OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2008332 Decision Ref: D0102009

Participants:

Jimmy Philip Yoo
Complainant

- and -

Sir Charles Gairdner Hospital
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – AIMS documents - whether any inconsistency between the FOI Act and Commonwealth legislation – clause 8(2) – confidential communications – whether information of a confidential nature obtained in confidence – whether disclosure could reasonably be expected to prejudice future supply of information – clause 8(4) – public interest.

Freedom of Information Act 1992: ss. 21, 24, 72, 75, 83, 102(1) and 102(3); Schedule 1, Clause 8.
Health Insurance Act 1973 (Cth): ss. 124V, 124W, 124(2) and 124Y.
Constitution (Cth): s.109.

Re Read and Public Service Commission [1994] WAICmr 1
Re Kimberley Diamond Company NL and Department for Resources Development and Another [2000] WAICmr 51
Ryder v Booth [1985] VR 869
Re C and Department for Community Development [1994] WAICmr 18
Re Welton and Police Force of Western Australia [1995] WAICmr 43
Director of Public Prosecutions v Smith (1991) 1 VR 63

DECISION

The decision of the agency to refuse access to the disputed documents is varied.

I find that the disputed documents, in the edited form produced to me, are not excluded from the complainant's application by virtue of the operation of s.109 of the Commonwealth *Constitution* but are potentially accessible under the FOI Act. I also find that those documents are exempt under clause 8(2) of the FOI Act.

JOHN LIGHTOWLERS
A/INFORMATION COMMISSIONER

5 May 2009

REASONS FOR DECISION

1. This complaint arises from a decision made by Sir Charles Gairdner Hospital ('the agency') to refuse Mr Jimmy Yoo ('the complainant') access to certain documents arising from an application made by him under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. On 17 April 2008, the complainant's solicitors applied on the complainant's behalf to the agency under the FOI Act for access to a complete copy of the complainant's original health records.

3. By notice of decision dated 21 May 2008, the agency gave the complainant access to a copy of his medical record.

4. There is no further correspondence on the agency's FOI file until 18 August 2008, at which time the complainant's solicitors wrote to the agency and advised that the complainant's medical records referred to one or possibly two incident reports relating to complications experienced by the complainant following surgery at the hospital in April 2007.

5. From the agency's FOI file, I understand that the agency treated the complainant's letter as a new FOI application, since the 30 day period in which to request an internal review of the agency's decision of 7 May 2008 had expired. On 12 September 2008, the agency's FOI Coordinator wrote to the complainant and said:

> "*… access is denied to a copy of the Incident Reports. Under Section 124Y of the Health Insurance Act 1973 (Cth)* [sic] *prohibits a person from making a record of, or disclosing, information that became known solely as a result of a declared quality assurance activity except in circumstances specified in the legislation."*

6. On 14 October 2008, the complainant sought an internal review of that decision. The agency provided the complainant with its notice of decision on internal review on 20 October 2008. That notice repeated the advice quoted above and added: "*It is an offence to release information contrary to section 124Y of the Health Insurance Act 1973 (Cth)."*

7. On 4 November 2008, the complainant's solicitors applied to me for external review of the agency's decision and said:

> "*The applicant's complaint relates to a refusal on the part of the abovenamed agency to allow access to a copy of (or access to an edited copy of) documents currently in their possession.*
>
> *The documents in question are described as two AIMS forms."*

8. In effect, the agency refused the complainant access to the two incident reports on the basis that the information in those documents was collected solely as a part of the process undertaken by the Advanced Incident Management System ('AIMS'), which information is protected under s.124Y of the *Health Insurance Act 1973* (Cth) ('the HI Act'). The agency considers that the prohibition against the disclosure of that information in s.124Y of the Commonwealth HI Act is inconsistent with the requirements of the WA FOI Act to disclose or give access to that particular information and, consequently, the Commonwealth law should prevail pursuant to s.109 of the *Constitution* (Cth).

Advanced Incident Management System

9. The website of the Office of Safety and Quality in Healthcare ('the SQH Office') www.safetyandquality.health.wa.gov.au/home/ (version as at 5 May 2009) gives the following relevant information about AIMS.

> "***What is AIMS?***
>
> *The Advanced Incident Management System (AIMS) is a standardised reporting system to enable the recording of clinical incidents consistently across the State. AIMS was implemented in all Western Australian public hospitals and health services in 2001/2002 to measure, and ultimately reduce, the prevalence and severity of incidents in health care.*
>
> *AIMS is a voluntary reporting system that captures actual and near miss events across a broad spectrum of areas. AIMS permits aggregation of large volumes of incident data to show patterns and alert the system to issues that may require further investigation. This inclusive reporting system provides an important foundation in helping WA map the range of incidents occurring. The system was implemented with the understanding that 'we don't know what we don't know' and prevented 'blind spots' in the State's incident monitoring.*
>
> …
>
> ***Conducting quality improvement activities with qualified privilege provided by Commonwealth QP Legislation***
>
> *The investigation and analysis of a clinical incident reported to AIMS is registered as a quality assurance activity under the* Health Insurance Act 1973: Part VC, Health Insurance Act 1992. *The Act provides statutory protection of* ***identified*** *information collected solely for the purposes of the AIMS process. This protection means that:*
>
> - *identified data cannot be disclosed to third parties not involved in the incident or the direct management of the incident*
> - *a court cannot compel information from the AIMS system as evidence*
> - *hospitals and health services cannot produce the AIMS form as evidence for a defense in any situation or in courts of law where an incident may have progressed to a litigious event*

Disclosure of identified data can incur a penalty of imprisonment for a term of up to 2 years.

…

What is qualified privilege?

The qualified privilege scheme is designed to encourage hospitals and health professionals to conduct quality improvement activities and investigate the causes and contributing factors of clinical incidents by protecting certain information from disclosure and protecting clinicians involved in the activity from civil liability.

Why is qualified privilege necessary?

To improve the safety and quality of health care, it is important to review what went wrong, and to find ways to prevent the event from happening again. Medical staff are more likely to talk about the medical mistakes they made if they know that the information they disclose cannot legally be disclosed to anyone. Disclosure of medical mistakes allows the identification of environments conducive to errors, and this facilitates system redesign to create an environment in which it is impossible to make a mistake.

What information is protected from disclosure?

The information that is generated or obtained solely as a result of the quality improvement activities of a registered quality improvement committee is protected under qualified privilege. This includes information such as the outcomes of reviews and the results of root cause investigations.

Factual information that can be obtained from other places is not protected by the legislation, for example, the patient's medical record is not protected."

10. The Department of Health ('the Department') has issued a policy document entitled: 'Clinical Incident Management Policy – Using the Advanced Incident Management System (AIMS)' ('the Policy'). The Policy, which can be downloaded from the website of the SQH Office, provides the following information on the security of AIMS at page 14:

"Hospitals and health services need to ensure the security access requirements to the incident reporting and management system conform to the AIMS Security Administration Policy.

Due to the sensitive nature of the information collected during the investigation and analysis phase of AIMS, hospitals and health services are obliged to maintain confidentiality. In addition to complying with the

> Health Insurance Act 1973 … *hospitals and health services are asked to observe the following "Code of Practice" when using AIMS:*
>
> - *semi completed/completed clinical incident forms should not be available for public view and should be transported in a sealed envelope;*
> - *clinical incident forms should be stored in a secure (locked) area within the hospital/health service;*
> - *hardcopy clinical incident forms may be destroyed after 12 months as the verbatim softcopy in the incident reporting and management system will constitute the record. Hospitals and health services may choose to keep hardcopy clinical incident forms in secure storage for a period of time determined by the hospital or health service;*
> - *employees with access to the AIMS application must not disclose their access number and password to others;*
> - *employees with access to the Data Manager Module of AIMS application must not disclose identified information from the system to any person not directly involved in the incident or its investigation and management; and*
> - *employees not involved in the incident or its investigation and management should not request information from staff with access to the system."*

11. Copies of reports dated 2005 and 2006 compiled from the de-identified data taken from AIMS Clinical Incident Forms can be downloaded from the Department's website.

THE DISPUTED DOCUMENTS

12. By letter to me of 10 February 2009, the agency identified the two documents in dispute in this matter as follows:

> Document 1 – a selected incident report; and
> Document 2 – an AIMS clinical incident form with handwritten entries.

13. The agency advised me that, in accordance with the Policy, the original AIMS forms may be destroyed after 12 months of the information contained in them having been transcribed onto a database. In this case, the first of the original two AIMS forms was destroyed in accordance with the Policy. I accept the agency's statement that this document has in fact been destroyed. However, the information on that form was, according to the agency, transcribed verbatim and has been returned to hard copy from the database as a selected incident report, which is Document 1 in this matter.

14. By letter of 21 November 2008, the agency advised me that AIMS uses a computer software system which is accessible across the public health sector in Western Australia. Information is entered into the AIMS database using a classification system within the database. The AIMS software then permits that information to be collated and used to identify system wide factors that contribute to the occurrence of adverse incidents.

REVIEW BY THE A/INFORMATION COMMISSIONER

15. On receipt of this complaint, I issued the agency with notices pursuant to sections 72(1)(b) and 75(1) of the FOI Act, requiring the production of certain documents to me. Following the receipt of those notices, the agency sought an extension of time in which to produce those documents in order to seek legal advice from the State Solicitor's Office. I granted an extension of time until 26 November 2008.

16. On 21 November 2008, the agency advised that it declined to produce the disputed documents to me on the ground that in its submission there exists a direct inconsistency between, on the one hand, sections 124Y(1) and (2) of the *Health Insurance Act 1973 (*Cth) ('the HI Act'), which prohibit disclosure of the disputed documents in this matter to me and, on the other hand, sections 75(1) and 83 of the FOI Act, which require the production of the disputed documents to me. The agency submitted that, in such circumstances, section 109 of the *Constitution* (Cth) applies. Section 109 provides:

> *"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."*

17. Between December 2008 to February 2009, there ensued an exchange of letters between my office and the agency wherein I pressed the agency to produce the disputed documents. On 19 December 2008, the agency wrote to me and asked me to reconsider my request for production of the disputed documents. In summary, the agency said:

    - By virtue of the fact that the complainant was the patient involved in the incident he would be able to identify the persons referred to in the disputed documents and that this was not a situation in which subsections (3) or (4) of s.124Y apply.

    - None of the individuals who are referred to in the disputed documents and who were contacted consented to the disclosure of information about them and, in those circumstances, the complainant's consent to the disclosure of information about him "*does not of itself meet the requirements of s.124Y(5) of the HI Act."*

    - Subsections (3), (4) and (5) of s.124Y cannot be met in this case.

18. On 20 February 2009, I met with senior officers of the agency and the State Solicitor's Office. Following that meeting, on 4 March 2009, the agency produced to me Document 1 and a verbatim transcript of the Clinical Incident Form (Document 2) in edited form so that information from which third parties could be identified to me was deleted together with a full explanation of why, in each case, that matter would identify a third party.

19. The agency also provided a blank AIMS form marked to show where the information in Document 1 was originally recorded. In addition, the agency

submitted that, even if I considered that any of the information produced in relation to Documents 1 and 2 could be disclosed in line with the limitations in s.124Y of the HI Act, all of that information is exempt under clause 8(2) of Schedule 1 to the FOI Act. In the alternative, the agency submitted that it would not be practicable to disclose that matter in line with s.24 of the FOI Act, because there would be so little matter remaining in the documents.

20. On 16 March 2009, I provided the parties with a letter setting out my preliminary view of this complaint. It was my preliminary view that:

- the disputed documents, in the form provided to me, are potentially accessible under the FOI Act because s.109 of the *Constitution* (Cth) has no application in respect of that matter;

- for the reasons set out in that letter, the disputed documents were *prima facie* exempt under clause 8(2) of Schedule 1 to the FOI Act.

21. In that letter, I invited both parties to make submissions to me, in particular in relation to clause 8(4). In the event, only the agency made further submissions to me.

IS THERE AN INCONSISTENCY BETWEEN THE HI ACT AND THE FOI ACT?

22. Since the agency did not retract its view that the disputed documents were not accessible under the FOI Act because that State law is inconsistent with a Commonwealth law – in this case, the HI Act – I have considered the question of inconsistency. Section 124V of the HI Act sets out its object, which is as follows:

> "*(1) The object of this Part is to encourage efficient quality assurance activities in connection with the provision of certain health services.*
>
> *(2) For the purpose of achieving that object, this Part contains provisions:*
>
> *(a) prohibiting:*
>
> *(i) the disclosure of information that became known solely as a result of those activities; or*
>
> *(ii) the production to a court of a document that was brought into existence solely for the purposes of those activities; and*
>
> *(b) protecting certain persons engaging in those activities in good faith from civil liability in respect of the activities."*

23. Section 124W of the HI Act defines the term 'quality assurance activity' as:

> "*(a) an assessment or evaluation of the quality, or a study of the incidence or causes of conditions or circumstances that may affect the quality, of health services provided by a person, whether before or after the commencement of this Part ...; or*
>
> *(b) the making of a recommendation about the provision of those services as a result of such an assessment, evaluation or study; or*
>
> *(c) the monitoring of the implementation of such a recommendation."*

24. That provision also defines 'declared quality assurance activity' to mean "*a quality assurance activity in respect of which a declaration by the Minister under section 124X is in force when the activity is engaged in".*

25. In addition, s.124W defines 'health service' to include "*any administrative or other service related to a health service"* and 'court' to include "*a tribunal, authority or person having power to require the production of documents or the answering of questions."*

26. Section 124X of the HI Act provides:

> *"(1) The Minister may, by signed writing, declare a quality assurance activity described in the declaration to be a quality assurance activity to which this Part applies.*
> *(2) ...*
> *(3) ...*
> *(4) A declaration, unless sooner revoked, ceases to be in force at the end of 5 years after the instrument of declaration was signed, but this subsection does not prevent the Minister from making a further declaration in respect of the same activity.*"

27. The agency advises that the Minister's declaration under s.124X of the HI Act with respect to AIMS was published on 7 June 2006 (QAA No.1/2006) and remains in force.

28. The HI Act prohibits the disclosure of certain information about declared quality assurance activities. Section 124Y of the HI Act provides:

> "*(1) Subject to this section, a person who acquires any information that became known solely as a result of a declared quality assurance activity, whether that person acquired the information in the course of engaging in activity, as a result of a disclosure under section 124Z or in any other way, must not, except for the purposes of that activity or in accordance with an authority given by the Minister, directly or indirectly make a record of that information or disclose that information to another person or to a court.*
>
> *Penalty: Imprisonment for 2 years.*
>
> *(2) Subject to this section, a person cannot be required:*

> *(a) to produce to a court a document that was brought into existence solely for the purposes of a declared quality assurance activity; or*
>
> *(b) to disclose to a court any information that became known solely as a result of such an activity;*
>
> *except when it is necessary to produce the document or disclose the information for the purposes of this Part.*
>
> *(3) Subsections (1) and (2) do not apply to information that does not identify, either expressly or by implication, a particular individual or particular individuals.*
>
> *(4) Subsection (2) does not apply to a document that does not identify, either expressly or by implication, a particular individual or particular individuals.*
>
> *(5) This section does not prohibit a disclosure of information if the person, or each of the persons, who would be directly or indirectly identified by the disclosure consents to the disclosure of that information."*

29. Section 75(1) of the FOI Act provides:

> "*The Commissioner may require an agency to produce documents for inspection so that the Commissioner can decide whether the document contains exempt matter or is a document of the agency".*

30. Section 83 of the FOI Act provides:

> *"If a person who has been required under Division 3 to –*
>
> *(a) give information;*
> *(b) produce a document; or*
> *(c) attend before the Commissioner or a conciliator,*
>
> *refuses or fails, without reasonable excuse, to comply with the requirement, the person commits an offence.*
>
> *Penalty:*
> *(a) for an individual - $6,000;*
> *(b) for a body corporate - $10,000."*

Consideration

31. From my perusal of s.124Y of the HI Act, I accept that it places prohibitions on the disclosure of certain information about - and certain documents relating to - declared quality assurance activities, and that AIMS is a declared quality

assurance activity. In my view, an inconsistency between s.124Y of the HI Act and sections 75(1) and 83 of the FOI Act does exist because the former prohibits the disclosure of information acquired under AIMS held by the agency and the latter requires the production of that information to the Information Commissioner.

32. Notwithstanding the prohibitions on disclosure in subsections (1) and (2) of s.124Y, subsection (3) of s.124Y makes it clear that such prohibition does not apply to information that does not, either expressly or by implication, identify a particular individual or individuals.

33. In addition, subsection (5) of s.124Y places a further limitation on the prohibition against disclosure. Subsection (5) states that a disclosure of information is not prohibited if the person or persons identified, either directly or indirectly, by the disclosure consents to the disclosure of the information.

34. In this case, the complainant has consented to the agency disclosing to my office any information that identifies him in the disputed documents and the agency has provided me with information taken from Documents 1 and 2 from which all information which identifies third parties has been removed. In effect, the information produced to me contains only personal information about the complainant. In my view, that information is not prohibited from disclosure under s.124Y(1) and (2) of the HI Act and, thus, is not the subject of any inconsistency between the FOI Act and the HI Act. Accordingly, I consider that the edited copies of Documents 1 and 2 which the agency has produced to me are potentially accessible under the FOI Act.

CLAUSE 8(2)

35. The agency claims, in the alternative, that the information in the disputed documents is exempt under clause 8(2). Clause 8, insofar as it is relevant, provides:

> *"**8. Confidential communications***
>
> **Exemptions**
>
> *(1) ...*
>
> *(2) Matter is exempt matter if its disclosure –*
>
> *(a) would reveal information of a confidential nature obtained in confidence; and*
>
> *(b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.*
>
> **Limits on exemption**
>
> *(3) ...*

> *(4) Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest."*

36. To satisfy the requirements of clause 8(2), the agency must persuade me to the relevant evidentiary standard as required by s.102(1) of the FOI Act, that the disputed documents contain confidential information which was both given and received in confidence, and also that the disclosure of the information could reasonably be expected to prejudice the future supply of information of that kind to the Government or an agency.

The agency's submissions

37. In its letter to me of 4 March 2009, the agency submits that the success of the AIMS reporting system is completely reliant on a no-blame culture, whereby health service staff feel confident that their notation of the event and any corresponding opinion or judgment is used solely to aid the further investigation and analysis of that event by the health service, without fear of that information being released to a third party. The agency says that, as a result of this staff expectation, the agency has experienced a significant improvement in the notification and investigation of incidents since the introduction of AIMS in 2001.

38. The agency submits that the positive impact of the AIMS reporting system experienced by the agency has also been the experience of other hospitals in Australia. As such, the agency submits that the release of *any* information contained on an AIMS form, however innocuous that information might appear, would immediately challenge the expectation of strict confidentiality of a staff member's contribution to the AIMS system and would be extremely detrimental to the future operation of any such system, not just in the agency but in any health setting.

39. The agency also said that for this reason the agency has been very concerned not to disclose the identity of individuals even for the purposes of providing the documents to my office.

40. On 1 April 2009, in response to my letter of 16 March 2009, the agency made detailed submissions, which I have summarised, as follows:

- In developing the AIMS system, it was recognised that a 'no-blame' approach and guaranteed confidentiality and security of the reporting process and information storage were of the utmost importance.

- A recent report by the Office of the Auditor General stated that the effectiveness of a voluntary reporting system such as AIMS depends upon having a positive reporting culture, in which staff engage because they trust the system and understand why reporting is important.

- When adverse incidents occur in a health care setting, the natural instinct for staff is to avoid getting involved because of embarrassment, shame

and fear of being blamed or losing professional reputation. For this reason, AIMS has been widely promoted across health care settings as a voluntary, totally confidential system of reporting which will only ever be used to improve patient safety. For this reason, AIMS generates information that would not otherwise be made available or documented elsewhere.

- A survey across the WA Health Sector in 2006 showed that 97% of staff understood that the information on an AIMS form was confidential. Agency officers are aware of the strict controls and guidelines which protect the confidentiality of AIMS reports. The guidelines include requiring the forms to be transported in a sealed envelope. The integrity of this part of the system is subject to audit. Once completed, the information on the forms is entered into the AIMS data base by a coder. Access to this data base is limited by password. At present only five people at the agency can access the data base: four coders plus the Risk Manager. Once forms have been coded the originals are placed in a locked filing cabinet in a locked office and, after 12 months, are confidentially destroyed.

- Since 2005 there has been a steady increase in the number of incidents reported annually across the WA public health sector using the AIMS system. At the agency, there were 1,695 incidents reported in 2002 and 4,887 in 2008. This reflects the growing confidence members of staff have in using the system rather than an increase in the number of incidents.

- The release of an individual incident report which has been edited to delete personal information will nevertheless be identifiable as an AIMS form or (in the case of a transcribed AIMS form) as constituting an AIMS report, which originates from a specific organization. Depending on what other personal information is deleted from the document, it may (as is the case here) expressly identify the incident which is the subject of the report. It is entirely foreseeable that if staff discovered that a form completed by one of them had been released in some form, this would induce feelings of anxiety and distrust in the AIMS system overall and would create insecurity, distrust and anxiety. The agency expects that the number of reports would significantly decline if AIMS forms, or any part of them, were required to be disclosed to third parties. The agency submits that it is well-recognised that most health-care professionals, particularly doctors, are very concerned about litigation and would be very wary of a reporting system that could be used against them or the hospital.

- There has never been a disclosure of an AIMS form (or any part thereof) through FOI or some other compulsory process while the AIMS system has been in place. Given the widespread use of AIMS throughout the national health system, the release of any part of an AIMS form, or of any information associated with an AIMS form, is likely to be widely reported in the health sector, and will certainly quickly become known throughout individual health agencies. That disclosure is therefore likely to impact

significantly on the success of the AIMS system as a whole and would ultimately undermine the continued success of, and extent of participation by staff in, the AIMS system. This lack of confidence and trust would be very likely to have a flow on effect on all organizations using the AIMS system. If this were to occur it seems likely that preventable errors would not be identified and acted upon. The safety and quality of the health system as a whole would decline.

- Experience in other sectors where safety is critical indicates that voluntary, confidential reporting without fear or reprisal can be effective in securing staff engagement. In particular, the aviation industry's systematic approach to passenger safety suggests that a voluntary, confidential reporting system is an effective means of capturing important information for learning and improvement in safety. In the United States, the National Aeronautical and Space Administration's (NASA) Aviation Safety Reporting System (ASRS) security system is designed and operated to ensure confidentiality and anonymity of the reporter and all other parties involved in a reported occurrence or incident. The Federal Aviation Authority (FAA) will not seek, and NASA will not release or make available to the FAA, any report file with NASA under the ASRS. There has been no breach of confidentiality in more than 20 years of the ASRS under NASA management. In fact the Veterans Administration in the US has instituted a voluntary, confidential and non-punitive Patient Safety Reporting System modelled on the ASRS.

Clause 8(2)(a) - confidential information obtained in confidence

41. Information is inherently confidential if it is not in the public domain; that is, if the information is known only to a small number or limited class of persons: *Re Read and Public Service Commission* [1994] WAICmr 1 at [28]. From the information given to me by the agency and from my perusal of the Policy and the Clinical Incident Form, I am satisfied that the information contained in the disputed documents is information of a confidential nature because it is known only to a limited number of people and is not in the public domain.

42. In *Re Kimberley Diamond Company NL and Department for Resources Development and Another* [2000] WAICmr 51, the former Information Commissioner said, at [26] : "*Information is obtained in confidence where there is evidence that establishes that the information was both given and received on the basis of either an express or implied understanding of confidence"*. I agree with that statement.

43. Based on my examination of the documents and on the basis of the information currently before me, as outlined above, I am persuaded that it is more likely than not that the information contained in the disputed documents was both given to, and received by, the agency on the basis of an express understanding of confidence. Accordingly, I am satisfied that the requirements of paragraph (a) of clause 8(2) have been established in this case.

Clause 8(2)(b) – prejudice to the future supply of information

44. In my view, paragraph (b) of clause 8(2) is directed at the ability of agencies to obtain information of a kind similar to the disputed matter in future. It is not concerned with the question of whether the particular person or persons who provided the disputed information would in future provide similar information: see *Ryder v Booth* [1985] VR 869 at 872.

45. In *Re C and Department for Community Development* [1994] WAICmr 18, the access applicant sought information concerning allegations of possible child abuse given to the Department for Community Development. In that case, the former Commissioner accepted that the information was of a confidential nature obtained in confidence and said, at [79]:

> *"… it is reasonable to expect that information of this kind may not be provided in future to the agency, unless it remains confidential. I am also persuaded of this in view of the absence of any statutory obligation or requirement on the general public to provide such information. I am also of the view that it is reasonable to expect that the agency's ability to obtain such information would be affected by the disclosure of these folios because people will be less likely to provide the details necessary for the agency to make a considered judgment of the veracity of the information received. I accept that if this occurred it would prejudice the agency's present ability in this regard."*

46. In *Re Welton and Police Force of Western Australia* [1995] WAICmr 43, the disputed information was given to the agency in confidence for the purpose of assisting officers of the Recruiting Branch to make a decision as to the suitability of the complainant for employment as a police officer. In that case, the former Commissioner said, at [21] – [22]:

> "*From my examination of the disputed document, I am satisfied that the confidential information in it was provided to the agency voluntarily. In my view, the fact that it was provided voluntarily, the absence of any obligation or requirement on the general public to provide such information and the fact that the agency has no power to compel the supply of that kind of information, must be matters for consideration when determining whether a claim that the future supply of information of that kind could be expected to be prejudiced, is reasonably based. In some circumstances, I consider that information supplied to an agency on a voluntary basis may not be supplied in future without an assurance of confidentiality.*
>
> *In this instance, it is clear from the contents of the disputed document that the information was provided reluctantly. That information is of such a nature that I accept the agency's claim that the disclosure of this document could reasonably be expected to prejudice the agency's ability to obtain such information in the future because members of the public will be less likely to volunteer information to the agency about potential*

recruits, in order to assist the agency to make informed and considered judgments for recruiting purposes."

47. I consider those cases to be a useful guide, in the present case. I accept as a fact that the information contained in the disputed documents is information that was voluntarily provided by health professionals to assist in an ongoing quality improvement process intended to prevent future clinical incidents. There is no statutory obligation on health professionals of which I have been informed to provide that information and I accept that, in circumstances where a clinical incident has occurred it might be easier for staff, without some encouragement, to avoid getting involved. In other words, staff would probably be reluctant to provide the information sought.

48. I accept that the policy objective of AIMS is to provide a system which encourages factual reporting by providing a measure of qualified privilege for all information that becomes known solely as a result of investigation and analysis of clinical incidents reported to AIMS. The degree of protection considered necessary is reflected in s.124Y(2) of the HI Act which provides that a person cannot be required to produce a document or disclose information to a court if that matter was brought into existence or became known solely for the purposes of a declared quality assurance activity.

49. As noted in paragraph 28 above, the prohibition in s.124Y against disclosure of that kind of information contains certain limitations which operate to allow health providers to disseminate de-identified data in order to address shortcomings in the provision of health services. I note from the reports on that data issued by the Department that in 2005 the Australian Patient Safety Foundation, the developers of AIMS, estimated that there was an under-reporting of incidents.

50. In my view, it would be reasonable to expect that health professionals may not voluntarily complete the AIMS clinical incident forms in future if any of the information in those forms were to be disclosed under the FOI process. I accept that to date it has been understood that the information provided in those forms has been given a high degree of protection from disclosure.

51. In my opinion, staff confidence in AIMS could reasonably be expected to be undermined by the release of information obtained under that process, even where that information may not be directly protected because it is not a declared quality assurance activity under the HI Act. I consider that the ability of the agency in the future to obtain information of the kind set out in AIMS clinical incident forms, which has been volunteered, could reasonably be expected to be prejudiced by the disclosure of the disputed documents. Accordingly, I consider that the agency has satisfied the requirements of paragraph (b) of clause 8(2) in respect of the disputed documents and that those documents are *prima facie* exempt under clause 8(2).

Clause 8(4) – public interest

52. If a *prima facie* claim for exemption is established, then consideration must be given to whether clause 8(4) operates to limit the exemption. Clause 8(4) provides that matter is not exempt under clause 8(2) if its disclosure would, on balance, be in the public interest. This 'public interest test' is used to balance competing public interests.

53. Under section 102(3) of the FOI Act, the onus is on the complainant in this case to establish that disclosure of the disputed documents would, on balance, be in the public interest, pursuant to clause 8(4).

54. In the present case, I invited the complainant to make submissions in relation to the public interest and the application of clause 8(4) but, on 31 March 2009, the complainant's solicitors advised me that the complainant declined to provide any submissions. Without information from the complainant relating to the identification and the balancing of competing public interests, I consider the complainant has not discharged his onus under s.102(3) of the FOI Act. In view of that, I have considered the application of clause 8(4) on the basis of the information currently before me.

The agency's submissions

55. On 1 April 2009, the agency advised me that it had identified the following public interests which weigh in favour of the disclosure of the disputed documents:

- A public interest in access applicants being able to enjoy their rights of access under the FOI Act.
- A public interest in patients being able to obtain access to medical information about themselves, especially where they may wish to pursue legal action if a legal basis exists for such action.
- A public interest in hospitals being transparent, as far as possible, regarding medical errors.

56. However, the agency submits that those public interests should be given little weight because a patient's right to obtain access to the documents comprising his or her medical record is unaffected by refusing access to an AIMS report, or part report. In the present case, the complainant has already obtained access in full to his medical record.

57. In addition, the agency submits that the substantial editing of the disputed documents is such that the information would be difficult to interpret accurately; may be misleading; and discloses nothing which could be of assistance to the complainant either to understand the nature of the incidents reported in relation to him, or to pursue litigation in relation to such incidents. The agency claims that the disputed documents, in their edited form, have no probative value for the purposes of litigation and cannot assist the complainant to understand the reasons for the adverse incidents reported.

Consideration

58. The expression 'public interest' is not defined in the FOI Act although the Court of Appeal in *Director of Public Prosecutions v Smith* (1991) 1 VR 63 at p.75 referred to it as follows:

> *"The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted acknowledged to be for the good order of society and for the well being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals."*

59. In favour of disclosing the disputed documents, I recognise a public interest in:

- the complainant being able to exercise his rights under the FOI Act, particularly as the disputed documents contain personal information about him which, by virtue of s.21 of the FOI Act, is a factor to be taken into account in deciding whether it is in the public interest for that matter to be disclosed. To that extent, the complainant's interest is a public, rather than a private interest;
- a person involved in a clinical incident in a State Government hospital being given as much information about that incident as can properly be disclosed;
- hospitals being transparent, as far as possible, regarding medical incidents.

60. With regard to the second bullet point, I accept the agency's submission that the editing of the disputed documents is such that there is limited information that might be of assistance to the complainant and that disclosure in that form has the potential to mislead. In relation to the third bullet point, I consider that that particular public interest is satisfied to some extent by the publication of the de-identified data taken from the AIMS Clinical Incident Forms.

61. Weighing against disclosure of the disputed documents, I recognise a public interest in:

- ensuring that express assurances of absolute confidentiality, if reasonably and properly made, should be respected;
- health staff having confidence that information provided voluntarily on a confidential and 'no-blame' basis will be used solely for the purpose of improving patient safety;
- a health provider being able to obtain, in confidence, voluntary information that it might not otherwise have got to assist in identifying medical incidents and to act upon that information for the benefit of the wider community.

62. The public interest test is intended to cover those cases, amongst others, where public disclosure would be prejudicial to the proper operation of government or the proper working of an agency. In my view, for the reasons given above in

paragraphs 50-51, it would be prejudicial to the proper and effective working of hospitals and health services in Western Australia to disclose the disputed documents.

63. In the present case, I accept that there is a difficult balance between the public interests on both sides. However, in balancing the competing public interests for and against disclosure as outlined above, I consider that those favouring non-disclosure outweigh those favouring disclosure, in this particular instance. Therefore, I find that the disputed documents are exempt under clause 8(2) of Schedule 1 to the FOI Act.

****