

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

**File Refs: 95124 and 95127
Decision Ref: D05795**

Participants:

David D'Arcy Clements
Complainant

- and -

Health Department of Western Australia
Respondent

David D'Arcy Clements
Complainant

- and -

Graylands Hospital
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - application for amendment of personal information under Part 3 - refusal to amend - information claimed to be inaccurate or misleading - factual information - information in the nature of opinion - agency offered to attach notation.

Freedom of Information Act 1992 (WA) ss. 45, 46, 75(1),102(1); Part 3.
Mental Health Act 1962 (WA) s. 29.

Clements v Information Commissioner (Supreme Court of Western Australia, 9 November 1994, unreported).

Corbett v Australian Federal Police (1985) 5 AAR 291.

R v Department of Army 482 F Supp 770 (1980).

DECISION

The decisions of the Health Department of Western Australia and Graylands Hospital not to amend their records in accordance with applications for amendment made under s.46 of the *Freedom of Information Act 1992*, are confirmed.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

29th November 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of decisions by Graylands Hospital ('the Graylands agency') and the Health Department of Western Australia ('the Health agency') not to amend information in accordance with applications for amendment made by Mr Clements ('the complainant') under the *Freedom of Information Act 1992* ('the FOI Act'). Although the complainant sought to have his identity suppressed, I am satisfied that the justification for doing so, namely, maintaining the privacy of the complainant, has been negated following the decision of the Supreme Court of Western Australia in *Clements v Information Commissioner* (9 November 1994, unreported).
2. On 30 March 1995 and 2 April 1995, the complainant lodged almost identical applications for amendment of personal information with the Health agency and the Graylands agency. The Health agency transferred part of his application to Fremantle Hospital, part was transferred to the Graylands agency and it dealt with the remaining part of the application in so far as it related to documents held by the Health agency. Subsequently, the Health agency agreed to attach a notation to 1 document but it refused to amend 4 other documents by altering, striking out or deleting entries as requested by the complainant. Subsequently, that decision was confirmed upon internal review.
3. The Graylands agency also agreed to attach a notation to 1 document, but it refused to amend 5 documents by altering, striking out, or deleting entries as requested by the complainant. Of the 5 documents which the Graylands agency refused to amend, 4 are copies of the documents that the Health agency refused to amend.
4. On 10 July and 12 July 1995, the complainant made two complaints to the Information Commissioner, seeking external review against the decisions of both agencies. As the complaints and the relevant decisions and documents are substantially the same, I have dealt with the two complaints together.

ACTION BY THE INFORMATION COMMISSIONER

5. In accordance with my power under s.75(1) of the FOI Act, I obtained the relevant documents from both agencies. After examining those documents and considering the submission of the complainant, together with the reasons given by the agencies for not making the requested amendments, I formed the preliminary view that the decisions of the agencies appeared to be justified. On 24 October 1995, both parties were advised of my preliminary view and reasons for that view. Following receipt of my preliminary view, on 10 November 1995, the complainant provided a further submission for my consideration.

6. In considering this matter I have examined the relevant documents in their entirety. The complainant made his submission in respect of two of the documents on the basis of edited copies of those documents obtained by him under an earlier FOI access application. To some extent, the fact that he has not had access to all of the material that is before me means that his knowledge of some matters is incomplete and his conclusions are based upon assumptions about the content of the matter deleted from the documents in his possession. Nevertheless, I have considered the various claims of the complainant in determining these matters.

THE DOCUMENTS

7. There are 5 documents which the complainant seeks to amend in accordance with his rights under Part 3 of the FOI Act. Those documents are described as follows:

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|-------------------|---|
| Document 1 | Integrated Case Notes of the Psychiatric Emergency Team (PET), dated 6 April 1992. |
| Document 2 | <i>Mental Health Act 1962</i> - Second Schedule Form 3, dated 6 April 1992. |
| Document 3 | Letter dated 22 December 1992, from Dr Groves to Ms MacDonald, Executive Director, Graylands Hospital. |
| Document 4 | Letter dated 23 December 1992, from D Hewitson (PET) to Ms MacDonald, Executive Director, Graylands Hospital. |
| Document 5 | Letter dated 6 May 1993, from M. Ash (PET) to Ms MacDonald, Executive Director, Graylands Hospital. |

My review in respect of the decision of the Health agency relates to Documents 2-5, and in respect of the decision of the Graylands agency, it relates to Documents 1-5.

THE AMENDMENT OF PERSONAL INFORMATION

8. Part 3 of the FOI Act deals with the amendment of personal information. Section 45 gives an individual a right to apply for amendment of personal information contained in a document of an agency if the information is inaccurate, incomplete, out of date or misleading. An application for amendment must contain, *inter alia*, details of the information that is believed to be incomplete, inaccurate, out of date or misleading, and reasons for that belief. An applicant must also state the form in which he or she wishes the amendment to be made. If an agency decides not to amend the information in accordance with an application made, it must provide the applicant with reasons for that decision. When that occurs, an applicant may request the agency to make a notation or attachment to the information. Further, a request for an attachment

may be made even though the initial decision has not been reviewed internally. An agency must comply with the request for a notation or attachment to be made unless the notation or attachment is defamatory or unnecessarily voluminous.

9. A complaint may be made to the Information Commissioner against a decision not to amend information in accordance with an application under Part 3 of the FOI Act. A complaint may also be made against the decision of an agency not to comply with a request for a notation or attachment to be made to the information.
10. In this instance, the Health agency and the Graylands agency provided detailed reasons for their decisions not to amend. Both agencies offered to attach to their records a summary of events as the complainant perceived them to be. The complainant did not accept those offers and, pursuant to his rights under Part 3 of the FOI Act, seeks to alter the relevant records by striking out and deleting certain information which he claims is inaccurate or misleading. In some instances, he has applied to insert additional information into the records to ensure that those documents are no longer misleading. The complainant provided some 19 pages of submissions for my consideration in order to justify his assertion that certain information in the documents described in paragraph 7 above is inaccurate or misleading.
11. Pursuant to s.102(1) of the FOI Act, the agency bears the onus of establishing that its decision was justified. Therefore, in the context of this matter, I must consider when an agency is justified in refusing to amend its records, and determine whether the decisions of the Health agency and the Graylands agency, on these occasions, were justified. The answer to those questions will depend on the nature of the information and the evidence upon which the decision not to amend is based.

THE NATURE OF THE INFORMATION

(a) Factual information

12. The information which the complainant seeks to amend in the documents is a mixture of factual information and opinion. In my view, factual information may be corrected if other factual information exists to substantiate that there are inaccuracies in the record. The factual information which the complainant seeks to amend consists of:
 - (i) the date of “6 April 1992” appearing in Documents 2, 3, 4 and 5;
 - (ii) the statement, “*He is sleeping poorly has increased energy has been pacing up & down and threatening that his wife is having an affair.*” in Document 2;
 - (iii) various statements of explanation in Document 3 provided by Dr Groves to the Commissioner of Health following a request from the

Parliamentary Commissioner for Administrative investigations ('the Ombudsman'); and

- (iv) various other entries in Document 1.
13. It is the contention of the complainant that Document 2 was completed by Dr Groves on 7 April 1992 and not 6 April 1992. Document 2 is a prescribed form under the *Mental Health Act 1962*, being the Form 3 (Referral by Medical Practitioner) which initiated the process by which the complainant was detained in Heathcote Hospital in April 1992 under the provisions of the *Mental Health Act 1962*. The complainant's belief that 7 April 1992 is the correct date is based on information contained in a letter dated 27 July 1992, received by him from Dr Smith, Director, Psychiatric Services in the Health agency, and also from his reading of a letter dated 11 May 1992, obtained by the complainant under the FOI Act, from Dr Groves to Dr Smith.
14. Section 29 of the *Mental Health Act 1962* provides:
- "29. (1) If, upon the application of any person, made in the prescribed manner, a justice is satisfied that a person is suffering from mental disorder and that it is in the interest of that person or of the public that he should be admitted to an approved hospital for treatment under this Act, the justice may, by order in the prescribed form under his hand, order that the person be taken, conveyed to and received into an approved hospital.*
- (2) The justice shall not make such an order as is mentioned in subsection (1) of this section, unless it appears from the referral of a medical practitioner, in the prescribed form, that he has, during the space of fourteen days immediately prior to the application, personally examined the person in respect of whom the application is made and that he is of the opinion that the person is suffering from mental disorder.*
- (3) Any order made under this section shall be accompanied by the referral and be presented at the approved hospital to which the person is conveyed."*
15. I am not persuaded by the evidence supplied by the complainant that the date of 6 April 1992 in Documents 2, 3, 4 and 5 is incorrect. Document 2 is signed by Dr Groves and bears the date 6 April 1992. I have also examined the copies of other prescribed forms under the *Mental Health Act 1962*. The Form 4 (Form of Application or Complaint) and the Form 5 (Order for Conveyance of a Person To and For His Reception in An Approved Hospital) relating to the complainant are signed by a Justice of the Peace and both are dated 6 April 1992.

16. Further evidence tending to support the view that 6 April 1992 is the correct date is to be found in Document 1. Document 1 is a record of the Psychiatric Emergency Team (PET) which is part of the Graylands agency. Document 1 contains entries relating to the complainant and it records the dates and times of events commencing on 5 April 1992 and concluding with an entry on 24 June 1994. Document 1 contains an entry by Dr Groves on 6 April 1992. In that entry Dr Groves states that he has completed a Form 3 in respect of the complainant. Although that entry does not record the time it was made, the next entry in the record is made at 1700 hours on 6 April 1992. Therefore, at the very least, the earlier entry by Dr Groves must have been made before 1700 hours on 6 April 1992.
17. I consider that the date of 7 April 1992 appearing in the documents in the possession of the complainant is an error. Moreover, both the agencies have acknowledged that that date is incorrect. For the reasons given, I am satisfied that the date of 6 April 1992 appearing in Documents 2, 3, 4 and 5 is correct. Accordingly, I confirm the decision of the Health agency and the Graylands agency not to amend their records in respect of this part of the complaints.
18. The complainant has not persuaded me that the factual information in Document 2 is misleading and inaccurate as he claims it to be. The complainant claims the record is inaccurate because he believes that information in Document 2 was provided by a third party. Document 2 contains a mixture of fact and professional medical opinion. Dr Groves quite clearly states in the letter to Ms MacDonald (Document 3) that all information, opinion and diagnosis in Document 2 was based solely on the information provided by the complainant when he examined him at his home on 5 April 1992, in the presence of two Community Mental Health Nurses.
19. It is perhaps not surprising that the complainant's perceptions of what occurred on that day differ from those of Dr Groves. The evidence which the complainant relies upon to support his claim consists of his belief about what occurred that day and the fact that the particular information in dispute is not recorded elsewhere, either in medical case notes or other documents relating to him. In my view, those claims do not comprise factual evidence that is sufficient to persuade me that the records are misleading or inaccurate. For the same reasons, I also reject the complainant's claims that the factual information in Document 3 is misleading and inaccurate.
20. The complainant also disputes the accuracy of certain factual information in Document 1. Document 1 is a document of PET. It records, in chronological order, information received by members of PET on duty at a particular time. I am informed by PET that information in that document is recorded, either contemporaneously or shortly after a call is received, depending on the situation at the time. I am also informed that, as a matter of practice, staff record the information received and action taken, in summary form. However, comments that seem particularly relevant may be recorded verbatim.

21. The information in Document 1 is a chronological record of information received by PET about the complainant. Document 1 also contains other relevant facts about the complainant known by the person making the record. The agency found no evidence of tampering with Document 1. Having inspected the document and taken into account the information provided by the agency, I agree with that finding. If Document 1 is an accurate record of what occurred in the offices of PET on 5, 6 and 7 April 1992, and there is no information other than the complainant's assertion before me to suggest that it is not, then, in my view, the complainant's claims must fail.
22. I am satisfied that Document 1 records a genuine account of the officers' view of what occurred in respect of the complainant. For that reason, I consider there is no justification for striking out the entries to which the complainant objects. If the complainant considers that the substance of the information provided to PET is incorrect, the appropriate remedy, in my view, is for the agency to attach to the record a notation or summary of events according to his recollections. That option was offered to the complainant by both agencies, but it has not been accepted by the complainant.
23. For the reasons given, I am satisfied that the decisions of the Health agency and the Graylands agency were justified. Accordingly, I confirm the decisions of the agencies not to amend the factual information in Document 1.

(b) Information in the nature of opinion

24. The complainant also seeks to amend information in the nature of professional medical opinions and diagnosis. In particular he seeks to amend opinions in the Form 3 (Document 2). I accept that information that consists of opinion is capable of being amended under Part 3 of the FOI Act: *Corbett v Australian Federal Police* (1985) 5 AAR 291. I also accept the statement of the grounds upon which such opinion may be amended of Gesell J in *R v Department of Army* 482 F Supp 770 (1980). In that decision his Honour said, at p.774:

"It is unnecessary to attempt to categorise the bases on which a professional opinion could be found to be 'incomplete, incorrect or misleading'. To that of a demonstration of total inadequacy of underlying factual information, there could no doubt be added those of the existence of bias or ill will, incompetence or lack of balance or necessary experience in the person forming the opinion, or the existence of such a trivial factual substratum as to render the opinion formed dangerous to rely upon and likely to result in error, or where facts have been misapprehended."

25. Taking those categories as a guide, I am satisfied that the decisions of the Health agency and the Graylands agency not to amend their records was justified. There is no material before me that suggests that Dr Groves was biased against the complainant, or that he was incompetent or lacked experience in mental health issues. The grounds upon which the complainant seeks to amend the professional opinion of Dr Groves is his belief that the opinion was based on

facts communicated to Dr Groves by another party and his claim that the statement "*He is a risk to himself and others*" is not substantiated either in the medical notes for 5-6 April 1992 or elsewhere. The complainant claims there is no evidence or history of him being a risk to anyone.

26. The agency admits that Dr Groves did not document specific evidence for his opinion regarding the potential risks posed by the complainant. However, I am not required to determine the correctness or otherwise of that opinion. In my view, there is material before me, including the description of the particular medical condition with which the complainant was diagnosed, to establish that the factual substratum on which the opinion was based was not trivial. Further, there is no evidence before me that the facts have been misapprehended by Dr Groves leading to an error in diagnosis.
27. Therefore, I am satisfied that the decisions of the agencies were justified. Accordingly, I confirm the decisions of the Health agency and Graylands agency not to amend their records.
