

H AND GRAYLANDS

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

**File Ref: 95113
Decision Ref: D05395**

Participants:

H
Complainant

- and -

Graylands Hospital
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - access in the manner referred to in s.28 - medical records - documents containing information of a medical or psychiatric nature concerning the access applicant - whether the principal officer of the agency formed the opinion that direct disclosure of the documents may have a substantial adverse effect on the physical or mental health of the access applicant.

Freedom of Information Act 1992 (WA) ss.28, 72(1)(b), 75(1), 102(1).

DECISION

The decision of the agency to give the complainant access to the requested documents by giving access to a suitably qualified person nominated by the complainant in accordance with s.28 of the *Freedom of Information Act 1992*, is confirmed.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

21st November 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of Graylands Hospital ('the agency') to invoke the provisions of s.28 of the *Freedom of Information Act 1992* ('the FOI Act') and to provide "H" ('the complainant') with indirect access to the complainant's medical records, by way of providing the documents to a suitably qualified person. The complainant wishes to obtain direct access to the relevant documents and, in particular, the complainant wishes to obtain copies of those documents.
2. The complainant was admitted for treatment as a patient in the agency on three occasions during 1994. After discharge, the complainant was treated as an out-patient at Swan Clinic with recommended medication. On 11 May 1995, solicitors acting on behalf of the complainant lodged an access application under the FOI Act with the agency, seeking access to certain medical records relating to the complainant held by the agency.
3. On 26 May 1995, the Acting Commissioner of Health decided to delete certain matter consisting of personal information about third parties and, after taking advice from Dr Baily, the complainant's consulting and treating psychiatrist, to provide indirect access to the remainder of the requested documents, pursuant to s.28 of the FOI Act, by making them available to another psychiatrist nominated in writing by the complainant. For the purposes of the FOI Act, the Acting Commissioner of Health is the principal officer of the agency, so internal review of the agency's decision was not available.
4. Subsequently, the complainant attended at the agency and discussed the substance of the contents of the documents with Dr Baily at length. The agency assumed that that discussion constituted acceptance of its decision to apply the provisions of s.28 of the FOI Act. However, following that discussion with Dr Baily, the complainant nominated another psychiatrist for the purpose of receiving indirect access to those documents. Whilst the agency was in the course of complying with its obligations under the FOI Act and forwarding the requested documents to the nominated psychiatrist, the complainant, on 21 June 1995, applied to the Information Commissioner for external review of the decision of the Acting Commissioner of Health.

REVIEW BY THE INFORMATION COMMISSIONER

5. After receiving the complaint, pursuant to my authority under s.75(1) and under s.72(1)(b) of the FOI Act, I obtained from the agency copies of the disputed documents and other documents relevant to this complaint. One of my investigations officers also met with Dr Baily. Following my consideration of the

material before me, including submissions from the complainant, I formed the preliminary view that the decision of the agency was justified.

6. The parties were informed of my preliminary view and reasons for that view, on 21 September 1995. Following receipt of my preliminary view, the complainant withdrew from that part of the complaint relating to the editing of personal information about third parties, but sought to proceed on the issue of access under s.28 of the FOI Act. The complainant and the complainant's solicitor provided additional material for my consideration, including testimonials as to the complainant's current work capacity and living arrangements. That material was given to the agency for consideration.
7. Access in accordance with s.28 of the FOI Act does not necessarily mean that an access applicant will not obtain copies of the documents. When access is provided indirectly through a suitably qualified person, that person may decide the form of access, including, but not limited to, reading the contents to an applicant, allowing inspection, providing copies or providing copies in an edited form. In this instance, the agency and Dr Baily maintain the view that the use of s.28 is appropriate and that the complainant should receive access to the documents by making them available to a suitably qualified person nominated by the complainant. The issue for my determination, therefore, is whether the agency's decision to give access to the requested documents in the manner described in s.28 was justified. It is not my decision to decide the form that access may take.

Access under Section 28 of the FOI Act.

8. Section 28 of the FOI Act provides:

“Medical and psychiatric information

28. If -

- (a) *a document to which the agency has decided to give access contains information of a medical or psychiatric nature concerning the applicant; and*
- (b) *the principal officer of the agency is of the opinion that disclosure of the information to the applicant may have a substantial adverse effect on the physical or mental health of the applicant,*

it is sufficient compliance with this Act if access to the document is given to a suitably qualified person nominated in writing by the applicant and the agency may withhold access until a person who is, in the opinion of the agency, suitably qualified is nominated.”

9. In reviewing a decision of an agency to give access in accordance with s.28 of the FOI Act, I consider that my role is to decide whether, in the circumstances of the particular case, the use of s.28 was justified. The agency bears the onus under s.102(1) of satisfying me in that regard.
10. In my view, I must be satisfied about three matters. Firstly, I must be satisfied that the requested documents contain information of a medical or psychiatric nature concerning the access applicant. Secondly, I must be satisfied that the principal officer of the agency, at the relevant time, held the view that direct disclosure of the documents may have a substantial adverse effect on the physical or mental health of the access applicant. Thirdly, I must be satisfied that the view was held on reasonable grounds.
11. I am satisfied, from my examination of the requested documents, that those documents contain information of a medical and psychiatric nature concerning the complainant. The documents comprise the totality of the agency's records relating to the complainant's admissions to the agency on three occasions during 1994.
12. Further, I am satisfied that the then Acting Commissioner of Health, Dr McCall, was of the opinion at the time he made his decision, that disclosure of the documents to the complainant may have a substantial adverse effect on the complainant's psychiatric health. The documents provided to me by the agency in its file maintained in respect of the complainant's access application indicate that Dr McCall considered this issue and formed a view before making his decision. From material before me, it appears that Dr McCall based his opinion upon information provided to him by Dr Baily, background information concerning the complainant and, presumably, his experience as a medical practitioner. Thus, even though the principal officer must hold the requisite opinion, under s.28 of the FOI Act the principal officer does not have to make the decision.
13. I am informed that Dr Baily is a qualified psychiatrist who treated the complainant during 1994. I am also informed that Dr Baily has had some contact with the complainant since the complainant's discharge from the agency. That contact consists of telephone calls and letters and he has also met with the complainant and discussed the FOI application, including a 2½ hour face to face session as part of a discussion about the agency's use of s.28 of the FOI Act. In those circumstances, I am satisfied that the opinion of the principal officer of the agency was held on reasonable grounds.
14. The nature of the substantial adverse effect which the agency claims may result from granting direct access to the requested documents is due to the nature of the complainant's illness. Dr Baily explained those consequences to me in the following terms:

"It is my opinion that there is a reasonable basis that [the complainant] would suffer substantial adverse effects of a mental nature as a consequence of release of a copy of [the complainant's] notes. The

course and onset of [the complainant's] previous episode resulting in admission to Graylands Hospital was manifested by taking information from wide and varied sources both verbal and written and abnormally linking this information in a very concrete and literal manner into a complex grandiose and persecutory delusional system. Each piece of information on its own (except for the more florid delusions of aliens and being able to read minds) appears to be reasonable. The process and way the information is linked together is indicative of a psychotic process.

The reason for having information released in interview by a psychiatrist is so this process if present can be detected and misinterpretation avoided.

As [the complainant's] condition is likely to be episodic and recurrent with exacerbation at times of stress, the ready access to a copy of [the complainant's] notes is likely to provide increased litigious behaviour which commenced when [the complainant] was psychotic.”

15. It is my understanding, from that explanation and other material before me, that the agency claims that direct disclosure will escalate the complainant's pursuit of legal remedies for the supposed wrongs of others resulting in an increased stress level which is likely to trigger another episode of the complainant's illness. I am further informed by Dr Baily that each subsequent occurrence of the illness makes it more difficult to re-establish the physical and mental health of the complainant. In the absence of any contradictory material from the complainant, I accept the advice of Dr Baily in his professional capacity.
16. On a number of occasions following the issue of my preliminary view, the complainant expressed concern that I have placed undue weight on the views of the agency and, in particular, the opinion of Dr Baily. The complainant explained that direct access to the requested documents was required in order that the opinion of other persons may be obtained with a view to refuting the recorded diagnosis and the appropriateness of the treatment provided during the complainant's admissions to the agency. Further, the complainant also expressed the view that the agency's decision and the views of Dr Baily are biased because of pending legal action by the complainant against the agency.
17. I am satisfied that the complainant has been given ample opportunity to provide evidence or submissions to support the claims made by the complainant. That includes the opportunity to obtain the opinion of an independent psychiatrist to attest to the complainant's capacity to gain direct access to the requested documents. The submissions provided by the complainant included the opinions of a number of people, none of whom have relevant psychiatric qualifications or experience.
18. In any case, the content of the testimonials provided to me by the complainant were not relevant to the question that I must decide. In contrast, the evidence of Dr Baily was directly relevant and I consider that evidence to be persuasive. Further, in spite of the complainant's claims of bias, there is no material before

me, other than the complainant's views on this point, that suggests that Dr Baily has not acted other than in an objective and professional manner.

19. Accordingly, I am satisfied that the agency's decision to provide the complainant with indirect access to the requested documents in accordance with s.28 of the FOI Act was justified
