OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2004089 Decision Ref: D0232006

Participants:

West Australian Newspapers Limited
Complainant

- and -

Department of the Premier and Cabinet
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - unpublished pages of Volume 2 of Final Report of Douglas Inquiry into Obstetric and Gynaecological Services at King Edward Memorial Hospital - clause 3(1) - whether "de-identified" information is personal information as defined - to whom identity must be apparent or reasonably ascertainable - whether disclosure is in the public interest - clause 6(1) - identification of deliberative processes - whether disclosure contrary to the public interest - clause 8(2) - whether confidential information obtained in confidence - extent of undertakings of confidentiality given by Inquiry - prejudice to future supply.

Freedom of Information Act 1992: ss. 15(1), 24, 102(1), 102(3), 104; Schedule 1, clauses 3(1), 3(3), 3(4), 3(6), 6(1), 6(2), 6(3), 6(4), 8(2)
Children's Court of Western Australia Act 1988: s.35
Freedom of Information Act 1982 (Cth): s.43(1)(c)(ii)
Privacy Act 1988 (Cth)
Hospitals and Health Services Act 1927: s.9
Public Sector Management Act 1994: s.11
Interpretation Act 1984: s.5
Royal Commissions Act 1968: ss.9, 19B

Re Tracey and City of Gosnells [1996] WAICmr 34
Re "H" and Shire of Serpentine-Jarrahdale [2000] WAICmr 59
Re R v West Australian Newspapers Ltd (ex parte Terrence Patrick Keating) (unreported, Supreme Court of Western Australia, 19 June 1997, Library No. 970316)
Re Waghorn & Christmass and Police Force of Western Australia [1995] WAICmr 11
Re De Waal and Ministry of the Premier and Cabinet [1999] WAICmr 18
Re Wills and the Department of the Premier and Cabinet [2005] WAICmr 12

Re Ayton and Police Force of Western Australia [1999] WAICmr 22
Re Read and Public Service Commission [1994] WAICmr 1
Re Collins and Ministry for Planning [1996] WAICmr 39
Re Waterford and Department of the Treasury (No 2) (1984) 5 ALD 588
Ministry for Planning v Collins (1996) 93 LGERA 69
Re Coastal Waters Alliance of Western Australia and Department of Environmental Protection and Cockburn Cement Limited [1995] WAICmr 37
Attorney-General's Department v Cockcroft (1986) 10 FCR 180
Ryder v Booth [1985] VR 869

DECISION

The decision of the agency is set aside. Subject to the deletion of the material specified in paragraph 10 of my reasons for this decision as not in dispute, the disputed document is not exempt.

D A WOOKEY
A/INFORMATION COMMISSIONER

12 December 2006

REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of the Premier and Cabinet ('the agency') to refuse West Australian Newspapers Limited ('the complainant') access to pages 239-439 of Volume 2 of the Final Report of the Douglas Inquiry into Obstetric and Gynaecological Services at King Edward Memorial Hospital 1990-2000 ('the Report'), on the grounds that it is exempt under clauses 3(1), 6(1) and 8(2) of Schedule 1 to the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. On 23 February 2004, the complainant applied to the Minister for Health for access to certain documents including the disputed document. On 5 March 2004, the Minister's FOI Co-ordinator transferred the access application to the agency, pursuant to s.15(1) of the FOI Act. On 7 April 2004, the agency's FOI Co-ordinator requested an extension of time on behalf of the agency, until 16 April 2004, within which to provide the complainant with a notice of decision. The complainant agreed to that request.

3. On 16 April 2004, the Principal Policy Officer, Office of the Director General, made the decision on access. The agency refused the complainant access to the disputed document on the ground that it contains matter that is exempt matter under clauses 3(1), 6(1) and 8(2) of Schedule 1 to the FOI Act.

4. By letter dated 22 April 2004, the complainant applied to the agency for an internal review of the initial decision on access. In support of that application the complainant submitted that the public interest arguments that weighed in favour of releasing the disputed document to the complainant far outweighed the reasons given by the agency for withholding access to the disputed document.

5. On 6 May 2004, the Director, Review and Co-ordination, Public Sector Management Division of the agency made the decision on internal review. The internal review decision-maker confirmed the agency's decision to refuse the complainant access to the disputed document. Following that, on 18 May 2004, the complainant applied to the Information Commissioner for external review of the agency's decision on access.

REVIEW BY A/INFORMATION COMMISSIONER

6. After receiving this complaint, I required the agency to produce to me, for my examination, the FOI file relating to the complainant's access application and the original of the disputed document. In order to further assist me with my inquiries into this complaint, the agency has also provided me with copies of Volumes 2 and 5 of the Report and I have obtained Volume 1 of the Report from the State Government internet website.

7. Following his initial examination of that material, my Senior Legal Officer invited the complainant to provide me with written submissions in support of its request for access to the disputed document. The complainant's submissions were received and provided to the agency, with the complainant's consent, for its consideration and response. The agency's submissions in response were, in turn, provided to the complainant for its consideration and response. Further submissions were received from the complainant.

8. By letter dated 19 May 2006, I informed the parties of my preliminary view. My preliminary view was that some parts of the document in dispute were exempt under clause 8(2) of Schedule 1 to the FOI Act and may also be exempt under clause 3(1), but that the document is not otherwise exempt.

9. On 9 June 2006 the complainant advised that, having considered my preliminary view, it was prepared to withdraw its complaint in respect of those parts of the document which, in my preliminary view, were exempt. By letter dated 22 June 2006, however, the agency made further submissions for my consideration and advised that, although it had reconsidered its claims in light of my preliminary view, it maintained all its claims for exemption for the whole of the document. Accordingly, this matter could not be resolved by conciliation between the parties.

THE DISPUTED INFORMATION

10. Following the responses to my preliminary view, the information remaining in dispute between the parties is all the disputed document other than the direct quotations of the words of patients (on pp 266, 267, 273, 277, 278, 284, 300, 302, 304, 305, 330, 331, 358, 428, 429, 430, 434 and 435). In light of my preliminary view that those passages are exempt under clause 8(2) and may also be exempt under clause 3(1) of Schedule 1 to the FOI Act, the complainant withdrew its complaint in respect of them and no longer seeks access to them. Therefore, any references in these reasons to the disputed document do not include those parts of the document.

THE EXEMPTIONS CLAIMED

Clause 3

11. The agency claims that the disputed document is exempt under clause 3(1) of Schedule 1 to the FOI Act. Clause 3(1) provides as follows:

> ***"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 the matter to the applicant.

(6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."

Definition of "personal information"

12. The phrase "*personal information*" is defined in the Glossary to the FOI Act as meaning "*…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) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample."

13. The definition of the term "personal information" in the FOI Act makes it clear that the exemption in clause 3(1) applies to any information or opinion about a

person from which the identity of that person is either apparent or can reasonably be ascertained.

Is the disputed information "personal information"?

14. Both of the agency's decision-makers held the view that the information recorded in the disputed document consists of information in the nature of "personal information" about women who were treated at King Edward Memorial Hospital (KEMH) in the period between 1990 and 2000; the babies born to those women; family members of those patients; and health care professionals involved in their cases. Both decision-makers formed the opinion that the information recorded in the case histories outlined in the disputed document consists of very specific details of the medical conditions of the women concerned; the medical treatment provided to those women; in certain cases, their recollections of and views about their treatment; and the outcome of their treatment.

15. The agency's decision-makers concluded that, if the disputed document were to be publicly disclosed, then it would be very likely that relatives of the women concerned and/or the health care professionals who worked at KEMH between 1990 and 2000 could ascertain the identities of the women and of the health care professionals who treated them at KEMH by virtue of the very specific information recorded in the disputed document.

16. Both of the agency's decision-makers appear to have relied upon the former Information Commissioner's decisions in *Re Tracey and City of Gosnells* [1996] WAICmr 34 and *Re "H" and Shire of Serpentine-Jarrahdale* [2000] WAICmr 59 in reaching the conclusion that the information recorded in the disputed document is "personal information" within the meaning of the FOI Act definition and that it is, therefore, *prima facie*, exempt under clause 3(1) of Schedule 1 to the FOI Act.

The agency's submissions

17. The agency submits that the former Commissioner accepted that "personal information" is not confined to the name of an individual or to information about an individual, in conjunction with that person's name, but that it extends to all kinds of information from which the identity of an individual or individuals is apparent or can reasonably be ascertained.

18. The agency submits that, in *Re Tracey*, the former Commissioner accepted that information about the length of time that a person had resided in a street (which was the centre of a neighbourhood dispute) and information about the person's occupation and other family details about the person concerned constituted information from which the identity of that person could reasonably be ascertained and was, therefore, "*personal information"* for the purposes of clause 3(1) of the FOI Act. The agency also submits that in *Re "H"*, the former Information Commissioner ('the former Commissioner') accepted that, in the circumstances of that particular case, the identity of the complainant could

reasonably be ascertained from the handwriting in which the complainant had written the document for which exemption was claimed.

19. The agency contends that the information in the disputed document is sufficiently specific to permit the patients, their babies, members of their families and the health care professionals who treated those women to be identified from that information. The agency says that this is so because the details of the case histories recorded in the disputed document are so specific to each of the women involved that the disclosure of the information in the disputed document will, inevitably, permit the identification of the patients concerned.

20. The agency submits that, given the extremely sensitive nature of the case history information recorded in the disputed document, its disclosure under the FOI Act is very likely to cause distress to the patients concerned and to their families. The agency suggests that a very cautious approach should be taken in determining whether the information in the disputed document constitutes personal information about the women, children and family members involved.

21. The agency submits that concern to avoid the potential disclosure of personal information about patients and former patients at the KEMH who might be identified from the information contained in the relevant pages (notwithstanding the efforts made by the Inquiry to de-identify that information) was one of the reasons for the Government's decision not to table the disputed document when the rest of the Report was tabled in Parliament.

22. The agency submits that the terms of the FOI Act appear to contemplate that a hypothetical reader of information disclosed under the FOI Act may have knowledge and skills apart from the knowledge or skills of the general population, because information such as finger prints, retina prints or body samples are contemplated as constituting personal information within the definition of "personal information" in the FOI Act. The agency submits that such information can only identify a person if the reader or recipient of the information is in possession of other information, such as a finger print data base.

23. The agency submits that, therefore, the FOI Act also appears to contemplate that, if the disputed document were to be released into the public domain, it may permit the identity of an individual patient, family member or health care professional to be ascertained by a person or by a group of persons with the requisite knowledge or skills to make the link between the information recorded in the disputed document and the individual. Accordingly, the agency says, the question to be considered in this case is whether the information recorded in the disputed document could, if disclosed, reasonably permit the identities of the individuals referred to in the disputed document to be ascertained from that information.

24. The agency submits that it was accepted by the former Commissioner that disclosure of documents under the FOI Act is, effectively, "disclosure to the world at large", because the FOI Act does not contain any restrictions on further

disclosure of documents obtained under the FOI Act by an access applicant. Finally, the agency submits that I should reject the complainant's submission that the purpose of the FOI Act is not to exempt matter where identification occurs to those persons who already have in their possession certain knowledge about a particular individual. Rather, the agency submits, if the information in a document would permit a person to identify a third party to whom the information refers, then that is sufficient to render it personal information as defined in the FOI Act.

The complainant's submissions

25. The complainant submits that it is not likely that any personal information, as that term is defined in the FOI Act, would be disclosed in the event that the disputed document were to be released publicly. The complainant says that, if the finding of the agency's decision-makers that the disputed document contains personal information about the patients or other persons is correct, then there must be identification of a person to a third party who has no involvement in the case.

26. The complainant submits that disclosing the disputed document would not reveal personal information about an individual, because the agency's decision-makers have applied the wrong test. The complainant submits that the 'test' that should be applied is not whether the disclosure of the disputed document "could" identify a patient, that is, whether it is possible to identify a patient. Rather, the complainant submits that the correct 'test' is whether it is reasonable that identification will occur, that is, whether it is "likely" to occur.

27. The complainant submits that it is not likely that personal information would be disclosed by the release of the disputed document under the FOI Act, because the information in the disputed document was "de-identified" by the Inquiry, in order to ensure that the individuals referred to in the disputed document cannot be identified. The complainant says that the views of the Chairman of the Inquiry have been disregarded by the agency's decision-makers and that, given his intimate involvement with the cases under review, the Chairman would have been the person in the best position to determine the question of identification.

28. The complainant submits that, even if the agency's conclusion that the disputed document contains personal information is correct, then the purpose of the FOI Act is not to exempt matter where identification occurs to persons who already have in their possession other knowledge or information about a particular person. The complainant submits that this is so because, if a former patient of KEMH reads information in the paper, he or she might recognize their own details but that, of itself, does not constitute disclosure of personal information to a third party. The complainant also submits that, under the FOI Act, there cannot be a disclosure of personal information about an individual to a third party if that third party is a health professional who, because of his or her knowledge of or involvement with a KEMH patient, then recognizes that patient upon reading the information in the disputed document, because the health professional already knows about the case and the individual concerned.

29. The complainant says that the view of the Full Court of the Supreme Court of Western Australia in the *R v West Australian Newspapers Ltd (ex parte Terrence Patrick Keating)* (unreported, Supreme Court of Western Australia, 19 June 1997, Library No. 970316) is relevant to the this matter. The complainant referred to the following passage in the judgment of Murray J where His Honour said, at p.7:

    "…I would accept that the capacity for identification which is proscribed is generally by the public, rather than by private individuals who may, by reason of knowledge otherwise acquired, have a particular capacity to identify a child the subject of a report, which the general reader, viewer or listener would not otherwise have. In my opinion, the requirement that the content of the report must be likely to lead to the identification of the child means that, giving the word "likely" its ordinary meaning, but not forgetting the seriousness of the consequences of contravention of the section, it must be established that there was a real or substantial prospect that the report would lead the general reader, viewer or listener to identify the child."

30. The complainant also submits that the Health Consumers' Council ('the HCC') supports its application on the question of identification in this case, and provided me with a copy of a letter to that effect from the HCC to the complainant.

31. The complainant submits that a distinction must be made between a finding based on speculation that a person's identity could, or could possibly, be ascertained, as distinct from a finding that a person's identity could reasonably be ascertained. The complainant submits that the wording of the exemption in clause 3 is not cast in terms of 'could' but, rather, in terms of reasonableness and that there should be a likelihood and not a possibility of identification before the exemption applies.

32. The complainant submits that in *Re Waghorn & Christmass and Police Force of Western Australia* [1995] WAICmr 11, the former Commissioner accepted that deleting the names and addresses of third parties who had complained about the conduct of the two police officers sufficiently addressed the public interest in maintaining the privacy of those third parties. The complainant submits that the disputed document does not contain the names of any of the patients described in the case histories nor does it contain the names of the health professionals who were involved in treating those patients.

33. The complainant submits that the Chairman of the Inquiry has stated that he "de-identified" the information in the Report so that identities of the persons referred to in the disputed document could not reasonably be ascertained.

34. The complainant submits that the former Commissioner decided, in *Re De Waal and Ministry of the Premier and Cabinet* [1999] WAICmr 18, that individual witnesses in that case could not be identified by the *"…views they have given or the accounts they have given or by the fact they belong to a particular group or profession"*. The complainant submits that the references to the medical conditions of the patients described in the Report, their treatment and the

outcomes of those cases would not reasonably lead to the identification of the patients concerned or the identities of the health professionals who were involved in treating those patients.

35. The complainant submits that the former Commissioner has held, on numerous occasions, that the purpose of the exemption in clause 3 of Schedule 1 to the FOI Act is to protect the privacy of individuals. The complainant submits that, if the intent of the exemption in clause 3 is to protect the privacy of individuals, it must necessarily follow that that right to privacy is to be protected from those persons who do not already have in their possession knowledge about a particular person.

36. The complainant submits that there can be no breach of the privacy of the women patients referred to in the disputed document if the relatives of those women patients or the health care professionals who worked at the KEMH at the relevant time, or who were involved in the treatment of those patients, can recall the identity of one or more of those patients and their case histories. The complainant says that, if a health care professional can recognize a patient from the reporting of the circumstances of an adverse incident, then that health care professional already has in his/her knowledge two pieces of information:

- the case history of the patient (condition, treatment or outcome); and
- the name/identity of the patient concerned.

37. The complainant submits that the cases relied on by the agency in support of its claim for exemption under clause 3(1) possess a significant distinguishing feature from this case because, in the cases referred to by the agency, a decision to allow access would have meant the access applicant would have been able to link two pieces of information, which would in turn lead to the disclosure of the identity of a person.

38. The complainant submits that in *Re Tracey* the former Commissioner accepted that the information recorded in the letters under consideration in that case constituted personal information about third parties because the complainant already knew the identities of the neighbours in the street and that the relevant letters would, if disclosed, have enabled the complainant to marry up the information in the letters with his existing knowledge which would, in turn, then lead him to identify the third parties involved in that particular case.

39. The complainant submits that the agency's view that the identities of the persons referred to in the disputed document could be ascertained by a member of the public with knowledge of the subject matter of the document should be rejected because the only members of the public who may be able to link the information in the disputed document with a particular individual are those individuals who already have that knowledge in their possession, due to their personal involvement with the patients, whether as a relative or a health care professional. The complainant submits that such a disclosure cannot constitute a breach of privacy of the third party or third parties concerned.

Consideration

40. To be personal information as defined in the FOI Act, the identity of the individual concerned must be apparent or reasonably ascertainable from the information. I note the agency's advice that it was not able to ascertain the identities of the individuals referred to in the disputed document. Neither has this office been able to do so.

41. Having examined the disputed document, I am satisfied that the information in the disputed document has been "de-identified", in the sense described by the complainant, because the disputed document does not contain details of the names, addresses or other information that directly identifies any individual, in particular, the patients concerned; their babies; members of their families or the health care professionals who treated those women and/or their babies. The ages of the women referred to are not given (they are referred to in decades only); the date of treatment is not given (only a five year period within which the case occurred); and the names and locations of other hospitals where some of the patients had also been treated are not given.

42. However, the information recorded in the case histories in the disputed document does consist of specific details about the medical conditions of the women concerned; the treatment given to those women; and the outcome of their treatment. I agree with the conclusion reached by the agency's decision-makers that the patients, the health professionals and others involved in the cases could ascertain from that information the identities of the women and other health care professionals concerned in at least some of those cases. It is likely also that the women concerned could identify from that information some of the health professionals referred to.

43. The central issue of the argument between the parties on this point is whether it is sufficient that one person, or a small number of people, already having some knowledge of a matter, could identify the individual concerned from the information in question for the person's identity to be "reasonably ascertainable" from the information, or whether the person's identity could only be said to be reasonably ascertainable from the information if any person reading the information, and not having any additional knowledge, could identify the person from that information. It is a difficult question.

44. As did the former Commissioner, I have on a number of occasions found information from which the access applicant in a particular matter, already having some knowledge of the individual concerned, could reasonably ascertain the identity of that person from the information to be "personal information" as defined, whether or not any other person, having no direct knowledge of the individual concerned, could reasonably ascertain the person's identity from the information (for example, the former Commissioner's decision in *Re Tracey*, referred to above). I have also, on at least one occasion, found information to be personal information in circumstances in which the access applicant requested access to information about a particular person on the basis that, because the applicant had requested information about that person, in those circumstances, no amount of editing of the documents could prevent it being revealed that the

information in the document was about that person *(Re Wills and the Department of the Premier and Cabinet* [2005] WAICmr 12). To interpret the definition otherwise in that case would have defeated the purpose of the clause 3(1) exemption – to protect the privacy of individuals about whom government documents contain personal information.

45. The definition of "personal information" in the Glossary to the FOI Act does not state to whom the identity must be apparent or by whom it must be reasonably ascertainable, although I tend to agree with the agency's submission that the definition itself contemplates identification by people with special knowledge in some circumstances.

46. In the *R v West Australian Newspapers* case, to which the complainant referred me, the issue under consideration was whether reports published in *The West Australian Newspaper* contained matter likely to lead to the identification of a child, and thereby constituted a breach of s.35 of the *Children's Court of Western Australia Act 1988*, an offence punishable as a contempt of the Supreme Court. Section 35(1) of that Act provides:

"Except where done in accordance with an order made under section 36A, a person shall not publish or cause to be published in any newspaper or other publication or broadcast or cause to be broadcast by radio or television a report of any proceedings in the Court, or in any other court on appeal from the Court, containing any particulars or other matter likely to lead to the identification of a child who is concerned in those proceedings –

(a) as a person against whom the proceedings are taken;
(b) as a person in respect of whom the proceedings are taken;
(c) as a witness; or
(d) as a person against or in respect of whom an offence has or is alleged to have been committed."

47. In the leading judgment, Murray J observed that s.35(1) resolved the tension between the two competing principles of court proceedings being open to public scrutiny and reporting to the community as a whole as against the need to protect witnesses, victims and alleged victims from the harmful effects that may ensue following their public identification and exposure to the community generally.

48. It was in that context that his Honour accepted that the capacity for identification which is proscribed by s.35 is generally by the public, rather than private individuals who may, by reason of knowledge otherwise acquired, have the capacity to identify a child. In that instance, the Court was not satisfied that the ordinary reader would be likely to connect the various reports and thereby identify the child and that it was not relevant to adduce evidence that any particular person reading the report could make the relevant identification.

49. I do not consider that case to be a great deal of assistance in the interpretation of the definition of "personal information" in the FOI Act. The provision under consideration by the court in that case was specifically concerned with

publication in the media. That is, the circumstances contemplated by the court were those in which the information would necessarily be published in the media to a media audience. Disclosure under the FOI Act does not necessarily equate to publication in the media.

50. When considering whether or not to disclose documents under the FOI Act, the effects of disclosure are generally considered as though disclosure were to the world, rather than only to the particular access applicant. The reason for that is that no conditions can be attached by an agency to the further dissemination by the access applicant of the information disclosed, although further dissemination may be otherwise legally constrained (for example, by the law of defamation). The reason for that is that, while disclosure to a particular access applicant may not be reasonably expected to result in any of the adverse effects contemplated by the exemption provisions, if that particular access applicant were able to further disseminate the information, it may be that the further dissemination by that particular access applicant to other people would have one of those adverse effects.

51. However, that does not mean, in my view, that consideration of the potential effects of disclosure under the FOI Act cannot be limited in a particular case to the effect of disclosure to the particular access applicant, being someone already having some knowledge of the person or matter concerned. Clearly, for example, disclosure of personal information about an individual to that individual would not breach that person's privacy, whereas disclosure of that same information to the world at large would breach that person's privacy. Similarly, disclosure of personal information about a person to someone who either already knows the identity of the person concerned or, because of other knowledge, could ascertain the identity of the person concerned from the information (for example, a nosey neighbour) would breach that person's privacy, even though the person's identity could not be ascertained by anyone else to whom that information were to be disclosed.

52. The stated objects of the FOI Act are to enable the public to participate more effectively in governing the State and to make the persons and bodies that are responsible for State and local government more accountable to the public (s.3). The purpose of the Act is not to call to account private individuals or to open their private affairs to public scrutiny other than in circumstances where much stronger public interests than the public interest in the protection of personal privacy may require that to occur. The FOI Act, therefore, contains the clause 3 exemption to ensure that the personal privacy of private individuals about whom personal information is contained in government-held documents is not unduly intruded upon.

53. It is in that context that the definition of "personal information" must be construed. As the purpose of the clause 3 exemption is to protect the personal privacy of individuals about whom government-held documents contain personal information, in my view the definition of "personal information" should be construed in a way that achieves that purpose and accords with the objects of the FOI Act. I am inclined to the view, therefore, that if any person, even if only a person having some additional knowledge, could reasonably

ascertain the identity of a particular individual from particular information about that individual, that information will be personal information for the purposes of the FOI Act.

54. In my opinion, as I have said, the information recorded in the case histories in the disputed document is so specific about the medical conditions suffered by the women concerned; the treatment given to those women; and the outcome of their treatment that, if the disputed document were to be disclosed under the FOI Act, such disclosure could reasonably be expected to enable the identities of one or more of the individuals concerned to be ascertained, albeit only by people who are already aware of the events concerned either because they were involved in them or the patient or a practitioner concerned has already imparted that information to them.

55. On that basis, in my view, disclosure of the disputed document would reveal personal information as defined and that information is, *prima facie,* exempt under subclause 3(1) of Schedule 1 to the Act.

The limits on exemption

56. I have considered whether any of the limits on exemption set out in subclauses 3(2)-3(6) of Schedule 1 to the FOI Act operates to render the information recorded in the disputed document not exempt under clause 3(1).

57. Insofar as the information contained in the documents relates only to factual accounts of things done by health care practitioners employed by, in or for the purposes of, KEMH or things done by a person performing services for KEMH under a contract for services in performing services under the contract, then it will be subject to the limit on exemption provided by clause 3(3) and (4), cited in paragraph 11 above. That limit would not apply, however, in respect of any information concerning things done by health care practitioners not employed or contracted by KEMH in such a capacity and would not apply, in my view, to the comments made about the actions of individuals in the delivery of the health care provided. Disclosure of those comments would reveal more than merely details of things done in the performance of their duties; it would reveal also an assessment of the things done.

58. Having examined the information recorded in the disputed document, in my opinion, the only other limit on exemption which may apply in the circumstances of this case is the limit on exemption in subclause 3(6), which 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 complainant bears the onus of establishing that disclosure of the disputed document would, on balance, be in the public interest.

The public interest

The complainant's submissions

59. The complainant submits that there are a number of strong public interest factors which weigh in favour of disclosure of the disputed document applicable to this matter as follows:

(a) Accountability

60. The complainant submits that, in *Re Ayton and Police Force of Western Australia* [1999] WAICmr 22, the former Commissioner said, on the issue of accountability:

> *"Favouring disclosure, I recognise a public interest in the accountability of government agencies for their actions. I recognise, as the agency does, that there is a public interest in the public being informed about the views held by people with expertise in a particular field concerning the operations of an agency so that the public can assess whether an agency is properly managed and whether adequate steps have been taken by the agency to address any genuine concerns raised about such issues".*

61. The complainant submits that, since the Report was published, further adverse incidents occurred at the KEMH, which have been reported in *The West Australian* newspaper along with concerns that the Inquiry has achieved nothing. The complainant submits that the Minister for Health has stated that the recommendations in the Report have not been implemented in an expeditious fashion; that doctors at the KEMH have resigned, citing conflict between clinical staff; and that Drs Brett and Humphrey's resignations have served to highlight that problems still exist at the KEMH.

62. The complainant submits that there has been no release of any official document discussing whether the Report recommendations have been implemented and that, accordingly, the public has no way of knowing whether things at the KEMH have improved; whether things have become worse; or whether the Inquiry was a waste of money. The complainant submits that the public "reports" referred to by the agency's decision-makers have consisted of the adverse incidents, the resignations of health professionals and criticism from within and external to the KEMH. The complainant submits that there have been verbal reassurances from the Government that everything is going to plan.

63. The complainant submits that the agency's claim that the public interest has been addressed by the disclosure of the balance of the Report, and the various steps being taken within Government to address those concerns, should be rejected because all that the public received was an edited copy of the Report; that reports from the Medical Board are sporadic; that, at times, those reports are the subject of suppression orders and only tell part of the story; and, further, that the Medical Board has refused to examine two of the cases referred to it by the Inquiry.

64. The complainant submits that the public is completely in the dark as to the "*…steps being taken within government*". The complainant says that it has been refused access, under the FOI Act, to audit reports which would have given some detail as to steps taken within government and how effective those steps have been and that there has been no accountability by the Government on the issue. The complainant says that the refusal to release the entire Report has meant that the public has been precluded from participating more effectively in governing the State, and making persons and bodies responsible for the State more accountable.

65. The complainant submits that it is not the only taxpayer calling for the release of the disputed document, but also midwives, former KEMH patients and Members of Parliament, who have recognized the importance of the disputed document in answering questions. The complainant submits that the non-disclosure of the disputed document has led to mistrust and suspicion concerning the decisions and conduct of both the Government and KEMH.

(b) Legitimate expectations

66. The complainant submits that, in holding the Inquiry hearings in private, the Chairman stated that he was seeking to balance the public interest in openness and transparency in the Inquiry examining the conduct of a public hospital, as against the public interest in individuals co-operating with that Inquiry by providing information to the Inquiry. The complainant submits that what was implied in the Chairman's reasons for the decision in Annexure 7 of the Report was that the public interest in openness and transparency would be satisfied through the publication of the Report in its entirety.

67. The complainant submits that for access to part of the Report to be denied means that its legitimate expectations of being able to fully inform the public about the Inquiry have not been realized. The complainant says that it did not pursue any appeal of the Chairman's decision not to hold the Inquiry hearings in public, because of a legitimate expectation that the Report, as with decisions of Courts, tribunals, inquiries and royal commissions would be made public.

(c) Defamation concerns

68. The complainant submits that one of the public interest reasons given by the agency for refusing access to the disputed document is that the material is damaging to health professionals, because they were not consulted by the Inquiry. The complainant submits that there is a live issue as to whether or not any person has been identified in the disputed document and that the fact that matter may be defamatory of a person is not a relevant factor for an agency to have considered under the FOI Act, because s.104 of the FOI Act precludes any cause of action in defamation against persons exercising their duties under the FOI Act. The complainant submits that the true remedy for a person who considers he or she has been defamed, is a defamation action against the publisher of that material and that it is not for the agency to make a finding that the publication of matter constitutes an actionable defamation.

(d) Doctor - Patient Confidentiality

69. The complainant submits that the issue of doctor/patient confidentiality is not a relevant factor. The complainant submits that this ground is simply a repetition of the agency's claim that the information in the disputed document is confidential.

(e) Concerns of women

70. The complainant submits that it continues to be contacted by women, either former KEMH patients, or women who are concerned they may one day be a patient at the KEMH, and that the reports of adverse incidents and staff turmoil at the KEMH have done nothing to allay the fears of those women. The complainant submits that the release of the remainder of the disputed document would enable:

    (i) patients to understand what went wrong with their cases;

    (ii) all women to monitor and to understand what could go wrong, either at the KEMH or in any other maternity hospital; and

    (iii) children of former patients to have some confidence in the KEMH in the event that their children find themselves at KEMH.

71. The complainant submits that, in an article published in *The West Australian*, on 27 January 2004, Dr Brian Lloyd stated that the disputed document served to illustrate the basis for the Inquiry recommendations, which were published. The complainant submits that the disputed document can only serve to illustrate the basis for the recommendations when they are released to the public for consideration, assessment and comment.

The agency's submissions

72. The agency submits that the general public interest in an access applicant being able to exercise his or her right of access under the FOI Act and the public interest in the community being informed of any deficiencies in the standard of care provided at the KEMH, so that steps may be taken to remedy those deficiencies, weigh in favour of disclosure.

73. The agency submits that the highly sensitive nature of the personal information under consideration, the strong public interest in the maintenance of personal privacy and the public interest in the maintenance of the confidentiality of doctor/patient records are strong public interest factors which outweigh the public interest factors in favour of disclosure.

74. The agency also submits that the public interest factors in favour of disclosure have been satisfied in this case by the disclosure of the balance of the Report; by the various steps taken within government to address the concerns identified in the Report; and by the disciplinary action subsequently undertaken by the Medical Board against some medical practitioners. The agency submits that the

public interests in disclosing the disputed document do not outweigh those public interests favouring the non-disclosure of the personal information about the women, their partners and their children, referred to in the disputed document.

75. The agency submits that there is nothing in the disputed document which will contribute to accountability in the sense described by the complainant because the contents of the disputed document is a discussion of individual case histories, the public revelation of which will do nothing to further accountability in the sense advocated by the complainant. The agency submits that there is nothing in the complainant's submission which explains how the public has been excluded from participating more effectively in governing the State and making persons and bodies responsible for the State more accountable.

76. The agency further submits that information in relation to the Inquiry recommendations is available on the Health Department's website and that there are other agencies, such as the Office of Health Review, with responsibility for monitoring standards in the provision of health care. The agency submits that, if the complainant or members of the public have continuing concerns about the adequacy of health care provided at the KEMH or elsewhere, those concerns should be directed to those other agencies for consideration.

77. The agency submits that the complainant's claim that it had a "*legitimate expectation*" that the full Report would be made public does not give rise to a legal entitlement to obtain access to the Report in its entirety and, further, that claim appears to be a private interest rather than a public interest factor supporting the disclosure of the disputed document.

78. The agency says that the complainant has misunderstood its submission about the conclusions reached about a number of health care professionals who were not given the opportunity to comment on the truth or accuracy of those conclusions. The agency says that the mere fact that the opinions or views expressed about those health care professionals may be defamatory is not relied on, of itself, as a public interest factor mitigating against disclosure. Rather, the agency says that the public interest relied on is the public interest in not disclosing opinions or views reached by the Inquiry which would damage the professional reputations of third parties, when those third parties have not been provided with an opportunity to respond to those views and opinions.

79. The agency submits that it is the denial of natural justice, and the resulting unfairness to the persons the subject of those opinions or views, which represents the foundation for the public interest against disclosure upon which the agency relies. The agency submits that this is a strong public interest which supports non-disclosure.

80. The agency submits that the complainant's claims that the release of the disputed document would: enable patients to understand what went wrong with their cases; enable women to monitor and understand what could go wrong, either at KEMH or any other maternity hospital; and enable children of former patients to have some confidence in KEMH in the event that their children find

themselves at KEMH are, in effect, a general repetition of the arguments relied on by the complainant concerning the public interest in accountability and in ensuring that the recommendations of the Inquiry are implemented.

81. The agency submits that disclosure of the disputed document would not serve any of those public interests and that, if the public interest in accountability may be served by the disclosure of the disputed document, then the Information Commissioner also needs to take into account whether serving the public interest in accountability should be at the price of the other significant public interests warranting the non-disclosure of the disputed document, including:

- the public interest in protecting the privacy of the women, children and their families whose case histories are discussed in great detail in the disputed document, and for whom it is to be anticipated that there would be great distress if that information were to be released into the public domain; and
- the public interest in not releasing into the public domain the opinions and views of the Inquiry about the standard of health care provided by health professionals, which opinions and views are likely to be personally and professionally damaging to the health professionals concerned, when those persons were not afforded the opportunity to comment in relation to those opinions and views, and to have their comments taken into account in the making of findings by the Inquiry.

82. In response to my preliminary view, the agency noted that, in respect of the *verbatim* quotations of the words of former patients, I had accepted as a public interest against disclosure that the information would reveal to people (namely, health professionals) who could identify those women from disclosure of the disputed document more than merely information that is already known to them by virtue of their having been involved in the particular case. The agency submitted that I had failed, however, to take that public interest into account in relation to other personal information contained in the disputed document. The agency submitted that there may be many instances in which a patient may have disclosed part of the information contained in the disputed document to a third party but that the disclosure of the disputed document would reveal to the third party far more information than that disclosed by the patient, given the very specific details about the medical conditions and histories of the women concerned, the treatment given to them and the outcomes of their treatment.

83. The agency also submitted that, as it had decided that the disputed document was exempt, it had not consulted with the individual patients referred to in the disputed document and, therefore, no consideration had been able to be given to the effect that the release of the information may have on any particular patient. The agency argued that there is no evidence available that the patients have given consent to the release of their personal information and that there is evidence to the contrary, being that the Inquiry made it clear that many patients only consented to participate in the Inquiry if their complete confidentiality was assured. The agency further submitted that it is reasonable to assume that, if a patient were to see her personal information in the newspaper and easily recognized her case, it would appear to her that any number of other individuals

who know her would also be able to identify her and that would be likely to cause significant distress to the individuals referred to in the disputed document.

84. The agency submits that the public interests that may favour disclosure of the disputed document are not sufficient to outweigh the public interests that favour the non-disclosure of the disputed document.

Consideration

85. I have considered the parties' submissions on this aspect of the matter. The former Commissioner expressed the view, in a number of her decisions relating to the meaning and interpretation of clause 3(1), that the exemption in clause 3(1) is intended to protect the privacy of individuals about whom personal information may be contained in documents held by State and local government agencies. I agree with her view that the FOI Act is not intended to open the private and professional lives of its citizens to public scrutiny in circumstances where there is no demonstrable benefit to the public interest in doing so.

86. As I have said, in my view, the public interest in the protection of personal privacy of individuals about whom personal information may be contained in government documents is a very strong one. That is the purpose of the clause 3 exemption. The FOI Act is designed to call Government and its agencies to account, not to unnecessarily intrude upon the private and professional lives of members of the community or to call them to account.

87. In this case however - other than in respect of the direct quotations of information given by former patients (which are no longer in dispute) - I am inclined to the view that the public interest in the protection of the personal privacy of the individuals concerned does not weigh as strongly against disclosure as it may in other circumstances. The information in question has been "de-identified" by the authors of the Report and, although the information is particular and sensitive information about individuals, it seems to me that only those people to whom that information is already known could identify the individuals concerned. That is, only those health professionals involved in each particular case, the patient herself and anyone to whom the patient has herself chosen to impart that sensitive information could possibly identify the people concerned from the information in the document.

88. Disclosure of the information in question could not, in my opinion, enable any person not already aware of it to identify any individual concerned in each case. According to the Report, over the 11 year period covered by the Inquiry, there were about 55,000 births at KEMH and many thousands of other obstetric and gynaecological procedures and services delivered (Volume 1, Chapter 1, paragraph 1.1.12). Given the time span covered by the Report, the numbers of patients treated at the hospital during that period; the passage of time since; and the de-identification of the material, it seems to me that it would be by no means certain that even those involved could recognise each case and identify the people involved. It seems to me, therefore, that the personal privacy of the individuals concerned would not be infringed because no one who did not already know the information could identify them from it.

89. Given the de-identification of the information, I am not persuaded that, as submitted by the agency, its disclosure is likely to cause distress to the patients concerned. As I have said, I consider it unlikely that anyone not already involved in or apprised of the details of a particular case could identify from the de-identified information about any individual involved; indeed even those involved may have difficulty identifying themselves in some cases. On the other side of this argument, the complainant submits that it has been contacted by former and prospective patients of KEMH expressing a desire that the information be disclosed. Neither the agency nor the complainant has provided me with evidence in support of these claims and the potential reaction of former patient to the disclosure of the disputed document is therefore a matter of speculation only.

90. I do not accept the agency's submission that, in essence, the balance of the public interests in relation to the disclosure of the *verbatim* quotations of the words of former patients applies equally to the other personal information contained in the disputed document. My preliminary view in respect of the *verbatim* quotations was that their disclosure would reveal to the health care professionals who treated these patients or were otherwise involved in their cases more information than was already known to them by virtue of their having been involved in that patient's case. The balance of the personal information about the patients contained in the disputed document is all information that would be or have been available to the health care professionals concerned who could identify the patient concerned by virtue of having been involved in the case.

91. I agree it is possible, as the agency suggests, that in some cases more information could be revealed to a third party who could identify the patient from the information than was disclosed to the third party by the patient. However, given the nature of the de-identification of the personal information in the Report, I consider that it would be unlikely in many, if not most, cases that – unless the patient herself confirmed it to be the case – a third party to whom some of the information had been disclosed could be confident that the balance of the information related to that person. Many of the case histories concern similar cases and it would be extremely difficult, in my view, for anyone who had not already been informed of all or most of the patient's medical history and treatment to positively identify that patient from the disputed document.

92. Also weighing against disclosure, I accept that there is a public interest in the protection of the reputations of professional people in circumstances in which they have not been given an opportunity to respond to opinions which may be considered critical of them. However, in this case, the health professionals are not identified by name; the Report makes no adverse finding against any individual; the assessments given in each instance are of the overall process and care given, rather than the actions of individuals; and the Report makes it very clear that the opinions given are as a result of a review of the documentation on the files only. In those circumstances, I am not persuaded that disclosure of the information in question could have any significant effect on the professional reputation of any individual involved in any of the matters such that the public

interest in protecting reputations where adverse findings have been made in the absence of the affording of procedural fairness to those concerned may require non-disclosure.

93. In this regard, I note that in a letter published in *The West Australian* on 1 February 2002 (on page 20), Mr Neil Douglas, the Chairman of the Inquiry pointed out:

"In fact, the report makes no adverse findings against individual doctors. It explained that the inquiry's focus was on "the systems at KEMH. Specifically the inquiry did not attempt to make findings or recommendations about individual clinicians or individual cases" …

The report explains that the clinical file review was overseen, and Chapters 5 and 6 were written, by the inquiry's two interstate clinical members, Professor Jeffrey Robinson and Associate Professor Kathleen Fahy …

The methodology for the clinical file review, detailed in Chapter 4, was similar to many other retrospective clinical file reviews used to examine adverse outcomes within the health sector in Australia, Britain and the United States.

Given the nature and extent of the inquiry's review and its time constraints, it was neither appropriate nor possible for the doctors and other clinicians involved in the 605 reviewed cases to be questioned on their actions.

As the report makes clear, the assessment of these cases by professors Robinson and Fahy was made only on the basis of what was recorded in the relevant patient files."

94. The agency submits that, contrary to my preliminary view, the Report did make adverse findings against individuals, at least of a preliminary nature, with the result that a number of practitioners were referred to the Medical Board for further investigation. The agency also contends that, contrary to my preliminary view, it is not the case that the assessments in each case were of the overall process and care given rather than the actions of individuals. The agency submits that, in many instances, the Report contains comments that are highly critical of individual doctors, who are referred to by their position and that, as the Inquiry covers a fairly short period of time (11 years) at one hospital, it would be a relatively simple matter to identify the individual doctors concerned.

95. The agency submits that it is not relevant that the Report makes it clear that the opinions given are as a result of a review of the documentation on the files only as, the agency contends, the opinions, evaluations and advice given by the consultants and members of the Inquiry are no less weighty for that reason. The agency submits that these public interest factors should have been given greater weight than they were in my preliminary view, as "[i]*t should be recognized that the disclosure of the information in question could have a significant effect on the professional reputation of any individual involved in any of the matters such that the public interest in protecting reputations where adverse findings*

have been made in the absence of the affording of procedural fairness to those concerned required non-disclosure of this information".

96. I do not accept the agency's submission that the Report did, in fact, make adverse findings against individuals, with the result that a number of practitioners were referred to the Medical Board for further investigation. Determining that some matters require further investigation does not amount to making adverse findings. It amounts only to considering that the matters require further investigation. Further, although I accept that there are some negative comments in the Report about the actions of particular practitioners, there are very few; the individual practitioner is not identified; and the focus of the comments is very much on the level of safety of the care given, rather than criticism of individuals.

97. Furthermore, given the level of de-identification of the practitioners, it seems to me that the only people who could possibly identify any particular individual practitioner are those who were involved in the particular case. They will be the patient and the other health professionals involved in the particular case. The health professionals will have their own views as to the actions that were taken by themselves and others involved in the case. The health professionals will also be aware that the conclusions drawn were on the basis of a file review only. In all of those circumstances, I do not consider that the professional reputations of the health professionals involved and referred to in the disputed document could be significantly affected by disclosure of the disputed document. I do not, therefore, consider that public interest factor to weigh strongly against disclosure in this instance.

98. I agree that there is a public interest in the preservation of doctor/patient confidentiality. However, it does not appear to me that doctor/patient confidentiality would be breached by disclosure of the disputed document. As I understand it, that confidentiality extends to not disclosing a particular patient's case or medical history in a way that would identify that person. The information in the disputed document is, as I have said, "de-identified" in such a way as might be done for publication in a medical journal or presentation at a conference.

99. Favouring disclosure, I recognise a public interest in people being able to exercise their rights of access under the FOI Act. I also recognise a public interest in the accountability of the hospital for the treatment of its patients and, in particular, where there has been an adverse outcome for the patient. That public interest has, to a large extent, been satisfied by the holding of the Inquiry; the submission of its Report to Government and its tabling in Parliament; and the Inquiry's referral of some matters to the Medical Board of Western Australia for further investigation.

100. I also agree with the complainant that there is a public interest in the community being informed of the steps taken by the Government to address the problems identified by the Inquiry. However, the disputed document does not contain information about what has been done by the Government and KEMH in

response to the Report, so that particular public interest would not be furthered by its disclosure.

101. I also recognise a public interest in the maintenance of public confidence in KEMH – being the State's only tertiary maternity hospital – and in the morale of its staff. That may be used as an argument against publishing the details of particular instances of the treatment which were assessed by the Inquiry, particularly those in which errors were identified. However, I agree with the view of the Inquiry (at page xxiii of the Executive Summary in Volume 1 of the Report) that "[s]*ustained public confidence, like sustained high levels of staff morale, is brought about by transparency, openness and accountability in the way that public institutions deal with and serve the public – not through a paternalistic approach that seeks to protect the public from knowing the real state of affairs."*

102. There is also, in my view, a public interest in the community being informed of the basis for the opinions formed in the Report and the recommendations made. Although the secondary analysis in that part of the Report which has already been published is very detailed, it informs of the errors and problems identified in very general terms only and is not particularly informative, in my view, of the kinds of things that actually went wrong (and right) in the period reviewed by the Inquiry.

103. Without disclosure of that material, the health professionals and patients concerned and the community remain in the dark about the events that were reviewed, the professional assessments of those events, the problems identified and the basis for many of the 56 recommendations made for changes in practices and processes that arose from the clinical file review. In my view, disclosure of the disputed document would have a significant educative value, particularly for health professionals, in informing them of the kinds of processes that were assessed to be safe or unsafe and the reasons for those assessments. In this regard, I note that Mr Douglas, in his letter referred to above, pointed out that:

"Professors Robinson and Fahy, who are very experienced in conducting and publishing clinical case analyses, sought to do so in Chapters 5 and 6 in a way that would achieve a balance between de-identifying the clinicians and patients involved in particular cases while maximising the illustrative value of these cases for future patient care and safety."

104. Disclosure would also enable some of those patients whose cases were reviewed to know that they were reviewed and what the assessment was. It may also assist women who may be patients at the hospital in the future to better understand what is and is not acceptable treatment, so that they are better able to recognise and voice any concerns they may have, and thereby be given greater confidence in the treatment they receive.

105. In balancing those public interests against each other, it is my view that the public interests favouring disclosure outweigh those against disclosure in this

instance and, therefore, I find that the disputed document (as described in paragraph 10 above) is not exempt under clause 3(1).

Clause 6(1) - deliberative processes

106. The agency also claims the disputed document is exempt under clause 6(1) of the FOI Act. Clause 6(1) provides as follows:

> ***"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."*

107. To establish a *prima facie* claim for exemption under clause 6, the agency must satisfy the requirements of both paragraphs (a) and (b) of subclause 1 of the exemption. If the disputed document contains matter of a kind described in paragraph (a), then it is necessary to consider the requirements of paragraph (b), that is, whether disclosure of that matter would, on balance, be contrary to the public interest. Further, the exemption is subject to the limitations provided in subclauses (2), (3) and (4), and regard must be had to whether any of those limitations applies.

108. Under s.102(1) of the FOI Act, the agency bears the onus of establishing not only that the disputed document contains information of the kind described in clause 6(1)(a) but also that the disclosure of the disputed document would, on balance, be contrary to the public interest. The complainant is not required to establish that disclosure would, on balance, be in the public interest. The

disputed document will not be exempt under clause 6 if the agency cannot establish the requirements of both paragraphs (a) and (b) of clause 6(1).

109. The former Commissioner discussed and considered the purpose of the exemption in clause 6, and the meaning of the phrase "deliberative processes", in a number of her formal decisions (see: *Re Read and Public Service Commission* [1994] WAICmr 1 and *Re Collins and Ministry for Planning* [1996] WAICmr 39). The former Commissioner agreed with the view of the Commonwealth Administrative Appeals Tribunal ("the Tribunal") in *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588 that the "deliberative processes" of an agency are its "thinking processes", the process of reflection, for example, on the wisdom and expediency of a proposal, a particular decision or course of action: see also the comments of Templeman J in *Ministry for Planning v Collins* (1996) 93 LGERA 69 at 72.

Clause 6(1)(a)

The agency's submissions

110. The agency submits that the disputed document contains information that consists of the opinions, advice and recommendations given by, and the deliberations of, the clinical members of the Inquiry as to the adequacy of the treatment provided to certain patients at the KEMH, which, it says, is manifest from a brief examination of the disputed document.

111. The agency submits that the deliberative process for which the opinions, advice and recommendations in the Report were obtained was a deliberation of the Government, or of the Minister for Health, in relation to determining whether the standard of care being provided generally at KEMH was adequate, whether there were any systemic deficiencies in the standard of care being provided, whether the care provided to particular patients was inadequate, and whether anything should be done to improve the standard of care provided at KEMH. The agency says that it does not claim that the relevant deliberative processes were those of the Inquiry or the agency itself.

The complainant's submissions

112. The complainant submits that the disputed document is not a document of an agency which reveals opinions, advice or recommendations and does not reveal the thinking processes of the agency and, further, that the publication of the Report has already disclosed the "*thinking processes*" of the agency. The complainant submits that the disputed document would not reveal the deliberative processes of the Inquiry because those thinking processes took place behind closed doors and that the Report (including the disputed document) is the product of those deliberations.

Consideration

113. Having examined the information recorded in the disputed document, I am satisfied that the disputed document contains opinions and advice given by the

consultants who reviewed the cases for the Inquiry and the clinical members of the Inquiry, as to the medical treatment provided to certain patients at the KEMH, in the period between 1990 and 2000.

114. The information recorded in the disputed document consists of, among other things, the professional opinions of two of the members of the Inquiry about selected case histories of former patients at the KEMH, flowing from their analysis of the recorded circumstances of those selected cases. I understand that the purpose of developing those opinions was to identify any systemic deficiencies in clinical care and form the basis for recommendations to the Government to assist the KEMH in the development of remedial measures, such as were required to be taken as a result of the recommendations arising from the Inquiry.

115. In my opinion, the information in the disputed document was obtained in the course of, and for the purpose of, firstly, the deliberative processes of the Inquiry in determining the recommendations it should make and was subsequently recorded in the Report and given to the Minister for the purposes of the deliberative processes of the Minister and the Government in determining what action to take in respect of the recommendations.

116. Accordingly, I am satisfied that the disputed document contains matter that meets the criteria of clause 6(1)(a).

Clause 6(1)(b) – the public interest

The agency's submissions

117. Initially, the agency submitted that the disclosure of the disputed document would be contrary to the public interest because the deliberative process of the Government and of the Minister for Health was continuing, in that attention was being given to the implementation of the recommendations of the Inquiry. The agency submitted that its claim that the deliberative processes relating to the implementation of the Inquiry recommendations were not yet finished was based upon the fact that the implementation of the recommendations of the Inquiry was still under consideration.

118. The agency submitted that, in a number of her decisions, the former Commissioner 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 such documents would adversely affect the decision-making process, or that disclosure would, for some other reason, be contrary to the public interest and that, in either of those circumstances, the former Commissioner considered that the public interest is served by non-disclosure.

119. The agency also submits that there are a number of significant other public interest considerations which support the non-disclosure of the disputed document. Those factors include:

- the public interest in not disclosing the opinions or views reached by the Inquiry, which opinions or views would damage the personal and professional reputations of third parties, when the views of those third parties, or their answers to the allegations made against them, have not be obtained or taken into account;

- the public interest in the maintenance of personal privacy; and

- the public interest in the maintenance of the confidentiality of doctor/patient records.

The complainant's submissions

120. The complainant submitted that the deliberative processes of the Government and the Minister for Health are completed because, on 18 June 2003, the former Minister for Health, Hon R Kucera MLA, issued a media statement entitled "*New era for King Edward Memorial Hospital begins today: Minister*". The complainant submits that in that statement the former Minister for Health advised all West Australians that "[a]*n expert group set up to implement the recommendations of the Douglas Inquiry ...has completed its work*" and that it was also declared that: "*…all 237 recommendations of the inquiry had been signed off, with four relating to legislative changes referred to the Department of Health for action*."

121. The complainant submits that, relying on those public statements, the thinking processes of the Government and/or the Minister have been completed and all that remains is for implementation of the outcome of the deliberations to occur. The complainant submits that, therefore, there is a clear public interest in the disclosure of the disputed document because the "*… decision-making processes of government agencies, particularly once completed, should be able to withstand scrutiny and … there is a public interest in the disclosure of documents that will enable that to occur*" (Re Coastal Waters Alliance of Western Australia and Department of Environmental Protection and Cockburn Cement Limited *[1995] WAICmr 37 at paragraph 35)."*

122. In addition, the complainant submits that the agency has not discharged the onus it bears of establishing that disclosure of the disputed document would be contrary to the public interest, because there is no suggestion that disclosure of the disputed document would destroy the integrity of the agency's deliberative processes; because the implementation process has been completed and all that remains are changes to be made to legislation; and because the agency has not stated that deliberations are continuing in relation to these four remaining recommendations and it has not explained how deliberations will be detrimentally affected if the disputed document is released.

123. The complainant submits that the other public interest factors referred to by the agency – relating to the potential for damage to the reputations of health care professionals, the disclosure of personal information of patients and their families and the maintenance of doctor-patient confidentiality – are not legitimate public interest factors which the agency should have considered.

124. The complainant submits that the question of possible damage to the reputations of health care professionals is not a legitimate factor for the agency to consider because the agency can place it no higher than proffering a view that it considers it would be "unfair" to the health professionals, unnamed as they are in the disputed document.

125. The complainant submits that, if a party feels aggrieved and considers that his/her private right has been infringed, that is a matter that can be taken up privately and it is not a relevant consideration for the agency or for the Information Commissioner. Whether the private right takes the form of a defamation action or a declaration of a breach of procedural fairness, the agency is not a court of law or a tribunal and is therefore not in a position to conclude whether an actionable infringement of a right has occurred. The complainant submits that, to do so, the agency would be required to examine the elements of the causes of action and to consider the application of any possible defences.

126. The complainant submits that emphasis placed by the agency on the right of the individual health practitioners has resulted in the agency failing to give proper weight to the public interest factors in favour of disclosure because the agency has placed the private interests of the health practitioners ahead of the rights of the patients and the public as a whole and, in so doing, it has denied the public the right to be fully informed of the cases referred to in the disputed document.

127. The complainant submits that the remaining public interest factors identified by the agency have also been covered in its submissions on the issue of disclosure of personal information and that any concerns as to patient/doctor confidentiality have been overcome by the de-identifying of the information in the disputed document.

128. Finally, the complainant submits that it is not required to demonstrate that disclosure of the disputed document would be in the public interest but, rather, it is entitled to access unless the agency can establish that disclosure of the disputed document would be contrary to the public interest.

Consideration

129. In my view, the parties' submissions as to the competing public interest factors that weigh for and against disclosure of the disputed document are, in the main, similar to the submissions made in relation to the claim for exemption under clause 3(1).

130. It appears to me that the only additional factor raised in respect of the exemption claim under clause 6 was the public interest in not prejudicing the ongoing deliberations of Government or an agency by disclosure. That is a public interest that this office has consistently recognised.

131. However, in this instance, I consider that there is some substance to the complainant's submissions that the disclosure of the disputed document could not destroy or otherwise adversely affect the integrity of an agency's deliberative processes. In my opinion, there is nothing before me which

establishes that the particular information recorded in the disputed document is presently being used in, or for, the purposes of the deliberations of an agency, the Minister or the Government generally. In response to my preliminary view, the agency agreed that the deliberative process is at an end and that, therefore, this particular public interest is not a factor in this case. In my view, the deliberative process was already at an end at the time the agency made its initial submissions in this regard.

132. The deliberative processes of the Inquiry ended in 2001. Further, I agree that the former Minister's media release on 18 June 2003 indicated that, at that stage, the Government's deliberations as to what action to take in response to the recommendations were complete, as does his statement to the Parliament on that date in which the former Minister said that *"the King Edward Memorial Hospital inquiry implementation group has completed its work of overseeing the implementation of recommendations contained in the* [Report]*"* and that "[o]*f the 237 recommendations contained in the report, all but four, which require legislative amendment, have now been signed off"* (Hansard, Wednesday 18 June 2003, page 8874d-8875a/1). In that statement, the former Minister also said that recommended changes to various statutes *"… will now be progressed by the Department of Health"*. Clearly, the outcome of the Government's deliberative process was a decision that all the recommendations would be implemented. It seems to me, therefore, that at the time the access application was made, the deliberative processes were at an end and there was no ongoing deliberative process that could be prejudiced by the disclosure of the disputed document.

133. In response to my preliminary view, the agency argued that I had failed to give appropriate weight to other significant public interest factors weighing against non-disclosure in the context of the deliberative process matter contained in the documents. The agency refers, in particular, to the public interest in the protection of the reputations of professional people in circumstances in which they have not been given an opportunity to respond to opinions which may be considered critical of them.

134. For the reasons given at paragraphs 92-97 above, I do not accept that there is any real risk of significant damage to the reputations of any of the individual health care professionals referred to in the disputed document, should it be disclosed. As I have said, in my opinion, other than the patients and other health care professionals involved in a particular case, I consider it highly unlikely that anyone else could identify any individual from the information, de-identified as it is. I also consider it likely in a number of cases that even those people involved in a particular case may not be able to identify any of the practitioners involved in the case. Therefore, I do not consider that this particular public interest weighs strongly against disclosure in this instance.

135. For the reasons I have given in paragraphs 86-105 above in respect of the claim under clause 3(1), I am of the view that the other public interest factors identified, when weighed against each other, favour disclosure of the disputed document. It follows that I am not persuaded that disclosure of the disputed

document would, on balance, be contrary to the public interest and I find that it is not exempt under clause 6(1).

Clause 8(2)

136. The agency also claims that the disputed document is exempt under clause 8(2). Clause 8(2) provides as follows:

> ***"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) Matter referred to in clause 6(1)(a) is not exempt matter under subclause (1) unless its disclosure would enable a legal remedy to be obtained for a breach of confidence owed to a person other than-*
>
> *(a) a person in the capacity of a Minister, a member of the staff of a Minister, or an officer of an agency; or*
>
> *(b) an agency or the State.*
>
> *(4) Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest.*"

137. There are two limbs to the exemption in clause 8(2). For the agency to establish a *prima facie* claim for exemption under clause 8(2), it must satisfy the requirements of both paragraphs (a) and (b) of clause 8(2). That is, it must be shown that the disputed document would, if disclosed, reveal information of a confidential nature obtained in confidence and also that disclosure could reasonably be expected to prejudice the future supply, to the Government or to an agency, of information of the kind under consideration.

138. In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, at 190, the Full Federal Court of Australia said that the words "*…could reasonably be expected to prejudice the future supply of information*" in s.43(1)(c)(ii) of the *Freedom of Information Act 1982* (Cwth) were intended to receive their ordinary meaning and required a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of

the relevant kind to the Government would decline to do so if the documents in question were disclosed.

The agency's submissions

139. The agency submits that the Inquiry's ruling, made on 30 November 2000, (page 83 and Annexure 7 of the Report) to hold its hearings in private demonstrates that the Inquiry was concerned that it be able to preserve the confidentiality of information provided to it and that the preservation of confidentiality was a significant factor in the Inquiry deciding to hold its hearings in private.

140. The agency submits that the public nature of the directions hearing and subsequent ruling, and representation by legal counsel of relevant categories of KEMH staff at the Inquiry's directions hearing, indicate that persons who were subsequently interviewed by the Inquiry would be aware of the Inquiry's concern to protect the confidentiality of the information they provided and that the information they provided would remain confidential.

141. The agency submits that at least some of the information contained in the disputed document was obtained by the Inquiry in the course of interviews with patients or health care professionals and, further, that staff, patients and other individuals who provided information to the Inquiry did so on the basis of an understanding that the information was confidential and was given in confidence. The agency also submits that the individuals who provided information to the Inquiry were encouraged to do so by the assurances of confidentiality made by the Inquiry and that, if the disputed document were to be publicly released, it could reasonably be expected to prejudice the future supply of information to future inquiries commissioned by the Government.

142. The agency submits that the fact that the complainant has received certain information relating to the Inquiry from various persons places it in a different position to the agency because the complainant can give undertakings of confidentiality to those persons, which government agencies cannot because of the operation of the FOI Act. The agency submits that the disclosure of the disputed document is not in the public interest and, accordingly, the disputed document is exempt under clause 8(2) of Schedule 1 to the Act.

143. The agency submits that the complainant's claim – that there is no suggestion that the future supply of information will be prejudiced as a result of the disclosure of the information contained in the disputed document, because the relevant information has been de-identified which provides an adequate protection of the confidence reposed in the Inquiry when information was provided to it on a confidential basis – is flawed.

144. The agency says that the complainant's claim that the supply of information has continued because it has received information from health professionals and former patients is not relevant because the complainant is not an agency, and the fact that it receives information does not indicate whether persons will be willing to provide information of this kind to a government agency in the future.

145. The agency submits that, when the complainant receives information from members of the community, it is not subject to the FOI Act, nor to any statutory requirement of public disclosure, and moreover is subject to the requirements of the *Privacy Act 1988* (Cth). The agency says that, as a result, the complainant is able to provide undertakings to persons who provide information that that information will not be disclosed without their consent. The situation is very different in respect of government agencies which are not able to exclude the operation of the FOI Act in relation to documents provided to them (or information provided to them which is then recorded in documents) by third parties.

146. The agency submits that the complainant acknowledges that, when it has received information about the care provided to patients at KEMH, some of the providers of that information have wished to remain anonymous and, accordingly, there is clearly a concern amongst some persons who possess information of the kind contained in the disputed document that that information is of a very sensitive nature.

147. The agency also submits that the particular nature of the information in question needs to be borne in mind. The nature of the information contained in the disputed document is very sensitive health information about patients at KEMH, their medical conditions, the treatment they received, information in relation to their children and their families, and the outcome of each case. This is not information of a kind which one would ordinarily expect to see individuals wishing to have "ventilated in a public forum" as the complainant claims.

The complainant's submissions

148. The complainant submits that the disputed document is not exempt under clause 8(2). The complainant submits that a distinction must be made between providing evidence on the basis that the patients would not be named/identified and providing evidence to the Inquiry on the basis that information sourced from the evidence would be reported or reproduced in a way that did not identify patients. The complainant submits that there is no suggestion from the Inquiry that the evidence of the witnesses was to remain completely secret and, had that been the case, the disputed document would never have been intended for public release.

149. The complainant also submits that a distinction should be drawn in this case, as it was in *Re de Waal*, between transcripts of interviews and *in-camera* evidence and the Report which stems from those interviews and or evidence. The complainant submits that it is not seeking access to the transcripts, unlike the access applicant in *Re de Waal*.

150. The complainant submits that there is no suggestion the future supply of information to the agency could reasonably be expected to be prejudiced by the disclosure of the disputed document because some former patients or health professionals from KEMH have approached it and consented to the recounting of their experiences in such a way that they remain anonymous and others have

consented to be identified. The complainant submits that the significance of that is to illustrate that individuals are prepared to talk about their experiences, anonymous or otherwise.

151. The complainant submits that the fact that it is not an agency is irrelevant, because "[c]*ontrary to the assertions made"* by the agency, it is subject to the *Privacy Act 1988* (Cwth). The complainant submits that it has different obligations when dealing with private information and is required to comply with the Privacy Principles set by the Australian Press Council and that the commercial arm of the company is subject to the Privacy Act.

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

152. Information is inherently confidential if it is not in the public domain. That is, the information must be known by a small number or limited class of persons. In order to have been *"obtained in confidence"* it must have been both given and received in confidence. The information recorded in the disputed document consists of information obtained from patient medical files held at the KEMH; information obtained from private, "in-confidence" interviews between staff of the Inquiry and other individuals or in evidence to the Inquiry in private formal hearings; and assessments based on that information by consultants and the clinical members of the Inquiry. Although the agency has not advised how widely the disputed document has been disseminated within government, so far as I am aware, none of the disputed information is in the public domain.

153. In my view, the disputed document cannot be said to have been given to and received by the Minister and the Government in confidence. It is clear that it was given to the Government by the Inquiry in the expectation that it would be published. Prior to the complainant withdrawing its complaint in respect of those parts of the disputed document specified in paragraph 10 above, the disputed document did, however, appear to me to contain some confidential information that was obtained by the Inquiry in confidence.

154. The Report clearly indicates that the Inquiry was concerned about the preservation of the confidentiality of information obtained by the Inquiry. Those concerns are discussed at length in paragraphs 2.2.19-2.2.87 (pp.41-58) of Volume 1 of the Report. In that regard, I note that the Inquiry developed a protocol (see paragraphs 2.2.88 – 2.2.93 (pp. 58-61) of Volume 1) that was intended, as far as was possible, to guarantee to any person who gave information to the Inquiry in an informal interview that information given in confidence to the Inquiry would remain confidential and that their interview statements would not be disclosed. In order to be able to give a similar assurance to those individuals who sought confidentiality of the information they gave in formal hearings, the hearings were held in private and a direction – or directions – that the transcript of the hearings was not to be published was made.

155. It was my preliminary view, therefore, that information of the kind contained in the *verbatim* quotations of information given by patients contained in the disputed document was given to, and received by, the Inquiry in confidence. It

might be assumed from the fact that those passages are quoted in the disputed document, which the Inquiry intended to be published, that those particular patients did not seek confidentiality of that information. However, in the absence of direct evidence from those women and given the circumstances – described above – in which information of that kind was given to and received by the Inquiry, I was prepared to accept that it was obtained in confidence. Given the complainant's withdrawal, those passages of the disputed document are no longer in dispute, and access to them need not be given.

156. I also advised the parties to this complaint that, in respect of the information taken from the clinical files and the opinions of the consultants and clinical members of the Inquiry, I am not satisfied that the requirements of paragraph (a) are met. It is stated in the Report that the clinical members wrote that part of the Report which constitutes the disputed document. Clearly, there was no expectation on their part that the information and opinions they gave would be treated as confidential; they prepared them for publication.

157. There is no evidence before me that the consultants who reviewed the files for the Inquiry and who gave their opinions to the Inquiry, which are reproduced in the disputed document, gave them on the basis of any understanding of confidentiality. The identity of the particular consultant who conducted each file review and gave an opinion is not disclosed.

158. The clinical files were provided to the Inquiry as a result of it having the power to require their production. In my opinion, it cannot be said that they were given to the Inquiry by KEMH on the basis of an understanding they would be treated as confidential or on the basis of any understanding as to how they would be treated; they were given and received on the basis that the Inquiry had the lawful authority and power to require that they be produced. I am not, therefore, persuaded that the information in the disputed document which comes from the clinical files of patients of KEMH can be said to have been "obtained in confidence" by the Inquiry.

159. In response to my preliminary view, the agency submitted that it had never claimed that the exemption in clause 8(2) applied to information contained in the disputed document which originated from clinical files of patients from KEMH, information from the consultants who reviewed those clinical files or the comments of or opinions of clinical members of the Inquiry. Rather, the agency submitted, its claim to exemption under clause 8(2) was made on the basis that the disputed document contains information obtained by the Inquiry in the course of interviews with patients or health care professionals and that that information is so inextricably intertwined with other information contained in the disputed document that it is not practicable to provide access to an edited copy of the disputed document under s.24 of the FOI Act.

160. The agency submits that it is not an unreasonable assumption that some of the information contained in the disputed document about the conduct of health care professionals who treated the patients whose case histories were reviewed was obtained from health care professionals who provided interview statements to the Inquiry. The agency concedes that *"…it may be difficult to determine with*

certainty whether, or the extent to which, any information in the relevant pages was obtained from interview statements with witnesses (as opposed to the clinical files) …" but contends that *"… there is a strong likelihood that some of the information was obtained from witness statements of current and former staff members"*. The agency submits that, as I have accepted that the witness statements were provided to the Inquiry in confidence, therefore any information contained in the disputed document which was obtained from interview statements is also information of a confidential nature obtained in confidence. For those reasons, the agency argues, the information contained in the disputed document which was obtained from interview statements provided to the Inquiry by current or former staff members of KEMH is properly viewed as information of a confidential nature which was obtained in confidence by the Inquiry.

161. I do not accept that submission. Firstly, I agree with the complainant that there is a distinction to be made between the evidence given to the Inquiry and a report based on that evidence. For the reasons given at paragraphs 169-172 below, it appears to me that the undertakings of confidentiality given by the Inquiry were in respect of the direct evidence given in confidence to it insofar as the identities of those who gave that direct evidence could be ascertained from it. I do not accept that those undertakings were intended to preclude the use of any of the information gathered from that evidence, in particular, by including it in the Report.

162. Further, there is no evidence before me that any of the information contained in the disputed document was obtained from health care professionals by way of interview statements to the Inquiry. The agency has not been able to identify any information of that nature to me and the clinical file review methodology, as set out on pages 177 to 214 of Volume 2 of the Report indicates that none of the information contained in the disputed document came from interview statements to the Inquiry by health care professionals.

163. To the contrary, it appears that, for the clinicians' accounts of events, the reviewers relied solely on the case notes made by the clinicians in the clinical files (see paragraph 4.5.4 on page 201). It was the patients' accounts of events that were ascertained by interview (see paragraph 4.5.5 on page 201). The Report specifies that the overall evaluation of cases by the Inquiry's clinical members was based on details extracted from the clinical file, the midwife or nurse reviewer's report, the medical specialist's report and, where available, the submission by the patient (paragraph 4.3.14 on page 190). There is no suggestion that evidence given by health care professionals either in written statements or in private hearings conducted by the Inquiry was considered or taken into account in the course of the clinical file review. Therefore, there is no evidence that any of the information contained in the disputed document is information of that nature.

164. It appears to me, therefore, that - other than the passages to which the complainant no longer seeks access - disclosure of the disputed document would not reveal any confidential information obtained in confidence by the Inquiry or the Government. Even if I considered otherwise, for the reasons that follow, I

am not persuaded that the disclosure of that information could reasonably be expected to prejudice the future supply of information of that kind to the Government or an agency.

Clause 8(2)(b) - prejudice to the future supply of that kind of information

165. In my view, paragraph (b) of the exemption in clause 8(2) is directed at the ability of the Government or an agency to obtain similar information in the future, and is not concerned with whether a particular person or third party will give information of that kind to the Government or to an agency in the future: see *Ryder v Booth* [1985] VR 869, at 872 per Young J.

166. The Inquiry was an agency, in my opinion, for the purposes of the FOI Act. The definition of "agency" in clause 1 of the Glossary to the FOI Act includes "a public body or office". Included in the definition of "public body or office" are a body or office that is established for a public purpose under a written law and a body or office that is established by a Minister.

167. It is stated in Chapter 2 of Volume 1 of the Report that the Inquiry was established by the Minister for Health under the *Hospitals and Health Services Act 1927* (the Hospitals Act) and by the Premier and Minister for Public Sector Management under s.11 of the *Public Sector Management Act 1994* (the PSM Act). It appears to me, therefore, that the Inquiry was a body established by a Minister – the Minister for Health – and was also a body established for a public purpose under a written law.

168. In my opinion, having regard to the terms of reference of the Inquiry, there is no doubt that it was established for a public purpose and clearly it was established for that purpose under the Hospitals Act and given certain protections if required by also being established under the PSM Act (see, in particular, paragraphs 2.2.1 - 2.2.13 of Chapter 2 of Volume 1 of the Report). The word "under" is defined in s.5 of the *Interpretation Act 1984*, when used in a written law such as the FOI Act, to include "by", "in accordance with", "pursuant to" and "by virtue of". It is my understanding that the Inquiry was established under s.9 of the Hospitals Act which provides, among other things, that the Minister may appoint one or more persons to hold such inquiries or investigations as he may deem necessary in relation to any matter concerning any public hospital. It appears to me that the question, therefore, is whether it could reasonably be expected that the disclosure of the disputed document would prejudice the future supply of information to future such inquiries commissioned by the Government and, in turn, the future supply of that kind of information to the Government.

169. The Inquiry considered that confidentiality was a critical element necessary to ensure that individuals, including members of staff and former members of staff of the KEMH, were encouraged to provide information and evidence to the Inquiry. On 23 October 2000, the Inquiry held a directions hearing as to whether its hearings should be in public or in private. On 30 November 2000, the Inquiry concluded that there were stronger public interest considerations against public proceedings. Those factors included:

"(a) the critical importance, to the outcome of the Inquiry, of obtaining information from patients and staff of KEMH who are best able to inform the Inquiry of what has happened and what is happening at the hospital;

(b) the Inquiry's experience that this information will not be provided unless legal and practical measures are put in place to ensure that information can be given to the Inquiry in confidence;

(c) the only practical way to ensure confidentiality - and, therefore, to enable patients and staff to inform the Inquiry of all that they know without fear of retribution - is for the information to be given in private;

(d) largely because of the Inquiry's investigative role and nature, much of the information it requires has been, and will continue to be, obtained through documentary material and interviews;

(e) the evidence that we anticipate will be given through the formal examination of witnesses will deal with only selected aspects of some issues;

(f) if this evidence were to be given in public, it is likely to provide observers with an unfair and misleading indication of the true position because of its presentation in isolation and without regard to the wider context; and

(g) the very real possibility of prejudice to individuals and others if there were to be public hearings that are limited in that way" (p. 6 of Annexure 7 to Report).

170. It is clear from the discussion in Volume 1 of the Report, referred to in paragraph 154 above, and from the ruling in Annexure 7 to the Report referred to in paragraph 169 above, that the Inquiry's concerns in relation to confidentiality were primarily in respect of ensuring - and being able to give assurances - that no person who came forward to the Inquiry with information would be exposed to adverse consequences from having done so. In particular, at pages 4 and 5 of Annexure 7 (pages A104 and A105 of Volume 5) the Inquiry said:

"… it is critically important for the conduct and outcome of this Inquiry that those who are in the best position to know what has happened and what is happening at KEMH are encouraged to give, and are appropriately supported in giving, relevant information to the Inquiry. These people include current and former members of staff and patients. They must be satisfied that, where appropriate, information that they give to the Inquiry can be given in confidence and remain confidential. They must also be satisfied that adequate legal and practical measures are in place to protect them against the risk of action being taken against them as a result of the information that they give to the Inquiry.

There are various contexts in which people have sought assurances of confidentiality from the Inquiry as a precondition to providing information.

One such context involves former patients who are very concerned about the possible adverse consequences should it become known that they have made serious allegations against staff of KEMH. Another context involves staff and former staff of the hospital. It is readily understandable that many of these people are very concerned that being identified and perceived as whistle-blowers might well have significant adverse implications for their careers as well as their personal lives. The career implications are compounded because KEMH is the only tertiary centre of its type in this State."

171. At paragraph 2.2.40 (on page 46) of Volume 1 of the Report, it is stated that "… *current and former KEMH staff members, patients and others sought assurances from the Inquiry that any information they gave to the Inquiry on a confidential basis would remain confidential – at least to the extent that their identities would not be revealed, either directly or where the disclosure of particular information might indicate its source".*

172. From my reading of Chapter 2 of Volume 1 the primary concern was to protect the confidentiality of the identities of those individuals who came forward voluntarily to give information to the Inquiry and to protect the confidentiality of the information they gave insofar as it might identify them. To that end, the Inquiry established a protocol to ensure that statements given in informal interviews would remain confidential both during and after the conclusion of the Inquiry and held its formal hearings in private and made a non-publication order under s.19B of the *Royal Commissions Act 1968* in respect of the transcript of the evidence given in formal hearings.

173. The passages of the disputed document in respect of which the complainant has withdrawn its complaint are passages directly quoting some patients. It is not clear from the Report whether those quotations are from evidence given in a formal hearing or from a statement taken in an informal interview. It is also not clear from the Report whether all of those individuals who gave evidence in formal hearings or in informal interviews sought or were given undertakings of confidentiality. Similarly, it cannot be determined from the Report whether or not those people whose words are directly quoted in the disputed document were given such undertakings.

174. However, it is clear that it was direct, verbal evidence given to the Inquiry and, given that it is clear from the Report that a number of individuals who came forward were given undertakings of confidentiality in respect of such information, I was prepared to accept that disclosure of those direct quotations could reasonably be expected to prejudice the future supply of such information to future inquiries. Were it to become known to people who gave or might in the future give information to such an inquiry on a confidential basis that information given to this inquiry, either in informal interview or in evidence, had been disclosed, they may well be reluctant to come forward voluntarily.

175. Although I accepted that those quoted are not named or directly identified, and the Inquiry members would have been aware of their obligations in respect of any confidentiality undertakings when they made the decision to publish those extracts in the Report, in the absence of direct evidence from the women

concerned that they consent to the publication of the information they gave in either a private hearing or a private interview, I did not consider it unreasonable to expect that disclosure of those direct quotations would give rise to concern among those who did provide information on the basis of a confidentiality undertaking and would undermine public confidence in the ability of future inquiries to give and honour such undertakings. It is clear from the passages referred to in Chapter 2 of Volume 1 of the Report that many of those who came forward were very concerned about doing so and would only do so on the basis of an undertaking of confidentiality. I did not consider it unreasonable to expect that, in those circumstances, people may be less willing to come forward voluntarily and give information to such inquiries in the future, if the direct quotations of information given in private in this case were to be disclosed.

176. Therefore, I advised the parties that my preliminary view was that those parts of the disputed document are *prima facie* exempt under clause 8(2). The complainant accepted that and, as I have said, withdrew its complaint in respect of that information. As the complainant no longer seeks to challenge the exemption claims for those parts of the disputed document, they are no longer in dispute and I need not deal with them further. As it has not been possible to identify any other information in the disputed document which is information that was obtained by the Inquiry in confidential interviews, statements or hearings, I do not consider it reasonable to expect that disclosure of the balance of the document would prejudice the ability of any future inquiry - and, in turn, the Government - to obtain such information.

177. In respect of the information obtained from the clinical files, I am not persuaded that disclosure of the disputed document could reasonably be expected to prejudice the future supply of that kind of information to any future inquiry commissioned by the Government. For the reasons explained in Chapter 2 of Volume 1 of the Report, the Inquiry was established by the Minister for Health under the Hospitals Act and by the Premier and Minister for Public Sector Management under s.11 of the PSM Act.

178. Section 9 of the Hospitals Act provides in full:

> *"(1) The Minister may, from time to time, hold such inquiries or investigations as he may deem necessary in relation to any matters concerning the public hospitals or any public hospital, or the administration of this Act in relation to public hospitals, and may appoint one or more persons to conduct such inquiries or investigations as he may deem fit.*
>
> *(2) When an inquiry is being held the Minister or any such person shall have free access to all books, plans, maps, documents, and other things belonging to any board, and shall have in relation to the witnesses and their examination, and the production of documents, the powers conferred upon a Royal Commission or the chairman thereof by the* Royal Commissions Act 1968*, and may enter and inspect any building, premises, or place, the entry or inspection whereof appears to be requisite for the purpose of such inquiry."*

179. Section 9 of the *Royal Commissions Act 1968* empowers a Commissioner to *"…cause a summons in writing under his hand to be served upon any person requiring him to attend the Commission…to produce any books, documents, or writings in his custody or control which he is required by the summons to produce."* Clearly, therefore, the Inquiry had - and any future such inquiry would have - the power to require the production to it of files such as those that were the subject of the clinical review. In those circumstances, the ability of any future such inquiry to obtain information of that kind could not be prejudiced by the disclosure of the disputed document.

180. Clearly, in my view, disclosure of the disputed document could not reasonably be expected to prejudice the future supply to such inquiries and, in turn, the Government, of information in the nature of comments and opinions of experts engaged to provide those comments and opinions. That is particularly so given that the professional making each comment and giving each opinion is not identified and there is no evidence before me that their comments and opinions were given in confidence.

181. Accordingly, even if I were persuaded - which I am not - that the disputed document contained confidential information obtained in confidence, I am not persuaded that disclosure of the disputed document could reasonably be expected to prejudice the future supply to an agency or the Government of information of that kind.

Conclusion

182. It is my finding, therefore, that the disputed document is not exempt under clause 8(2).

CONCLUSION

183. For the foregoing reasons, I find those parts of the document remaining in dispute (being all except the direct quotations of the words of patients) are not exempt. I consider that it would be practicable to edit the disputed document by deleting those passages in respect of which the complainant has withdrawn its complaint and to give the complainant an edited copy of the document in accordance with s.24 of the FOI Act.

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