

Participants:

'N'
Complainant

- and -

Royal Perth Hospital
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to allegations against officers of the agency – clause 3(1) – whether information is personal information – whether information about third parties is prescribed details under clause 3(3) – clause 3(6) - whether disclosure, on balance, is in the public interest – section 24 – whether practicable to give access to an edited copy.

Freedom of Information Act 1992: sections 21, 24, 74(1), clauses 3(1), 3(2), 3(3), 3(4), 3(5), 3(6), 8(2); Schedule 1; Schedule 2, Glossary

Freedom of Information Regulations 1993

Police Force of Western Australia v Kelly and Another (1996) 17 WAR 9

DPP v Smith [1991] 1 VR 63

DECISION

The agency's decision is varied. The disputed documents are exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*.

Sven Bluemmel
INFORMATION COMMISSIONER

28 August 2009

REASONS FOR DECISION

1. This complaint arises from a decision made by Royal Perth Hospital ('the agency') to refuse the complainant access to documents under the *Freedom of Information Act 1992* ('the FOI Act'). Given the circumstances of this matter, and my obligations under s.74(1) of the FOI Act, I have decided not to identify the complainant by name in these reasons for decision.

BACKGROUND

2. The complainant was an employee of the agency providing specialised medical services. A number of allegations were raised into a variety of issues and against a number of individuals in the same specialised unit in which the complainant worked. I understand that the complainant is no longer an employee of the agency having resigned in 2005. On that basis, it is also my understanding that the complainant was not an officer of the agency at the time of that investigation.
3. I understand that by letter dated 18 September 2008, the complainant applied to the agency under the FOI Act for access to 8 different types of documents, all relating to an investigation conducted by the agency into allegations against officers of the agency.
4. By letter dated 22 September 2008, the agency's FOI Coordinator wrote to the complainant acknowledging receipt of his access application and confirming that a notice of decision would be provided to him by 6 November 2008. On 10 November 2008, the complainant wrote to the agency requesting an internal review of its deemed refusal decision, as it had not provided him with a notice of decision within the permitted period under the FOI Act.
5. On 5 December 2008, Dr Alistair Marr, Business Manager, Clinical Services of the agency decided to grant the complainant access in full to certain documents; access to edited copies of certain documents and to refuse him access to certain documents.
6. The complainant's application for external review dated 29 January 2009 only seeks external review of the agency's decision to refuse him access to certain documents under clause 8(2) of Schedule 1 to the FOI Act.

REVIEW BY INFORMATION COMMISSIONER

7. Following the receipt of this complaint, the agency produced to the former A/Information Commissioner its FOI file maintained in respect of the complainant's access application and the originals of the disputed documents.
8. By letter dated 24 March 2009, the former A/Commissioner informed the parties of his preliminary view of this complaint and his reasons. It was the former A/Commissioner's preliminary view that the disputed documents were exempt in full under clause 3(1) of Schedule 1 to the FOI Act. The former A/Commissioner invited the parties to accept his preliminary view or to provide

further submissions. The agency accepted the A/Commissioner's preliminary view and withdrew its claim for exemption under clause 8(2) of Schedule 1 to the FOI Act.

9. The complainant did not withdraw his complaint and provided further submissions. The complainant also provided evidence that one of the third parties named in the disputed documents consents to the disclosure to the complainant of any personal information, as defined, about that third party contained in the disputed documents.
10. On that basis, the agency was invited to release to the complainant all of the personal information, where practicable, about that third party to the complainant. In addition, the agency was invited to reconsider its decision and to release, again where practicable, personal information about the complainant which is contained in the disputed documents.
11. The agency agreed and released to the complainant a number of documents, in full and in part. On receipt of those documents, the complainant informed my office that he remained dissatisfied with the access provided and wished to pursue this matter. In addition, the complainant made further submissions to which I refer later in this decision.
12. I have examined all of the documents and evidence relating to this complaint. I have also considered the former A/Commissioner's preliminary view and reviewed this office's file in relation to this matter.

THE DISPUTED DOCUMENTS

13. There were 251 documents in dispute in this matter consisting of approximately 1200 folios. After the former A/Commissioner's preliminary view, 71 documents were released in full to the complainant. Of the remaining 180 documents, the agency granted partial access to 64 and refused access to 116 documents. Those 180 documents remain in dispute. They include summaries of interviews with various third parties, as well as correspondence involving various third parties and the agency. Some of the folios are duplicates.
14. The agency claimed that the disputed documents are exempt under clause 8(2) of Schedule 1 to the FOI Act. However, in dealing with a complaint, the Information Commissioner has the power to decide any matter in relation to the access application that could have been decided by the agency. In this case, having inspected the disputed documents, the former A/Commissioner formed the preliminary view that the disputed documents are exempt under clause 3(1) of Schedule 1 to the FOI Act. On that basis, the former A/Commissioner did not consider the agency's claim for exemption under clause 8(2) of Schedule 1 to the FOI Act.

Clause 3 - personal information

15. Clause 3, insofar 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

- (2) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.*
- (3) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to -*
- (a) *the person;*
- (b) *the person’s position or functions as an officer; or*
- (c) *things done by the person in the course of performing functions as an officer.*
- (4) ...
- (5) ...
- (6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*

16. In the Glossary in Schedule 2 to the FOI Act, the term ‘personal information’ is defined 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 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.”*

17. Clearly, the purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies.

Consideration

18. Given the circumstances of this matter, it is likely that the complainant is aware of the identities of a number of the third parties whose personal information may be contained in the disputed documents. However, the issue of what the complainant may know of the contents of the requested documents from other sources is not a consideration in overcoming the application of a relevant exemption, and I refer to the decision of the Supreme Court of Western Australia in *Police Force of Western Australia v Kelly and Another* (1996) 17 WAR 9 at 14 which dealt with a similar situation. Although that case dealt with a claim for exemption under clause 5(1)(b) of Schedule 1 to the FOI Act, I consider that the comments relating to the question of what is known by an access applicant are also relevant to this case.

19. In *Kelly*, Anderson J said:

“In considering the question of whether exemption is lost once the matter has found its way into the hands of the applicant or into public hands, I think it must be remembered that what is under consideration is the right of access to the particular documents of an agency. One would not expect the character of the documents as exempt documents to depend on whether, by some means, the subject matter of the documents, or some of it, had already got out...it would mean that an applicant could overcome a claim of exemption by showing or claiming that he already knew something of the matter from other sources. I do not think it could have been intended that exemption should depend on how much the applicant already knows or claims to know of the matter. Also the Act plainly contemplates that, as regards exempt material, the agency may give access to some documents or parts of documents but refuse access to others dealing with the same subject (see ss.3(3), 23(1)).”

I agree with those comments.

20. Nonetheless, the question of what is known by the complainant may be relevant to the application of the limit on exemption in clause 3(6), to which I will come later.
21. Having examined the disputed documents, I consider that all of those documents would reveal personal information, as defined, about a number of individuals. 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 its face, exempt under clause 3(1).
22. In my view, and with the benefit of examining the disputed documents, all of the information contained in the disputed documents is, *prima facie*, exempt and, if disclosed, would reveal personal information about other individuals.

23. The next question is whether any of the limits on the exemption applies. As one third party referred to in the disputed documents has consented to the disclosure of personal information about him, I consider that the limit in clause 3(5) applies in this case to the personal information about that individual and agree with the manner in which documents containing personal information about that third party have already been released to the complainant. Nothing before me indicates that any other third parties have consented to the disclosure to the complainant of their personal information.

Clause 3(2)

24. Clause 3(2) provides that information is not exempt under clause 3(1) merely because its disclosure would reveal personal information about the applicant in any access application. In my view, the use of the term ‘merely’ in clause 3(2), according to its ordinary dictionary meaning, means ‘solely’ or ‘no more than’ personal information about the applicant.
25. Having examined the disputed documents, I consider that there is only a very small amount of personal information, as that term is defined in the FOI Act, about the complainant contained in the disputed documents. Much of the information in the disputed documents concerns third parties. That information which does concern the complainant is inextricably intertwined with information about third parties. Therefore, the exemption in clause 3 in the present case is not based solely on the fact that the information is personal information about the applicant.

Clauses 3(3) and 3(4)

26. The limit in clause 3(3) provides that matter is not exempt matter under clause 3(1) merely because its disclosure would reveal prescribed details about a person who is or has been an officer of an agency. Clause 3(4) is similar in scope but relates to a person who performs or has performed services for an agency under a contract for services.
27. The ‘prescribed details’ are listed in regulations 9(1) and 9(2) of the *Freedom of Information Regulations 1993* (‘the Regulations’), as follows:

“9(1) *In relation to a person who is or has been an officer of an agency, details of –*

- (a) the person’s name;*
- (b) any qualifications held by the person relevant to the person’s position in the agency;*
- (c) the position held by the person in the agency;*
- (d) the functions and duties of the person, as described in any job description document for the position held by the person; or*
- (e) anything done by the person in the course of performing or purporting to perform the person’s functions or duties as an officer as described in any job description document for the position held by the person,*

...

- (2) *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;*
 - (b) *any qualifications held by the person relevant to the person’s position or the services to be provided pursuant to the contract;*
 - (c) *the title of the position set out in the contract;*
 - (d) *the nature of services to be provided and described in the contract;*
 - (e) *the functions and duties of the position or the details of the services to be provided under the contract, as described in the contract or otherwise conveyed to the person pursuant to 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 ...”.*

28. I note that all of the disputed documents contain references to third parties who are officers or former officers of the agency or other government agencies. In my view, some of that information amounts to prescribed details as set out in regulations 9(1) and 9(2).
29. However, I consider that much of the information concerning the third parties, such as details of allegations investigated, would reveal more than prescribed details about those persons. In my opinion, information of that nature is personal information that is exempt under clause 3(1). Accordingly, I have considered below whether it is possible to edit any of the documents to disclose only prescribed details about officers of the agency.

Clause 3(6)

30. If I am satisfied that a *prima facie* claim for exemption exists under clause 3(1) and none of the other limits on exemption applies, then, pursuant to section 102(3) of the FOI Act, the onus is on the complainant to establish that disclosure would, on balance, be in the public interest, pursuant to clause 3(6).
31. Both the complainant and the agency made submissions in relation to the public interest in clause 8(2) of Schedule 1 to the FOI Act. However I consider those submissions equally relevant to my consideration of the public interest in clause 3(6) of Schedule 1 to the FOI Act.

THE COMPLAINANT’S SUBMISSIONS

32. In summary, I understand the complainant’s submissions to be that there is a public interest in providing him with the disputed documents so that the

complainant is fully informed of the nature and substance of certain allegations involving him and is given an opportunity to respond to them and give his version of the events. The complainant submits that this is an overriding public interest, being a fundamental principle of natural justice.

33. The complainant accepts there is a public interest in officers of agencies being able to report issues of concern about medical practitioners in confidence.

THE AGENCY'S SUBMISSIONS

34. In its notice of decision dated 5 December 2008, the agency made the following submissions in relation to clause 8(4):

“...it is not in the public interest for [the disputed documents] to be released as it shows only internal personal conflict between a limited number of doctors which has no influence on the operation of hospital procedures or patient care.”

35. In addition, the agency submits the following public interest factors favour disclosure:

“the public interest in an access applicant exercising his/her rights of access under the FOI Act.;

the public interest in a person [...] who has been the subject of adverse allegations regarding his conduct being able to view the substance of those allegations;

the public interest in a person [...] who has been the subject of an investigation into adverse allegations regarding his conduct and adverse findings, being able to view the findings of the investigation to understand the basis of the findings and the information on which those findings were made;

the public interest in ensuring the accountability of the agency's grievance resolution procedure; and

the fact that the allegations relate to conduct which occurred over 2 years ago and is therefore not current.”

36. The agency submits the following public interest factors favour non-disclosure:

“the public interest in State government agencies establishing procedures for the receipt and investigation of grievances and complaints, and in the effective operation of that system.

The fact that there are no disciplinary consequences following this investigation (and therefore the public interest factors in favour of disclosure are less pressing);

The fact that the allegations relate to conduct which occurred over 2 years ago and the agency has implemented a process to resolve the matter and move forward, with no adverse consequences [to the complainant];

The public interest in “Drawing a line” under this matter and enabling the agency to move forward without there being further complaints in relation to this matter (which is now over 2 years old) and further public funds expended on this matter; and

The fact that [the complainant was] offered the opportunity to participate in the process, but declined.”

CONSIDERATION

37. The public interest is not defined in the FOI Act. In my view, the term is best described in the decision by the Supreme Court of Victoria in *DPP v Smith* [1991] 1 VR 63, at page 75, where the Court said:

“The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals ... There are ... several and different features and facets of interest which form the public interest. On the other hand, in the daily affairs of the community, events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest per se is not a facet of the public interest”.

38. The application of the public interest test in clause 3(6) involves identifying the public interest factors for and against disclosure, weighing them against each other and deciding where the balance lies.
39. Favours disclosure of the disputed information, I recognise that there is a public interest in people being able to exercise their rights of access under the FOI Act and a public interest in people being able to access personal information about them which is held by a government agency. That latter public interest is also recognised in section 21 of the FOI Act.
40. Of particular relevance to this case, I recognise a public interest in individuals being informed of the nature of any allegations made against them and being given an opportunity to respond to those allegations before any decisions adverse to their interests are made. That is a key requirement of procedural fairness. However, based on the information before me, including my examination of the disputed documents, I find as facts that in the circumstances of this matter:
- there is only a small amount of personal information about the complainant contained in the disputed documents which is

inextricably intertwined with personal information about third parties;

- the investigatory steps taken by the agency as evidenced in the disputed documents do not primarily relate to the complainant but rather to third parties (the complainant having left the employ of the agency prior to the commencement of the investigation); and
- the responses provided by other third parties recorded in the disputed documents do not refer to the complainant other than incidentally.

41. It is relevant that the scope of the complainant's access application is to seek access to documents relating to an investigation conducted by the agency into allegations against officers of the agency. It is not limited to allegations or investigations against the complainant. This decreases the extent to which disclosure of the disputed documents would serve the public interest in the complainant having access to allegations made about him.
42. Accordingly, I find that there is only a limited public interest in disclosing that information to the complainant.
43. I also note that the public interest in persons being able to respond to issues about them has been met to some degree in the circumstances of this matter by the documents which have been disclosed to the complainant by the agency.
44. Favouring non-disclosure of the disputed information I recognise that there is a strong public interest in maintaining personal privacy. That public interest is recognised by the inclusion of the exemption in clause 3(1) and the requirement to consult with individuals before disclosing personal information about them. In my view, that public interest may only be displaced by some other considerably stronger public interest that requires the disclosure of personal information about another person.
45. I also recognise that there is a public interest in maintaining the highest levels of professionalism in the medical profession and, to that end, in maintaining the confidence of individuals to raise issues of concern about doctors and other medical professionals.
46. In weighing the competing public interests for and against disclosure in this case, I am of the view that those favouring non-disclosure outweigh those favouring disclosure in this instance.

Editing

47. I have also considered whether it would be practicable to edit the disputed documents and release to the complainant the small amount of information contained in them which is not exempt under clause 3.

48. Section 24 provides:

“If -

- (a) the access application requests access to a document containing exempt matter; and*
- (b) it is practicable for the agency to give access to a copy of the document from which the exempt matter has been deleted; and*
- (c) the agency considers (either from the terms of the application or after consultation with the applicant) that the applicant would wish to be given access to an edited copy,*

the agency has to give access to an edited copy even if the document is the subject of an exemption certificate.”

49. In my view, the question of what the word ‘practicable’ means in section 24 of the FOI Act was settled by the Supreme Court of Western Australia in its decision in *Winterton*. In that case, Scott J said, at page 16:

“It seems to me that the reference in s24(b) to the word “practicable” is a reference not only to any physical impediment in relation to reproduction but also to the requirement that the editing of the document should be possible in such a way that the document does not lose either its meaning or its context. In that respect, where documents only require editing to the extent that the deletions are of a minor and inconsequential nature and the substance of the document still makes sense and can be read and comprehended in context, the documents should be disclosed. Where that is not possible, however, in my view, s24 should not be used to provide access to documents which have been so substantially edited as to make them either misleading or unintelligible.”

50. In this instance, the editing required to delete all of the personal information about people other than the complainant, including officers of the agency, from the disputed documents would be so substantial as to render the remainder of those documents unintelligible. Therefore it is my view that the agency is not required by s.24 of the FOI Act to provide the complainant with edited copies of the disputed documents.

51. I find that the disputed documents are exempt under clause 3(1) of Schedule 1 to the FOI Act and that it is not practicable to give access to edited copies of the disputed documents.
