

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

**File Ref: F2003133
Decision Ref: D0332003**

Participants:

‘Q’
Complainant

- and -

**Graylands Selby-Lemnos and
Special Care Health Service**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – psychological tests – clause 11(1)(a) and clause 11(1)(b) – whether disclosure could reasonably be expected to impair effectiveness of methods or procedures for the conduct of tests – whether disclosure could reasonably be expected to prevent objects of tests being attained – public interest factors – disclosure to the world at large – section 26 – whether reasonable grounds to believe that documents exist or should exist – sufficiency of searches.

Freedom of Information Act 1992 (WA) ss.26 and 102(3), Schedule 1 clauses 3, 11(1)(a), 11(1)(b) and 11(2).

Re H and Graylands Hospital [1996] WAICmr 50

DECISION

The decision of the agency to refuse access:

- (a) to the disputed matter on the ground that it is exempt under clause 11(1)(a) and 11(1)(b) of Schedule 1 to the *Freedom of Information Act 1992*; and
- (b) to the additional requested documents on the ground that they either do not exist or cannot be found,

is confirmed.

D A WOOKEY
A/INFORMATION COMMISSIONER

5 December 2003

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by Graylands Selby-Lemnos & Special Care Health Service ('the agency') to refuse 'Q' ('the complainant') access to certain documents requested by the complainant under the *Freedom of Information Act 1992* ('the FOI Act'). I have decided not to identify the complainant in this decision in order to protect his privacy.

BACKGROUND

2. The complainant is a former involuntary patient of the agency having been admitted to the agency on 3 December 2002 for treatment and discharged on 6 January 2003. During the period of treatment, the complainant was the subject of a number of psychological tests administered by the Senior Clinical Psychologist at the agency.
3. In June 2003, the complainant made an application to the agency for access under the FOI Act to all documents relating to his treatment. The agency gave the complainant access to most, but not all, of the documents contained in his patient file. However, access was refused to some information on the grounds that it is exempt under clauses 3 and 11 of Schedule 1 to the FOI Act. Subsequently, on 18 August 2003, the complainant lodged an application for external review of the agency's decision, which the former Information Commissioner ('the former Commissioner') accepted as a complaint even though internal review had not been completed.
4. The complaint consists of two parts. The first part relates to the agency's decision to refuse access to documents, which are claimed to be exempt under clause 11, and the second part relates to the complainant's claim that the agency has not identified all of the documents covered by the terms of his access application.

REVIEW BY THE INFORMATION COMMISSIONER

5. The former Commissioner obtained the requested documents and the relevant FOI file from the agency. Various inquiries were made with the agency and the complainant, but this complaint could not be resolved by conciliation between the parties.
6. On 29 October 2003, after considering the material before her, the parties were informed, in writing, of the former Commissioner's preliminary view of this complaint, including her reasons. It was her preliminary view that the matter to which access had been refused may be exempt under clause 11. The former Commissioner was also of the view that, after the agency had conducted additional searches, the agency had taken all reasonable steps to find the documents described in the access application and no further documents exist that fall within the scope of the access application. Therefore, the agency was not required to search its record holdings any further in order to satisfy the access application.

7. The complainant responded and confirmed that he wished to pursue his complaint. However, the complainant did not provide any further relevant information for my consideration.

THE DISPUTED DOCUMENTS

8. There are 7 documents in dispute in this matter. Those documents are listed and described as follows:

Document No.	Document description	Disputed matter
1	Psychological Assessment Report dated 6/1/03 (4 pages)	Test scores and analysis on pages 2-4.
2	The Wechsler Memory Scale Visual Reproduction Response Booklet (16 pages)	All
3	The WAIS-III and WMS-III Summary Report of The Psychological Corporation (19 pages)	All
4	The Wechsler Adult Intelligence Scale-III (Test Booklet) (14 pages)	All
5	The Wechsler Memory Scale-III (Test Booklet) (26 pages)	All
6	The Wechsler Test Adult Reading Record Form (4 pages)	All
7	The Wechsler Adult Intelligence Scale Response Booklet (8 pages)	All

THE EXEMPTIONS

9. The agency withdrew its claim for exemption based on clause 3, but maintained its claim that the disputed matter is exempt under clause 11(1)(a) and (b) of Schedule 1 to the FOI Act. Clause 11, so far as is relevant, provides:

"11. Effective operation of agencies

Exemptions

(1) Matter is exempt matter if its disclosure could reasonably be expected to -

(a) impair the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency;

(b) prevent the objects of any test, examination or audit conducted by an agency from being attained;

...

Limit on exemptions

(2) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."

10. The exemption in clause 11 was considered by the former Commissioner in a number of her decisions. Most relevantly, the exemptions provided by paragraphs (a) and (b) of clause 11(1) were considered in *Re H and Graylands Hospital* [1996] WAICmr 50. There, the agency had claimed both exemptions for certain documents relating to the psychological testing of a particular patient (who was the access applicant and complainant in that matter).
11. In that case, the former Information Commissioner said:

“The exemption in clause 11(1)(b) appears to me to be directed at the outcome of the particular test, examination or audit, whereas clause 11(1)(a) is directed at protecting the viability of a method or procedure for the conduct of a test, examination or audit. I consider that there is some overlap between the exemptions provided in clauses 11(1)(a) and 11(1)(b) of Schedule 1 to the FOI Act. Depending on the nature of the test in question, disclosure of test documents may have the effect of either impairing the method or procedure for conducting the tests, or preventing the objects of the test from being attained, or both.”

I agree with that view.

The agency’s submission

12. In respect of the disputed documents, the agency informs me that:
- each of the psychological tests administered to the complainant is a standard test used worldwide and each test forms part of a group of tests designed to provide the clinical psychologist with information from which a more complete psychological assessment can be made;
 - it is possible for a subject to modify his or her responses to a particular test on any subsequent occasions, if the subject believes that the first response may have adversely impacted on his or her assessment;
 - the fundamental effectiveness of psychological testing is founded upon protecting the integrity and confidentiality of the questions and answers to the tests in question and the release of such tests and answers would seriously compromise the value of the test and its usefulness to the psychological profession;
 - although the tests are administered on a one to one basis, the results are discussed with the subject in general terms only;
 - the interpretation of the test results is used by the agency, together with other medical and clinical information, to decide upon a treatment program for the patient;
 - the same psychological tests may be administered to a patient whenever he or she enters the agency for treatment and those tests may be re-administered to the complainant if he were to be readmitted for similar treatment in the future;

- the disclosure of the disputed documents would reduce the effectiveness of those particular testing procedures because the complainant and other potential subjects could practise answers to the questions and thereby significantly distort future results and the effectiveness of the tests;
- the Australian Psychological Society's Code of Professional Conduct provides that its members must not compromise the effective use of psychological tests, nor render them open to misuse, by publishing or otherwise disclosing their content to persons unauthorised or unqualified to receive such information; and
- completed test documents remain confidential and those documents are stored in the office of the clinical psychologist, or in a clinical psychology archive, separately from the complainant's medical records, with access to the disputed documents strictly limited by officers of the agency.

Findings – Clause 11(1)(a) and (b)

13. In *Re H*, the former Commissioner pointed out that “[a]s no conditions may be attached to the disclosure of documents under the FOI Act, disclosure to an access applicant is potentially, and must be considered, disclosure to the world at large” and accepted in that case that “... if the disputed documents were to be disclosed to the complainant and, thereby, to the world at large, then the complainant, and any other person to whom the documents were subsequently disclosed, may then be in a position to tailor his or her answers to the tests, so that a contrived rather than a true picture of his or her psychological profile is presented, and the method of testing would therefore be less effective as the results could not be relied upon”.
14. I have examined the disputed documents and considered the other material provided by the agency. I have also considered the material provided by the complainant. The disputed matter in the documents variously contains, among other things, the scoring methodology; scores given to the complainant's answers; guides for the person administering the test as to what to look for in the answers; and analysis of the complainant's responses.
15. I accept that, if the disputed documents were to be disclosed to the complainant or to anyone else, that information could be used to tailor answers to any subsequent test and thereby distort the outcome. In that way, I consider that disclosure to the complainant could reasonably be expected to prevent the objects of any future testing of him by the agency from being attained. If they were to be further disclosed to other people, the achievement of the objects of the tests could similarly be prevented in respect of other people tested. For that reason, if the information were to become generally known, the effectiveness of the testing instrument would be compromised.
16. For similar reasons, and having considered the particular disputed documents in this matter, I accept the claim that disclosure of the disputed documents in this case could reasonably be expected to adversely affect the reliability and integrity of the testing procedure, which depends for its effectiveness on the fact that it is exclusive to the profession of psychology and is not otherwise available to unqualified people. If the information in these documents were to

become generally available then the person administering the test could not be confident that the person being tested had not had access to it and had not prepared for it. In those circumstances, it seems to me, the results could not be relied upon in any case and the method therefore would be an ineffective method of testing.

17. Therefore, I am satisfied that disclosure of the disputed documents to the complainant could reasonably be expected to render them less effective as test instruments and thereby impair the effectiveness of the method of testing by the agency. I also consider that disclosure could also be reasonably expected to prevent the objects of any future test by that method of the complainant – or any other person to whom the documents may be disclosed – from being attained. Accordingly, I consider that the disputed documents, on their face, are exempt under clause 11(1)(a) and (b).

Public interest

18. Clause 11(1) is subject to the limit on exemption in clause 11(2), which provides that matter is not exempt matter under clause 11(1) if its disclosure would, on balance, be in the public interest. Under s.102(3) of the FOI Act, the onus is on the complainant to establish that disclosure would, on balance, be in the public interest. The complainant did not provide any specific submissions as to why he considers it is in the public interest to disclose the disputed matter to him. Therefore, the complainant has not satisfied the onus placed on him under s.102(3). However, I have nonetheless considered the public interest factors that, in my opinion, are relevant to the circumstances in this matter and whether, on balance, it would be in the public interest to disclose the disputed documents.
19. Favouring disclosure, I recognise that there is a public interest in ensuring that State and local government agencies are accountable to the public for the decisions that they make. That particular aspect of the public interest is embodied in s.3(1)(b) of the FOI Act. I also recognise that there is a public interest in the complainant being able to exercise his right of access under the FOI Act and in patients being given as much information as is reasonably possible to help them understand the treatment they have received in a facility such as the agency.
20. I note that the agency has offered the complainant limited access to the disputed documents by having the Senior Clinical Psychologist, who administered the tests to the complainant, explain and discuss with him his answers and any other questions that the complainant may have concerning those tests. In my view, the public interest in patients being as fully informed as possible about their treatment has been sufficiently satisfied in this instance by the disclosure of most of the complainant's patient file and the offer from the agency for the Senior Clinical Psychologist to meet with the complainant to explain any concerns he may have about his treatment.
21. Balanced against disclosure, I recognise that there is a public interest in maintaining the effectiveness of the methods and procedures used by the agency for assessing persons committed to its care and in ensuring that the objects of conducting tests are not compromised. To the extent that the

efficacy of psychological tests is necessary for the agency to properly perform its functions for the benefit of patients and the wider community, I also recognise that as an aspect of the public interest.

22. In balancing the competing public interests I am of the view that the public interest in maintaining the effectiveness of the psychological testing procedure, and hence the ability of the agency to carry out its functions in respect of mental health on behalf of the wider community, outweighs the other public interests which I have identified. Accordingly, for the reasons given, I find that the disputed documents are exempt under clause 11(1)(a) and (b) of Schedule 1 to the FOI Act.

DOCUMENTS THAT CANNOT BE FOUND OR DO NOT EXIST

23. The complainant claims that additional documents exist that the agency has not identified. In particular, the complainant claimed that he recalled the thickness of his patient file to be greater than that of the copy given to him by the agency. When a complainant makes such a claim, I must first decide whether there are reasonable grounds to believe that additional documents of the type requested exist, or should exist, and are, or should be, held by the agency. If I consider that there are reasonable grounds for that belief then I must decide whether the agency has taken all reasonable steps to find the documents. I do not consider that it is my function to physically search for the requested documents on behalf of the complainant. I take the view that, provided I am satisfied that the requested documents exist, or should exist, within the agency, it is my responsibility to inquire into the adequacy of the searches conducted by the agency and to require further searches, if necessary, in order to satisfy me that the agency has acted in accordance with its obligations under the FOI Act.
24. In this instance, after a preliminary assessment of the complaint, it appeared that there may be additional documents that fall within the scope of the access application, which the agency had not identified as a result of its initial searches. A member of my staff attended at the agency and made inquiries into this complaint. As a result of those inquiries and discussions with officers from the agency, the complainant was given access to additional documents, which were found by the agency following a further search of its records. The agency also identified, but refused access to, the disputed documents. Those documents did not form part of the patient file, but were held separately by the Senior Clinical Psychologist.
25. The complainant was informed of the nature and extent of the searches conducted by the agency to find those documents and given a detailed explanation of how a patient file is constructed and maintained and why the copy provided may appear less voluminous than the original. After considering the advice provided by the agency, the former Commissioner was satisfied that the agency had conducted reasonable searches and had given the complainant a reasonable description of the documents identified. Based on additional information provided by the agency, including the description of the

additional searches conducted and the documents identified, I share the former Commissioner's view that the agency has taken all reasonable steps to locate all the relevant documents and it is unlikely that there are any more documents of the type requested.

26. The former Commissioner advised the complainant of the outcome of those inquiries and that she did not require the agency to conduct further searches because she was satisfied that all reasonable steps had been taken to identify all documents falling within the scope of the access application which exist in the agency. On that basis, the complainant was advised that this office was unable to assist him further. The complainant maintained his claim that additional documents exist which have not been identified by the agency, but he did not specify what those documents might be or provide any new material to support that claim.
27. Having reviewed the material before me, I am satisfied that the agency has taken all reasonable steps to locate the documents but further documents either do not exist or cannot be found. Accordingly, I confirm the agency's decision to refuse access under s.26 of the FOI Act on the ground that no additional documents exist.
