

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

**File Ref: F0861999
Decision Ref: D0052000**

Participants:

'B'
Complainant

- and -

**Department for Family and Children's
Services**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – application for amendment of personal information under Part 3 - refusal to amend - information in the nature of opinion - information claimed to be inaccurate or misleading - request for notation or attachment to the information - certification under s.48(3) that information may be obliterated or removed - prejudice or disadvantage to the complainant.

Freedom of Information Act 1992 (WA) Part 3: ss. 45, 48(1), 48(3), 50; 65(3).

Child Welfare Act 1947 (WA)

Re Clements and Health Department of Western Australia [1995] WAICmr 57

Re Leverett and Australian Telecommunications Commission (1985) 8 ALN N135

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

DECISION

In respect of those documents remaining in dispute, the decision of the agency is confirmed. The disputed matter is not inaccurate, incomplete, out of date or misleading.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

10 February 2000

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner made under s.65(3)(a) of the *Freedom of Information Act 1992* ('the FOI Act') against a decision of the Department for Family and Children's Services ('the agency') not to amend information in accordance with an application for amendment under Part 3 of the FOI Act. In this instance, I have identified the complainant by the letter 'B' in order to protect his privacy and that of his family.
2. The context of this complaint is a bitter Family Law dispute between the complainant and his wife which has been ongoing for several years. There are two children of the marriage between the complainant and his wife and those children have been the subject of allegations of abuse made by the wife against the complainant. In addition, the complainant has made certain counter-allegations against his wife.
3. In the course of the agency's involvement with the complainant and his family, a number of documents, including both paper and electronic records, were created. The paper records are contained in six files relating to a period of approximately 9 years.
4. As part of its record system, the agency also maintains a number of electronic databases for both current and archived material. Information pertaining to the complainant and his family is held on the agency's Client and Community Services System ('CCSS') database. The CCSS database contains information on individuals brought to the attention of the agency. In addition, the agency has an electronic file management database (TRIM). Under the agency's mandate to protect children, certain external organisations may request information from the agency concerning job applicants.
5. In March 1999, the agency wrote to the complainant to advise him that it had received a request from a potential employer for information, if any, held by the agency about him. A consent form signed by the complainant accompanied that request. The agency provided the complainant with a copy of the information it proposed to send in response to that request. The draft letter included statements to the effect that the agency had investigated allegations against the complainant and concluded that those allegations had been 'substantiated'. The letter also included an explanation of the term 'substantiated' as applied by the agency. The complainant was given an opportunity to provide further information and was informed by the agency of his rights under the FOI Act to have personal information amended.

6. On 15 March 1999, the complainant applied to the agency under s.45(1) of the FOI Act to amend its records by the deletion of references to allegations made against him and to those allegations having been ‘substantiated’. On 14 April 1999, the agency notified the complainant of its decision not to amend its records as requested but informed the complainant that a copy of his letter and the attachments to it would be included on its files as a documented record of his concerns.
7. On 25 April 1999, the complainant sought an internal review of the agency’s decision. Although the agency informed the complainant that it was prepared to include on its files an additional detailed notation covering the issues of concern to him, the initial decision not to delete information from those records was confirmed by the internal reviewer. On 15 June 1999, the complainant lodged a complaint with the Information Commissioner about the agency’s decision not to amend its records in accordance with his request.

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 in a document of an agency if the information is inaccurate, incomplete, out of date or misleading. An application for amendment must contain, among other things, details of the information that is believed to be incomplete, inaccurate, out of date or misleading, and reasons for that belief. An applicant is also required to state the form in which he or she wishes the amendment to be made.
9. If an agency decides not to amend the information in accordance with an application made, it must give the applicant reasons for that decision. When that occurs, an applicant may request the agency to make a notation or attachment to the information. 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. If an agency decides to amend its records, s.48(1) provides that it may do so by alteration, striking out or deletion, inserting information or inserting a note in relation to the information.
10. However, an agency must not amend its records so as to obliterate or remove information or otherwise destroy a document unless authorised to do so by the Information Commissioner under s.48(3) of the FOI Act. Section 48(3) is in the following terms:

“48. (3) *The agency is not to amend information under subsection (1) in a manner that –*

(a) obliterates or removes the information; or

(b) results in the destruction of a document containing the information,

unless the Commissioner has certified in writing that it is impracticable to retain the information or that, in the opinion of the Commissioner, the prejudice or disadvantage that the continued existence of the information would cause to the person outweighs the public interest in maintaining a complete record of information.”

11. The decision of the agency was that the information in question is not inaccurate, incomplete, out of date or misleading and, therefore, that there was no ground for the amendment of its records by the deletion of personal information in the manner requested by the complainant. In addition, the agency asserted that there is a public interest “*in maintaining a complete record of the findings made as a result of a formal statutory inquiry*”.

REVIEW BY THE INFORMATION COMMISSIONER

12. The right given to the complainant under s.45(1) of the FOI Act to apply for the amendment of information contained in the agency’s records is limited to information of a particular kind: personal information about him. Therefore, the first question that I must consider is whether the agency’s records contain information of that kind. Having examined the agency’s records, I am satisfied that they contain personal information, as defined in the FOI Act, about the complainant. I consider that information to include the complainant’s name, address, personal details, family relationships, the allegations made against him and the opinions expressed by officers of the agency that those allegations were ‘substantiated’. I also consider that the CCSS database contains personal information about the complainant.
13. The complainant sought the deletion of all references to the allegations made against him, and of all references to statements that allegations of abuse made against him had been ‘substantiated’, which appear in the agency’s files and on its database. The complainant claims that those allegations are untrue. In support of that claim, he referred me to a number of specific documents and provided additional documents for my consideration. In the terms of the FOI Act and in the circumstances of this case, the complainant’s claims go to the question of whether the personal information in the agency’s records is inaccurate or misleading. Therefore, I have dealt with his complaint on that basis.
14. My office held various meetings and discussions with the parties in an effort to identify the particular records containing the allegations against the complainant and statements to the effect that those allegations had been substantiated by the agency. Unfortunately, the agency’s files were not maintained in strict chronological order and many documents on files are drafts or duplicates of others. Information concerning the allegations and the agency’s actions or views was only obtained by working through each file and reading each document. There is no single identifiable report recording the actions and

- decisions taken by the agency in relation to each allegation which made the task of determining whether grounds for amendment existed difficult.
15. On 22 November 1999, I wrote to the parties informing them of my preliminary view in this matter. My preliminary view was that the personal information about the complainant contained in 3 documents, in which reference is made to allegations being substantiated, is misleading and that that information should be obliterated because the prejudice or disadvantage caused to the complainant by its continued existence outweighs the public interest in maintaining a complete record. It was also my preliminary view that the relevant personal information in 4 other documents in which substantiation of allegations is referred to may not be inaccurate, incomplete, out of date or misleading and the agency's decision not to amend it may have been justified and that the complainant is entitled to have a notation added to that information in accordance with s.50 of the FOI Act. Finally, it was my preliminary view that the information contained in documents in which allegations are recorded, but in which no reference is made to their having been substantiated or not, may not be inaccurate, incomplete, out of date or misleading.
 16. The agency agreed to amend the personal information that, in my preliminary view, may be misleading, in the manner proposed by me. The complainant continues to seek amendment of the information that, in my preliminary view, may not be inaccurate, incomplete, out of date or misleading.

The disputed documents

17. After examining the agency's records, the following documents were identified by my office as being the documents sought to be amended by the complainant:
 1. Various documents containing, or referring to, allegations against the complainant in volumes 1-6 of the agency's files.
 2. Documents that refer to 'substantiation' by the agency in connection with those allegations, as follows:
 - File: Volume 1, folios 103 – 104, Child Protection Information System Form;
 - File: Volume 3, folio 93, Outcome Return Form;
 - the agency's letter to the complainant dated 5 March 1999 (referred to in paragraph 5 above);
 - CCSS database printout in relation to first child;
 - CCSS database printout in relation to second child;
 - CCSS database printout referring to the person believed responsible by the agency for maltreatment of the children; and

- the computer database record of information referring to allegations of child maltreatment having been ‘substantiated’.

As the agency has agreed to amend the first 3 documents in point 2 above in accordance with my preliminary view, they are no longer in dispute.

18. Clearly, the agency’s records include professional opinions about the complainant formed by officers of the agency and those opinions are included in the information that the complainant seeks to have amended. In *Re Clements and Health Department of Western Australia* [1995] WAICmr 57, Mr Clements sought to amend information in the nature of professional opinions. In that case, I accepted that information consisting of opinion is capable of being amended under Part 3 of the FOI Act. I accept as correct the statement of Gesell J in *R.R. v Department of Army* 482 F. Supp. 770 (1980), a decision of the United States District Court, District of Columbia, at p.774:

“It would defy common sense to suggest that only factually erroneous assertions should be deleted or revisited, while opinions based solely on these assertions must remain unaltered in the individual’s official file. An agency may not refuse a request to revisit or expunge prior professional judgments once all the facts underlying such judgments have been thoroughly discredited.”

19. I also accept the statement of the Commonwealth Administrative Appeals Tribunal (‘the Tribunal’) in *Re Leverett and Australian Telecommunications Commission* (1985) 8 ALN N135 as correctly identifying the grounds upon which such opinions may be amended. In that decision the Tribunal said, at N136:

“It is unnecessary to attempt to categorize 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.”

20. Having identified the particular personal information about the complainant that forms the subject of this complaint, two questions arise. The first question is whether the information concerning the allegations made against the complainant is inaccurate or misleading.

The agency’s record of the allegations

21. I approached the first question by considering whether the allegations made against the complainant, or references to those allegations, could be viewed by a reasonable person as being inaccurate or misleading. In terms of the amendment

of personal information under the FOI Act, I consider that the truth or otherwise of those allegations is not relevant to that question. The record of the allegations made against the complainant is a record of the statements of a third party or parties. It is not a record of the truth or otherwise of those statements, only that they were made.

22. In its notice of decision given to the complainant on 5 May 1999, the agency referred to the public interest in maintaining a complete record of its inquiries. The view of the decision-maker expressed in that letter was that the deletion of the information would result in altering the historical record. I concur with the agency's view of that matter. There is no material before me that would lead a reasonable person to believe that the record of those allegations is, in any way, inaccurate or misleading. Accordingly, I find that there is no basis for the deletion or other amendment of that information and the agency's decision not to amend it was justified.
23. However, under s.50 of the FOI Act, it is open to the complainant, as suggested by the agency, to have a detailed notation attached to each allegation, or reference to such allegations, giving details of the matters in relation to which the complainant claims the information is inaccurate or misleading. The agency has agreed to attach such a notation and that is discussed further at paragraphs 32-33 below.

The agency's record of allegations against the complainant being substantiated

24. The second question is whether the statements in the agency's records that the allegations against the complainant were substantiated are inaccurate or misleading. That question requires my consideration of the meaning of the word 'substantiated' as it is applied in the agency in relation to the agency's treatment of such allegations.

What constitutes 'substantiation' of an allegation by the agency?

25. The agency has a statutory obligation under the *Child Welfare Act 1947* to investigate allegations of child maltreatment and to develop an intervention plan for the care and protection of children, if necessary. I am informed by the agency that the agency's Child Protection Guide to Practice ('the Guide'), first published in 1987 and amended in 1992, is the primary point of reference for decision-making by the agency on child maltreatment allegations. Section 7.25 of the Guide provides that, following the investigation of a child maltreatment allegation:

"...a decision must be made as to whether the allegation is substantiated or not. This decision should be made in consultation with appropriate DCS staff and have the endorsement of the Responsible Senior Officer.

This decision and the reasons for determining this must be fully documented.

The evidence to substantiate an allegation need not be conclusive to stand as legal evidence, but needs to provide credible evidence that harm to the child has occurred, and leads you to make the professional judgement that the child has been harmed, or is at risk of further harm.

The allegation is substantiated if any/all of the following are apparent:

-Strong medical, physical, behavioural and psychological evidence.

-Admission on the part of the person alleged responsible.

-A clear statement of harm from the child. In these instances emphasis should be placed on believing the child, and working to establish the validity of the child's claim.

-Credible statement from individuals who have acknowledged that the harm has occurred.

-A marked discrepancy between caregiver's explanation and the nature of the injury" (my underlining).

26. I understand that section 7.25 of the Guide was operative at the period in question, although the wording in the 1987 version is slightly, but not in my view relevantly, different. The agency informs me that, in order to substantiate that a child has been harmed, officers are required to gather information pertaining to a range of factors set out in the professional literature as indicators of whether harm has occurred. In doing so, officers exercise their professional judgement on a range of source material in order to determine, on credible evidence, whether a child has been harmed.
27. In effect, a conclusion by the agency that an allegation has been substantiated is a determination that a particular child has suffered harm. Accordingly, although section 7.25 of the Guide refers to the 'substantiation' of allegations, it is clear from information submitted to me by the agency, and from the indicators listed in section 7.25, that there is, in fact, a two-tiered process. Firstly, the agency determines whether or not a child has been harmed, that is, whether there is substantiation of the allegation of harm to the child. The second step is to identify the person believed to be responsible for that harm. I understand that the agency has a duty of care to children and that this identification of the person believed responsible ('the PBR') is made for the sole purpose of developing a plan for the safety of the child. Accordingly, the information relied upon must be credible but need not meet legal standards of proof.
28. The agency informs me that the provision in section 7.25 of the Guide, that a decision "*should be made in consultation with appropriate staff and with the endorsement of the Responsible Senior Officer*", means that such consultation or endorsement is discretionary rather than mandatory. However, the agency has provided me with information to show that, in the complainant's case, inquiries were made in accordance with the requirements of section 7.25 of the Guide,

and that various consultations were undertaken, at the relevant dates, in line with the procedures set out in section 7.25 of the Guide.

29. The agency informs me that the agency identified the complainant as the PBR so that its officers could develop a safety plan for the children concerned rather than for the purpose of determining the complainant's innocence or guilt. The agency informs me that it must take immediate action to protect children at risk of harm and its priority is the protection of children to whom it owes a duty of care.
30. I am advised that the agency was well aware of conflicting material concerning the allegations of harm and that its officers considered all sources of information before reaching a conclusion that harm had occurred. The agency informed me that the evidence upon which it relies has to be credible, but does not have to meet the requirements of evidence that is admissible in legal proceedings. I understand that the agency makes its own independent assessment on the material available to it before deciding whether an allegation of harm to a child is substantiated and before identifying the PBR.
31. From the material before me and my inquiries with the agency, I am satisfied that the agency's conclusion that the allegations of harm to the children had been substantiated was based on a number of clear disclosures by the children, together with statements from staff and others who believed that harm had occurred. In my opinion, that conclusion was based on the procedures outlined in section 7.25 of the Guide. Therefore, I find that the agency's documents recording that conclusion are not inaccurate, incomplete, out of date or misleading.

Section 50 - Notations on the record

32. Section 50 of the FOI Act provides that, where the agency decides not to amend information, an applicant may "*request the agency to make a notation or attachment to the information*", that is, to the information claimed to be inaccurate, incomplete, out of date or misleading. Section 50(3) provides that the agency must comply with the request unless it considers that the notation or attachment is defamatory or unnecessarily voluminous. The complainant has informed me that he wishes to have a notation prepared by him disputing the accuracy of the allegations attached to all relevant documents held by the agency. The agency has agreed to attach his notation as a separate folio in each of the client files, and I consider that to be sufficient in this instance to comply with s.50 in respect of the agency's paper records. I consider that attaching the notation to each document would be unnecessarily voluminous and consider the agency's proposal sufficient to alert any person accessing any of the relevant files to the complainant's response to the allegations.
33. As some of the records of the agency consist of computer databases, I consider that it may be impractical, if not impossible for the agency to fully comply with its obligations under s.50 of the FOI Act. Accordingly, in respect of the

computer records, I am of the view that an alert warning for the computer records will be sufficient compliance in this instance.

‘Substantiation’ of allegations against the complainant

34. However, I reached a different view in relation to the documents recording the allegations against the complainant as being substantiated as that term is applied by the agency. As the agency has since agreed to amend that information in accordance with my preliminary view and the written certification I have given it, that information is no longer in dispute. However, it may assist the complainant and other readers of these reasons to understand my decision if I nonetheless explain my different conclusion in respect of that matter.
35. In my opinion, confusion arose from the agency’s use of the term ‘substantiate’ in connection with the word ‘allegation’. As I understand it, the criteria for ‘substantiation’ in section 7.25 of the Guide apply to allegations of harm to the child only, not to allegations that a particular person is responsible for the harm to the child. What is ‘substantiated’ is not an allegation made against a particular person, but that the child has been harmed.
36. The agency advises me that the term ‘substantiate’ is a commonly accepted term in child welfare circles, both here and overseas. Nonetheless, I note that this term is used by the agency itself in ways that do not always make the meaning clear. For example, it may be recorded that an ‘allegation was substantiated’ when the agency only intends to record that a particular child has been found to have been harmed, and not to indicate that an allegation made against a particular individual has been substantiated. Accordingly, I consider that, to the extent that the agency’s records suggest that allegations against the complainant have been ‘substantiated’, the records are misleading. Even in terms of the agency’s particular use of the term ‘substantiated’, that is not the case since the agency is substantiating an allegation of maltreatment of a child, and not an allegation that a particular individual is the perpetrator of that maltreatment.
37. I consider that the confusion in the use of the term ‘substantiate’ is evident both in the Guide used by officers of the agency and throughout the files viewed by this office. The agency acknowledges that there is a tendency for its staff to confuse the two concepts of substantiation of harm and identification of the PBR. In my view, it is inaccurate and misleading to use the one phrase, the “allegation was substantiated”, as a shorthand way of indicating both that the agency has substantiated that harm to a child has occurred and that a PBR has been identified.
38. Further, I also consider the references suggesting that allegations against the complainant have been ‘substantiated’ to be misleading because, as that term is commonly understood, a reasonable person reading those documents could understand them to mean that those allegations have been proven to be true. The Australian Concise Oxford Dictionary (Third Edition, 1997) defines ‘substantiate’ as “*prove the truth of (a charge, statement, claim, etc.) give good grounds for*”. The files of the agency indicate that strongly differing

professional opinions were held about the credibility of the allegations. For example, the allegations against the complainant were viewed as fabrications on two occasions in a court of law, and the medical evidence was not unequivocal. I do not consider that the agency has proven the truth of the allegations made against the complainant, nor do I understand the agency to be claiming that it has done so. In my opinion, a reasonable person reading the agency's documents relating to the complainant would understand that some of those records imply that the allegations against him have been proven to be true when, clearly, that is not the case.

Certification under s.48(3) of the FOI Act

39. Section 48(3) of the FOI Act provides that the agency is not to amend information in a manner that obliterates or removes the information, or results in the destruction of the document containing the information, unless I have certified, in writing, that it is impracticable to retain the information or that, in my opinion, the prejudice or disadvantage that the continued existence of the information would cause to the person outweighs the public interest in maintaining a complete record of information.
40. In this instance, it is clearly not impracticable to retain the information. References to 'substantiated' allegations appear in only three documents on the agency's files. There is no practical reason why that information cannot be retained. The question, therefore, was whether, in my opinion, the prejudice or disadvantage that the continued existence of the information would cause to the complainant outweighs the public interest in maintaining a complete record of information.

Prejudice or disadvantage to the complainant

41. The complainant provided me with submissions on this point. He considers that, as a result of what he perceives to be the agency's selective information processes, there have been a number of serious consequences for himself and his family. In my view, a number of these are not directly linked to the retention on the agency's records of the information in question. However, the complainant submits that, as a result of the information which the agency proposed to send to a prospective employer, he was obliged to withdraw his employment application and thus lost the opportunity to be considered for employment in that instance.
42. In my opinion, the potential release by the agency of references to 'substantiated' allegations against the complainant to an external body, or to other organisations as part of the agency's information-sharing procedures, may cause the complainant prejudice or disadvantage that would outweigh the public interest in maintaining a complete record of information in this case.
43. I consider that there is a public interest in an agency retaining a complete record of the results of its investigations and findings in respect of allegations made against particular individuals. However, I also consider that there is a public interest in those findings being accurately recorded in a manner that is not

misleading. Accordingly, I formed the view that this may be a suitable case for certification under s.48(3) of the FOI Act that references to allegations against the complainant having been 'substantiated' be obliterated or removed from the agency's records. Therefore, I gave the agency written certification under s.48(3) and it is proceeding to amend the 3 documents identified in paragraph 17 above by deleting references to 'substantiated' in the context of stating or implying the guilt of the complainant.

44. During discussions, the agency informed me that the complainant's files are inactive and have been inactive for some time. However, the agency was prepared to take additional steps to ensure that any future use made of those files would accurately reflect the position with respect to the complainant. The agency informed me that it would place alert warnings on both its paper files and computer databases and ensure that no action would be taken with respect to the contents of the records relating to the complainant without reference to the Executive Director, Metropolitan Services. Taking into account those suggestions, I am satisfied that the appropriate steps have been taken, or will be taken, to ensure that misleading information is not conveyed to external organisations in the future.
45. I am also advised that, partly in consequence of the confusion over the use of terms such as 'substantiate' in the agency, a project is currently underway to develop clear guidelines for the use of accurate language in case practice management. The aim of that project is to reflect clearly the two separate concepts of determining that harm has occurred to a child and identifying the person believed to be responsible for that harm.
