

Decision D0252008 – Published in note form only

***Re Knowles and Royal Perth Hospital and Wade* [2008] WAICmr 25**

Date of decision: 4 July 2008

Freedom of Information Act 1992: section 32(2); Schedule 1, clause 3(1)

In January 2008, the complainant applied to the agency for access, under the *Freedom of Information Act 1992* ('the FOI Act') to the medical records of his late mother. The agency refused the complainant access to those records on the ground that he was not his mother's "closest relative" for the purposes of s.32 of the FOI Act. Under that provision, the agency was required to consult the "closest relative" of a deceased third party. In effect, that individual "stands in the shoes" of the deceased person with regard to personal information held by the agency about the latter.

The agency accepted evidence that there had been an estrangement between the complainant and his late mother and that the complainant's sister ('the third party') was the "*closest relative*" for the purposes of the FOI Act. The agency confirmed its decision on internal review and, in May 2008, the complainant applied to the A/Information Commissioner ('the A/Commissioner') for external review of the agency's decision.

Having reviewed the agency's files, including its FOI file, this office advised the complainant that, in light of the recent decision in *Re J and Police Force of Western Australia* [2008] WAICmr 5, he - as the elder of the two surviving children - appeared to be the "*closest relative*". In *Re J*, the A/Commissioner held that - where the question was which one of surviving adult children was the closest relative of their late mother - the eldest child was the closest relative for the purposes of the FOI Act. In view of the decision in *Re J*, the agency accepted that the complainant was his late mother's "*closest relative*" and, consequently, should be given access to her medical records.

The third party and the deceased's executor were invited to be joined as parties to the complaint and/or to make submissions to the A/Commissioner. The former was joined as a party and both she and the executor made submissions to the A/Commissioner.

On 20 June 2008, the A/Commissioner provided each of the parties and the executor with a letter setting out his preliminary view of the complaint. The A/Commissioner accepted that the deceased had, in her last years, expressed the wish that the complainant should not have access to her medical records but that did not alter the A/Commissioner's view, as expressed in *Re J*.

The A/Commissioner considered that questions such as intention and the quality and closeness of family relationships were factors that were too subjective to rely upon in interpreting the term "*closest relative*". The FOI Act was not intended to deal with such questions as the proper interpretation of words used in a statutory declaration or the state of mind of a deceased person. The A/Commissioner considered that the most appropriate way to distinguish which surviving child should be designated the "*closest relative*" for the purposes of the FOI Act is to select the

individual born first in time because this provides the most objective and certain approach to interpretation, and accords with the ordinary dictionary definition of the term as used in the FOI Act.

Following the receipt of the A/Commissioner's letter, both the third party and the executor made further submissions to the A/Commissioner. However, the A/Commissioner was not persuaded by those submissions and found that the complainant was his mother's "*closest relative*" for the purposes of the FOI Act.

The A/Commissioner set aside the agency's decision to refuse access to the requested medical records on the basis that the complainant was not the closest relative of his late mother and considered that, as the "*closest relative*" of his late mother, the complainant was entitled to access her medical records.