OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: F2011224** **Decision Ref: D0292012**

Participants:

James Kerr Watmore
Complainant

- and -

WA Country Health Service – Great Southern
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – complaint form – qualified privilege under *Health Insurance Act 1973* (Cth) – whether disputed matter the complaint form or part of that form – whether the disputed matter a declared quality assurance activity – the applicable 'person' for the purposes of s.124Y(1) of the *Health Insurance Act 1973* (Cth) – whether the disputed matter is the subject of qualified privilege – clause 3(1) – personal information – closest relative – clause 3(3) – prescribed details – clause 3(6) – whether disclosure would, on balance, be in the public interest – editing – s.24.

Freedom of Information Act 1992: sections 10, 24, and 76(7); Schedule 1, clauses 3(1), 3(3), 3(6) and 8(2); Glossary, clause 1
Freedom of Information Regulations 1993: regulation 9(1)
Health Insurance Act 1973 (Cth): sections 124W, 124W(1), 124W(2), 124X, 124X(4), 124Y(1), 124Y(2), 124Y(3), 124Y(4), 124Y(7)
Constitution (Cth): section 109
Health Services (Quality Improvement) Act 1984

Re Malik and Office of the Public Sector Standards Commissioner [2010] WAICmr 25
Re Winterton and Police Force of Western Australia [1997] WAICmr 15
Re Mossenson and Others and Kimberley Development Commission [2006] WAICmr 3
Re Farina and Treasurer [2011] WAICmr 12
Re Ryan and City of Belmont [2000] WAICmr 42
Re U and Department of Health [2010] WAICmr 3

DECISION

The agency's decision is set aside. I find that neither Documents 2 and 3, nor the disputed matter in those documents, is subject to qualified privilege pursuant to s.124Y(1) of the *Health Insurance Act 1973* (Cth). I also find that the telephone numbers and email address on page 1; the ID numbers on lines 6 and 12 of page 2; the name of the individual in lines 3 and 4 on page 3; and the signature on page 7 of Documents 2 and 3 are exempt under clause 3(1) of Schedule 1 to the FOI Act but that the remainder of the information in those documents is not exempt under clause 3(1) and it is practicable to give access to edited copies of those documents.

Anne Marshall
A/INFORMATION COMMISSIONER

12 November 2012

REASONS FOR DECISION

1. This complaint arises from a decision made by the WA Country Health Service – Great Southern ('the agency') to refuse Mr James Watmore ('the complainant') access to certain documents under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. In April 2011, the complainant applied to the agency under the FOI Act for access to documents relating to the death of his 17-year old son, Kieran, in the Albany Regional Hospital ('the ARH') on 28 August 2008. Specifically, the complainant sought access to documents containing:

    - the findings of an internal investigation by the ARH into that death;
    - the complaint from the ARH to the Nurses and Midwives Board of Western Australia (now the Australian Health Practitioner Regulation Agency) in relation to the nursing staff responsible for his son's care at the time of the incident; and
    - the decision of the Department of Health ('the Department') or the ARH not to renew the employment contract of a particular staff member.

3. The State Coroner conducted an inquest into the incident and his report, dated 30 September 2009, is a public document. Kieran Watmore's family subsequently received a public apology in Parliament from the Minister for Health, who said "*Kieran should not have died when he did, there were a number of systemic deficiencies that led to his death and these cannot be ignored"* and noted that the Department would implement all of the Coroner's recommendations.

4. On 16 May 2011, the agency refused access to the requested documents – without identifying any of them – under clauses 3(1) and 8(2) of Schedule 1 to the FOI Act, which relate, respectively, to 'personal information' and 'confidential communications'.

5. The complainant applied to the agency for internal review of its decision, initially in relation to only one of the three documents or categories of document listed in his application but ultimately in relation to all three. Following some additional communication between the parties, the agency confirmed its original decision by way of two separate notices of decision on internal review, dated 15 June 2011 and 22 August 2011.

6. The complainant applied to the Information Commissioner ('the Commissioner') for external review of both internal review decisions on 10 and 22 August 2011 and, since both applications relate to the one access application, this office dealt with them as one matter.

REVIEW BY INFORMATION COMMISSIONER

7. After receiving this complaint, the Commissioner required the agency to produce to him its FOI file maintained in relation to the complainant's access application and the originals of the documents in dispute in this matter.

8. Since the agency had not identified specific documents, the Commissioner's Investigations Officer made further inquiries with the agency and identified four documents (Documents 1, 2, 3 and 4) as within the scope of the complainant's access application. In the course of further inquiries with the agency, the agency claimed that all four documents were exempt under clause 8(2) of Schedule 1 to the FOI Act and that certain information in two of the documents "*may be protected under section 124Y of the* Health Insurance Act *affording Commonwealth Qualified Privilege to the information."*

9. On 18 January 2012, following additional inquiries with the agency, the Commissioner provided the parties with a letter setting out his preliminary view of this complaint, which was that the disputed documents were not exempt under clause 8(2), although all contained personal information about third parties that was, *prima facie*, exempt under clause 3(1). Since the agency had provided the Commissioner with no information about its claim that s.124Y of the *Health Insurance Act 1973* (Cth) ('the HI Act') applied in this case – other than advising him of its uncertainty as to whether it did or not – he was not satisfied that the claim was justified and he invited the agency to provide him with further information or material in support of that claim.

10. In response to the Commissioner's letter, on 16 February 2012, the agency withdrew its claim for exemption under clause 8(2) for the four documents and, having consulted with the relevant third parties, gave the complainant access to Documents 1 and 4. However, the agency maintained its claim that s.124Y of the HI Act applied to Documents 2 and 3.

11. This office then undertook a series of further inquiries with the agency as to the basis of its claim under s.124Y of the HI Act. On 5 April 2012, this office wrote to the agency seeking clarification and information concerning Documents 2 and 3. However, the agency's response, on 3 May 2012, included the advice that it was "*not in a position to provide you with a satisfactory response to the questions you have posed"* and, in fact, provided no response to those questions. On 15 May 2012, the Commissioner met with a senior officer of the agency and the agency's legal adviser. Following that meeting, the Commissioner wrote to the agency on 4 July 2012 seeking additional information, which the agency provided on 26 July 2012. I note that this office had difficulty in both obtaining information as to the agency's claim and obtaining that information in a timely manner.

12. In dealing with this matter I have taken into account, amongst other things, the following:

    - the agency's FOI file, including its notices of decision;
    - information provided by the agency and the State Solicitor's Office at a meeting with the Commissioner on 15 May 2012 and in correspondence from the agency;
    - the agency's policy entitled '*Clinical Incident Management Policy using the Advanced Incident Management System (AIMS)'*, which is publicly available;
    - the agency's '*Sentinel Event Policy'*, which is publicly available;
    - the Declaration dated 7 June 2006 made under s.124X of the HI Act by the Commonwealth Minister for Health and Ageing; and
    - information from the websites of the Australian Patient Safety Foundation Inc ('the APSF') and the Office of Safety and Quality in Healthcare ('the OSQH').

THE DISPUTED MATTER AND THE AGENCY'S CLAIM

13. The two documents in dispute in this matter, Documents 2 and 3, are essentially the same document – a Complaints Form of the former Nurses and Midwives Board of Western Australia ('NMB') that was completed by a senior officer of the agency on 14 October 2009 ('the Form') – but whereas Document 2 is printed in small font on seven sheets of A4 landscape paper, Document 3 is printed in standard font on seven sheets of A4 portrait paper.

14. The agency no longer claims that Documents 2 and 3 are exempt under any of the exemption clauses in Schedule 1 to the FOI Act. Instead, the agency claims that the second and third paragraphs of bullet point 2 on page 4 of Document 2 (repeated in Document 3) (together 'the disputed matter') is information to which s.124Y(1) of the HI Act, a Commonwealth Act, applies. In brief, s.124Y(1) of the HI Act provides that any information acquired by a person that became known solely as a result of 'a declared quality assurance activity' must not, except in limited circumstances, be disclosed.

15. In the event I decide that access should be given to the disputed matter in Documents 2 and 3, the agency claims that an inconsistency will exist between s.124Y(1) of the HI Act and the access provisions of the FOI Act and, consequently, s.109 of the *Constitution* (Cth) will apply. Section 109 provides:

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

16. Although the agency claims that only the disputed matter is information that became known solely as a result of a declared quality assurance activity, the agency takes the view that it cannot simply delete the disputed matter and provide access in edited form to Documents 2 and 3 because the nature of the documents as a whole is such that they could not be edited to de-identify particular individuals in compliance with s.124Y(3) of the HI Act. Section 124Y(3) provides, among other things, that s.124Y(1) does not apply to information that does not identify particular individuals. The agency notes that *"given the information seems to already be in the public arena, we accept the unsatisfactory nature of this outcome".* I understand, therefore, that the agency claims that no part of Documents 2 or 3 should be disclosed because of the inconsistency between s.124Y(1) of the HI Act and the access provisions of the FOI Act.

The Commonwealth Health Insurance Act 1973

17. The HI Act prohibits the disclosure of certain information about declared quality assurance activities. The consequence of an activity being a declared quality assurance activity is that it is unlawful to disclose information identifying individuals that is obtained solely as a result of that activity, except for the purposes of that activity, unless those individuals consent or unless that information can be de-identified.

18. Section 124Y of the HI Act provides, insofar as it is relevant:

> "*(1) Subject to this section, a person who acquires any information that became known solely as a result of a declared quality assurance activity, whether*

that person acquired the information in the course of engaging in activity, as a result of a disclosure under section 124Z or in any other way, must not, except for the purposes of that activity or in accordance with an authority given by the Minister, directly or indirectly make a record of that information or disclose that information to another person or to a court.

Penalty: Imprisonment for 2 years.

(2) Subject to this section, a person cannot be required:

(a) to produce to a court a document that was brought into existence solely for the purposes of a declared quality assurance activity; or

(b) to disclose to a court any information that became known solely as a result of such an activity;

except when it is necessary to produce the document or disclose the information for the purposes of this Part.

(3) Subsections (1) and (2) do not apply to information that does not identify, either expressly or by implication, a particular individual or particular individuals.

(4) Subsection (2) does not apply to a document that does not identify, either expressly or by implication, a particular individual or particular individuals.

(5) This section does not prohibit a disclosure of information if the person, or each of the persons, who would be directly or indirectly identified by the disclosure consents to the disclosure of that information."

(6) ..

(7) If a quality assurance activity ceases to be a declared quality assurance activity, this section nevertheless continues to apply in respect of information known, or a document that was brought into existence, at a time when the activity was a declared quality assurance activity."

19. The term 'quality assurance activity' is defined in s.124W of the HI Act to mean:

"*(a) an assessment or evaluation of the quality, or a study of the incidence or causes of conditions or circumstances that may affect the quality, of health services provided by a person, whether before or after commencement of this Part, being:*

(i) services in respect of which payments were made, or that are or would be eligible for payments, under Part II, III or IV; or

(ii) services relating to the prescribing of pharmaceutical products in respect of which payments were made, or that are or would be

eligible for payments, under Division 3 of Part VII of the National Health Act 1953*; or*

(iii) services in respect of which payments were made under the Health Care (Appropriation) Act 1998*, or that are or would be eligible for such payments; or*

(b) the making of a recommendation about the provision of those services as a result of such an assessment, evaluation or study; or

(c) the monitoring of the implementation of such a recommendation."

20. Section 124W defines the term 'declared quality assurance activity' to mean:

"*a quality assurance activity in respect of which a declaration by the Minister under section 124X is in force when the activity is engaged in."*

21. Section 124W(2) of the HI Act provides:

"*For the purposes of* [Part VC]:

(a) information about a matter is not taken to have become known merely because of the existence or dissemination of suspicions, allegations or rumours about that matter; and

(b) information may be taken to have become known solely as a result of a declared quality assurance activity even though it was previously known to a person whose actions have been or are being investigated by the persons engaging in the quality assurance activity."

22. Section 124X of the HI Act provides:

"*(1) The Minister may, by signed writing, declare a quality assurance activity described in the declaration to be a quality assurance activity to which this part applies.*

(2) ...

(3) The Minister must not make a declaration in respect of a quality assurance activity unless the Minister is satisfied that:

(a) any person who is engaging, or proposes to engage in the activity is authorised to do so:

(i) under a law of the Commonwealth, of a State or of a Territory; or
(ii) by, or by an authority of, the Commonwealth, a State or a Territory; or
(iii) by a body that provides health care; or
(iv) ...

(v) by a body established wholly or partly for the purposes of research; or
(vi) by an association of health professionals; or
(vii) by any other prescribed body; and

(b) it is in the public interest ..."

(4) A declaration, unless sooner revoked, ceases to be in force at the end of 5 years after the instrument of declaration was signed, but this subsection does not prevent the Minister from making a further declaration in respect of the same activity."

The agency's submissions

23. By letter of 16 February 2012 and in its discussions with this office, the agency submits that:

- Part VC of the HI Act sets out a regime for the protection of confidentiality – qualified privilege – in the conduct of 'quality assurance activities'. Section 124Y of the HI Act (which comes within Part VC) provides that it is unlawful to disclose information identifying individuals that became known solely as a result of a declared quality assurance activity, unless those individuals consent. It is unnecessary for the purposes of s.124Y to satisfy ordinary tests of confidentiality. Rather, the information in question must only meet the requirements of the statutory regime.

- By instrument dated 7 June 2006, the then Commonwealth Minister for Health and Ageing ('the Minister') made a declaration under s.124X of the HI Act that the activity described in the Schedule to the declaration was a quality assurance activity to which Part VC of the HI Act applied. The declaration described the quality assurance activity as being the Advanced Incident Management System ('AIMS').

- The declaration, although ceased by operation of s.124X(4), was in force at the material times so that s.124Y applies pursuant to the operation of s.124Y(7).

- Once satisfied that the disputed matter is matter to which s.124Y of the HI Act applies, there arises an inconsistency between s.124Y of the HI Act and the access provisions of the FOI Act. The mechanism by which inconsistencies between State and Commonwealth laws are resolved is set out in s.109 of the Commonwealth *Constitution.*

- The High Court has recognised that inconsistency between a Commonwealth and a State law may arise directly or indirectly. It seems, in this instance, that s.10(1) (and the operation of s.76(7)) of the FOI Act may give rise to a direct inconsistency with s.124Y(1) and (2) of the HI Act.

- First, s.10(1) of the FOI Act effectively requires the agency to do something which s.124(Y)(1) of the HI Act prohibits, namely to disclose to the complainant

personal information that became known solely as a result of the AIMS process, for a purpose other than a purpose of the AIMS process.

- Second, the operation of s.76(7) of the FOI Act requires the agency to do something which s.124Y(2) of the HI Act prohibits, namely to produce to the complainant information which was brought into existence solely for the purposes of the AIMS process. Such a direct conflict clearly constitutes an inconsistency for the purposes of s.109 of the *Constitution* (Cth): see, for example, *R v Brisbane Licensing Court; ex parte Daniell* (1920) 28 CLR 23.

- An alternative way of viewing the inconsistency is that ss.10 and 76(7) of the FOI Act effectively make or act upon as lawful something which s.124Y(1) of the HI Act makes unlawful. In *Clyde Engineering Co Ltd v Cowburn (*1926) 37 CLR 466 at 489, Isaacs J said that *"If one enactment makes or acts upon as lawful that which the other makes unlawful, or if one enactment makes unlawful that which the other makes or acts upon as lawful, the two are to that extent inconsistent*."

- In this case, an inconsistency arises only to the extent that the disputed matter was brought into existence solely for the purposes of the AIMS study and contains personal information. The High Court has referred to this type of inconsistency as an 'operational inconsistency': see *Commonwealth v Western Australia* (the Mining Act Case) (1999) 196 CLR 392 at 417 (Gleeson CJ and Gaudron J), at 441 (Gummow J) and at 478 (Hayne J, McHugh J agreeing at 421).

- Since the disputed matter is taken from the Sentinel Event Notification System, which records the AIMS information, the sentinel event root cause analysis is covered by qualified privilege via the HI Act. [I note that, according to the website of the OSQH, a root cause analysis ('RCA') is "*a comprehensive and systematic methodology to identify the gaps in hospital systems and the processes of health care that may not be immediately apparent and which may have contributed to the occurrence of an event."*]

- Therefore, as s.124Y applies to Documents 2 and 3, it is not open for s.10 of the FOI Act to apply to them and so the agency cannot disclose them pursuant to a decision under s.76(7) of the FOI Act.

- In *Re Yoo and Sir Charles Gairdner Hospital* [2009] WAICmr 10 the former A/Commissioner at least implicitly accepted that there would have been an inconsistency between s.124Y and the provisions of the FOI Act which require disclosure of documents.

Consideration

24. The qualified privilege to which the agency refers, citing the HI Act, operates to protect certain information from disclosure and clinicians from civil liability. Qualified privilege is used by hospitals and health professionals to investigate the causes and contributing factors of clinical incidents by encouraging frank disclosure and to conduct quality improvement activities in light of the information obtained. If a health service wishes to conduct an investigation under qualified privilege, it has the choice either of conducting the investigation under the State *Health Services (Quality Improvement) Act*

1994 or under the Commonwealth HI Act. In the present case, the agency has advised this office that the relevant investigation was conducted under the HI Act.

25. In my opinion, the questions for my determination in this matter can be summarised as follows:

- What is the disputed matter?
- What is the relevant quality assurance activity and is it a declared quality assurance activity?
- Who is the "*person who acquires any information that became known solely as a result of a declared quality assurance activity*", pursuant to s.124Y(1) of the HI Act, in this case?
- Is the disputed matter the subject of qualified privilege pursuant to s.124Y of the HI Act?

The disputed matter

26. The agency claims in effect that the disputed matter is the whole of Documents 2 and 3, being the Form. However, the agency only claims that the second and third paragraphs of bullet point 2 on page 4 of each document is information that is subject to s.124Y(1) of the HI Act, being information that became known solely as a result of a declared quality assurance activity.

27. Section 124Y(3) provides, among other things, that s.124Y(1) does not apply to information that does not identify a particular individual or individuals. As I understand it, the agency is arguing that the corollary is that s.124Y(1) applies to <u>any</u> information that identifies – expressly or impliedly – 'particular individuals'.

28. The agency appears to be arguing that, even if the disputed matter was deleted from the Form, the remaining information would identify particular individuals; 'particular individuals' are individuals who have some association with "*information that became known solely as a result of a declared quality assurance activity*"; therefore, pursuant to s.124Y(3) of the HI Act, the remaining information in the Form is also covered by s.124Y(1).

29. In my view, the agency has misunderstood the context of s.124Y. That provision concerns documents that were brought into existence solely for the purposes of a declared quality assurance activity and information that became known solely as a result of such an activity (see ss.124Y(2)-(4)). In the present case, the relevant matter comprises the second and third paragraphs of bullet point 2 on page 4 of the Form, which the agency claims became known solely as a result of a declared quality assurance activity.

30. In my view, if qualified privilege exists in this case it is applicable only to the disputed matter and not to the whole of Documents 2 and 3.

What is the relevant quality assurance activity and is it a declared quality assurance activity?

31. The agency advises this office that the relevant quality assurance activity is AIMS. I understand that the APSF, a not-for-profit independent organisation funded through memberships, consultancies and research grants, developed the AIMS software that is used state-wide (and in other Australian jurisdictions) to collect and analyse information about healthcare incidents, using a classification based on its understanding of iatrogenic harm (that is, harm caused by medical care or treatment).

32. The agency refers to the Minister's declaration of 7 June 2006 ('the Declaration') made under s.124X of the HI Act. I have examined that document. The schedule to the Declaration describes the "*Persons engaging in the activity*" as the "*Australian Patient Safety Foundation"* and the quality assurance activity to which Part VC of the HI Act applies as being the following:

> "*Advanced Incident Management System.*
>
> *The Activity is a study of the incidence or causes of conditions or circumstances that affect the quality and safety of health services. The purpose of the Activity is to investigate and analyse (Phase 2) actual and potential adverse patient incidents to develop preventative strategies using the Advanced Incident Monitoring* [sic] *System."*

33. The Declaration includes an Explanatory Statement and an attachment headed "*Overview of the Activity*". The latter states, among other things, that:

> "*The Activity* [described in the schedule] *meets the requirements of section 124X(3)(a) of the Act in that the persons engaged in this activity are authorised to do so by the Australian Patient Safety Foundation, which is an association of health professionals and a body established wholly or partly for the purpose of research, and the bodies that provide health services operating AIMS*" and that the declared activity is limited "*to the investigation and analysis phase (Phase 2) of the existing Advanced Incident Management System. The Activity as described would allow collection of information through a single point without unnecessarily restricting some sorts of information, the disclosure of which is desirable."*

34. I understand from that Explanatory Statement that the quality assurance activity, AIMS, relates to the quality of health services which would be eligible for payment of Medicare benefits and public hospital services, as required by s.124W(1) of the HI Act.

35. In light of the above, I am satisfied that the relevant quality assurance activity is Phase 2 of AIMS. In this case, that is the investigation and analysis of the clinical events surrounding Kieran Watmore's death via the AIMS process.

36. I am also satisfied that Phase 2 of AIMS is a declared quality assurance activity, as described in the Declaration. The Declaration expired at midnight on 9 June 2011 and has not since been renewed. However, I am satisfied that it was in force at the material

time and that s.124Y continues to apply to the disputed matter, pursuant to s.124Y(7) of the HI Act.

Who is the* "person who acquires any information that became known solely as a result of a declared quality assurance activity", *pursuant to s.124Y(1) of the HI Act?

37. In the present case, the agency acquired the disputed matter. Section 124W of the HI Act defines 'person' for the purposes of Part VC of the HI Act to include a committee or other body of persons, whether incorporated or unincorporated and includes a member of such a committee or other body. The disputed matter was also acquired by the staff member who completed the Form. In my view, the agency and the staff member are each a 'person' for the purposes of s.124Y(1) of the HI Act.

Is the disputed matter the subject of qualified privilege pursuant to s.124Y of the HI Act?

38. The Declaration states that the 'person' engaging in the AIMS activity is the APSF. I accept that the APSF comes within the definition of 'person' in s.124W of the HI Act.

39. From the APSF's website, I understand that information acquired by a health service under AIMS is intended to be entered into a database specifically maintained for AIMS. Software designed especially for AIMS collates that information in a form that can be reported within the health service and to the APSF. The electronic information can be used to generate reports of aggregated information in relation to incidents within various classifications. The data is used to develop local and national strategies for preventing the occurrence of adverse incidents in the future.

40. The Explanatory Statement attached to the Declaration appears to extend the description of the persons engaging in the activity by including persons who are authorised to engage in AIMS by the APSF. In the present case, the agency has provided this office with no information to establish either that it provides information to the APSF or that it was authorised by that body.

41. My understanding of how AIMS operates within the agency is taken from the agency's "*Clinical Incident Management Policy - Using the Advanced Incident Management System (AIMS)*" ('the AIMS Policy') and from the Commissioner's meeting with the agency's nominated representative for this matter, the Chief Operating Officer, WA Country Health Service – Northern and Remote, and correspondence with that officer.

42. The Introduction to the AIMS Policy provides, among other things:

> "*... Central to risk management is the reporting, monitoring and management of clinical incidents to the Advanced Incident Management System (AIMS).*
>
> *AIMS is in place across all WA government area health services and covers the reporting, investigation, analysis and monitoring of clinical incidents that occur as a result of the provision of health care. The main objective of AIMS is to improve health care delivery. The reporting of clinical incidents enables hospital and health service staff to commence an investigation to identify contributing factors and system errors that may have caused or contributed to the incident...*

> *A clinical incident is an event or circumstance resulting from health care which could have, or did lead to, unintended harm to a person, loss or damage, and/or a complaint*."

43. The AIMS Policy makes it clear that staff are encouraged, but not required, to report a clinical incident through AIMS. Reporting is voluntary and the reporter can choose to remain anonymous. I understand that the purpose of this is, among other things, to increase the full and frank reporting of incidents to assist in future prevention of clinical incidents.

44. The process of reporting, investigating and analysing via AIMS is described on pp.7-9 of the AIMS Policy, as follows:

- Health workers voluntarily submitting a report to AIMS complete a Clinical Incident Form ('AIMS form'), which allows for anonymous reporting. Page 1 of the AIMS form is limited to the notification of the clinical incident, which is not a part of the declared quality assurance activity. Consequently, information contained on page 1 is not protected by qualified privilege. However, the information entered on to page 2 of the AIMS form comprises the first part of the investigation and analysis of the clinical incident and is therefore protected.

- Once a clinical incident has been notified to AIMS, the next stage is for the incident to be investigated and analysed. The AIMS Policy notes: "*It is important that all relevant information is provided as the quality of the information reported has a direct impact on the ability of senior management to investigate and analyse clinical incidents, and prevent their recurrence."*

- The supervisor of the person reporting the clinical incident or a senior staff member is responsible for conducting a risk assessment, undertaking further investigation and analysis and documenting the appropriate remedial action to be taken.

- The Head of Department, Service Head or Director should comment on, among other things, the action taken or needed to prevent a recurrence and manage future risks, and be satisfied that the relevant risk management has occurred.

45. In this case, the agency advised this office, by letter of 26 July 2012, that an AIMS form was completed and entered onto the AIMS database in relation to Kieran Watmore's death by the end of the day on which he died, 28 August 2008**,** and that the death was reported as a sentinel event pursuant to its *Sentinel Event Policy* (2008) ('the SE Policy') by a senior staff member on 15 September 2008.

46. The SE Policy describes sentinel events as rare events that lead to catastrophic patient outcomes. Unlike the reporting of clinical incidents to AIMS, the SE Policy states that the reporting of sentinel events is mandatory for all public hospital and health service staff.

47. The agency's SE Policy includes the following advice at pp.4-6:

- "*Sentinel events must be reported using the Sentinel Event Notification Form and include the hospital identification code, the date on which the event occurred, a brief description of the sentinel event and whether the investigation will be conducted under qualified privilege or is a coroner's case ... Notifications can be submitted via secure fax, email, post or courier."*

- "*Sentinel events should also be reported to the Advanced Incident Management System (AIMS). See the Clinical Incident Management Policy for WA Health Services using the Advanced Incident Management System for further information."*

- " *Root Cause Analysis (RCA) is one investigation methodology recommended ...Following an investigation, the Sentinel Event Final Report is to be forwarded to the Senior Policy Officer at the Office of Safety and Quality in Healthcare within 45 working days of initial notification. The Office ... acts as a central repository of de-identified recommendations arising from the investigations of sentinel events and where appropriate will disseminate lessons learned to hospitals and health services across the State."*

48. Public hospital and health services can investigate a sentinel event under qualified privilege via the AIMS process. The SE Policy states at p.8:

> "***6.2 Conducting sentinel event investigations under the Commonwealth qualified privilege scheme by concurrent reporting to the Advanced Incident Management System (AIMS)***
>
> *Public hospital and health services can investigate a sentinel event under qualified privilege via the AIMS process. In such cases, the hospital should notify the Senior Policy Officer at the Office of Safety and Quality in Healthcare in the required way and then investigate and analyse the incident using the Commonwealth qualified privilege scheme."*

49. The agency's Chief Operating Officer has advised this office that, in the present case, the Sentinel Event Notification form was not completed in hard copy but that the notification was made directly onto the Sentinel Event Notification System database.

50. In answer to this office's questions about what the 'study, investigation or analysis' conducted under AIMS in relation to Kieran Watmore's death consisted of, the agency's Chief Operating Officer advised as follows:

> *"an incident investigation process was initiated under AIMS led by the Regional Medical Director and with assistance from nursing staff from the hospital, a doctor from another facility and the regional clinical risk manager. Over the course of the investigation assistance was also sought from staff external to the region such as the Executive Directors Medical and Nursing Services and the Area Director Safety and Quality. A final report was agreed and submitted to the Department on 13 February 2009. The investigation process was at times referred to as a Root Cause Analysis".*

51. Since the agency is claiming that that investigation process or RCA is subject to qualified privilege, no copy of the final report was provided to this office.

52. From the above, it is evident that the agency had several avenues available – and used more than one of them – to investigate the circumstances surrounding Kieran Watmore's death at ARH on 28 August 2008.

53. In order to rely upon the prohibition against disclosure contained in s.124Y(1) of the HI Act, it is necessary for the agency to establish that the disputed matter – and any related matter – became known solely as a result of Phase 2 of AIMS, this being the declared quality assurance activity.

54. On the information before me, it is not clear whether the agency is claiming that the sentinel event notification made on 15 September 2008 was concurrently reported to AIMS – in view of the fact that the agency has also advised me that an AIMS notification was made on 28 August 2008 – and whether the agency conducted one or two RCAs or investigations in respect of those two separate notifications.

55. Following Kieran Watmore's death, the Coroner conducted an inquest and handed down his findings on 30 September 2009. In addition, the ARH conducted its own internal investigation, which was completed by way of a report dated 27 October 2009.

56. I have examined the Form, dated 14 October 2009, which is Documents 2 and 3. The disputed matter contains much of the factual information set out in the Coroner's report, which had been published by the time that the Form was completed.

57. In my view, it is not clear from the disputed matter, and the related matter surrounding it, whether the former became known solely as a result of Phase 2 of AIMS or from other sources that produced relevant information. Moreover, the relevant AIMS activity described to me by the agency's Chief Operating Officer as being 'the study, investigation or analysis' conducted under AIMS appears to have been a different activity to that described in the disputed matter and undertaken by different officers of the agency.

58. In addition, Documents 2 and 3 refer to another document that was not included with the Form given to the NMB on the ground that it was protected by qualified privilege. The agency confirmed that the reference there to qualified privilege was a reference to the HI Act. The agency was unable to explain to this office what that document was and why it was said to be the subject of qualified privilege when the disputed matter was not originally claimed to be protected from disclosure to me by virtue of qualified privilege. In answer to this office's questions, the agency advised that the senior officer who filled out the Form was aware of the fact that an entry concerning Kieran Watmore's death had been made onto the AIMS database on 28 August 2008. In light of that, it is not evident why that senior officer, being aware of information that was covered by qualified privilege and claiming that privilege for other information, did not also claim qualified privilege for the disputed matter.

59. It appears that Kieran Watmore's death was investigated as being both a sentinel event and as reportable under AIMS. If the agency had conducted a sentinel event

investigation concurrently with an AIMS investigation – which it is not clear to me that it did – could it still be said that the disputed matter became known 'solely' as a result of an AIMS investigation rather than a sentinel event investigation?

60. In dealing with this complaint there have been a number of unknowns and, on occasion, it has been exceedingly difficult to obtain relevant information from the agency to assist this office's understanding of this matter, despite requests over a considerable period of time. Since the agency has raised this claim, the agency bears the onus of persuading me that it has made out the elements of s.124Y(1) of the HI Act and, for the reasons given here, the agency has not done so.

61. On the information before me, I am not satisfied that the disputed matter acquired by the agency and the officer completing the Form became known "*solely as a result of a declared quality assurance activity"*, that is Phase 2 of AIMS. Consequently, I consider that s.124Y of the HI Act has no application to the disputed matter. In light of that, it is unnecessary for me to consider whether s.109 of the Commonwealth *Constitution* has any application.

CLAUSE 3 – PERSONAL INFORMATION

62. Since Documents 2 and 3 contain personal information about third parties ('the disputed information'), I have considered whether that information is exempt under clause 3 of Schedule 1 to the FOI Act. Clause 3, insofar as it is relevant, provides:

> *"(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*
>
> *(2) ...*
>
> *(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) ...*
>
> *(5) ...*
>
> *(6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."*

63. Clause 1 of the Glossary to the FOI Act defines 'personal information' to mean:

> *"... information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead –*
>
> *(a) whose identity is apparent or can reasonably be ascertained from the information or an 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".*

64. The purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom personal information may be contained in documents held by State and local government agencies. The definition of 'personal information' in the Glossary makes it clear that any information or opinion about a person from which that person can be identified is, on the face of it, exempt matter under clause 3(1).

65. Documents 2 and 3 identify officers or former officers of the agency, Kieran Watmore and another private individual (the latter is referred to in lines 3 and 4 on page 3 of Documents 2 and 3). All of that information is *prima facie* exempt under clause 3(1) because it would identify those persons. In my opinion, the only limits on the exemption that might apply to that information are clauses 3(3) and 3(6).

Clause 3(3) – prescribed details

66. The information concerning officers of the agency in Documents 2 and 3 includes their names, positions, functions, duties and things done by them in the course of performing or purporting to perform their functions and duties. In my view, that kind of information is prescribed details that are not exempt pursuant to the limit on the exemption in clause 3(3): see regulation 9(1) of the *Freedom of Information Regulations* ('the Regulations') and *Re Malik and Office of the Public Sector Standards Commissioner* [2010] WAICmr 25 at [34]-[41].

67. However, that information also includes the contact details (both telephone and email) on page 1; the ID numbers on lines 6 and 12 of page 2; and the signature on page 7 of Documents 2 and 3. In my view, that information would, if disclosed, not merely reveal prescribed details because it goes beyond the information identified as prescribed details in regulation 9(1) of the Regulations.

68. I agree with the decision in *Re Winterton and Police Force of Western Australia* [1997] WAICmr 15, in which the former Information Commissioner determined that handwritten signatures are generally exempt under clause 3(1). I consider that clause 3(3) does not apply to the handwritten signature of an officer which, in my view, is personal to the individual concerned and relates to more than merely the officer's work as an officer. Further, I do not consider that the contact details on page 1 of Documents 2 and 3 are prescribed details since they appear to be the direct contact details of officers rather than general contact details of the agency concerned: *Re Malik* at [42]; *Re Mossenson and Others and Kimberley Development Commission* [2006] WAICmr 3 at [23]-[25] and *Re Farina and Treasurer* [2011] WAICmr 12 at [23]-[26].

Clause 3(6) – public interest

69. I have also considered whether the personal information about Kieran Watmore, the other individual and the information about officers that is not prescribed details are subject to the limit on the exemption in clause 3(6). Determining whether or not disclosure would, on balance, be in the public interest involves identifying the relevant competing public interests – those favouring disclosure and those favouring non-disclosure – weighing them against each other and making a judgment as to where the balance lies in the circumstances of the particular case.

70. In favour of disclosure, I recognise a public interest in individuals, such as the complainant, being able to exercise their rights of access under the FOI Act, subject to the exemptions in Schedule 1. I also recognise public interests in the transparency and accountability of government agencies that discharge functions on behalf of the community, particularly where, as here, those functions impact on the healthcare of individuals.

71. In *Re U and Department of Health* [2010] WAICmr 3, the complainant applied for a report into the clinical care of his wife prior to her death. In that case, at [66]-[69], the Commissioner accepted that where the closest relatives of a deceased person support an access application under the FOI Act for disclosure of matter concerning the deceased, the public interest in protecting the privacy of a deceased person is diminished.

72. In the present case, I accept that Kieran Watmore's parents - his closest relatives - both support the complainant's application. I note that most, if not all, of the information about Kieran Watmore in Documents 2 and 3 is already in the public domain. I also consider that the disclosure of Documents 2 and 3, with the exception of the small amount of information that I consider to be exempt, would further the public interests in government transparency and accountability by contributing to an understanding of the events surrounding Kieran Watmore's death and the ensuing investigations.

73. Weighing against disclosure in this instance, I take the view that there is a stong public interest in maintaining personal privacy. That public interest is recognised by the inclusion of the exemption provided by clause 3(1). In my view, that public interest may only be displaced by some other stronger public interest that requires the disclosure of private information about another person.

74. With regard to the contact details of officers, I recognise a public interest in members of the public being able to contact agencies and relevant officers. However, I do not consider that public interest always requires that members of the public have the direct work telephone numbers and individual officers' email addresses, given that agencies can be contacted by general telephone numbers and email addresses which are publicly available: *Re Farina* at [31]-[36].

75. In relation to the private individual referred to on page 3; the ID numbers; and the signature on page 7 of Documents 2 and 3, I consider that information ought to be protected from disclosure, in the interests of personal privacy. In my view, there is no stronger public interest that overrides the public interest in privacy in respect of that particular matter. In *Re Ryan and City of Belmont* [2000] WAICmr 42 at [82], the former Information Commissioner observed that a person's signature is unique to that

person who, in the absence of good reason to the contrary, ought to have sole discretion as to its dissemination. I agree with that view. In weighing the competing public interests, I consider that those favouring the non-disclosure of officers' contact details, the person referred to at page 3, the ID numbers and the signature outweigh those favouring disclosure in this case but that the reverse applies in relation to the personal information about Kieran Watmore in Documents 2 and 3. In my view, the public interests in disclosure outweigh those favouring non-disclosure with regard to the personal information of Kieran Watmore.

76. Further, I consider that it is practicable to edit Documents 2 and 3 pursuant to s.24 of the FOI Act to delete the information that I consider to be exempt under clause 3(1).

CONCLUSION

77. I find that neither Documents 2 and 3, nor the disputed matter in those documents, is subject to qualified privilege pursuant to s.124Y(1) of the HI Act. With the exception of the telephone numbers and email address on page 1; the ID numbers in lines 6 and 12 of page 2; the name of the individual in lines 3 and 4 on page 3 and the signature on page 7 of Documents 2 and 3, I find that those documents are not exempt under clause 3(1) of Schedule 1 to the FOI Act and it is practicable to give access to them in edited form with the information that, in my view, is exempt deleted.

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