

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

**File Ref: F2004040
Decision Ref: D0152004**

Participants:

David Lyall
Complainant

- and -

**Insurance Commission of Western
Australia**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – access to edited copy - document listing individuals who had provided services to agency - clause 3(1) - whether information is personal information - whether individuals are persons who have performed services under a contract for services - whether disputed information is prescribed details - clause 4 - whether disputed information is commercial or business information - clause 5(1)(e) - whether disclosure of disputed information would endanger life or physical safety

Freedom of Information Act 1992: sections 10, 68(2); Schedule 1, Clause 3(1), 3(3), 3(4), 3(6), 4(3), 5(1); Schedule 2, Glossary

Freedom of Information Regulations 1993: regulation 9

Insurance Commission of Western Australia Act 1986: sections 4 and 12(4)

Medical Act 1894

Psychologists Registration Act 1976

Interpretation Act 1984: section 5

Freedom of Information Act 1982 (Cth): section 43(1)

Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft (1986) 10 FCR 180; (1986) 64 ALR 97; (1986) 12 ALD 468

DECISION

The decision of the agency to give access to an edited copy of the document is set aside. I find that the disputed information in the document is not exempt under clause 3(1) and nor, in addition, is it exempt under clauses 4(3) or 5(1)(e).

D A WOOKEY
A/INFORMATION COMMISSIONER

26 August 2004

REASONS FOR DECISION

1. This complaint arises from a decision made by the Insurance Commission of Western Australia ('the agency') to refuse Mr David Lyall ('the complainant') access to a document requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. The agency is a State-owned enterprise of the Western Australian Government and a body corporate established under section 4 of the *Insurance Commission of Western Australia Act 1986* ('the ICWA Act'). The agency operates as a commercial insurer and is funded by both premiums and investment generated on reserves. Its clients include a range of government departments, authorities and instrumentalities. The RiskCover Division manages the self-insurance arrangements of the State Government, among other things. The agency makes use of professional bodies and individual service providers to assist with insurance and claims-related matters.
3. On 30 January 2004, the complainant applied to the agency, under the FOI Act, for the following:

"Lists for the financial years 1998-1999 to 2002-2003 detailing: -

 1. *Doctors/Medical Specialists used by RiskCover or their agents to provide medico-legal reports.*
 2. *Their area of speciality.*
 3. *The number of times they have been used and the type of claim they have been used for (e.g. Workers Compensation).*
 4. *The Government Department/Entity RiskCover is acting on behalf of.*
 5. *The case officer responsible for the referral."*
4. On 27 February 2004, the agency notified the complainant that it had created a document containing the requested information but had edited that document to delete the names of the medical specialists ('the specialists') in accordance with clause 3(1) of Schedule 1 to the FOI Act. The agency claimed that the limits on the exemption in clauses 3(3) and 3(4) did not apply in this case because the specialists were not "officers" of an agency, nor were they persons who performed services for an agency under a contract for services.
5. On 9 March 2004, the agency confirmed that decision. Thereafter, on 11 March 2004, the complainant applied to the Information Commissioner for external review of the agency's decision.

THE DISPUTED INFORMATION

6. The information in dispute is contained in a computer-generated document of 123 pages which lists the names of the specialists; their payee numbers; the government agency to which their service related; the type of claim (ie worker's compensation or liability insurance); and the number of times that each individual provided a service to that agency for the financial years 1998/1999 - 2002/2003 ('the Document'). The Document records that specialists were used over this period on a total of 19,527 occasions.
7. The agency has given the complainant access to a copy of the Document revealing the relevant government agency, the type of claim and the number of times a payment was made but from which the names of the specialists and the payee numbers have been deleted. In the copy of the document released to the complainant, the names of the specialists have been replaced with "practitioner identification numbers" which have been listed in the column from which the "payee numbers" have been deleted. I do not consider the "payee numbers" to be within the scope of the access application and therefore do not consider that information to be in dispute. Accordingly, the disputed information in this matter is the names of the specialists.

REVIEW BY THE A/INFORMATION COMMISSIONER

8. Following the receipt of this complaint, the agency produced the Document to me, together with its FOI file maintained in respect of this matter. I also required the agency to provide further information in support of its claim.
9. At that stage, given the large number of individuals who are third parties as defined in the FOI Act – some 2,500 specialists – I suggested that the agency refrain from notifying those persons – as it is required to do by section 68(2) of the FOI Act – until such time as I had determined the preliminary issue, which is whether or not the specialists are "officers" of the agency or persons who performed services for an agency under a contract for services.
10. On 30 April 2004, I informed the parties, in writing, of my preliminary view of this complaint. My preliminary view was that the disputed information was not exempt under clause 3(1) because its disclosure would reveal information that was prescribed details under clause 3(4) and such prescribed details are not exempt under clause 3(1). It was also my preliminary view that the work involved in dealing with the complainant's access application would have diverted a substantial and unreasonable portion of the agency's resources away from its other operations and that the agency would have been justified in refusing to deal with it, pursuant to section 20 of the FOI Act.
11. In light of my preliminary view, I invited the agency to reconsider its claim for exemption and, in addition, I invited the complainant to reduce substantially the scope of his access application. The agency did not accept my preliminary view and made further submissions to me. However, following further correspondence, the complainant limited his access application to cover only

the ‘top’ 100 specialists whose names appeared on the Document over the five year period, that is, those persons whose services had been used the most number of times by the agency.

12. Subsequently, the agency identified those 100 individuals and notified them of this complaint in writing, in accordance with its obligation under section 68(2)(a) of the FOI Act. They were also advised of their rights as third parties in this matter and invited to make submissions and/or be joined as parties to this complaint. Forty of the third parties contacted my office or the agency in response to the agency’s letter. I received two written submissions – one of those being from two individuals. None of the 100 specialists contacted sought to be joined as a party to the complaint.

Clause 3 – personal information

13. The agency claims that the names of the specialists listed in the Document are exempt under clause 3(1) of Schedule 1 to the FOI Act. Clause 3, in so far as it is relevant, 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

...

- (4) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, prescribed details relating to -*

- (a) *the person;*
(b) *the contract; or*
(c) *things done by the person in performing services under the contract.*

...

- (6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*

14. Clause 1 of the Glossary defines “personal information” to mean:

“... 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 an 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”.*
15. In my opinion, the purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom personal information may be contained in documents held by State and local government agencies. The definition of “personal information” in the Glossary makes it clear that any information or opinion about a person from which that person can be identified is, on the face of it, exempt matter under clause 3(1).

The agency’s submissions

16. In its response to my notice requiring further information, the agency advised me that the specialists provide services to the agency pursuant to the latter’s right of subrogation under the relevant insurance policy. Those services include:
- the provision of expert evidence of a medical nature to the agency or its lawyers;
 - the provision of expert evidence of a medical nature to the claimants or their lawyers;
 - the treatment of a claimant;
 - the provision of an expert opinion on the basis of medical and other reports;
 - engaging in any activity appropriate to their qualifications, experience and expertise.
17. The agency says that the specialists may be ‘selected’ (which I understand to mean ‘engaged’) by a claimant or a third party, such as the agency’s or claimant’s lawyer, as well as by the agency. I understand that the Document only relates to referrals to specialists that the agency has arranged. The agency advises me that, if it refers work to a specialist, the agency pays the latter on receipt of an invoice or, if the claimant or third party engages the specialist, the agency reimburses the claimant or third party for the payment of that person’s fees.
18. The agency notes that it has no formal selection process for specialists, although it holds a list of those used in the past from which the Document was produced. I understand that, on occasion, specialists offer their services directly to the agency and that the agency is under no obligation to use or reuse a particular specialist.
19. The agency advises me that, when a specialist is selected by the agency to provide a service, the agency writes to that specialist asking, for example, for a medical report on a claimant and setting out relevant particulars. The agency does not use a standard or form letter requesting medical services and it

provided me with examples of the kinds of letters sent to specialists. I understand that such letters do not set out details of payment since specialists simply submit invoices for their fees based on the standard Australian Medical Association rate.

20. The agency says that there is no formal written contract in cases where it selects a specialist for one of the purposes referred to above. I understand that the agency has no policies or guidelines that apply to the services provided to the agency by the specialists. The agency notes that those services are governed by the *Medical Act 1894* and other relevant professional conduct rules, ethics and standards.
21. The agency submits that the names of the specialists are “personal information” as defined in the Glossary to the FOI Act and that the only applicable limit on exemption is that in clause 3(6).
22. In its notice of decision dated 27 February 2004, the agency advised the complainant that the specialists listed in the Document are independent experts giving an independent opinion. The agency said that those persons do not come within the definition of “officer” of an agency in clause 1 of the Glossary. The agency also said that the relationship between the specialists and the agency was not that of parties to a contract for services since, as I understand the agency’s argument, those individuals are independent experts.
23. In response to my preliminary view, the agency said that - since, in most cases, the individual specialists work for private companies - any ‘consideration’ paid by the agency for their work is paid to corporate third parties and not to the specialist in his or her own right. The agency submits that this means that any contract is between the agency and the legal entity for which a specialist works and that, consequently, the ‘person’ referred to in clause 3(4) of Schedule 1 to the FOI Act is that legal entity and not the specialist. In this regard, the agency notes that its records do not differentiate between those specialists who provide their services directly to the agency and those who provide their services by way of an intermediary company.
24. The agency has identified a public interest in members of the public having access to information held by government agencies and a public interest in the specialists listed in the Document retaining their privacy. However, in weighing those interests one against the other, the agency submits that a person’s right to privacy outweighs the public’s right to access in this case and the agency maintains its claim that the disputed information is exempt under clause 3(1).

The complainant’s submission

25. The complainant, in his application for internal review, dated 2 March 2004, submits that the specialists are “officers of an agency” for the purposes of the FOI Act because they have accepted “*public monies for service*”.

26. In his responses to my preliminary view, dated 4 May 2004 and 26 May 2004, the complainant raised a number of issues not all of which are relevant to the matters for my determination in this matter. In particular, the complainant submits that the specialists are “officers of an agency” because the definition of an “officer” in clause 1 of the Glossary in Schedule 2 to the FOI Act includes “*any person employed in, by, or for the purposes of, the agency*”. The complainant submits that as the word “employed” is not defined in the FOI Act it should be given its ordinary meaning, which would include “to use the services of”.
27. The complainant also submits that the agency appears to be deliberately going out of its way to avoid compliance with the FOI Act and to avoid giving effect to the objects of the Act.

The third parties’ submissions

28. Forty of the specialists, who are the third parties in this matter, contacted my office or the agency to discuss the issues arising in this complaint, insofar as those issues concerned them. Of that number, 14 consented to the release of the disputed information relevant to them and 12 objected to its release. The remainder sought further information but did not comment on whether or not they consented or objected to the release of the personal information about them. I received written submissions from three of the third parties. The remainder of the responses received were recorded in the form of emails from the third parties or file notes of telephone conversations made by my Legal Officer.
29. Five of the third parties, including the three who provided me with written submissions, raised concerns about personal safety issues. In particular, two third parties were concerned that the complainant is using the FOI Act to create a dossier on the private practice of individual doctors working in Independent Medical Examiner practice and those practitioners may become the subject of attack by disgruntled examinees or individuals with psychiatric problems if the Document is released. I was advised that there have been cases where examinees have developed paranoid ideation, threatening violent behaviour towards independent examiners which has led to shootings in Queensland and South Australia and threatened shootings in Western Australia. I was given an example of a letter sent by a disgruntled patient to multiple medical practitioners as evidence of the risks that may arise. I note that the only “threats” in that letter are of legal action; it does not contain any threat to the physical safety of anyone.
30. Those two third parties advised me that they would never have entered into a contract with any government agency that allows the release of such information to the public and would have refused to undertake the requested services if they had known that such information could be disclosed. Another third party expressed similar views and said that he had heard of people being stalked in circumstance such as these. In effect, those third parties submit that the disclosure of the disputed information raises safety concerns for the specialists, their families and staff.

31. Four third parties submitted that it would be possible to satisfy any questions regarding the referral practices of the agency in these areas by giving codified information. That is, a specialist's name could be replaced by a number and, thus, the identity of that individual would not need to be released. One of those third parties considered that if this compromise was not accepted it was likely that the information was required for mischievous purposes.
32. Three third parties took the view that the disclosure of the disputed information was a breach of personal privacy. Two third parties referred me to an instance in this State whereby union representatives had brandished the names of doctors on picket signs for perceived political gain in breach of the privacy of those individuals.
33. Three third parties were concerned that there was no "balanced" data about the work undertaken by specialists on behalf of applicants and their medical and legal representatives. One said that the release of this kind of information makes the specialists concerned look as if they are biased and can be used to discredit a specialist's expertise in a court of law, if it appears that that individual always appears for a defendant's insurance company. He said that releasing information in this way could give a totally wrong impression.
34. Two third parties considered that the disputed information was commercial information and it was wrong to disclose this kind of information on the basis that there could be detrimental flow-on business effects, although those effects were not explained to me.
35. One of the third parties queried whether psychologists, amongst others, should be listed in the Document since they are not medical practitioners who are registered under the *Medical Act 1894*, but are registered under the *Psychologists Registration Act 1976*.
36. I have taken all of those responses into account.

Is the disputed information "personal information"?

37. Having examined the disputed information – that is, the names of the specialists – I consider that its disclosure would clearly reveal information about individuals whose identity is apparent on the face of that document. Therefore, in my view, the disputed information is "personal information" as defined, which is *prima facie* exempt under clause 3(1).

Are the specialists "officers" of an agency or persons who perform services under a contract for services?

38. Clause 3(3) provides that information is not exempt as personal information under clause 3(1) merely because its disclosure would reveal certain prescribed details about a person who is or has been an officer of an agency. Clause 3(4) is in similar terms in relation to a person who performs, or has performed, services for an agency under a contract for services. The

prescribed details are set out in regulation 9 of the *Freedom of Information Regulations 1993* ('the Regulations') and include a person's name.

39. If the specialists listed in the Document do not come within one of those two categories then disclosure of their names would in my view reveal "personal information" as defined in the Glossary in Schedule 2 to the FOI Act, which is *prima facie* exempt matter under clause 3(1) of Schedule 1. Alternatively, if the specialists are officers of an agency or persons who perform services for an agency under a contract for services, their names and the other information about them in the Document would be "prescribed details" as referred to in clauses 3(3) and 3(4) and as set out in the Regulations, with the consequence that that information would not be subject to the exemption in clause 3(1).

Consideration

40. I have considered the query raised by one of the third parties, a psychologist, that those specialists listed in the Document who are not medical practitioners registered under the *Medical Act 1894* are outside the scope of the complainant's access application. I understand that clinical psychologists' reports prepared for legal proceedings are commonly referred to as medico-legal reports and some universities include in their clinical psychology doctorate courses a unit on writing medico-legal reports. Considering the wording and context of the access application - which refers both to "doctors" and to "medical specialists" used to provide "medico-legal reports" - it seems to me that it is reasonably interpreted as a request for information relating to reports by a range of health professionals requested and prepared for assisting the agency in the assessment of compensation claims. It seems clear to me to have been intended to cover the providers of medical, psychiatric and psychological reports and perhaps also those in related fields such as physiotherapy and chiropractic.
41. With regard to the complainant's submission that the agency appears to be deliberately avoiding compliance with the FOI Act and its objects, there is nothing before me to show that this is the case. The agency is entitled to put forward arguments and submissions in support of its position.
42. I have considered the information provided to me by the agency concerning the process by which specialists undertake work for the agency. I also note section 12(4) of the ICWA Act which provides that the agency "*may engage under contract for services such professional and technical or other assistance as it considers necessary to enable the Commission and the Corporation to carry out their respective functions.*"
43. I understand that the agency does not dispute that it is an "agency" for the purposes of the FOI Act. I accept that the specialists are independent experts. I also accept that there is no formal written contract between the agency and the specialists. However, I do not accept the agency's contention that no contract for services exists between the agency and the specialists used by the agency, whose names are listed in the Document.

44. As I understand it, a contract of service is a contract of employment between an employer and an employee and a contract for services is a contract between an independent contractor and the person requiring the services. The question in this case is whether the specialists have performed services for the agency under a contract for services. A contract may be either oral, written, or a combination of both and it may be created either by implication or expressly. At common law the following elements are essential to the creation of a contract:
- offer;
 - acceptance;
 - an intention to enter legal relations;
 - sufficient consideration;
 - a capacity to contract;
 - legality of purpose;
 - genuine consent; and
 - certainty of terms.
45. From the information given to me by the agency, I understand that it pays the specialists in return for certain services, which are described in the letters sent to them requesting those services. On the material before me, I consider that contracts between the agency and the individual specialists - or the companies for which they work - are created by implication when the specialists or their companies accept the offer of work made in writing by the agency and that the consideration for the agency is, for example, a report, and for the specialist or his or her company it is the payment made for that report.
46. In my view, it is not relevant whether the contract is made between a specialist and the agency or the company for which that specialist works and the agency. Clause 3(4) concerns prescribed details that relate to “...*a person who performs, or has performed, services for an agency under a contract for services.*” Section 5 of the *Interpretation Act 1984* endows certain words with meanings that are applicable to every written law passed by the Parliament of Western Australia, including the word “under”, which is defined in relation to a written law or a provision of a written law to include “by”, “in accordance with”, “pursuant to” and “by virtue of”. Accordingly, I consider that it is sufficient if the specialists perform services for an agency in accordance with, or pursuant to, or by virtue of, a contract for services and it is not material whether that contract is made between the agency and an individual specialist or the agency and the company for which a specialist works.
47. Since there is nothing before me to establish that any of the elements of a contract are absent, I consider that the specialists and the agency operate under a series of contracts for services. Accordingly, I consider that the specialists listed in the Document are persons who come within the description in clause 3(4), that is, they are persons who have performed services for an agency under a contract for services. In view of that, I do not consider it necessary to determine whether or not the specialists are also “officers” of an agency.

Would disclosure reveal “prescribed details”?

48. The question then is whether disclosing the names of the specialists would reveal “prescribed details” as referred to in clause 3(4). Given the information already disclosed in the Document, disclosure of the names would also disclose, in relation to each specialist, the fact that the specialist has provided a service to an agency and the number of times he or she provided a service to particular agencies. It would not reveal the specifics of the service provided, the identities or any information about the workers concerned, nor any contact details or other private information about the specialists.

49. The “prescribed details” for the purposes of clause 3(4) are listed in regulation 9(2), and include:

“In relation to a person who performs or has performed services for an agency under a contract for services, details of -

(a) the person’s name;

...

(d) the nature of the services to be provided and described in the contract;

...

(f) anything done by the person in the course of performing or purporting to perform the person’s functions or duties or services, as described in the contract or otherwise conveyed to the person pursuant to the contract”.

50. It seems to me that the only information that would be revealed by disclosure of the names falls within those three descriptions and, accordingly, I am of the view that disclosure of the disputed information would reveal no more than prescribed details pursuant to clause 3(4) and, thus, it is not exempt under clause 3(1).

51. Since I consider that the disputed information is not exempt under clause 3(1), it is unnecessary for me to consider whether or not clause 3(6) applies in relation to, among other things, the privacy issues raised by the agency and the third parties. However, in view of the safety and other concerns expressed by the third parties, I have looked at the question of whether any other exemptions are relevant.

Clause 4 - commercial or business information

52. Two third parties said that the disputed information was commercial information and that there could be some kind of adverse flow-on effect to their businesses or the businesses that they worked for if that information were disclosed. In view of that, I have considered the application of clause 4(3) of Schedule 1 to the FOI Act.

53. Clause 4, insofar as it is relevant, provides:

“4. Commercial or business information

Exemptions

(3) Matter is exempt if its disclosure-

- (a) would reveal information (other than trade secrets or information referred to subclause (2)) about the business, professional, commercial or financial affairs of a person; and*
- (b) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.”*

54. The exemption in clause 4(3) deals with information about the business, professional, commercial or financial affairs of any person, which includes a company or incorporated body, as defined in section 5 of the *Interpretation Act 1984*. The exemption recognises that the business of government is frequently mixed with that of the private sector and that neither the business dealings of private bodies, nor the business of government, should be adversely affected by the operations of the FOI Act. The exemption in clause 4(3) consists of two parts and both paragraphs (a) and (b) must be satisfied before a claim for exemption is established.
55. In the present case, the disputed information reveals that certain individuals have provided services to the agency in relation to particular types of claim on more than one occasion. In my opinion, that information is, *prima facie*, information about the business, professional, commercial or financial affairs of those individuals, and I am satisfied that the requirements of clause 4(3)(a) have been met.
56. However, I must also be satisfied that disclosure of the disputed information could reasonably be expected to have an adverse effect on the affairs of the specialists, or to prejudice the future supply of information of that kind to the agency.
57. The Federal Court in *Attorney-General’s Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180 discussed the meaning of the phrase “*could reasonably be expected*” in the context of s.43(1)(c)(ii) of the *Freedom of Information Act 1982* (Cth). The Court held, at page 190, that the words were intended to receive their ordinary meanings and required a judgment to be made by the decision-maker as to whether a suggested outcome is reasonable, as distinct from something that is irrational, absurd or ridiculous.

58. There is no information before me to show how the disclosure of the information in question could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the third parties and I am unable to determine what those effects might be.
59. I note that two of the third parties have stated that, had they been aware that this kind of information could be disclosed to the public, they would have refused to enter into a contract with the agency to undertake the services. However, this was raised as an issue by only two of the 100 third parties contacted by the agency and, in my view, the disclosure of the disputed information could not reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency where “information of that kind” in this context is the names of individual specialists who have provided professional services to the agency and the number of times they have done so. Consequently, on the information before me, I am not persuaded that the requirements of clause 4(3)(b) have been established and I consider that the disputed information is not exempt under clause 4(3).

Clause 5 - endanger life or physical safety

60. Five of the third parties were concerned that the disclosure of the disputed information could place them in at risk of personal harm. Clause 5(1)(e) provides that matter is exempt if its disclosure could reasonably be expected to endanger the life or physical safety of any person.
61. The words “reasonably be expected” bear the meaning given to that phrase in *Cockcroft’s* case, referred to above.
62. In this case, there is nothing to establish that the complainant or any other individual has any personal grudge against any of the specialists listed in the Document or that the information is sought for any malicious reason. The complainant agreed to the release of his name to the third parties and none of the specialists who contacted my office expressed any concerns about him personally.
63. Under 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. Subject to the Act, a person’s right to be given access is not affected by any reasons a person may give for wishing to obtain access or the agency’s belief as to what those reasons are.
64. Notwithstanding the submissions of the third parties, no objective material has been put before me by the agency or by any other person to establish that the disclosure of the disputed information could reasonably be expected to place the life or physical safety of any of the third parties in danger by the complainant or any other person. As a result, on the information before me, I am not persuaded that the requirements of clause 5(1)(e) have been met and I consider that the disputed information is not exempt under that provision.

Conclusion

65. In light of the above, I consider that the disputed information is prescribed details that are not exempt under clause 3(1) and that, in addition, the disputed information is not exempt under clause 4(3) or clause 5(1)(e) of Schedule 1 to the FOI Act.
