OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2009250 Decision Ref: D0032010

Participants:

U
Complainant

- and -

Department of Health
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – Chief Psychiatrist's report – whether confidentiality provision in *Mental Health Act 1996* prevents disclosure under the FOI Act – clause 3 – personal information – limits on exemption in clauses 3(2) - 3(5) – clause 3(6) - whether disclosure, on balance, in the public interest – clause 6(1) – deliberative processes – clause 8(1) – confidential communications.

Freedom of Information Act 1992: sections 8(1), 32(1), 32(2), 32(5), 32(6), 102(1) and 102(3); Schedule 1, clauses 3(1)-3(6), 6(1) and 8(1); Schedule 2, Glossary
Mental Health Act 1996: sections 206(1) and 206(2)
Public Sector Management Act 1994: section 35
Interpretation Act 1984: section 19(2)(h)
Freedom of Information Regulation 1993: regulations 9(1) and 9(2)
Guardianship and Administration Act 1990: section 3
Freedom of Information Act 1992 (Qld) (repealed): sections 44(1) and 51(3)

Police Force of Western Australia v Winterton (1997) WASC 504
McKinnon v Secretary, Department of Treasury (2005) 145 FCR 70
Re Read and Public Service Commission [1994] WAICmr 1
DPP v Smith [1991] 1 VR 63
Re J and Police Force of Western Australia [2008] WAICmr 5
Re Fotheringham and Queensland Health (1995) 2 QAR 799
Re Pemberton and The University of Queensland (1994) 2 QAR 293
Re Watson and West Moreton Health Service District [2005] QICmr 5
Re Waterford and Department of Treasury (No 2) (1984) 5 ALD 588
Re Speno Rail Maintenance Australia Pty Ltd and The Western Australia Government Railways Commission and Another [1997] WAICmr 29

DECISION

The agency's decision is set aside. In substitution, I find that the disputed information is not exempt under clauses 3(1), 6(1) or 8(1) of Schedule 1 to the *Freedom of Information Act 1992.*

Sven Bluemmel
INFORMATION COMMISSIONER

28 January 2010

REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Health ('the agency') under the *Freedom of Information Act 1992* ('the FOI Act') to refuse access to a document requested by U, the complainant in this matter. To protect the privacy of the complainant and his family, I have decided not to identify them by name in these reasons for decision.

BACKGROUND

2. The agency is established by the Governor under s.35 of the *Public Sector Management Act 1994.* The Director General of the agency is responsible to the Minister for Health ('the Minister') for the efficient and effective management of the State's health services. The Director General is the agency's principal officer for the purposes of the FOI Act.

3. The agency is made up, amongst other things, of a number of health services and divisions, including the North Metropolitan Area Health Service ('NMAHS'), the South Metropolitan Area Health Service ('SMAHS') and the Mental Health Division. The NMAHS and the SMAHS have responsibility for health services in their respective areas, such as hospitals, clinics and units. For example, King Edward Memorial Hospital ('KEMH') reports to the NMAHS and Fremantle Hospital and Health Service ('Fremantle Hospital') reports to the SMAHS.

4. For the purposes of the FOI Act, each of those health service bodies is an agency, so that, for example, applicants can apply directly to hospitals for their medical records held by those hospitals or, as in the present case, an applicant can apply directly to the agency – in effect the 'umbrella' organisation for the provision of government health services – for documents in its possession.

5. On 30 April 2009, the complainant applied under the FOI Act to the agency for access to a full copy of a report, dated 25 March 2009, prepared by the Chief Psychiatrist into the clinical care of the complainant's wife, prior to her death in May 2008 ('the Report').

6. In his application to the agency the complainant advised, as follows:

> "*On February 19th 2009* [the former Director General of the agency] *confirmed that the full report would be available to* [the deceased's] *family (see attached letter). This decision was later overturned."*

7. The confirmation referred to by the complainant appears to be a letter dated 13 February 2009 from the former Director General to two members of the deceased's family which said, among other things, that the agency had agreed to their request to be given a copy of the Report and gave an undertaking to make that document available to them. However, the agency has since advised me that the undertakings originally given to the deceased's family were made without considering the provisions of s.206 of the *Mental Health Act 1996* ('the MH Act').

8. The former Director General of the agency provided the complainant with a notice of decision on 29 May 2009, which gave the complainant access to pp. 3-4 and 32-36 of the Report but refused access to the remainder of that document. The information released consists of a summary of the Report's recommendations and appendices (ii)-(iv) of the Report, which relate to a description of terms used within the Report; information concerning the agency's Open Disclosure Standard; and a section headed 'Compassion and Respect'.

9. Since the agency's principal officer was the decision-maker, it was not open to the complainant to seek internal review of the agency's decision (see s.41 of the FOI Act) and, on 12 June 2009, the complainant applied to me for external review of the agency's decision.

REVIEW BY INFORMATION COMMISSIONER

10. On receipt of this complaint, I required the agency to produce to me the original of the Report and the agency's FOI file maintained in respect of the complainant's application. Following the receipt of that material, my office obtained further information from the agency concerning the background to this matter together with copies of certain material referred to in the Report.

11. On 18 November 2009, having considered all of the information before me at that stage, I advised the parties, in writing, of my preliminary view of this complaint. My preliminary view was that the agency's decision to refuse access to the remainder of the Report under clauses 3(1), 6(1) and 8(1) of Schedule 1 to the FOI Act was not justified. I invited the parties to provide me with further information and submissions in support of their respective positions by 4 December 2009. The agency sought, and was granted, an extension of time until 15 December 2009 in which to provide me with its submissions.

12. By letter dated 30 November 2009, the agency advised me that the Chief Psychiatrist could commit an offence under s.206(1) of the MH Act if he were to release the requested information and stated: *"It is therefore particularly important that the lawfulness of any release of the document is supported with strong evidence."* By letter dated 15 December 2009, the former Director General of the agency advised me that the agency maintained its decision and provided me with additional submissions in support of its position.

THE DISPUTED INFORMATION

13. The disputed matter is all of the Report except for pp. 3-4 and 32-36 which have already been disclosed to the complainant ('the disputed information').

SECTION 206(1) OF THE MH ACT

14. Section 206 of the MH Act relevantly provides:

> "***206. Confidentiality***
>
> *(1) A person must not directly or indirectly divulge any personal information obtained by reason of any function that person has, or at any time had, in the administration of this Act or the* Mental Health Act 1962.
>
> *Penalty: $2 000.*
>
> *(2) Subsection (1) does not apply to the divulging of information -*
>
> *(a) in the course of duty;*
> *(b) under this Act or another law;*
> *(c) for the purposes of the investigation of any suspected offence or the conduct of proceedings against any person for an offence; or*
> *(d) with the consent of the person to whom the information relates, or each of them if there is more than one."*

15. Accordingly, Section 206(1) of the MH Act does not prevent the disclosure of personal information - which is not defined in the MH Act - in the course of administering that Act if disclosure is made in any of the circumstances set out in paragraphs (a)-(d) of s.206(2).

16. Section 8(1) of the FOI Act provides that access to documents is to be given "*despite any prohibitions or restrictions imposed by other enactments (whether enacted before or after the commencement of this Act) on the communication or divulging of such information"* and that no offence is committed merely by complying with the FOI Act. Section 8(2) provides that s.8(1) applies unless an enactment is expressly stated to have effect despite the FOI Act. The MH Act contains no such express statement.

17. Section 19 of the *Interpretation Act 1984* provides that certain extrinsic material may be considered in the interpretation of a provision of a written law. That includes any relevant material in any official record of proceedings in either House of Parliament (s.19(2)(h)). I note that in the debate in the Legislative Assembly following the second reading of the Mental Health Bill, a query was raised about access to patients' records by patients or their next of kin under the proposed legislation. In reply, the Minister for Health expressly acknowledged that the 'safeguards' in the FOI Act apply to those records (*Hansard,* volume 336, p.7716, 31 October 1996).

18. Consequently, I consider that should I find that the disputed information is not exempt under the FOI Act, disclosure of the disputed information to the complainant by the Chief Psychiatrist or the agency would not be an offence under s.206(1) of the MH Act.

CLAUSE 3 - PERSONAL INFORMATION

19. The agency claims that the disputed information is exempt under clause 3 of Schedule 1 to the FOI Act. Clause 3 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) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, prescribed details relating to –*
>
> *(a) the person;*
> *(b) the contract; or*
> *(c) things done by the person in performing services under the contract.*
>
> *(5) Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of matter to the applicant.*
>
> *(6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.*"

20. In the Glossary to the FOI Act, the term 'personal information', insofar as it is relevant, 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) ..."

21. In my view, 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. The definition of 'personal information' in the Glossary makes it clear that any information or opinion about a person - whether living or dead - from which that person can be identified is *prima facie* exempt information under clause 3(1).

The agency's submissions

22. The agency's submissions are contained in its notice of decision and in its letters to me of 30 November 2009 and 15 December 2009. In brief, those submissions are as follows:

- The Report contains personal information about third parties, including the deceased, and is therefore exempt under clause 3(1) of Schedule 1 to the FOI Act. The personal information about the deceased consists of information about her medical treatment and information she provided to hospital staff.

- The issue of information about third parties other than the deceased does not need to be considered because the information about those other parties is so inextricably linked with that about the deceased. That is:

    - The agency accepts that the personal information contained in the Report about officers or former officers of the agency is 'prescribed details' for the purposes of clauses 3(3) or 3(4) but submits that it is not possible to edit the disputed information to give access solely to that information because such information is inextricably entwined with personal information about the deceased.

    - The agency also accepts that the personal information contained in the Report about members of the deceased's family (other than the complainant) could be disclosed under clause 3(5) if the complainant provides evidence that those persons consent to the disclosure of personal information about them in the disputed information. However, the agency submits that it is not possible to edit the disputed information to give access solely to that information because it is inextricably entwined with personal information about the deceased.

- Clause 3(5) otherwise has no application because there is insufficient information to establish that the deceased had consented to the release of personal information about her contained in the disputed information to

the complainant and because it is for the complainant to provide evidence of that consent. In that regard:

- There is no written evidence of consent. The only references to the deceased's consenting to the disclosure of her personal information to the complainant are 'second hand'. The agency is not aware of any document in which the deceased expressly consented to the complainant's being given her personal information.

- The agency notes that the complainant was estranged from his wife at the time of her death and he is not named as the next of kin in the relevant hospital admission forms. Further, there is nothing in the Consent for Exchange of Information form indicating that the deceased consented to the disclosure of her personal information to the complainant or to any family member.

- The only indication of consent is certain information contained in the Report. However, it is unclear from that information whether the deceased's consent was for "*all personal information being provided to* [V]*, or only particular details. It is also unclear whether* [the deceased] *was consenting to the disclosure being only for the duration of her stay in hospital, or whether it was intended to continue."*

- Given the lack of written evidence of the deceased's consent; the uncertainties surrounding the scope of any verbal consent; the sensitive nature of the personal information; and the fact that the complainant's wife is now deceased, the agency submits that there is insufficient evidence to decide on the balance of probabilities that the deceased provided her consent to the release of personal information about her to the complainant and, therefore, clause 3(5) is not applicable and the disputed information is exempt under clause 3(1).

The complainant's submissions

23. In his letter to me seeking external review, the complainant submits that there is evidence to suggest that the deceased gave verbal consent for him to be involved in her care and have access to her personal information, including information regarding her clinical care.

Consideration

24. I have examined the disputed information in the Report, which includes the role of the Chief Psychiatrist; the Report's terms of reference; the scope and methodology of the review; the deceased's patient history including her treatment at KEMH and at the Alma Street Centre (which comes under Fremantle Hospital); the events leading to the deceased's death; and issues arising from the Chief Psychiatrist's review.

25. In my view, the disputed information contains personal information as defined in the FOI Act about the deceased, the complainant, the complainant's children, other members of the deceased's family and the staff of certain health services. That information is *prima facie* exempt under clause 3(1) because the identity of those persons is apparent or could reasonably be ascertained from that matter.

26. However, clause 3(1) is subject to the limits on the exemption set out in clauses 3(2)-3(6).

Clause 3(2)

27. 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 this case, the complainant). According to its ordinary dictionary meaning, the word 'merely' in clause 3(2) means 'solely' or 'no more than' personal information about the applicant.

28. In my view, disclosure of the disputed information would not merely reveal personal information about the complainant because that information is inextricably interwoven with information about the deceased (see *Police Force of Western Australia v Winterton* (1997) WASC 504). Therefore, if the personal information about the deceased contained in the disputed information is exempt, the limit on the exemption in clause 3(2) will not apply.

Clauses 3(3) and 3(4)

29. Clauses 3(3) and 3(4) provide that certain information about officers or former officers of agencies that relates to the work performed by them is not exempt as personal information under clause 3(1). That information – which is referred to as 'prescribed details' – is listed in regulations 9(1) and 9(2) of the *Freedom of Information Regulations 1993.*

30. The agency accepts that the personal information about officers or former officers of the agency contained in the disputed information is 'prescribed details' for the purposes of clauses 3(3) and 3(4). However, the agency submits that the prescribed details in the disputed information cannot be disclosed in the present case because that information is inextricably interwoven with information about the deceased. Consequently, if disclosed, that matter would not 'merely' reveal prescribed details. I accept that, in the event that the personal information about the deceased is exempt, clauses 3(3) and 3(4) will have no application.

Clause 3(5)

31. Clause 3(5) provides that matter is not exempt matter if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.

32. The complainant asserts that the deceased gave a verbal consent for the complainant to be given information regarding the deceased's medical care.

While he has provided me with no evidence specifically supporting that assertion, my review of all the information before me leads me to the view that the deceased did indeed at some time consent to the agency disclosing personal information about her to the complainant. My view on this issue is outlined further in paragraphs 49-57 below, and is based on all the evidence before me, including material provided by the agency.

33. Clause 3(5) provides that the onus is on the complainant – as the access applicant – to provide evidence establishing that the deceased consented to the disclosure of the relevant matter to the complainant. The agency submits that the effect of clause 3(5) is that, in considering whether the limitation on exemption in clause 3(5) applies in this case, I cannot consider evidence other than that provided by the complainant. As noted above, the complainant has not provided me with evidence specifically supporting his assertion that verbal consent was given.

34. A literal interpretation of clause 3(5) provides some support for the agency's submission referred to in the preceding paragraph. However, the conclusion I reach in relation to the application of the limit on exemption in clause 3(6) below means that I am not required to reach a conclusion on the interpretation of clause 3(5) at present.

Clause 3(6)

35. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Pursuant to s.102(3) of the FOI Act, the onus is on the complainant to establish that disclosure of personal information about the deceased would, on balance, be in the public interest, pursuant to clause 3(6).

36. Determining whether or not disclosure would, on balance, be in the public interest involves identifying the competing public interests - those favouring disclosure and those favouring non-disclosure - weighing them against each other and making a judgment as to where the balance lies in the circumstances of this particular case.

37. In my view, the public interest is a matter in which the public at large has an interest as distinct from the interest of a particular individual or individuals: see *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70; *Re Read and Public Service Commission* [1994] WAICmr 1 and *DPP v Smith* [1991 1 VR 63.

<u>The complainant's submissions on the public interest</u>

38. The complainant submits that there is evidence that the deceased gave a verbal consent to the disclosure of information to him concerning her clinical care as set out in the Report.

39. The complainant submits that the agency has given disproportionate weight to the deceased's apparent withdrawal of consent for disclosure of her medical

information to certain family members. The complainant advises that, when the deceased was not ill, she had a close, loving and trusting relationship with those family members, one of whom she named as next of kin in her clinical records.

40. The complainant acknowledges that there is a strong public interest in the maintenance of personal privacy but submits that this must be balanced against the public interests in:

- the public having knowledge of the standard of care being offered by health services in Western Australia;
- government accountability, by disclosing whether the mental health services were negligent in this case;
- ensuring that close family members are able to stay informed about the clinical care of patients in the public health system, which is particularly important in the context of mental health, where family members often provide the necessary support network for those suffering from mental illness; and
- family members being informed about the basis on which decisions are made in the public health system.

41. The complainant submits that those public interests override the public interest in maintaining personal privacy in this case.

The agency's submissions on the public interest

42. The agency submits that clause 3(6) has no application in this case for the following reasons:

- The disputed information contains sensitive personal information regarding mental health treatment and issues associated with the deceased and there is a very strong public interest in maintaining the deceased's privacy, which is strengthened by the fact that disclosure to an access applicant is potentially disclosure to the world at large.
- The public interest in protecting individuals' right to privacy in the conduct of their personal affairs is a significant one and one that has been consistently recognised in past rulings of the Information Commissioner.
- There is insufficient information to establish that the deceased consented to the agency's giving information about her medical treatment, including information which she gave to hospital staff, to the complainant.
- The fact that the complainant's wife has died does not lessen the public interest in protecting her privacy. Indeed, the case against releasing the personal information about the deceased is strengthened in light of the evidence in the Report that she did not want information about her treatment to be provided to some members of her family. A very strong

countervailing public interest would be required to displace this right to privacy, and no such public interest exists in this case.

- The deceased's right to privacy in her death, as well as in her lifetime, needs to be appropriately respected and sufficient regard should be given to the fact that she is deceased and is, therefore, unable to clarify and explain her position in relation to her consent to the disclosure of the disputed information.

- Although the fact that some personal information about the deceased is in the public domain is ordinarily a factor favouring disclosure, in this case it is third parties - and not the deceased - who placed that information in the public domain.

- Since the deceased did not consent to her personal information being provided to members of her family, it is not a public interest factor in favour of disclosure that those same family members are likely to support the access application.

43. The agency recognises public interests in informing the public about the operation of the public health system and the basis upon which decisions are made in the public health system. However, the agency submits that those public interests have been satisfied by the disclosure to the complainant of the summary of recommendations on pp.3-4 of the Report.

Consideration

44. Favouring disclosure, I recognise a public interest in individuals being able to exercise their rights of access under the FOI Act and the general public interest in obtaining access to information held by governments.

45. I agree with the complainant that there is a public interest in the community having knowledge, and thereby an understanding, of the standard of care being offered by health services in Western Australia and I consider that the disclosure of the disputed information would assist in that regard.

46. I recognise public interests in the transparency and accountability of government agencies for the manner in which they discharge their functions and obligations on behalf of the people of Western Australia, particularly so in relation to the provision of health services with the special responsibilities which that involves. In my view, that transparency and accountability includes informing the public, where possible, of the basis for decisions taken. Where there are concerns about the operation of those health services, I consider that it is in the public interest that there should be public awareness of those matters to facilitate the accountability of the public sector for what occurred; to keep the community informed; and to promote discussion of public affairs.

47. In my view those public interests are not fully served by the agency's disclosure of pp.3-4 and appendices (ii)-(iv) of the Report. None of that information explains the findings of the Report in relation to the clinical care given to the

deceased, nor does it disclose the basis for the Chief Psychiatrist's recommendations and the material upon which those recommendations were based.

48. I also recognise a public interest in individuals such as the complainant being informed about the basis upon which decisions are made in the public health system about close family members. This interest is stronger where, as here, those decisions have serious and long-lasting effects on the family. I consider that to be particularly appropriate in the context of mental health, where the necessary support network for patients is often provided by those family members.

49. In the present case, the parties have conflicting views about whether the deceased consented to the disclosure of information about her clinical care and her health, including her mental health, to the complainant by the agency. The agency submits that there is insufficient information to establish that such consent was given. The complainant contends that verbal consent was given.

50. On the information before me, I accept that there is no evidence of any written consent by the deceased to the disclosure of her personal information to the complainant. However, there is clear evidence before me that part of the State's health service, KEMH, did consider that the deceased had consented to the complainant having access to her clinical information. Notwithstanding that such consent was 'second hand' or unwritten, that consent was acted upon by that agency, on the information before me, to keep the complainant advised about his wife's condition and treatment.

51. The agency contends that the information that refers to the issue of consent is unclear as to "*whether the deceased was consenting to all personal information being provided to* [the complainant]*, or only particular details. It is also unclear whether* [the deceased] *consented to the disclosure being only for the duration of her stay in hospital, or whether it was intended to continue."*

52. In my view, the evidence before me, which includes the Report, is not as unclear on this point as the agency contends. I consider that it contains nothing to indicate that only particular details concerning the deceased's health and treatment could be properly disclosed to the complainant. It appears to me to be broad enough to cover all aspects of the deceased's condition and treatment. There is also nothing on the information before me to show that the deceased ever withdrew that consent insofar as it concerned the complainant, although it is evident that at particular times the deceased made it clear that she did not consent to other members of her family having access to her personal information.

53. I have not given much weight to the agency's contention that there is nothing in the Consent for Exchange of Information form to indicate that the deceased consented to the disclosure of her personal information to any family member, in light of the information set out in the Report. Nor have I given much weight to the agency's submission that the complainant was not named as next of kin in the relevant hospital admission forms, since that information appears to have

been provided for the purpose of nominating a specific contact person rather than for any broader purpose.

54. From the information before me, I understand the following:

- The deceased received treatment at KEMH and at Fremantle Hospital. The Report contains information concerning her clinical care at those two facilities.

- KEMH, at the time of the deceased's treatment there, accepted that the deceased had expressly consented to the complainant being involved in her clinical care and being given access to her clinical information, to the extent that the complainant was kept fully informed and was in regular contact with the clinical staff treating his wife. The complainant also attended clinical care meetings with clinicians in the company of his wife. Information to that effect was provided to the Minister by the NMAHS.

- After the death of the complainant's wife, KEMH took the view that the complainant was her next of kin whose consent was required before any medical records could be released. On 13 June 2008, officers of the agency, including officers of KEMH, met with the complainant and members of the deceased's family to go through the deceased's medical records. With the complainant's consent as next of kin, KEMH gave a copy of the deceased's medical records to another member of the deceased's family.

- On 18 July 2008, the complainant applied under the FOI Act to Fremantle Hospital for a copy of the deceased's medical records held by that agency. Fremantle Hospital also recognised the complainant as next of kin to the deceased and gave the complainant access to those medical records on 29 August 2008 without deleting the third party information about other members of the deceased's family *"as it was apparent that the family also wanted access"*.

55. It seems to me that prior to the access application the subject of this complaint, the health service agencies that were actively involved in the treatment of the deceased were satisfied that she had consented to the complainant being given information about her condition and treatment or were prepared to accept that the complainant (as next of kin) was the appropriate person to be given access to those medical records and to consult as to their release to other close members of the deceased's family.

56. In my opinion, it is always open to the agency to require patients to be specifically consulted about access to their medical records, both during their lives and in the event of their deaths, and for any consent to disclosure to be evidenced in writing. I note that the agency has provided me with no information to indicate that such an approach was consistently implemented across the agency.

57. I consider that, in the absence of any coherent and coordinated action across the relevant health services relating to the disclosure of patients' medical

information, it is unreasonable to suggest that the transfer of a patient from one area of the State's health service to another while undergoing continuous treatment invalidates a consent obtained prior to the transfer.

58. I agree with the agency's submission that the deceased's right to privacy in death should be appropriately respected and that sufficient regard should be given to the fact that she is unable to clarify the terms of any consent to disclosure. I accept, on the information before me, that the deceased did not consent to certain members of her family being given access to information about her clinical condition. However, I am satisfied that the complainant was not included in that restriction and I note that, although estranged from the deceased at the relevant time, he had custody of their young children and remained in close contact with her and her medical advisers. On the information before me I also accept the complainant's advice that, when well, the deceased had a close and loving relationship with those members of her family referred to here and that they consistently demonstrated concern and support for her.

59. I also agree with the agency that the disputed information is of a very sensitive personal nature and that information disclosed under the FOI Act is potentially information disclosed to the world at large since no restrictions can then be placed upon its further release. However, it seems to me that the deceased's medical records in relation to her treatment both at KEMH and at Fremantle Hospital have already been released to the complainant and to the deceased's family. Accordingly, that particular information, which is of a kind referred to in the disputed information, is potentially already in the public domain, so that the agency can have no control over its further dissemination. To the extent that such information is potentially already in the public domain, the level to which the public interest in the deceased's right to privacy is served by non-disclosure of the Report is diminished.

60. I note that it was also open to the agency, on receipt of this application, to have considered the operation of s.32 of the FOI Act, which contains a mechanism for consultation where, as here, an application is made under the FOI Act for access to personal information about a deceased person. In such cases, the agency is not to give access to that information unless the agency has taken such steps as are reasonably practicable to obtain the views of the deceased's 'closest relative' as to whether the document contains matter that is exempt under clause 3.

61. In *Re J and Police Force of Western Australia* [2008] WAICmr 5, the former A/Information Commissioner considered the meaning of the term 'closest relative' in s.32(2) and held that the definition of the term 'nearest relative' in the *Guardianship and Administration Act 1990* ('the GA Act') is a relevant guide to the interpretation of 'closest relative' for the purposes of the FOI Act. Section 3 of the GA Act defines 'nearest relative' as follows:

> "*nearest relative in relation to a person means the first in order of priority of the following persons, who has attained the age of 18 years and is reasonably available at the relevant time -*

(a) a spouse or de facto partner;
(b) a child
(ba) a stepchild
(c) a parent;
(ca) a foster parent;
(d) a brother or sister;
(e) …"

62. Accordingly, in considering whether or not to give the complainant access to the Report under the FOI Act, the agency could have taken into account the fact that the complainant – notwithstanding that he had been estranged from the deceased at the relevant time – was her closest relative for the purposes of s.32(2) since, at the time of her death, he was still legally her spouse.

63. Section 32(5) of the FOI Act provides that where the views of a 'closest relative' are obtained "*that person is to be regarded as being the third party"* for the purpose of an external review. The 'third party' is defined in s.32(1) as being the individual to whom the personal information the subject of the access application relates. In other words, once the agency has made a decision as to whether or not to give access to the personal information of a third party, the closest relative 'stands in the shoes' of the third party and can challenge the agency's decision on that basis.

64. In *Re Fotheringham and Queensland Health* (1995) 2 QAR 799, the Queensland Information Commissioner ('the Qld Commissioner') made the following comments, at p.806, in relation to the equivalent provision to s.32(2) in the *Freedom of Information Act 1992* (Qld) ('the Qld FOI Act'):

> "*Since it is obviously not possible to consult with a deceased person over a question of access to information concerning the deceased person's personal affairs, the practical alternative recognised by the legislature (see s.51(3) of the FOI Act) is consultation with the deceased person's closest relative. The views expressed by the closest relative, whether for or against disclosure of information concerning the deceased person's personal affairs, will ordinarily be relevant factors for an agency to take into account when deciding, pursuant to the discretion conferred by s.28(1) of the FOI Act, whether or not to claim an exemption which is available. The views expressed by the closest relative may also, according to the circumstances of a particular case, be entitled to some weight in the application of the public interest balancing test incorporated within s.44(1) of the FOI Act."*

I share that view and consider that it applies to the application of s.32(2).

65. However, s.32(6) of the FOI Act provides that an agency is not obliged to consult with third parties (or, if deceased, their closest relatives) if the agency does not intend to give access to personal information about those third parties. In the present case, the agency decided not to give access to the disputed information on the basis that it was exempt under clauses 3(1), 6(1) and 8(1) of

Schedule 1 to the FOI Act and that it was not practicable to edit that material, pursuant to s.24 of the FOI Act.

66. I have considered whether the fact that the complainant is the deceased's 'closest relative' for the purposes of the FOI Act carries weight in relation to the application of the public interest test in clause 3(6). In *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at [164], the Qld Commissioner stated that, in certain circumstances, it may be appropriate:

> *"… to recognise a legitimate public interest which favours disclosure of particular documents to a particular applicant for access, even though no such public interest would be present when disclosure to other applicants was in contemplation …"*

I share that view, which I consider to be relevant to the present case.

67. In *Re Watson and West Moreton Health Service District* [2005] QICmr 5, an applicant sought access to her deceased mother's medical records under the Qld FOI Act. The applicant provided the respondent agency with evidence to show that she was one of a number of siblings who were all the 'closest living relatives' of the deceased for the purposes of the Qld FOI Act and that her siblings all consented to the disclosure of their mother's medical records to her.

68. In that case, the Qld Commissioner considered s.44(1) of the Qld FOI Act which provided that information was exempt "*if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest'"*. In applying that test, the Qld Commissioner considered the strong public interest in the privacy of an individual's medical records and the relevance of the views of that person's closest relative and said, at [33]:

> "*The* [Qld] *FOI Act in s.51* [the equivalent of s.32 of the FOI Act] *provides a clear mechanism for consultation of a deceased's closest living relatives. I am of the view that where the closest living relatives support the applicant's FOI access application for disclosure of the matter in issue, the privacy interest favouring against disclosure is diminished. I am satisfied that, in the circumstances of this case, the views of the deceased's children are of some weight in the application of the public interest balancing test. However, I note that in the absence of any public interest considerations favouring disclosure, the consent of the deceased's closest living relatives alone would not be sufficient to outweigh all public interest considerations favouring non-disclosure."*

69. I accept that is the correct approach and I consider that where, as here, the access applicant is the deceased's closest relative; there is evidence that the other members of the deceased's family support his access application; and public interests that favour disclosure have been demonstrated – the agency's claim that disclosure of the disputed information would be contrary to the public interest in protecting the privacy of a deceased person is significantly weakened.

70. Weighing against disclosure in this instance, I recognise a strong public interest in maintaining personal privacy, including the privacy of deceased persons. The public interest in respecting the privacy of an individual's medical information, including mental health information, will ordinarily carry considerable weight in the application of the public interest balancing test in clause 3(6).

71. The public interest in personal privacy is acknowledged by the inclusion in the FOI Act of the exemption in clause 3(1). In my view, that public interest may only be displaced by some other, considerably stronger, public interest that requires the disclosure of private information about another person.

72. In this case, from the information provided to me, I am satisfied that a good deal of information about the deceased's medical condition and treatment has already been disclosed to the complainant, so that the non-disclosure of that matter, insofar as it is contained in the disputed information, would not strongly serve that particular public interest.

73. I also recognise a public interest in preserving the trust and confidence of the public in the confidentiality of health records, particular in relation to the sensitive area of mental health records. However, in this case there is evidence that the deceased consented to the disclosure of her health information to the complainant. In addition, the complainant is the deceased's next of kin; the father and carer of the children of the marriage, and other close members of the deceased's family support such disclosure.

74. In balancing the competing public interest considerations in this case, I find that those favouring disclosure of the disputed information to the complainant outweigh the public interests in protecting the privacy of the deceased's medical records.

75. Consequently, I consider that the limit on the exemption in clause 3(6) applies and the personal information about the deceased in the disputed information is not exempt under clause 3(1).

76. In light of that, the remainder of the disputed information that is prescribed details and personal information about the complainant and his children, which is interwoven with personal information about the deceased, is not exempt and nor is the personal information about other members of the deceased's family.

CLAUSE 6 – DELIBERATIVE PROCESSES

77. The agency maintains its claim that the disputed information is exempt under clause 6(1) of Schedule 1 to the FOI Act. Clause 6 provides:

> ***"6. Deliberative processes***
>
> **Exemptions**
>
> *(1) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal –*
>
> *(i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or*
>
> *(ii) any consultation or deliberation that has taken place,*
>
> *in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency; and*
>
> *(b) would, on balance, be contrary to the public interest.*
>
> **Limits on exemptions**
>
> *(2) Matter that appears in an internal manual of an agency is not exempt matter under subclause (1).*
>
> *(3) Matter that is merely factual or statistical is not exempt matter under subclause (1).*
>
> *(4) Matter is not exempt matter under subclause (1) if at least 10 years have passed since the matter came into existence."*

78. In *Re Waterford and Department of Treasury (No 2)* (1984) 5 ALD 588, the Commonwealth Administrative Appeals Tribunal said, in relation to the equivalent exemption in the *Freedom of Information Act 1982* (Cth):

> "*In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action … It is documents containing opinion, advice, recommendations etc. relating to internal processes of deliberation that are potentially shielded from disclosure … Out of that broad class of documents, exemption …only attaches to those documents the disclosure of which is 'contrary to the public interest'."*

I agree with those comments.

79. Section 102(1) of the FOI Act provides that the onus is on the agency to establish that its decision was justified. To establish a *prima facie* claim for exemption under clause 6(1), the agency must demonstrate that the requirements of both paragraphs (a) and (b) of clause 6(1) are satisfied. If the requirements of both paragraphs are established, the disputed information will be exempt, subject to the application of the limits on the exemption in clauses 6(2)-6(4).

The agency's submissions

80. In brief, the agency submits as follows:

- The Chief Psychiatrist's review of the medical care provided to the deceased and recommendations on how processes can be improved, constitute a deliberative process of the agency.

- The disputed information contains opinions, advice and recommendations prepared in the course of, or for the purposes of, that deliberative process.

- In favour of disclosing the disputed information, the agency recognises public interests in:

    - the general right of access under the FOI Act;
    - the public being informed about the operation of the public health system; and
    - the public being informed about the basis upon which decisions are made in the public health system.

81. However, the agency submits that those particular public interests have been satisfied by the disclosure of the 'Summary of Recommendations' on pp.3-4 of the Report to the complainant.

82. Weighing against disclosure of the disputed information, the agency recognises a public interest in the privacy of sensitive personal information, which outweighs the public interests in disclosure of the disputed information in this case.

83. The agency submits that there is insufficient evidence to conclude that the deceased consented to the disclosure of information about her clinical condition and care to the complainant.

84. The agency also contends that none of the limits on the exemption in clauses 6(2)-6(4) applies in this case.

The complainant's submissions

85. The complainant submits that it would not, on balance, be contrary to the public interest to disclose the disputed information to him and repeats his submissions concerning the public interest made in relation to clause 3, set out in paragraphs 38-41 above.

Consideration

86. I accept the agency's submission that a review by the Chief Psychiatrist of the clinical care given to a patient is a deliberative process of the agency. I have examined the disputed information and I am satisfied that it contains advice given by, and consultation that has taken place with, the deceased's family and members of the agency's staff, as well as the Chief Psychiatrist's opinions, recommendations and deliberation upon the material before him. I accept that information of that kind was obtained, prepared and recorded, or took place, in the course of, and for the purpose of, the preparation of the Report by the Chief Psychiatrist. Accordingly, I consider that the agency has satisfied the requirements of paragraph (a) of clause 6(1).

87. However, in order for the disputed information to be exempt under clause 6(1), paragraph (b) of that provision must also be satisfied. That is, the agency must establish that the disclosure of the disputed information would, on balance, be contrary to the public interest.

88. The public interest test in clause 6(1)(b) is intended to cover those cases where disclosure of the information in question would be prejudicial to the proper operation of government or to the proper working of an agency. Previous decisions of the Information Commissioner have consistently expressed the view that it would be contrary to the public interest to prematurely disclose documents while deliberations in an agency are continuing if there is evidence that the disclosure of those documents would adversely affect the decision-making process, or that disclosure would, for some other reason, be contrary to the public interest.

89. In the present case, the particular deliberative process of the Chief Psychiatrist has concluded so that premature disclosure in respect of that particular process is not a consideration.

90. I have already addressed the public interests submissions made by the agency and relevant to this matter in paragraphs 44-74 of this decision, insofar as they relate to clause 3(6) and my consideration of that matter applies equally to my consideration of clause 6(1)(b). Therefore, for the reasons given in paragraphs 44-74, in balancing the competing public interest factors, I consider that those favouring disclosure outweigh those that do not. In my view, the disclosure of the disputed information would not, on balance, be contrary to the public interest.

91. I agree with the agency's submission that none of the limits on the exemption in clauses 6(2)-6(4) applies. Consequently, I find that the disputed information is not exempt under clause 6(1) of Schedule 1 to the FOI Act.

CLAUSE 8(1) - CONFIDENTIAL COMMUNICATIONS

92. The agency maintains its claim that the disputed information is exempt under clause 8(1) of Schedule 1 to the FOI Act, which provides as follows:

> *"**8. Confidential communications***
>
> **Exemptions**
>
> *(1) Matter is exempt matter if its disclosure (otherwise than under this Act or another written law) would be a breach of confidence for which a legal remedy could be obtained."*

93. In *Re Speno Rail Maintenance Australia Pty Ltd and The Western Australian Government Railways Commission and Another* [1997] WAICmr 29, the former Information Commissioner expressed the view that the exemption in clause 8(1) applies to documents if their disclosure would give rise to a cause of action for breach of a common law obligation of confidence, such as a breach of a contractual obligation of confidence, for which a legal remedy may obtained. The former Commissioner was also of the view that because of the precise wording of the exemption clause, clause 8(1) does not apply to documents if their disclosure would give rise only to a cause of action for breach of an equitable obligation of confidence.

94. The agency submits that clause 8(1) encompasses an equitable obligation of confidence but, on 15 December 2009, advised me that, in the event that I formed the view that the deceased consented to the disclosure of her personal information to the complainant, agreed that it would not be necessary to consider that particular legal question.

The agency's submissions

95. In its notice of decision, the agency submits that the disclosure of the disputed information would constitute a breach of an equitable obligation of confidence, which exists if the following three criteria are met:

(i) where the information has the necessary quality of confidence about it;
(ii) where the information was imparted in circumstances importing an obligation of confidence; and
(iii) where the release of that information would constitute an unauthorised use of that information.

96. With regard to each of these, the agency submits that:

- information relating to an individual's health or medical condition is ordinarily accepted as having the 'necessary quality of confidence'.

- the nature of the relationship between a patient and a health professional is ordinarily accepted as meaning that information relating to an individual's health or medical condition is imparted in circumstances importing the necessary obligation of confidence.

- the release of the information without the deceased's authorisation will constitute 'unauthorised use' of that information.

The complainant's submission

97. In his letter seeking external review, the complainant submits that the public interest in persons being informed about the standard of care offered by health services in Western Australia acts as an exception to any equitable obligation of confidence.

Consideration

98. Clause 8(1) provides that matter is exempt if its disclosure (otherwise than under the FOI Act or another written law) would be a breach of confidence for which a legal remedy could be obtained. Clause 8(1) is not subject to a public interest test.

99. Legally enforceable obligations to maintain confidence may arise in both contract and equity. The express terms of a contract may impose a contractual obligation of confidence and any breach of that obligation would have a legal remedy, which would include damages and injunctions. Where no contract exists, an equitable obligation of confidence can arise where information with the necessary quality of confidence is given in circumstances importing an obligation of confidence. A breach of that obligation occurs if there is an unauthorized disclosure or use of that information. A claim for breach of an equitable obligation does not need to show that damage has resulted from the use or disclosure of that information. Equitable remedies include injunctions and declarations.

100. The agency does not contend that any contractual obligation of confidence exists in this case. Rather, the agency submits that an equitable obligation of confidence exists. In the present case, I do not propose to reconsider the decision in *Re Speno* because I consider that - in the event that clause 8(1) does apply to equitable obligations of confidence - the three criteria referred to by the agency are not made out in the present case.

101. As I have stated, on the information before me, I am satisfied that the deceased consented to the agency disclosing personal information in the form of information about her clinical condition and care to the complainant, so that no obligation of confidence arises in the circumstances of this particular case, where the complainant is the relevant applicant. Nor, in my view, would such disclosure constitute an unauthorized use of the disputed information.

102. In my view, the agency has not made out its claim for exemption under clause 8(1) and I consider that the disputed information is not exempt under that provision.

CONCLUSION

103. I find that the disputed information is not exempt under clauses 3(1), 6(1) or 8(1) of Schedule 1 to the FOI Act.

****