19.
Hospitals Act 1927 (WA) ss.7(1); 7(2); 15.
Financial and Administration and Audit Act 1985 (WA) s.54(3).

Re Kobelke and Minister for Planning and Others (Information Commissioner WA, 27 April 1994, unreported).
Re Veale and Town of Bassendean (Information Commissioner WA, 25 March 1994, unreported).
Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 108 ALR 163.
Department of Health and Anor v Jephcott (1985) 62 ALR 421.

Applicant A and Heathcote Hospital

DECISION

The decision of the agency of 6 January 1994 is varied. The edited parts of the documents to which access is provided, consist of matter that is exempt under either clause 3 or clause 8(2).

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

9th June 1994

REASONS FOR DECISION

BACKGROUND

1. This is an application to the Information Commissioner for external review of a decision of Heathcote Hospital ('the agency') made under the *Freedom of Information Act 1992* ('the FOI Act'). In that decision the agency decided to provide the applicant with indirect access to edited copies of documents consisting of case notes, reports and other documentation relating to the applicant's stays in the agency in 1989 and 1992 and required the applicant to nominate a suitably qualified person for the purpose of access.

2. On 2 November 1993 the applicant made a formal request to the agency under the FOI Act seeking access to these documents. On 16 December 1993 the manager of the agency ('the Manager') decided that access would be provided to all documents some of which were edited by the agency, but the Manager decided that the information should be given indirectly to the applicant by a suitably qualified person pursuant to s.28 of the FOI Act. The Manager claimed exemptions for the edited parts of the documents under clauses 3 and 5(e) of Schedule 1 to the FOI Act.

3. On 21 December 1993 the applicant sought internal review by the Commissioner of Health of this decision. The applicant also questioned the status of Heathcote Hospital as an "agency" under the FOI Act and whether the "principal officer" of the agency had in fact made the decision as required by s.28 of the FOI Act. By 7 January 1994 the applicant had not received a decision on the application for internal review and the applicant lodged a formal complaint with my office on 10 January 1994.

REVIEW BY THE INFORMATION COMMISSIONER

4. Initial inquiries by my office established that the applicant had lodged two requests under the FOI Act, one with the agency and the other with the Health Department of Western Australia ('the Health Department') as a separate agency. The Health Department had partially transferred its application to the agency and had released other documents to the applicant. The Health Department had also denied access to some documents. During the process of dealing with the access application the agency sought and obtained from the applicant an extension of time for decision-making due to the intervening Christmas and New Year holiday periods.

5. Although the applicant had agreed to an extension of time to 7 January 1994, the agency requested a further extension to 12 January 1994 and suggested that the applicant appeal to my office if this additional time was considered unreasonable. The applicant considered this was unreasonable and consequently complained to my office on 10 January 1994 and provided me with copies of all correspondence received from both the agency and the Health Department.

6. By the time my office commenced a review of this matter, the applicant had received a decision on his application for internal review. That decision was made by the Commissioner of Health on 6 January 1994 and confirmed the decision of the manager. The applicant subsequently confirmed the request for external review of this decision by my office.

Preliminary Issue - Whether decision under s.28 made by "principal officer"?

7. Although the decision of 6 January 1994 had been made by the Commissioner of Health it appeared to me that the applicant had a valid point concerning the requirements under s.28 and whether these had been followed. My office sought to clarify this matter with the agency.

8. The Health Department is a department of the Public Service and is therefore an "agency" as defined in the Glossary in the FOI Act. Section 19 of the *Mental Health Act 1962* ('the Mental Health Act') provides for the establishment of hospitals to be conducted by the Health Department. Heathcote Hospital was established by the Governor under s.19 of the Mental Health Act and is a "public body" as defined in the Glossary in the FOI Act. Heathcote Hospital is also therefore an "agency" as defined in the Glossary in the FOI Act.

9. Section 15 of the *Hospitals Act 1927* ('the Hospitals Act') empowers the Governor to appoint Hospital Boards in relation to any public hospital. It appears that the Governor has not appointed such a board in respect of Heathcote Hospital. Section 7(1) of the Hospitals Act provides that where the Governor has not appointed persons to constitute a hospital board, or where the board has been abolished, the management and control of the hospital in question is vested in the relevant Minister.

10. As no board has been appointed for Heathcote Hospital the Minister for Health is deemed to be the "Board" of that hospital with all the powers, duties and functions that a board would have, as provided by s.7(2) of that Act. In effect the "Board" of Heathcote Hospital is an incorporated body that has no members. Where an agency consists of an incorporated body with no members, the Glossary in the FOI Act provides that the "principal officer" of that agency is the person who manages the affairs of that body.

11. On 30 June 1986, pursuant to powers under s.54(3) of the *Financial Administration and Audit Act 1985* ('the FAA Act'), the Commissioner of Health was appointed the accountable authority for hospitals controlled by the Minister for Health under s.7(2) of the Hospitals Act. The Commissioner for Health, by virtue of his appointment as accountable authority under the FAA Act, is the person directly responsible for the management of the affairs of Heathcote Hospital. Therefore, he is the "principal officer" of Heathcote Hospital, as defined in the Glossary in the FOI Act.

12. I am satisfied that the decision of the Commissioner of Health of 6 January 1994 was made in his capacity as the principal officer of Heathcote Hospital. It is therefore a decision which is properly made in accordance with the requirements of s.28 of the FOI Act and is a decision reviewable by me in accordance with my authority under s.66(1)(f) of that Act. Although it appears that the decision in the first instance did not comply with the requirements of s.28, that anomaly has now been corrected by the decision on internal review which is now the subject of review by my office.

13. In my view, the notice of decision provided to the applicant by the principal officer of the agency did not conform to the requirements of s.30 of the FOI Act. I therefore sought additional explanation from the agency to justify the conclusion reached under s.28 that disclosure of the documents to the applicant may have *"...a substantial adverse effect on the physical or mental heath of the applicant..."*. One of my staff also met with an agency psychiatrist to clarify the reasons for invoking s.28. During this process, whilst it appeared that the concerns for the applicant's mental health were genuine, it was evident that the agency had not examined the applicant since 1992, thus raising the question whether the use of s.28 was appropriate in all the circumstances. The possibility of an independent psychiatric examination of the applicant was put to both parties as a means of resolving the issue of the applicant's access to these documents. Both parties agreed that this was an appropriate course of action.

14. Although I am required by s.76(3) to make a decision on a complaint within 30 days except where it is impracticable to do so, I consider that all avenues of conciliation should be explored before resorting to a formal decision. In this instance, an independent psychiatric examination was a procedure that could provide evidence to support or otherwise contradict the use of s.28 and I considered it appropriate to adjourn the investigation to allow this examination to take place. On 24 February 1994, the agency agreed to reconsider its use of s.28 following such an examination, but confirmed its claims for exemption for certain parts of the documents.

15. On 11 March 1994 I advised the applicant that I would suspend my investigation of this complaint pending the examination which was scheduled for 5 May 1994. The applicant agreed to this course of action. Whilst awaiting the results of this examination, I reviewed the agency's claim for exemption in relation to the edited parts of the documents. Relevant parties were consulted and I provided the applicant with an opportunity to make any submissions to me on the exemptions

under clauses 3 and 5(e). The applicant subsequently provided a written submission on 18 March 1994.

16. On 26 April 1994, the agency informed both the applicant and my office that it had located additional documents that it considered were within the ambit of the applicant's access application. It had decided to add these to the original files and to grant edited access only in accordance with the original decision. Exemptions were claimed under clauses 3, 5 and 8 in relation to these additional documents. The applicant withdrew his claim for access in relation to three of these documents.

17. On 17 May 1994 I received a copy of the independent psychiatric report. On 31 May 1994 the agency advised me that it was prepared to release edited copies of the relevant documents directly to the applicant. However, it maintained its claim for exemption in relation to the edited parts of these documents. As the issue of indirect release to the applicant under s.28 of the FOI Act has been resolved, this decision relates only to the claims for exemption maintained by the agency in relation to the edited material.

THE CLAIMS FOR EXEMPTION

18. In the course of dealing with a complaint I am required under s.74(1)(a) to avoid the disclosure of exempt matter. In this instance the documents contain personal information relating to the applicant as well as other parties. I consider the applicant is entitled to privacy in respect of having been admitted to a hospital for the treatment of mental illness and therefore it is necessary for me to avoid identifying the applicant as well as other parties in my reasons for decision in order to give effect to the principles in this legislation. It is also necessary for me to refer to the disputed documents and to discuss the exemptions in general terms only so as to avoid the disclosure of exempt matter.

19. In the original notice of decision to the applicant the manager claimed exemption for the edited parts of the documents under clause 3 (Personal Information) and clause 5(e) (Law enforcement, public safety and property security). The edited parts of the additional documents located on 26 April 1994 are claimed to be exempt under the same clauses as well as under clause 8(2) (Confidential communications).

20. I have had the opportunity of examining the documents in question and reading the parts that the agency has deleted. Members of my staff have also consulted with a number of people, including agency staff, in order to determine whether the claims for exemption under clauses 3, 5(e) and 8(2) are justified. On the basis of the information before me I am satisfied that edited access only should be provided to the applicant and that the matter withheld from the applicant is exempt matter under one or more of the clauses claimed. However, I am unable to fully explain my reasons for reaching this conclusion without breaching my duty under s.74(1)(a). Nevertheless, I will endeavour in this decision to provide

as much information as possible so that the applicant is aware of the basis for this conclusion.

(a) Clause 3 - Personal Information

21. Clause 3 of Schedule 1 provides:

> ***"3. Personal information***
>
> ***Exemption***
>
> *(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*
>
> ***Limits on exemption***
>
> *(2)...*
> *(3)...*
> *(4)...*
> *(5)...*
>
> *(6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."*

22. In the Glossary, "**personal information**" means "*...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."*

23. As I have stated in previous decisions (see *Re Kobelke and Minister for Planning and Others (27 April 1994, unreported); Re Veale and Town of Bassendean (25 March, unreported))*, the purpose of the exemption in clause 3 is to protect the privacy of individuals. It is the identity of an individual which must be apparent, or which can reasonably be ascertained from an actual disclosure of the document, that is relevant for the purpose of this exemption. Although, in some instances, the mere mention of a person's name may reveal "personal information" about that individual (such as the identity of an informer), more is normally required in order to establish this exemption. Parts (a) and (b) of the definition suggest that disclosure of the document, ordinarily, must reveal

something more about an individual, other than his or her name, to attract the exemption.

24. It was confirmed in writing to my office that the applicant was not seeking access to personal information about third parties. However, the applicant was seeking to know the nature of the information provided to the agency in order to consider remedies under s.45 of the FOI Act where this information was considered to be inaccurate, incomplete, misleading or out of date.

25. The right in Part 3 of the FOI Act to amend personal information held by government agencies does not include an automatic right to change a record that reveals an opinion genuinely held by someone else. This right only arises when an applicant is able to prove, to the satisfaction of the agency concerned, that the information is inaccurate, incomplete, out of date or misleading. Having had the opportunity to read the documents in question and to consider the nature of the information to be deleted and its sources, I find that it is unlikely that the applicant would be able to convince the agency that these records required correcting in anyway.

26. I am also satisfied that the edited parts of the documents contain personal information about third parties. In my view, the public interest in protecting the privacy of the third parties in this case is greater than the public interest in ensuring that this applicant is able to exercise the right of access under the FOI Act. In my view there is ample information in the documents to which access has been granted that reveals the reasons for the applicant's admission to Heathcote Hospital without access being given to those parts which contain personal information about third parties. For this reason, it is my view that some of this matter is exempt under clause 3 and its disclosure would not, on balance, be in the public interest.

(b) Clause 5(e) - Law enforcement, public safety and property security

27. The exemption under clause 5(e) provides that matter is exempt *"...if its disclosure could reasonably be expected to...endanger the life or physical safety of any person"*. The words *"could reasonably be expected to"* appear in other exemptions and in like provisions in the FOI Acts of the Commonwealth and the other States. The leading authority on the meaning of this phrase is the decision of the Full Federal Court in *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163. That case held that, on an objective view of the evidence, there must be real and substantial grounds for expecting certain consequences to follow from disclosure of the documents.

28. In the matter before me there is material in which there is speculation about the possible consequences of disclosure. That material is insufficient, in my view, to establish the exemption under clause 5(e). I note that the report of the independent psychiatrist tends to support the claims of the applicant that there was not a risk of adverse consequences to the life or physical safety of any person. However, the purpose of that report was to satisfy, or not, the

requirements under s.28 of the FOI Act. That section deals with the effects of release of documents on the mental and physical health of the applicant. It is not concerned with the effects of disclosure on the health or safety of others. Objectively, I am unable to find that the exemption under clause 5(e) has been established.

(c) Clause 8 - Confidential communications

29. Clause 8(2) of Schedule 1 to the FOI Act provides:

> *"(2) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal information of a confidential nature obtained in confidence; and*
>
> *(b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency."*

30. I have discussed the meaning of this clause in my earlier decisions in *Re Read* and *Re Veale.* As previously stated, although there is some overlap between the requirements of clause 8(1) and (2), information is inherently confidential if it is not in the public domain. That is, the information must be known by a small number or limited class of persons. Where the person supplying the information specifically requests that the information should not be disclosed, and the person receiving it agrees, then an obligation of confidence arises. In *Department of Health and Anor v Jephcott* (1985) 62 ALR 421, the Full Federal Court held that a source of information is confidential if provided under an express or implied pledge of confidentiality. However, in order to qualify for exemption under clause 8(2), it is not sufficient to establish only that the information was of a confidential nature and obtained in confidence. Part (b) must also be satisfied to claim the exemption and the application of the public interest test must be considered.

31. Applying this test to the edited parts of the documents in the matter before me, I am satisfied that some of the information consists of confidential communications. Considering the nature of this information and its sources I am also satisfied that disclosure would prejudice the future supply of confidential information of this type to the agency. The applicant said that there was a public interest in protecting the rights of individuals from the power of the bureaucracy especially in the case of psychiatry. It was the applicant's view that there was a public interest in the establishment of an independent body consisting of a consultant psychiatrist, a member of the legal profession and a member of the public, to test the validity of decisions to incarcerate people under the provisions of the Mental Health Act.

32. I can appreciate the views of the applicant in this matter. However, the applicant's proposal that such an independent body be established is not a matter for me and, in my opinion, the public interest identified by the applicant, if indeed there is such a public interest, is outweighed by the public interest in maintaining the flow of confidential information to this agency. In my view, that type of information is essential for a proper consideration of the management and treatment of people under the mental health system. I am therefore satisfied that disclosure of this type of information would prejudice its future supply to the agency because it is more likely than not that similar sources of information would not be available to assist in the management of future patients under the mental health system.

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