

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

**File Ref: F2004075  
Decision Ref: D0212004**

Participants:

**Carole Williamson**  
Complainant

- and -

**Department of Health**  
Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – documents relating to job classification and appeal – scope of the access application – section 26 – whether reasonable grounds to believe that documents exist or should exist – sufficiency of searches.

*Freedom of Information Act 1992 (WA)*: ss.26(1), 66(1)(d)

*Freedom of Information Regulations 1993*: Regulation 8

*Re Oset and Ministry of the Premier and Cabinet* [1994] WAICmr 14

*Re Doohan and Police Force of Western Australia* [1994] WAICmr 13

*Re Uren and Minister for Planning* [1995] WAICmr 21

## DECISION

The decision of the agency to refuse access to the additional requested documents on the ground that they either cannot be found or do not exist is confirmed.

D A WOOKEY  
A/INFORMATION COMMISSIONER

16 December 2004

## REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Health ('the agency') to refuse Ms Carole Williamson ('the complainant') access to documents requested by her under the *Freedom of Information Act 1992* ('the FOI Act').

## BACKGROUND

2. In 2001 the Australian Industrial Relations Commission ('AIRC') issued an order varying the Nurses (Australian Nursing Federation ('ANF')) Award by translating established senior nursing positions (ANF Levels 3, 4 and 5) into a new 10-tier Senior Registered Nurse ('SRN') classification structure. The order of the AIRC prescribed the Senior Nurses Work Value Transitional Review Process. In accordance with the Nurses (WA Government Health Services) Agreement 2001, the agency was required to develop and implement that review process which took place in two stages.
3. The first stage involved the reclassifying of each existing senior nursing position into the new SRN classification structure. This work was carried out by the State Classification Review Committee ('the SCR Committee'), which I am advised was also known as the Senior Nurses Workforce Classification Panel. The SCR Committee was nominated by the Director General of the agency and its representatives included members of both the 22 rural and the four metropolitan health services ('the Health Services'). The SCR Committee met at the agency's office in East Perth from February to April 2001 and initially considered some 287 positions.
4. At the relevant date, the members of the SCR Committee were Mr Craig Bennett, Chief Executive, North Metropolitan Area Health Service, Mr Paul Aylward, General Manager, West Pilbara Health Service, Mrs Heather Guyas, Director of Nursing, Rockingham – Kwinana District Health Service, Ms Di Mantell, Director of Nursing, Kalgoorlie Regional Hospital, Mr Graham Edwards, Coordinator, Labour Relations Branch of the agency and Mr John Holland, Director, Austral College. Austral College ('Austral') is a division of Austral Training and Human Resources - a registered training organisation - and an independent consultant, which successfully tendered for the contract with the agency to conduct the work value review using the Senior Nurses Classification Tool ('the Classification Tool').
5. The second stage was the considering of appeals made by senior nurses who were dissatisfied with the resulting classification of their positions. The agency advises that appeals were heard in 2002 and 2003 by the Independent Transitional Appeal Panel ('the Appeal Panel') established in accordance with Schedule 4 to the amended Federal Nurses (ANF - WA Public Sector) Award 2002. The members of the Appeal Panel comprised an equal number of nominees of the ANF and the agency, with a former Commissioner of the Western Australian Industrial Relations Commission as Chair. I understand

that there was no right of appeal from the Appeal Panel.

6. The Appeal Panel met on a number of occasions to consider 404 appeals lodged. At the relevant time, the complainant held a senior nursing position at Royal Perth Hospital ('RPH'), which was affected by the reclassification process. I understand that the complainant appealed the reclassification of her position to the Appeal Panel and the complainant's appeal was considered on 1 August 2003 but was not upheld.

7. On 11 October 2003, the complainant wrote two (unsigned) letters to the agency applying for the following documents under the FOI Act. One was for:

*"... all the papers, reference materials and scoring systems that fully explain the process of how both the appeal panel scored my post, and how the original Senior Nurses Work Value Classification panel scored my post, which logically was also scrutinised during the appeal process."*

The other was for:

*"...all the papers used in the appeal process and the records of how all the members of the appeal panel scored my post and all the papers used in the original process and the records of how all the members of the original Senior Nurses Workforce Classification Group scored my post, which I assume were also scrutinised by the appeal panel during their deliberations."*

8. On 3 November 2003, the complainant wrote and signed two letters to the agency in which she sought access under the FOI Act to:

*"... - all the papers,  
- reference materials and scoring systems,  
- and scoring matrix,*

*that fully explain the process of how both the appeal panel scored my post against all criteria, and how the original Senior Nurses Work Value Classification panel scored my post, which logically was also scrutinised during the appeal process"*

and

*" - all the papers used in the appeal process in relation to my appeal  
- and the records of how all the members of the appeal panel scored my post, and all the papers used in the original process  
- and the records of how all the members of the original Senior Nurses Classification Group scored my post, which I assume, were also scrutinised by the appeal panel during their deliberations."*

9. The agency dealt with the complainant's two separate applications as one application. The agency identified five documents as coming within the scope of that access application and, on 10 December 2003, it gave the complainant

access to them in full. Those documents are described as follows:

- Document 1: Job Evaluation Questionnaire for Nurse Manager, Corporate position at RPH, dated 22 April 2002.
- Document 2: Senior Nurses Work Value Appeal Checklist, dated 7 February 2003.
- Document 3: Supporting Statement and attachments for position of Nursing Director, Corporate Nursing Services, RPH - Senior Nurse Work Value Appeal.
- Document 4: Job Specification for the position of Coordinator Corporate Nursing Services - Sir Charles Gairdner Hospital.
- Document 5: Appeal Application - Position of Nursing Director RPH (Transitional Appeal Panel) dated 17 September 2003.

10. On 20 December 2003, the complainant wrote to the agency and said:

*“I ... wish to request a full review of my FOI on the grounds that there must at least be some other paperwork detailing how/why and who reached the decisions in relation to my initial submission and subsequent appeal.”*

11. In its notice of decision on internal review, dated 8 January 2004, the agency advised the complainant as follows:

*“The Independent Transitional Appeal Panel (ITAP) composition was widely publicised following their appointment by the Director General of Health. This group was composed of Mr. John Negus Australian Industrial Relations Commissioner (retired); Mr. Jim Thomson Director of Mental Health Nursing NMHS; Mrs Beth Anderson, Manager Geraldton Hospital; Miss Belinda Burke ANF Senior Industrial Officer and Mr. Neil Fergus ANF Industrial Officer.”*

12. The agency also gave the complainant access in full to two additional documents:

Document 6: a document entitled *“SRN Descriptors to be read in conjunction with SRN Award Definitions”*; and

Document 7: a letter dated 30 January 2002 from Mr J Holland to Ms D Mantell and Mr G Edwards attaching the first six pages of a document entitled *“Senior Nurses Work Value Assessment Interim Results - Senior Nurses Classification Tool - January 2002”*.

The agency advised the complainant that it could find no further documents.

13. The agency’s FOI file shows that, on 20 February 2004, the complainant e-mailed the agency’s FOI Coordinator, Mr Tony Hooper, to advise that she had heard nothing from the agency following her request for internal review. The agency’s FOI file establishes that Mr Hooper followed up the complainant’s query and was informed by the internal review decision-maker that the notice

of decision, dated 8 January 2004, had been sent to the complainant. However, Mr Hooper forwarded an electronic copy of that decision by email to the complainant on 25 February 2004. The complainant responded by email to Mr Hooper on 26 February 2004 confirming that she had received that document.

14. On 8 March 2004, the complainant wrote to the agency and said that the documents supplied to her were not complete because they had omitted the following:

- “(1) All correspondence and matters relating to the Senior Nurses Work Value Review from Ms D Mantell, Mr G Edwards and others in the Health Department and Austral Training*
- (2) The original review and scores of the 287 positions performed by Austral Training College using the Bi Pars Job Evaluation system as detailed in the materials supplied*
- (3) The original report of January 15<sup>th</sup> 2002 as presented by Austral as detailed in the material supplied*
- (4) The **definitions** originally provided by Austral for SRN 1 through to Level 10 not the subsequently developed **descriptors** as provided*
- (5) The original second page of the Austral letter of January 2002 not what appears to be an amended second page*
- (6) The evaluations, assessments and job descriptions used as described as benchmarks for the whole process for the posts of Co Director Nursing Sir Charles Gairdner Hospital, and Coordinator Nursing/Business Manager Sir Charles Gairdner Hospital*
- (7) Appendix 1 from the report presented as being from Austral is also missing detailing the changes made to the classification tool and the reasons why*
- (8) The scoring matrix developed by Austral as detailed at length in all its mathematical glory under **Grouping method** on the final page”.*

15. On 29 March 2004, the agency wrote to the complainant in relation to those eight queries and advised her as follows:

- “1. There is correspondence between the key people involved in the Classification process, including Department of Health officers and Austral. This correspondence is outside the scope of your application as it does not directly relate to the classification and review of your post.*
- 2. Your position was not one of the 287 that were reviewed by Austral and therefore documents relating to these positions fall outside the terms of your application.*
- 3. The classification of Senior Nurses by CRC group was not provided because you sought information relating to the classification and review of your specific position.*
- 4. The Department does not have this information. It is held by Austral.*
- 5. The second page of the letter to Ms D Mantell and Mr G Edwards from Mr J Holland dated 30 January, 2004, a copy of which has been provided to you, has not been changed.*

6. *The posts used as benchmarks in the classification process have been determined by an independent process outside of this review. Austral holds this information.*
  7. *Ms D Mantell has conducted a search for Appendix 1 to the report but has not been able to find it.*
  8. *The Department has only received the results of the Austral review. All computational and assessment material is held by Austral.”*
16. On 29 April 2004, the complainant sent a facsimile (undated) to this office requesting an external review of the agency’s decision, attaching an unsigned access application to the agency dated 11 October 2003 (the first of the two cited in paragraph 7 above); her letters to the agency dated 8 and 30 March 2004; and her request for internal review, dated 19 December 2003. However, the complainant did not attach the agency’s internal review decision which is required to accompany a complaint to my office, pursuant to section 66(1)(d) of the FOI Act and regulation 8 of the *Freedom of Information Regulations 1993*.

#### **REVIEW BY THE A/INFORMATION COMMISSIONER**

17. On the basis of the complainant’s insistence that she had not received from the agency a notice of decision on internal review, and with the agreement of the agency, I accepted the complaint out of time. I required the agency to produce to me, for my examination, the FOI file relating to the complainant’s access application. As detailed in paragraph 13 above, the file evidenced that the complainant had in fact been sent a notice of decision on internal review and had acknowledged receipt of it. After examining the material on the FOI file, I required the agency to provide me with certain additional information in writing, and my Legal Officer subsequently met with officers of the agency to make further inquiries and to ascertain what procedures were followed, and what documents were generated, by the SCR Committee and by the Appeal Panel.

#### ***The SCR Committee process***

18. The agency advises me that the Health Services were required to submit documentation regarding all senior registered nursing positions to the SCR Committee via Austral. The submission for each position required a Job Description Form (‘JDF’), Job Evaluation Questionnaire (‘JEQ’) and Organisational Chart.
19. The agency states that the complainant’s position of “Divisional Coordinator of Nursing” was originally an “ANF L 4.1”. However, I note that the cover page of Document 1, dated 22 April 2002, refers to her position as “Nurse Manager, Corporate”; page 3 of that document refers to her position as “Nurse Manager, Level 3”; and page 21 of that document refers to her position as “Nurse Coordinator Corporate Nursing”.

20. I understand that Austral's initial task was to conduct a work value review of 287 senior nurse positions. Those positions were used by Austral to test its model. The agency advises me that the complainant's position was not one of those 287 positions. In order to conduct the work value review, each senior nursing position was converted into the new classification structure by assessing its documented responsibilities against level descriptors. This was done by using the Classification Tool developed by Austral in the course of its contract with the agency from a modified form of the BIPERS classification system. As I understand it, the Classification Tool uses the JEQ completed for each senior nursing position in conjunction with the methodology set out in Document 7 to assess job factors and award a numerical value to each, with the total score compared to the points required for each classification level.
21. I also understand that the BIPERS classification system is used in the government health industry and almost exclusively across the WA public sector as part of the review process of a broad range of allied health and other positions and that the BIPERS licence in Australia is held by William M Mercer Pty Limited. The BIPERS system used by the public sector in Western Australia is publicly available on the website of the Department of the Premier and Cabinet. The agency advises me that Austral holds a licence to use the BIPERS system.
22. By January 2002, Austral had completed its assessment of the 287 positions by allocating points for each of those positions and grouping the positions into bands showing a range of scores. I understand the agency to say that the points awarded to those positions were determined by using the BIPERS matrix system as set out in Document 7 under the heading "Grouping Method". The agency advises that the points awarded to each of the 287 positions were informally written on the front cover of each JEQ and that those documents are - or were - held by Austral.
23. Having evaluated each position, Austral made recommendations based on those evaluations for consideration by the SCR Committee. I understand that the SCR Committee then used Austral's evaluations of those 287 positions as a guide to determine the final groupings of positions, which was done by taking into account the additional factors referred to in paragraph 4 of page 1 of Document 7.
24. The agency advises that the SCR Committee assessed the total number of senior nursing positions individually taking into account the previous classifications made. At this point, as I understand it, the corporate nursing positions were placed in groups by being mapped against other corporate positions – the complainant's particular position being mapped against the position of "Business Manager, Theatre".
25. I understand that the positions were classified using the definitions for Senior Registered Nurses Levels 1-10 developed by the SCR Committee and the amended Nurses (ANF - Public Sector) Award 2002 descriptors and that those classifications were recorded in a document entitled "*Results of the Senior Nurses' Work Value Review 2002*". The agency advises that this document is



the same document referred to as the “Senior Nurses Work Value Assessment Interim Results - Senior Nurses Classification Tool - January 2002” document (Document 7), to which it has given the complainant access by way of a full copy.

26. The outcome of the SCR Committee’s deliberations on the complainant’s position, among others, was a list of all senior registered nurse positions recording the outcomes, headed “Senior Nurses Reclassification Determination 2002”. This document was circulated to the Health Services as an attachment to the agency’s Operational Circular OP 1585/02 on 15 August 2002. The agency advises that there are no other documents which refer to the SCR Committee’s deliberations on the complainant’s position or the other positions it dealt with.

### ***The Appeal Panel process***

27. On 7 February 2003, the complainant completed the checklist/coversheet for the documentation to appeal the classification of her position, which she described as “Nursing Director, Corporate Nursing Services” (Document 2). The submission document attached to that coversheet (Document 3) notes:

*“The position of Nurse Director - Corporate Nursing is being appealed to a Senior Registered Nurse (SRN) Level 9 from the granted SRN Level 8.”*

28. As a result of my inquiries, I understand that the process followed by the Appeal Panel in considering the reclassification of the complainant’s position, amongst others, was as follows:

- Appellants were required to lodge a written submission consistent with the Federal Order and Award which addressed all points in the award definition for the classification level they believed to be appropriate to their current role. They also had to provide a comparison (where possible) between like positions and identify similarities and differences to justify them. This documentation was provided to all panel members in addition to the award descriptors and the *Results of the Senior Nurses’ Work Value Review 2002*.
- Following the deliberations of the Appeal Panel, the Chair recorded its decisions which were then signed by the Chair and forwarded to the Director General of the agency.
- Individual appellants were notified by the agency of the outcome of their appeals. The Regional Directors and Chief Executives were also advised by the agency to ensure the appropriate processes were put in place for any changes in classification as a result of the appeal process.

### ***Documents used in the SCR Committee and the Appeal Panel processes***

29. From the above account, I understand that the documents listed as (i)-(xi) below were used by the SCR Committee for the purpose of the classification

process in relation to the complainant's position and that documents (xii)-(xvi) were used by the Appeal Panel in relation to the complainant's appeal:

- (i) the JDF (part of Document 3);
- (ii) the JEQ (Document 1);
- (iii) the organisational chart for the complainant's position (part of Document 3);
- (iv) the Classification Tool (the agency says that this comprises the JEQ and the explanatory notes in Document 7);
- (v) modified BIPERS scoring matrix used by Austral;
- (vi) the JEQ used by Austral in relation to the position of "Business Manager, Theatre (Document 13)";
- (vii) the record of Austral's evaluation of the position of "Business Manager, Theatre", recorded on page 11 of the document headed "Senior Nurses by CRC Group" attached to Document 7 (Document 12);
- (viii) SRN descriptors used in conjunction with the SRN Award definitions (Document 6);
- (ix) Nurses (ANF - Public Sector) Award 2002 descriptors;
- (x) definitions developed by the SCR Committee;
- (xi) outcome document (attachment to Operational Circular OP 1585/02);
- (xii) the complainant's written submission to the Appeal Panel attaching her JDF and organisational chart (Documents 2, 3 and 4);
- (xiii) the award descriptors referred to in (ix);
- (xiv) the SRN descriptors to be read in conjunction with the Award descriptors referred to in (viii);
- (xv) the "Results of the Senior Nurses' Work Value Review 2002" (Document 7); and
- (xvi) the record of the Appeal Panel's decision (Document 5).

30. Accordingly, as I understand it, at the time that I accepted this complaint, the agency had given the complainant access under the FOI Act to all of those documents except those described in (v), (vi), (vii), (ix), (x), (xi) and (xiii).
31. The agency also advised me on the searches it had conducted for the requested documents. In addition, inquiries were made with Austral concerning the existence of documents within the scope of the complainant's access application.
32. In the course of those inquiries it became apparent that, when Document 7 was given to the complainant, it comprised a 2-page letter dated 30 January 2002 attaching a 6 page document. However, I noted that the original letter also included a 20 page attachment headed "Senior Nurses by CRC Group". The agency, in its letter to the complainant of 29 March 2004, had advised her that this document was outside the scope of her access application because it did not relate to the classification and review of her specific position. However, I considered that, since one page of that document referred to the position of "Business Manager, Theatre" against which the complainant's position was mapped, that page came within the scope of the complainant's access application. Subsequently, the agency released page 18 of that document to

the complainant (Document 8).

33. In addition, in the course of my dealing with this matter, two further documents were identified as coming within the scope of the complainant's access application and released to her by the agency:
  - a document headed "Proposed Nurses Classification System", which I understand is a preliminary and provisional reference document formulated by Austral to group Senior Registered Nurses (Document 9); and
  - a document headed "Criteria for Senior Registered Nurses" (Document 10), which I understand is a document also used by Austral.
34. Finally, the agency sent the complainant a copy of the Award descriptors (the document described at (ix) in paragraph 29 above) a copy of which I understand had already been obtained by the complainant outside the FOI process.
35. On 10 September 2004, I informed the parties, in writing, of my preliminary view of this complaint. My preliminary view was that, on the basis of the material then before me, other than the document described at (xi) in paragraph 29 above - which the agency advises me the complainant is able to access from the agency's intranet site - there were no further documents which came within the scope of the access application because such documents either do not exist or cannot be found and that it seemed to me that the agency had made reasonable searches for the requested documents.
36. In light of my preliminary view, I invited the complainant to reconsider her complaint or to provide me with further information or submissions in support of her claim that further documents existed. In an undated letter received by my office by facsimile on 22 September 2004, the complainant sought an indefinite extension of time in which to respond and raised a number of issues, not all of which were relevant to the matters for my determination.
37. In reply to the complainant's facsimile, I gave her an additional 16 days in which to respond to my preliminary view and also offered her the opportunity to make oral submissions to me. The complainant did not avail herself of that opportunity. I also asked the agency to make additional searches and inquiries in view of certain queries raised by the complainant.
38. Subsequently, the agency advised that it had located three additional documents and gave the complainant access to the final version of Document 7 (Document 11), which had not previously been disclosed - and which includes information that was originally intended to be "Appendix 1" to the report prepared by Austral (listed as point 7 in the complainant's letter of 8 March 2004 to the agency); page 11 of a document headed "Senior Nurses Review - JEQ Scores" (Document 12) which contains the data relevant to the complainant's position; and the JEQ for the position of Business Manager Theatre from which a small amount of personal information was deleted, pursuant to clause 3(1) (Document 13). However, the complainant did not

withdraw her complaint.

39. Following this process, the complainant had, in my view, been given access to all the documents referred to in paragraph 29 above except those described in items (v), (ix), (x), (xi) and (xiii). Of those, I understand that the document described in (ix) and (xiii) is publicly available and therefore the provisions of the FOI Act do not apply to it. The document described in (xi) is available to the complainant on the agency's intranet site. Therefore, the only documents detailed in that list as being the documents used by the agency in assessing the classification of the complainant's position and to which she has not already been given access (or is otherwise able to access) are those described in (v) and (x).

### **THE SCOPE OF THE COMPLAINANT'S ACCESS APPLICATION**

40. I understand from the complainant's access applications to the agency that she is seeking access to documents that explain the process of how her position at RPH was classified by the SCR Committee and how that classification was reviewed by the Appeal Panel.
41. As I understand it, the scope of her access applications, as set out in her two letters to the agency on 3 November 2003, reproduced verbatim in paragraph 8 above, is:
- (1) all papers used in the appeal process in relation to the complainant's appeal, including the records of how all the members of the appeal panel scored the complainant's post and all reference materials, scoring systems and scoring matrix that explain how the appeal panel scored the complainant's post against the all the relevant criteria; and
  - (2) all papers used in the original classification process (in relation to the complainant's post), including the records of how all the members of the original Senior Nurses Work Classification Group scored the complainant's post and all reference materials, scoring systems and scoring matrix that explain how the Senior Nurses Work Value Classification Panel scored the complainant's post.
42. In its letter to the complainant of 29 March 2004, the agency advised that the documents described in points 1, 2 and 3 of her letter of 8 March 2004, cited in paragraph 14 above - which she considered should have been provided to her in the course of her access application - were not documents which explained the process of how the complainant's position was classified and, thus, were outside the scope of her access application. In that regard, the agency also says that, since the 287 positions considered by Austral did not include the complainant's position, the JEQs relating to those positions (see document (vi) in paragraph 29 above) are outside the scope of her access application. In relation to points 2 and 3 of the complainant's letter, the agency has since given the complainant copies of Documents 8, 12 and 13.

43. Having considered the complainant's access applications, the agency's advice to her and the information and material before me, I consider that the scope of the complainant's access applications is as set out in the two points referred to in paragraph 41 above and that, with the exceptions of Documents 8, 12 and 13, items 1, 2 and 3 in the complainant's letter of 8 March 2004 are not within the scope of her access applications. In the letters comprising the complainant's access application she specified that she sought documents relating to the classification of her position, both originally and subsequently by the appeal panel, and all the documents referred to, used in and created during both the original process of classifying the complainant's position and subsequently in her appeal against the classification of her position.
44. None of the documents described in items 1, 2 and 3 - other than the exceptions noted - relate to the classification of the complainant's position. As explained in paragraph 32 above, the complainant's position was mapped against the position of "Business Manager, Theatre" and the page of Document 8 - together with Documents 12 and 13 - which deal with that position have now been given to the complainant. Other than that, none of the documents described in items 1, 2 and 3 of the complainant's letter of 8 March 2004 was used in, referred to or created in the course of the original process of classifying the complainant's post or the subsequent appeal process. They are not, therefore, "... papers that fully explain the process of how both the appeal panel scored [the complainant's] post against all criteria ..." or "... how the original Senior Nurses Work Value Classification panel scored [the complainant's] post ..."; nor are they "... papers used in the appeal process ...", "... records of how all the members of the appeal panel scored [the complainant's] post ...", "... papers used in the original process [of scoring the complainant's post] ..." or "... records of how all the members of the original Senior Nurses Classification Group scored [the complainant's] post ...". They are not, therefore, within the scope of the access application. The complainant did not ask for them.
45. In respect of the documents that the complainant claimed, in her letter of 8 March 2004 to the agency, should exist and had not been given to her (listed in paragraph 14 above), I am of the view that:
- for the reasons given in paragraphs 43 and 44 above, the documents described in points 1-3 of that letter - other than the exceptions referred to - are not within the scope of the access application;
  - there is no evidence before me that page 2 of the document described in point 5 of the letter has been altered and therefore no evidence that another page 2 should exist;
  - the documents in point 6 are not within the scope of the access application as they were not used or referred to in classifying the complainant's position, originally or on appeal, and the complainant has now been given the JEQ relating to the post against which her position was mapped (Document 13);

- the document described in point 7 does not exist – it has been explained to the complainant that the information originally intended to be included in an appendix to the attachment to Document 7 was incorporated into the final draft of the document (Document 11) under the heading “Assessor Guidelines” and the complainant has been given a copy of that document; and
- the scoring matrix referred to in point 8 and the definitions referred to in point 4 would appear to be within the scope of the access application but the complainant has not been given access to them. The agency has refused access to them on the basis that either it does not have them or they cannot be found.

## DOCUMENTS THAT DO NOT EXIST OR CANNOT BE FOUND

46. Section 26(1) of the FOI Act deals with the obligations of the agency in the circumstances where it is unable to locate the documents sought by an access applicant or where those documents do not exist. Although the agency has not referred to section 26 in its notice of decision to the complainant, I understand that it has refused the complainant access to any further documents on the ground that they do not exist or cannot be found and, consequently, the agency’s decision to refuse access falls squarely within that provision.
47. Section 26 provides as follows:
- “(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.*”
48. The former Information Commissioner (‘the former Commissioner’) discussed the requirements of section 26 in a number of decisions relating to documents that cannot be found: see, for example, *Re Oset and Ministry of the Premier and Cabinet* [1994] WAICmr 14; *Re Doohan and Police Force of Western Australia* [1994] WAICmr 13; and *Re Uren and Minister for Planning* [1995] WAICmr 21. In those decisions, the former Commissioner accepted that,

when dealing with such an issue, there are two questions that must be answered. The first question is whether there are reasonable grounds to believe that the requested documents exist or should exist and are, or should be, held by the agency. Where the first question is answered in the affirmative, the next question is whether the agency has taken all reasonable steps to find those documents.

49. The former Commissioner also accepted that it was not her function to physically search for the requested documents on behalf of a complainant and took the view that, provided she was satisfied that the requested documents exist, or should exist, it was her responsibility to inquire into the adequacy of the searches conducted by an agency and to require further searches to be conducted if necessary. I agree with the former Commissioner's conclusions in relation to the requirements of section 26.
50. I also observe that it is not my role to investigate or answer questions as to why the agency has taken the action it has with respect to the grading of the complainant's position.

### **The existence of the documents**

51. The agency has given the complainant access to Documents 1-13, as described in paragraphs 9, 12, 32, 33 and 38 above. In light of the agency's clarification of the processes of the SCR Committee and the Appeal Panel, and in view of the additional inquiries and searches made, I consider it reasonable to expect that further documents exist or may exist arising from the classification of the complainant's position and her appeal against that classification. Those documents would include:

- the scoring matrix used;
- a record of the calculation using the BIPERS scoring matrix to determine the position of Business Manager Theatre against which the complainant's position was mapped;
- the definitions developed by the SCR Committee;
- notes made by the members of the SCR Committee and the Appeal Panel in the course of their deliberations concerning the complainant's position.

### **Searches conducted by the Agency**

52. On my receipt of this complaint, I asked the agency to detail the searches made for the requested documents.
53. The agency advises me that Ms Di Mantell, Principal Nursing Advisor, Workforce Directorate, is responsible for the notes and other records made by the SCR Committee and that both she and Mr John Hammond of Austral have conducted searches for the requested documents in their respective databases and filing systems. The agency also advises me that the only documentation created by the Appeal Panel and provided to the agency was the summary for each position that was assessed by the Appeal Panel stating the outcome of the

process and signed by the Chair. I understand that the complainant has received a copy of the document which relates to her position (Document 5).

54. The agency says that all the documents held by it relating to the SCR Committee and the Appeal Panel are to be found in its office B1/49. The agency advises that searches for the requested documents were made by the Principal Nursing Advisor of all the agency's SRN files, both in the course of dealing with the complainant's original access application and, again, over the period April-July 2004.
55. As a result of the agency's clarification concerning the processes of the SCR Committee and the Appeal Panel, my Legal Officer asked the agency to make further searches and inquiries - including with the members of the SCR Committee and the Appeal Panel - and, in particular, to ascertain what information was held by Austral; what information the agency was entitled to access under the terms of its contract with Austral; and whether any records of the discussions and deliberations of the members of the SCR Committee and the Appeal Panel were made and retained by the agency.
56. In response, the agency provided me with a copy of its contract with Austral which invokes the terms and conditions contained in the "Request for Quote Document, (HDQ64/01)" and the Austral proposal dated 21 August 2001. The Request for Quote Document notes that the Western Australian Government Health Supply Council's "*General Conditions of Contract for the Engagement of Consultants*" are deemed to be incorporated into that document. Clause 12 of the General Conditions provides:
- "All works items materials or information whatever nature produced or developed by the Consultant or under the direction of the Consultant pursuant to or in the course of providing the Services shall be and become the sole and complete property of the Crown in right of Western Australia..."*
57. The agency advises that the Classification Tool was developed by Austral pursuant to or in the course of providing the services under its contract with the agency but that the matrix scoring system, held under licence by Austral, was not developed for the agency and therefore is not required under the contract to be given to the agency. I accept that advice. The matrix is not therefore a document of the agency as it does not have it or a right to access it; nor is it the document of any other agency and therefore it is not accessible under the FOI Act. The complainant has been given access to the Classification Tool (Documents 1 and 7).
58. Mr Hammond of Austral advises that he has undertaken a thorough search of its office and storage room and can locate no documents relating to the complainant's position. He notes that all of the documents examined by Austral were held by Austral until it moved office in December 2003, after which date those documents were returned to the agency. Mr Hammond also notes that Austral did not receive separate documentation for every individual position (only the 287 positions evaluated by Austral, which - as noted - did not include the complainant's position).



59. The agency advises me that the SCR Committee members may have made personal notes in the course of their deliberations on the reclassified positions (which I am advised amounts to some 1005 to date), including the complainant's position, but that such notes were not required to be kept. The agency contacted the SCR Committee members to see whether any of those persons had retained notes relevant to the complainant's complaint but advises me that no notes have been retained.
  
60. In addition, the agency says that the AIRC Order did not require documentary recording of outcomes by the Appeal Panel and it was for the Appeal Panel to determine what documentation would arise from its deliberations. The agency advises me that it has searched the relevant files in office B1/49 for notes made by the Appeal Panel members in relation to its deliberations on, or discussions of, the complainant's appeal but has been unable to locate any documents of that description. The agency also advises me that it made efforts to contact the Appeal Panel members to see whether any notes made by members have been retained but advises me that no notes have been retained.
  
61. Having reviewed the material before me, I am satisfied that the agency has taken all reasonable steps to find all the documents the subject of the complainant's access application but that additional documents either cannot be found or do not exist. Accordingly, I confirm the agency's decision to refuse access under section 26 of the FOI Act.

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