

M AND PMH

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

**File Ref: 95141
Decision Ref: D05995**

Participants:

M
Complainants

- and -

Princess Margaret Hospital for Children
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - access to edited copies - documents relates to management of child by agency and another agency - clause 3(1) - personal information about third parties - public interest factors for and against disclosure of personal information - section 26 - documents in the possession of the agency but which can not be found - sufficiency of searches - role of Information Commissioner.

Freedom of Information Act 1992 (WA) ss. 26, 72(1)(b), 75, Schedule 1 clauses 3, 5(1)(a), (b), (c), Part 5, Schedule 2 Glossary.

Freedom of Information Regulations 1993 (WA).

Re Barrett and Police Force of Western Australia (Information Commissioner, WA, 12 September 1995, unreported).

Re Uren and Ministry for Planning (Information Commissioner, WA, 12 July 1995, unreported).

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, Nazaroff and Nazaroff 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 Oset and Health Department of Western Australia (Information Commissioner, WA, 1 June 1995, unreported).

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

DECISION

The decision of the agency is varied. In substitution it is decided that:

- except for the matter described in the schedule attached to this decision, which is exempt matter under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*, the disputed documents are not exempt; and
- it is not possible to give access to other documents because all reasonable steps have been taken to find the documents and they either do not exist or cannot be found.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

11th December 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of Princess Margaret Hospital for Children ('the agency') to refuse "M" ('the complainants') access to documents relating to the complainants' children, requested by them under the *Freedom of Information Act 1992* ('the FOI Act'). The complainants' children are wards of the State and I have decided not to identify the complainants by name in this decision in order to protect the interests of the children.
2. On 28 April 1995, the complainants applied to the agency for all documents relating to themselves and to their children, including one child who is deceased. On 9 June 1995, the complainants were informed by the agency that it had no record of them or their deceased child ever attending the agency. However, in relation to the complainants' other children, the agency refused access to any documents on the basis that the legal guardian of the children, the then Department for Community Development (now the Department for Family and Children's Services (the DFCS)) had not agreed to the disclosure of those documents.
3. On internal review of that decision, the agency decided to grant the complainants full access to a number of documents, to grant access to edited copies of others and to refuse access to other documents on the ground that those documents were the subject of an access application made by the complainants to the DFCS. The agency also imposed a charge of \$240 in respect of the grant of access.
4. On 24 July 1995, the complainants applied to the Information Commissioner for external review of the decision of the agency to refuse them access to documents and to impose a charge for access to other documents. The complainants also disputed the agency's claim that it did not hold and could not find any documents relating to them or to their deceased child.

REVIEW BY THE INFORMATION COMMISSIONER

5. On 2 August 1995, I notified the agency that a complaint had been made in respect of its decision. Pursuant to my powers under s.75(1) and s.72(1)(b) of the FOI Act, I required the production to me of the originals of the documents in dispute, together with the agency's FOI file maintained in respect of this matter. I also required information as to the basis for the charges calculated by the agency. The documents and information required were provided to my office on 8 August 1995.

6. On 4 October 1995, after examining the disputed documents and considering submissions, I provided the parties with my preliminary view. It was my preliminary view, on the material then before me, that of the 85 documents in dispute 77 may not be exempt and that the remainder contained matter that was, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act. However, I did not form a view as to whether the charge of \$240 was justified as it appeared to me that there was scope for conciliation of this complaint and that that course of action could reduce any amount that was payable by the complainants for access. It was also my preliminary view that the searches undertaken by the agency to locate documents relating to the complainants and to the deceased child were, in all the circumstances, reasonable.
7. After being informed of my preliminary view, the agency released further documents to the complainants. During the conciliation process, additional documents were released in full and access to edited copies of others was agreed to by the agency. At the conclusion of that process, 19 documents remained in dispute between the parties and the parties reached agreement on an amount that was payable for access on the basis that the documents contained information that was not personal information about the complainants as that term is defined in the FOI Act. Therefore, the only matters for my determination concern the exempt status or otherwise of the 19 documents remaining in dispute and the issue of the sufficiency of the searches undertaken by the agency to locate documents concerning the complainants and their deceased child.

THE DISPUTED DOCUMENTS

8. The 19 documents in dispute between the parties have been listed and described on a schedule prepared by my office and provided to the parties. Therefore, I am satisfied that the complainants are aware of the nature of the matter for which exemption is claimed. Those documents consist of routine administrative correspondence between the agency and the DFCS, operation consent forms, reports about the children by social workers and documents containing medical information about the children. The agency claims that those documents and parts of those documents are exempt under clauses 3(1) and 5(1)(a), (b) and (c) of Schedule 1 to the FOI Act. One document, which in my preliminary view was not exempt, is claimed by the agency to be outside the ambit of the access application. I propose to deal with that claim first.

Document outside the ambit of the access application

9. When an agency receives an access application under the FOI Act one of the first findings of fact that must be made is the identification of the documents of the agency to which access is sought. The identification of documents that are within the ambit of an access application is dependent, to some extent, on the terms of the access application. In many cases, one would not expect applicants to be able to identify the documents sought with any degree of precision. An applicant may not be aware of the nature and content of documents held by State

and local government agencies, other than in a general sense. The imbalance in that situation is corrected, to some extent, by the publication requirements in Part 5 of the FOI Act and by providing access to agencies' information statements that should contain, *inter alia*, a description of the kinds of documents usually held by the agency.

10. Document 57 on the schedule prepared by my office is a letter from the legal section of the DFCS to a doctor in the agency. That letter does contain a brief reference to the complainants. Further, I consider there is information in that document that would enable the complainants and the children to be identified. The complainants' access application was for all documents that "...refer in particular to or allude to..." the complainants and their children. In my opinion, they are alluded to in Document 57. I consider, therefore, that Document 57 is within the ambit of the access application.
11. However, in my view, Document 57 is not exempt. The author and addressee of that document are both officers of agencies and their names are not exempt matter pursuant to clause 3(3) of Schedule 1 to the FOI Act, and the *Freedom of Information Regulations 1993*. Accordingly, I find that Document 57 is not exempt under clause 3, nor is it exempt for any other reason.

Sufficiency of search

12. Section 26 of the FOI Act deals with the requirements of an agency in circumstances in which it is unable to locate the documents sought by an access applicant. That section provides as follows:

"26. (1) *The agency may advise the applicant, by written notice, that it is not possible to give access to a document if -*

(a) *all reasonable steps have been taken to find the document; and*

(b) *the agency is satisfied that the document -*

(i) *is in the agency's possession but cannot be found;*

or

(ii) *does not exist.*

(2) *For the purposes of this Act the sending of a notice under subsection (1) in relation to a document is to be regarded as a decision to refuse access to the document, and on a review or appeal under Part 4 the agency may be required to conduct further searches for the document."*

13. Complaints about allegedly missing documents or documents which should exist but do not exist in agencies arise not infrequently in my external review function. Most recently in my decisions in *Re Barrett and Police Force of Western Australia* (12 September 1995, unreported) and in *Re Uren and Ministry for Planning* (12 July 1995, unreported), I have considered allegations about missing documents: see also *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); *Re 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); *Re Oset and Health Department of Western Australia* (1 June 1995, unreported).
14. In those decisions I have discussed the function of the Information Commissioner when dealing with complaints that concern documents allegedly missing from an agency's record-keeping system. I repeat my view of that function which is, in my opinion, 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 the 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 the searches undertaken have been adequate, I shall 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.
15. As I have said before, the adequacy of efforts made by that agency to locate documents the subject of an FOI access application is 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.
16. In this instance, a member of my staff attended at the agency on 8 September 1995, to review the manner in which the agency searched for the relevant records. A search was undertaken on the agency's computerised database using the name and birthdate of each of the complainants and the deceased child. That search resulted in a patient record number being displayed which prompted further searches to be undertaken in the Patient Information Section including the Primary (on-site) records and Secondary (off-site) records. In addition, searches were undertaken in the Anatomical Pathology Records section. None of those searches located any relevant records.
17. I am informed by the agency that, in addition to its general medical records, its records are maintained by three different sections of the agency which operate separate record-keeping systems. Those sections are the Psychiatry Department, the Social Work Department and the Child Sexual Abuse Department. The agency did not search the records maintained by the Sexual Abuse Department

for documents relating to the deceased child, but searches were undertaken in the other two departments to no avail.

18. The agency informed me that, once a child reaches 13 years of age or, in the case of a deceased child, five years after the death of that child, the agency has a policy of preserving records on microfiche. Searches of the microfiche records of the agency were also undertaken to no avail.
19. The agency also informed me that it does not create, as a matter of practice, separate files for parents of children who may consult with social workers or psychiatrists employed by the agency. Any records of such consultations are placed on either the child's file or the family file. In this case there are no separate family records relating to the complainants.
20. The complainants claimed that, as the child in question died in January 1991, the agency's policy of preserving the records of deceased children on microfiche five years after the death of the child did not, therefore, apply to the records concerning that child. However, the complainants did not explain the basis of that claim. In any case, the complainants also informed me that a file on the deceased child was presented to the Children's Court at the wardship hearing and that the contents of that file may have been admitted in evidence at that hearing.
21. In respect of records relating to the complainants, it was the contention of the complainants that officers of the agency have been in possession of files at various meetings attended by the complainants which, in their opinion, related to them. However, no other material was provided to me to support that contention and which would assist in identifying particular records that would warrant a further search by the agency.
22. Based on all of the information, it is my view that the agency has taken all reasonable steps to locate any records in its possession relating to the complainants and to the deceased child but none can be found. Accordingly, it is my view that the documents requested by the complainants which relate to this part of the access application either do not exist or they exist but cannot be found. Accordingly, I confirm the agency's decision to refuse access to those documents.

THE EXEMPTIONS

23. The agency claims exemption under clause 3(1) for parts of the disputed documents and also claims that each document is exempt under clause 5(1)(a), (b) and (c) of Schedule 1 to the FOI Act. I propose to deal with the claims under clause 5 first because I do not find those claims substantiated by any material before me. Clause 5, in so far as is relevant, provides:

"5. *Law enforcement, public safety and property security*

Exemptions

- (1) *Matter is exempt matter if its disclosure could reasonably be expected to:*
- (a) *impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law;*
 - (b) *reveal the investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted;"*
 - (c) *enable the existence, or non-existence, or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be discovered;"*

24. I do not consider that it is necessary for me to explain the scope and meaning of the exemption in clauses 5(1)(a), (b) and (c) in any detail. Pursuant to s.102(1) of the FOI Act, the agency bears the onus of establishing that its decision to deny access was justified. The first time that the agency relied upon clause 5 was in a letter to my office dated 20 October 1995. It was mentioned again in a letter to my office dated 13 November 1995. However, apart from stating its reliance upon those paragraphs of clause 5(1), there is no evidence before me that goes any way towards establishing that those exemptions apply to the disputed documents.
25. The agency has not identified the lawful method or procedure for detecting, investigating or dealing with any possible contravention of the law it claims could be impaired, nor how its effectiveness could be impaired by disclosure, nor any reasons why that impairment could reasonably be expected to follow from disclosure of the disputed documents. The agency has not identified any possible contravention of the law claimed to be being investigated, nor by whom it is claimed to be being investigated, nor what part of any investigation could reasonably be expected to be revealed by disclosure of the disputed documents. No confidential source of information has been identified.
26. I have had the benefit of examining the disputed documents together with a significant amount of other material provided by the agency and, in my view, disclosure of the disputed documents could not reasonably be expected to reveal anything about the content of an investigation, nor could it reasonably be expected to impair any investigative methods, nor could it reasonably be expected to enable the existence of any confidential source of information to be discovered. That is, there is no information before me to establish that any of the exemptions in clause 5 applies to the disputed documents.

27. The documents all appear to me to relate to the health, welfare and management of the children. Only one document, Document 84, alludes at all to a possible contravention of the law and it appears that Document 77 may have been generated in the course of an investigation of the matter raised in Document 84. However, it is clear from the last 3 folios of Document 77 that the matters raised in Document 84 have been put to the complainants. Disclosure of Document 84 would not, therefore, reveal anything of substance to the complainants as they have already been informed of those matters. Document 77 is an account of the agency's contacts with the complainants and consists almost entirely of personal information about the complainants and personal information about their children. Given the contents and nature of that document and the circumstances of its creation, the documents already given to the complainants and other information given to the complainants by the agency, I do not consider that disclosure of that document would reveal anything of substance to the complainants as very little, if any, of its contents is information not known to them. Accordingly, I find that none of the disputed documents is exempt under clause 5(1)(a), (b) or (c) of Schedule 1 to the FOI Act.

Clause 3 - Personal information

28. Clause 3, so far as 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).”

29. In the Glossary in Schedule 2 to the FOI Act, "**personal information**" is defined as meaning "*...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 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."*
30. I have previously expressed the view in a number of my formal decisions that the purpose of the exemption in clause 3 is to protect the privacy of individuals. That exemption is a recognition by Parliament of the fact that all government agencies collect and hold a vast amount of important and sensitive private information about individual citizens and that information of that kind should not generally be accessible by other persons without good cause. Further, data on the operation of FOI legislation in Western Australia indicates that agencies are

conscious of the need to protect personal privacy and that they are applying the exemption in clause 3 in a responsible manner.

31. When an agency decides that a document contains personal information about a person, and that document is the subject of an access application under the FOI Act by some other person, the relevant agency may provide access to that document with personal information deleted. An agency may delete all of the personal information, including the relevant name of the person to whom the information relates, from which that person could be identified. In some instances, this may be achieved by deleting the name only and providing access to the remaining information, if the identity of the person to whom the information relates is not able to be ascertained from that information itself.
32. I am satisfied that some of the documents contain personal information about third parties which is, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act. Some of those documents also contain personal information about the complainants but some of that information is inextricably entwined with the personal information about third parties, including the children. The exemption provided by clause 3(1) is, however, limited by a “public interest test” provided by clause 3(6). That is, matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. The onus of persuading me that disclosure of personal information about third parties would, on balance, be in the public interest lies on the complainants pursuant to s.102(3) of the FOI Act.

The complainants’ submission

33. The complainants provided me with a list of names, addresses and telephone numbers of various foster carers of the children. They also provided me with information concerning the people whom they assert have signed medical forms consenting to surgery procedures on the children. I was informed by the complainants, and it was not disputed by the agency, that they are fully conversant with the medical situation regarding their children and that they visit the agency for all appointments concerning the children. The complainants also informed me that they are aware of the names of doctors and health workers dealing with their children.
34. It is the submission of the complainants that the identities of various third parties about whom personal information is contained within the disputed documents are either matters of public record or the third parties are officers of agencies whose names and job descriptions are not exempt matter under the FOI Act. In either case, it is their submission that it is not in the public interest to protect the identities of people if those people have breached some regulation or departmental procedure.

The public interest

35. In my view, there are two competing public interests that must be balanced in this instance. On the one hand, I recognise a strong public interest in protecting the privacy of third parties. On the other hand, I also recognise a public interest in the complainants being able to exercise their rights of access under the FOI Act. I also consider the fact that some of the third parties, namely the children, are wards of the State and that the complainants are no longer the legal guardians of those children, and the fact that other third parties are care-givers to those children, to have significant weight in the balancing process.
36. Taking into account the amount of information already released to the complainants through the FOI process, I consider that the public interest in maintaining the privacy of third parties, including aspects concerning the privacy of the children, outweighs the public interest in the complainants being able to exercise their rights of access under the FOI Act.
37. Therefore, in respect of the documents listed below, I find the matter described to be exempt matter under clause 3(1) of Schedule 1 to the FOI Act. The documents are identified by the numbers used in the schedule prepared for the parties by my office.

No.	Description	Exempt matter
3	Letter dated 13 June 1995, from DFCS to agency.	All of paragraph 3 commencing with the words "The child..."
4	Letter dated 10 May 1995 from DFCS to agency.	All of paragraph 3 commencing with the words "The child..."
11	Copy of operation consent form dated 8 December 1994.	The address and post code in the right hand corner of page 1 and the left hand corner of page 2; the name of the person consenting; the words after the heading "Full name of patient"; the words that appearing after the heading "Relationship to patient"; and signature of the person consenting, on page 2.
18	Copy of operation consent form dated 3 November 1994.	The address and post code in the right hand corner of page and in the left hand corner of page 2; the name of the person consenting; the words that appear after the heading "Relationship to patient"; and the signature of the person consenting, on page 2.
19	Copy of Anaesthetic consent form dated 3 November 1994.	The name and address of the care-giver on page 2.
22	Letter dated 20 October 1994, from DFCS to agency.	The name, address and phone number of the care-giver appearing under the name of the child and in the first line of paragraph 1.

- 26 Letter dated 21 September 1994, from DFCS to agency. The last paragraph commencing with the name of the child.
- 29 Letter dated 26 June 1995, from DFCS to agency. The first sentence in the second paragraph.
- 31 Letter dated 13 March 1995, from DFCS to agency. The first paragraph and the fourth paragraph.

38. Finally, I find that Documents 5, 6, 20, 23, 53, 57, 74, 77, 78 and 84 listed on the schedule provided to the parties, and consisting of certain correspondence between the agency and the DFCS, facsimile transmission reports and a copy of a medical consent form, are not exempt. Although there is a considerable amount of personal information about the complainants' children contained in the documents, the particular information is already known to the complainants - through other documents released to them by the agency and by the DFCS and through their involvement in the course of events the subject of the documents. Therefore, in my opinion, that matter cannot be exempt under clause 3(1) as it would not be revealed to them by disclosure of the disputed documents. In any event, the public interest in protecting the privacy of the children would not be served by finding exempt matter already revealed to the complainants.
