

**R AND JUSTICE**

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

**File Ref: 96079  
Decision Ref: D03796**

Participants:

**'R'**  
Complainant  
  
- and -  
  
**Ministry of Justice**  
Respondent

**DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - indirect access - s.28 - documents from prison file - documents from unit management file - documents to be made available through a suitably qualified person - meaning of suitably qualified person - 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 requested documents may have a substantial adverse effect on the physical or mental health of the access applicant - whether opinion of principal officer reasonably held - role of Information Commissioner on review.

*Freedom of Information Act 1992 (WA)* ss.28, 66(6), 72(1)(b), 75(1), 102(1).

*Freedom of Information Regulations 1993 (WA)* regulation 7.

*Medical Act 1894 (WA)* s.11

## DECISION

I confirm the decision of the agency to provide access to the documents by making them available to a suitably qualified medical practitioner in accordance with provisions of s.28 of the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

1st July 1996

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Ministry of Justice ('the agency') to provide "R" ('the complainant'), with indirect access to copies of certain documents of the agency. The agency decided, in accordance with the provisions of s.28 of the *Freedom of Information Act 1992* ('the FOI Act'), that access to the requested documents should not be given direct to "R", but that "R" should be given access indirectly by the documents being given to a suitably qualified person, being a qualified medical practitioner.
2. This complaint arises from two separate access applications lodged with the agency by the complainant. Having taken into account certain matters concerning the personal circumstances of the complainant, I have decided not to identify him in my decision and these reasons. Accordingly, he is referred to as "R". The complainant is a prisoner at Casuarina prison, having been transferred to Casuarina prison when Fremantle prison was closed. By letter dated 10 July 1995, the complainant applied to the agency under the provisions of the FOI Act for access to, among other things, all documents held by the agency about him.
3. On 18 September 1995, Mr W F Bykerk, FOI Co-ordinator of the agency identified four files the agency held in respect of the complainant, being his medical file, (which is in two volumes), his unit management file and his prison file. The agency granted the complainant direct access to most, but not all, of the documents from his prison file. However, the agency invoked the provisions of s.28 of the FOI Act in respect of the complainant's entire medical file; certain documents from his unit management file; and certain documents from his prison file. That is, the agency granted the complainant indirect access to those documents, pursuant to the provisions of s.28 of the FOI Act.
4. The complainant applied to the agency for internal review of the decision on access and, on 13 November 1995, Mr P Nella, Manager, Records Management Branch of the agency confirmed the decision to grant the complainant indirect access to the requested documents. Thereafter, the complainant lodged a complaint with the Information Commissioner seeking external review of Mr Nella's decision.
5. The complainant's complaint was received at my office on 21 November 1995. On 1 December 1995, one of my Investigations Officers spoke to the complainant by telephone and arranged a preliminary conference with him to take place on 5 December 1995. However, on 4 December 1995, the complainant informed my Investigations Officer that he did not wish to proceed with his request for external review of the agency's decision and he withdrew his complaint to the Information Commissioner.

6. Subsequently, in March 1996, my office received further correspondence from the complainant which clearly indicated that, notwithstanding the fact that he had withdrawn his complaint against the agency's decision on his first access application, he still remained aggrieved by the decision to grant him indirect access to certain documents from his unit management file and documents from his prison file. Although I did not have a complaint before me at that time, on 20 March 1996, one of my Investigations Officers met with the complainant for the purpose of providing assistance to him by fully informing him of his rights and the processes under the FOI Act.
7. At that meeting it appeared to my officer that the complainant accepted the agency's decision relating to the grant of indirect access to the documents on his medical file. The complainant has since confirmed in writing that he accepts the agency's decision in that regard. However, the complainant does not accept the agency's decision to grant him indirect access to the documents on his prison and unit management files. Following the meeting with my Investigations Officer, the complainant made a second access application to the agency, seeking direct access to the documents from his prison and unit management files, to which indirect access only had previously been granted.
8. On 6 May 1996, the agency decided again that the provisions of s.28 of the FOI Act applied and suggested to the complainant that he could be given access to the requested documents indirectly through Dr Hames, the medical officer at Casuarina Prison. The agency provided Dr Hames with copies of the requested documents for that purpose. However, the complainant disputes the agency's decision in that regard and lodged another complaint with the Information Commissioner seeking external review of the agency's decision on his second access application. It is that decision of the agency which forms the basis of the complaint currently before me.

## **REVIEW BY THE INFORMATION COMMISSIONER**

9. After receiving the complainant's first complaint in November 1995, pursuant to my authority under s.75(1) and under s.72(1)(b) of the FOI Act, I obtained copies of the disputed documents from the agency, together with other documents held by the agency relevant to that complaint. Taking into account the history of this matter, the nature of the material concerned and the results of previous inquiries and investigations carried out by my Investigations Officer, I decided to exercise my discretion under s.66(6) of the FOI Act and allow the complaint to be made even though the complainant had not applied for internal review of the decision of the agency. The parties were advised accordingly.
10. On 17 May 1996, the agency produced for my inspection and examination each of its FOI files relating to the access application. On 21 May 1996, my Investigations Officer met with the complainant and with Dr Hames. After examining the disputed documents and considering the other material before me, including the information gathered by my officer, I formed the preliminary view that the decision of the agency appeared, in all the circumstances, to be justified.

On 6 June 1996, the parties were informed of my preliminary view and my reasons for that view. However, the complainant maintains his claim that he is entitled to have direct access to the documents that are the subject of his second access application.

**Access under Section 28 of the FOI Act.**

11. 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."*

12. A "suitably qualified person" for the purposes of s.28 is defined in regulation 7 of the *Freedom of Information Regulations 1993* to mean a medical practitioner within the meaning of the *Medical Act 1894* ('the Medical Act'). In that Act "medical practitioner" is defined to be a person or a body corporate which is registered under the Medical Act. Section 11 of the Medical Act deals with persons entitled to be registered as medical practitioners and sets out in detail the requirements for registration. It is unnecessary that I discuss those requirements for the purposes of this matter. Essentially, for my purposes, a suitably qualified person means a registered medical practitioner.
13. The grant of access in accordance with s.28 of the FOI Act does not necessarily mean that an applicant will not obtain copies of the requested documents. If an agency decides to provide an applicant with indirect access to documents by making them available to a registered medical practitioner, the medical practitioner concerned may decide the form of access, including, but not limited to, reading the contents, or part of the contents to an applicant; summarising and explaining the contents; allowing inspection; providing copies or providing copies in an edited form.

14. 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. I do not consider it my role to decide the manner in which the registered medical practitioner deals with the provision of access once the use of s.28 has been justified.
15. 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.

### **Information of the relevant kind**

16. The complainant claims that the requested documents were written by a person or persons who do not have medical qualifications. The complainant further claims that because the requested documents were extracted from his prison and unit management files, they cannot contain information of a medical or psychiatric nature. Accordingly, the complainant submits that he is entitled to unrestricted access to the requested documents.
17. In my view, s.28(a) does not include a requirement that the requested documents have been written or prepared by a person or persons holding medical qualifications. Section 28(a) requires only that the requested documents contain "*information of a medical or psychiatric nature concerning the applicant*". I am satisfied from my own examination of the contents of the requested documents that those documents contain information of a medical and psychiatric nature concerning the complainant.

### **Opinion of the principal officer**

18. Further, I am satisfied that at the time the agency made the decision on access, the Acting Director General of the agency, Dr McCall, was of the opinion that direct disclosure of the requested documents to the complainant may have a substantial adverse effect on the complainant's physical or mental health. The documentary evidence on the agency's FOI files in respect of each of the complainant's access applications clearly indicates that when the then Director General of the agency, Mr Grant, considered the complainant's first access application and when Dr McCall considered the complainant's second access application, each considered the nature and content of the disputed documents and formed an opinion on the matter before making their respective decisions.
19. From material before me, it appears that Mr Grant based his opinion about the matter upon advice he received from the then Director of Health Services at the

agency, Dr Bockman. It also appears that Dr McCall based his opinion on the matter upon advice provided to him by Dr Baker, the Acting Director of Health Services of the agency. An examination of the agency's FOI files clearly establishes that both Dr Baker and Dr Bockman reviewed the complainant's complete files before providing their respective advice. There is also material before me that Dr Baker consulted with another forensic psychiatrist.

20. The nature of the substantial adverse effect which the agency claims may result from granting the complainant direct access to the requested documents is due to the fragile nature of the complainant's mental health. I consider there to be ample evidence in the documents produced to me and other material before me that the particular substantial effect to the complainant which the principal officer considered may result from disclosure of the documents is not a far-fetched possibility. Given its particular nature, as I understand it, I do not consider it appropriate to detail that potential adverse effect in these reasons. In those circumstances and for the reasons given, I am satisfied that the opinion of the principal officer of the agency was held on reasonable grounds.

## Conclusion

21. On the basis of my own examination of the contents of disputed documents; the material on the agency's FOI files about the complainant; the complainant's medical history and attempts at self harm since his imprisonment; and the professional opinions provided to the former and current Directors General of the agency, I am satisfied that the agency's decision to grant the complainant indirect access the requested documents by giving access through a suitably qualified medical practitioner was justified. Accordingly, I confirm the decision of the agency to rely upon the provisions of s.28 of the FOI Act.

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