

OSET AND HEALTH

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

**File Ref: 95036
Decision Ref: D01495**

Participants:

Batoul Oset
Complainant

- and -

**Health Department of Western
Australia**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - section 26 - documents in the possession of the agency but which cannot be found - sufficiency of searches - role of the Information Commissioner.

Freedom of Information Act 1992 (WA) s. 26.

Re Doohan and Western Australia Police Force (Information Commissioner, WA, 5 August 1994, unreported).

Re Oset and Ministry of the Premier and Cabinet (Information Commissioner, WA, 2 September 1994, unreported).

Re Lithgo and City of Perth (Information Commissioner, WA, 3 January 1995, unreported).

Re Tickner and Police Force of Western Australia (Information Commissioner, WA, 7 March 1995, unreported).

Re Nazaroff and Others and Department of Conservation and Land Management (Information Commissioner, WA, 24 March 1995, unreported).

Re Goodger and Armadale Kelmscott Memorial Hospital (Information Commissioner, WA, 9 May 1995, unreported).

Re Anti-Fluoridation Association of Victoria and Secretary to Department of Health (1985) 8 ALD 163.

DECISION

The decision of the Health Department of Western Australia to refuse access to the requested documents, on the ground that they cannot be located, is confirmed.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

1 June 1995

REASONS FOR DECISION

BACKGROUND

1. This complaint to the Information Commissioner concerns the adequacy of searches conducted by the Health Department of Western Australia ('the agency') to locate documents requested by Ms B Oset ('the complainant') under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 19 September 1994, the complainant lodged an access application with the agency under the FOI Act seeking access by way of inspection to the file dealing with complaints she had previously made about the Perth Dental Hospital. It is the practice of the complainant to send copies of her correspondence to government agencies to various other parties. On this occasion, a copy of her access application was sent to the Premier of Western Australia, Hon Richard Court MLA.
3. On 1 November 1994, the agency decided that supervised access to the requested documents would be allowed. Following a verbal request by the complainant that documents of the Perth Dental Hospital and the agency be viewed together at one location, arrangements were made for this to occur. On 17 November 1994, the complainant was provided with access by inspection to all documents located by the Central Office of the agency and Dental Health Services. The complainant was also provided with copies of documents selected from those inspected.
4. Although the complainant had applied for internal review of the first decision on 19 December 1994, and that application was accepted by the agency although it was out of time, the complainant did not identify the particular documents which she claimed were missing from the files which she had inspected. By letter dated 17 February 1995, the complainant identified and described those documents as:
 - "1) *My complaints of 21st August and 1st September 1992 to Director for Dental Health Services, Mr David Neesham, and Mr Neesham's replies...*
 - 2) *My complaints dated 18th and 26nd September 1992 to former Minister for Health Mr Keith Wilson relating to above complaints, and Mr Wilson's replies (except Mr Wilson's reply of 18th September to my verbal complaint and reply dated 25th August 1992).*
 - 3) *Letter from my Member of Parliament, Dr Liz Constable of August 1992 to Manager of Perth Dental Hospital, Mr Brian Atkinson, relating to above complaints, and Mr Atkinson's reply.*
 - 4) *Documentation related to investigation of above complaints.*

- 5) *Documentation related to investigation to my complaints of 1993 against Perth Dental Hospital and reasons for their denials."*
5. On 24 February 1995, the agency advised the complainant that the original documents of some of those to which she had sought access could not be located but that she had been given access to copies of those documents. The agency described in some detail its record management practices and the searches it had undertaken in an effort to locate the original copies of the requested documents. Some additional documents were located during those searches and copies were provided to the complainant. However, the original documents as described by the complainant could not be located.
6. On 8 March 1995, the complainant lodged a complaint with the Information Commissioner about the missing documents.

ACTION BY THE INFORMATION COMMISSIONER

7. Pursuant to s.26(1) of the FOI Act, an agency may advise an applicant, by written notice, that it is not possible to give access to a document if all reasonable steps have been taken to find the document, and the agency is satisfied that the document either is in the agency's possession but cannot be found, or does not exist. Section 26(2) of the FOI Act provides that the sending of such a notice is to be regarded as a decision to refuse access to the document.
8. On that basis I accepted the complaint as a complaint against a decision of the agency to refuse access to the requested documents. However, the question for my determination is whether the decision of the agency to refuse access, on the basis that the documents exist but cannot be found, was justified. The answer involves a consideration of whether the agency's efforts to locate the documents were reasonable in all the circumstances.

Documents that cannot be found or do not exist

9. On a number of occasions when dealing with complaints about access to documents under the FOI Act, I have considered allegations about missing documents: see *Re Doohan and Western Australia Police Force* (5 August 1994, unreported); *Re Oset and Ministry of the Premier and Cabinet* (2 September 1994, unreported); *Re Lithgo and City of Perth* (3 January 1995, unreported); *Re Tickner and Police Force of Western Australia* (7 March 1995, unreported); *Nazaroff, Nazaroff and Nazaroff and Department of Conservation and Land Management* (24 March 1995, unreported); *Re Goodger and Armadale Kelmscott Memorial Hospital* (9 May 1995, unreported). At least one of those decisions concerned this same complainant who should, therefore, be aware of the function of the Information Commissioner when dealing with such matters.

10. However, I will repeat my view of that function since it is, of necessity, limited. The function of the Information Commissioner, when reviewing a complaint involving a denial of access on the ground that requested documents either do not exist or cannot be located, is limited, in my view, to inquiring into the adequacy of searches conducted by the agency. I do not consider it is my function to physically search for the documents on behalf of a complainant, nor to examine in detail an agency's record-keeping system. However, if I am not satisfied that those searches have been adequate, I will exercise my power, under s.26(2) of the FOI Act, to require an agency to conduct further searches in an effort to locate documents.
11. In order to satisfy me that the agency had conducted a reasonable search for the documents requested by the complainant, one of my officers visited the agency and reviewed its record-keeping practices. Discussions were also held with a number of officers of the agency with responsibility for record management and FOI matters.
12. On 28 March 1995, my officer visited the agency and spoke with Mr Grant McPherson, the agency's FOI Co-ordinator. Mr McPherson informed him that:
 - (i) he had dealt with two FOI applications from the complainant, one of which had been transferred from the office of the Minister for Health;
 - (ii) the agency does not keep files on individual patients, other than a treatment file, nor on individual complainants;
 - (iii) the matters identified by the complainant were filed on a general complaints file at the agency and on a general correspondence file relating to Perth Dental Hospital;
 - (iv) the complainant was given full access to her dental records and to all papers contained in a working file held by the Manager of Perth Dental Hospital;
 - (v) although the original copies of the requested documents were not on file in the agency, copies of those documents were on file and the complainant had been given full access to those records; and
 - (vi) searches had been made and documents relevant to the complainant's access application retrieved from three locations, namely, Central Health Records, Perth Dental Hospital and the office of the Minister for Health.
13. Mr Claude Minuta, Co-ordinator, Corporate Services, Perth Dental Hospital, advised that:
 - (i) he had co-ordinated a search of the Dental Hospital to locate relevant documents;
 - (ii) that search revealed two complaints from the complainant on Ministerial files, the complainant's dental records and a working file held by the Manager of Perth Dental Hospital;
 - (iii) the record supervisor conducted further searches but no additional documents could be found;
 - (iv) the original documents requested should be located somewhere in the agency but those documents could not be found;

- (v) he could not think of any other place in the agency to search, nor any other person to consult for help to find those documents.

14. Ms Helen Esler, Records Supervisor, Perth Dental Hospital, advised that:

- (i) she had searched the patient records and found those relating to the complainant;
- (ii) she knows that an envelope exists containing correspondence associated with the complainant's treatment but could not locate that envelope;
- (iii) normally correspondence of that nature would be attached to a patient's record but, because of the amount of correspondence from the complainant, it had been kept separate from the records file;
- (iv) efforts to locate that envelope included searching the whole row of patient files adjacent to where the complainant's patient file was located within the patient records storage area at Perth Dental Hospital, including records with a similar number in case it had been misfiled; and
- (v) cabinets, drawers and desks in other parts of the records area were also searched but to no avail.

15. Mr Martin Ley, Records Manager of the agency, advised that:

- (i) he retained the original file in relation to the complaints and kept copies of final correspondence issued from the Minister's office in relation to this matter;
- (ii) searches are conducted in the computer system using key words and the titles of files and the like;
- (iii) particular pieces of correspondence are not recorded and all searches are based on file titles and subject matter;
- (iv) the Minister's office records particular pieces of correspondence. Six items of correspondence relating to the complainant are recorded on that system; and
- (v) no other documents relating to the complainant can be located within the agency's computer searching system.

16. Ms Vas Liakos, office of the Minister for Health, advised that:

- (i) she had transferred the complainant's access application from the Minister to the agency;
- (ii) the practice of the Minister for Health is that all correspondence is referred to and filed in the agency;
- (iii) when a matter is finalised by the Minister only a copy of the Minister's final letter is kept for future reference;
- (iv) the single copy of that document is filed at the Central Records area of the agency; and
- (v) the Minister's office does not hold original documents such as those requested by the complainant.

17. As I have said before, in my decision in *Re Oset and Ministry of the Premier and Cabinet*, at paragraph 17 of that decision, the adequacy of efforts made by an

agency to locate documents the subject of an FOI access application are to be judged by having regard to what was reasonable in the circumstances: *Re Anti-Fluoridation Association of Victoria and Secretary to Department of Health* (1985) 8 ALD 163, at 170. In this instance, I am satisfied that the agency has made what I consider to be a reasonable attempt to locate the requested documents. Further, I am satisfied that nothing more could be done in order to satisfy the complainant.

18. In my view, the agency has adequately informed the complainant of its search efforts so that she should be well aware of the nature and extent of the searches it has undertaken. The complainant has also been fully informed about this by my office. In a submission to my office, dated 16 May 1995, which submission was lodged following a letter sent to the complainant containing my preliminary view of the adequacy of the agency's search efforts, the complainant said:

"I request a true explanation to missing documents, as I believe a thorough search was not conducted, or the documents had become missing on purpose."

19. The fact that a document cannot be found in an agency's filing system does not necessarily mean that it does not exist or that it has been deliberately lost or misplaced. Where there is evidence that it was received, and no evidence to suggest that it has passed out of the agency's possession, there is a strong possibility that it is still in the possession of the agency but that it is misplaced. In this instance, my view is that the most plausible explanation as to the whereabouts of the missing documents is that they are in the missing envelope referred to by Ms Esler.
20. Until such time as the requested documents may be located within the agency or a related agency, I consider the searches conducted thus far to be reasonable in all the circumstances. Further, there is no evidence before me to support the complainant's claim that those documents have been deliberately withheld from her. In fact, the agency, along with a number of other agencies, has provided the complainant with full access to documents requested by her under the FOI Act at no cost to her but at considerable cost to the agency, and has, in my opinion, dealt with her subsequent complaints with considerable forbearance.
