JEANES AND KRH

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: 94106** **Decision Ref: D00395**

Participants:

Peter Ross Jeanes
Applicant

- and -

Kalgoorlie Regional Hospital
Respondent

- and -

D
First Third Party

- and -

E
Second Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - letter of complaint instigating investigations of a medical practitioner - minutes of meetings of Clinical Appointments Committee - documents tabled - clause 6 - deliberative process of the agency - public interest - provision of high standard of medical services in rural Western Australia - procedures for receipt and investigation of grievances and complaints - clause 3 - protection of privacy of individuals - personal information about third parties.

Freedom of Information Act 1992 (WA) ss. 68(1); 68(2)(a); 69(2); 72(1)(b); 75(1); 102(1); 102(3); Schedule 1 clauses 3(1), 4(3), 6(1), 8(2), 11(1)(a), 11(1)(b); Glossary in Schedule 2.

Re Read and Public Service Commission (Information Commissioner WA, 16 February 1994, unreported).
Re Waterford and Department of Treasury (No. 2) (1984) 5 ALD 588.
Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs (Information Commissioner, QLD, 30 June 1993, unreported).
Re Murtagh and Commissioner of Taxation (1984) 54 ALR 313.

Re Edwards and Ministry of Justice (Information Commissioner WA, 12 December 1994, unreported).

DECISION

The decision of the agency of 15 August 1994 is varied. It is decided that the following documents, which are described in paragraph 11 of this decision, are exempt under clause 6(1) of Schedule 1 to the *Freedom of Information Act 1992*:

- Documents 1, 2, 3, 4 and 6-10 inclusive;

and, further, it is decided that those parts of Documents 5, 11, 12 and 13 listed in paragraph 41 of this decision are exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*, and that the remaining parts of those documents are not exempt.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

7th February 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of Kalgoorlie Regional Hospital ('the agency') to deny Mr Peter Jeanes ('the applicant') access to documents associated with an investigation by the Clinical Appointments Committee ('the CAC') of the agency.

2. The applicant, who is the editor of the *Kalgoorlie Miner*, the Goldfields regional daily newspaper, first applied to the agency under the *Freedom of Information Act 1992* ('the FOI Act') on 30 May 1994 seeking access to documents containing the details of a then current investigation being conducted by the CAC, together with documents pertaining to any previous investigations by the CAC. It appears from information before me that the ambit of this application was reduced by agreement between the agency and the applicant on 8 July 1994 and this was confirmed in writing on 12 July 1994. It was agreed that the access application was limited to the letter of complaint instigating current and past investigations of a certain medical practitioner, together with minutes of meetings of the CAC dealing with those investigations, and all documents tabled at those meetings ('the requested documents').

3. On 15 July 1994, the agency advised the applicant that 13 documents had been identified as being within the ambit of his access application. Further, it was the decision of Mr P J Aylward, General Manager, Northern Goldfields Health Services, to deny access to the requested documents under clauses 3(1), 4(3), 6(1) and 8(2) of Schedule 1 to the FOI Act.

4. On 22 July 1994, the applicant applied to the agency for internal review of the decision to deny him access to the requested documents. On 15 August 1994, a decision on internal review was made by Mr Shane Houston, Director, Central Health Authority, which confirmed the earlier decision to deny the applicant access to the requested documents because the documents were claimed to be exempt under various clauses of the FOI Act. By complaint dated 2 September and lodged on 6 September 1994, the applicant sought external review by the Information Commissioner.

REVIEW BY THE INFORMATION COMMISSIONER

5. On 15 September 1994, pursuant to my obligations under s.68(1) of the FOI Act, I notified the agency that this complaint had been accepted for review. In accordance with my authority under ss.75(1) and 72(1)(b), I required the agency to produce for my inspection the originals of the requested documents together with the file maintained by the agency with respect to this complaint. Those documents were produced to me on 21 September 1994.

6. Although the agency's decision-makers had identified and weighed a number of public interest factors and concluded that, on balance, the public interest did not favour release of the requested documents, the notices of decision provided to the applicant did not contain sufficient information to establish that the documents were, in fact, of the type described in the various clauses for which exemption was claimed, or, where a particular clause required it, that their disclosure could reasonably be expected to have the effects described. Therefore, I sought further and better reasons from the agency for the decision to deny access, including the findings on material questions of fact in relation to all exemptions claimed. These were provided to me on 19 and 20 October 1994.

7. I was also provided with a copy of a document entitled *"Terms of Agreement between the Minister for Health of Western Australia, and the Australian Medical Association (WA Branch) Concerning the Provision of Medical Services by Visiting Medical Practitioners in State Government Non-teaching Hospitals of Western Australia 1992-1995"* ('the agreement'). The agreement sets down the conditions which apply to the provision of visiting medical services in Government non-teaching hospitals such as the agency. It also provides, *inter alia*, for the appointment and role of a Medical Advisory Committee ('the MAC') and the appointment and role of the CAC, and describes procedures for dealing with complaints about medical practitioners.

8. During the course of this review, 15 potential third parties were identified from the contents of the requested documents. On 11 October 1994, the agency notified each of those persons of the substance of the complaint before me, in accordance with its obligations under s.68(2)(a) of the FOI Act. However, that notification should have been made by the agency shortly after it had received my notification of receipt of this complaint on 15 September 1994. The legislative requirement under s.68(2)(a) to notify third parties of a complaint before the Information Commissioner is to provide those parties with an opportunity of being formally joined as third parties to the complaint with all the rights of review that such joinder entails. Subsequently, I received formal requests from two of those third parties to be joined as parties to this complaint and they were joined in accordance with s.69(2) of the FOI Act.

9. Submissions from the applicant and the agency were provided to the third parties and each was given the opportunity of responding and of making his or her own submissions on the exempt status or otherwise of the requested documents. I also received a submission from the Chairman of the CAC dated 18 October 1994.

10. On 19 January 1995, after I had considered the submissions from the various parties and examined the requested documents, all parties to this complaint were provided with my preliminary view and reasons for concluding that the agency's refusal of access to the requested documents appeared justified. The applicant was invited, in light of my preliminary view, to reconsider his request for access to those documents. He was also provided with a final opportunity to make additional submissions if he wished, nonetheless, to pursue his complaint to a

formal decision. The applicant declined to make any further submissions on this matter and pressed me for a formal decision.

THE REQUESTED DOCUMENTS

11. There are 13 requested documents to which access has been denied. The documents and the exemptions claimed by the agency are as follows:

Document	Description	Exemption Clause
1	Letter to Chairman, Medical Advisory Committee from Medical Director, dated 17/2/92, plus 4 attachments	3(1);6(1);8(2); 11(1)(a); 11(1)(b)
2	Minutes of Clinical Appointments Committee meeting dated 11/5/94	As above
3	Statement dated 14/4/94	3(1); 4(3); 8(2)
4	Letter (a), dated 18/4/94	3(1)
5	Letter (b), dated 18/4/94	3(1); 6(1)
6	Letter (c), dated 18/4/94	3(1); 6(1)
7	Letter dated 25/4/94, plus attachments	3(1); 6(1)
8	Letter dated 26/4/94	3(1); 4(3)
9	Letter dated 27/4/94	3(1); 6(1)
10	Statement, undated, received 3/5/94	3(1); 8(2)
11	Letter (a), dated 5/5/94	3(1)
12	Letter (b), dated 5/5/94	3(1); 11(1)(a) & (b) 6(1)
13	Letter dated 9/5/94, plus attachment	3(1); 6(1)

THE EXEMPTIONS

12. Although the agency claimed more than one exemption was applicable to most documents, I propose to consider the claims based on clauses 6(1) and 3(1) as each document is claimed by the agency to be exempt from disclosure under one or other of those two clauses. Clause 6(1) provides:

> ***"6. Deliberative processes***
>
> ***Exemptions***
>
> *(1) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal -*
> *(i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or*
>
> *(ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency;*
>
> *and*
>
> *(b) would, on balance, be contrary to the public interest."*

13. To establish an exemption under clause 6(1), the agency must satisfy both parts (a) and (b) of this exemption. In my decision in *Re Read and Public Service Commission* (16 February 1994, unreported), I accepted the meaning of the phrase *"deliberative processes of...a Minister or agency"* given by the Commonwealth Administrative Appeals Tribunal in *Re Waterford and Department of Treasury (No 2)* (1984) 5 ALD 588 as being correct for Western Australia (see discussion in *Re Read* at paragraphs 14-26). The relevant passages from *Re Waterford* (cited at paragraph 17 in *Re Read*) are as follows:

> *"As a matter of ordinary English the expression 'deliberative processes' appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing on one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. Only to the extent that a document may disclose matter in the nature of or relating to deliberative processes does s.36(1)(a) come into play...*
>
> *It by no means follows, therefore, that every document on a departmental file will fall into this category. Furthermore, however imprecise the dividing line may appear in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of the agency...*
>
> *It is documents containing opinion, advice, recommendations etc. relating to internal processes of deliberation that are potentially shielded from disclosure...Out of that broad class of documents, exemption under s.36*

only attaches to those documents the disclosure of which is 'contrary to the public interest'..."

14. A number of the requested documents were created in accordance with the processes outlined in the agreement for dealing with complaints about medical practitioners. Others were created using the particular powers provided by various clauses of that agreement or were created due to the specific requirements of those clauses. In so far as the agreement sets down the agreed procedures for dealing with complaints about medical practitioners, I am satisfied that the relevant clauses outline a deliberative process of the agency according to the test in *Re Waterford* described in paragraph 13 above. The relevant clauses of the agreement are as follows:

*"3.15 **COMPLAINTS ABOUT MEDICAL PRACTITIONERS***

3.15.1 A complaint shall not be accepted unless it is in writing or circumstances exist such that the complainant is unable to put the complaint in writing. All complaints concerning medical practitioners shall be dealt with in a confidential manner by all persons involved in dealing with the complaint.

3.15.2 Whoever receives a complaint against a medical practitioner will communicate it to the Hospital Management. The Hospital Management will communicate the complaint in writing to the Chairperson of the Medical Advisory Committee and the medical practitioner concerned within a reasonable period of time after receipt by the hospital.

3.15.3 A complaint may arise from concern that there may have been. [sic]

a a breach of professional ethics

b clinical negligence

c a breach of a term of the Agreement

d a medical misadventure which results in harm to a patient

e action inimical to the good order and management of the hospital

3.15.4 A complaint may be lodged by:

a a patient

b patient's relatives or legal guardian

c medical practitioners

d member(s) of Hospital Management acting in their own right or on receipt of written representations by a member of staff or other parties which justify examination.

3.15.5 Complaints relating to an appointed medical practitioner will be treated on a strictly confidential basis by all concerned. Where litigation against the hospital may follow from such a complaint, the hospital reserves the right to communicate all material information to its legal advisers, in which case the medical practitioner shall be immediately informed.

3.15.6 Nothing in this section precludes the resolution of minor complaints between individual medical practitioners and hospital personnel.

3.15.7 Notwithstanding any other course of action, the Hospital Management may effect a resolution satisfactory to the parties, and in such a case no further action will occur.

3.15.8 The procedure for processing a complaint about a medical practitioner will be that upon receipt of a complaint, the Hospital Management will confer with the Chairperson of the Medical Advisory Committee to decide:-

a whether the Medical Advisory Committee will process the complaint in the manner set out in this section, or

b that the matter is serious or there exists a conflict of interest in which case the complaint will be referred to a Senior Departmental Medical Officer who will apply the steps under (c) of this subclause

c The complaint will be processed as follows:

i A complaint report will be raised

ii The complaint will be conveyed to the medical practitioner in writing with copies of documentation pertaining to the complaint as soon as possible

iii The medical practitioner will be invited to respond to the complaint in writing and offered the opportunity to discuss the complaint and all the associated evidence with the Medical Advisory Committee or Senior Departmental Medical Officer undertaking the inquiry

iv The complaint will be considered as soon as reasonably practical, but in any event within four (4) weeks,

v *When the Medical Advisory Committee or Senior Departmental Medical Officer has considered the complaint it will communicate its conclusion and recommendations to the Hospital Management who will write to the medical practitioner with a report of the outcome and actions, if any, it intends to take*

vi *The hospital management may inform the Board of Management and/or the Regional Director of the complaint and its outcome*

vii *Where a resolution is effected which is satisfactory to all parties no further action shall take place. Where a complaint is unresolved and serious it should be dealt with under 3.15.9.*

3.15.9 Procedure for an Unresolved and Serious Complaint

a *All the steps set out in section 3.15.8 - Procedure for processing a Complaint - must be followed*

b *Where the complaint 'is unresolved and has been referred to the Board of Management and/or Regional Director, either may initiate an investigation in the terms detailed in this section.*

c *Where the Board of Management and/or Regional Director has initiated an investigation, an independent investigator will be appointed*

d *The process for the selection and reporting of the investigator will follow that for appeals to the decisions on clinical appointments (Section 2.8).*

e *The investigator will conduct an inquiry and consult with all parties and will write a preliminary report, detailing the different and separate aspects of complaints.*

f *The medical practitioner will be invited to respond to each and every aspect of the independent investigator's inquiries following which the independent investigator shall compile a final report detailing his/her conclusions and recommendations*

g *The investigator's final report will be referred to the medical practitioner for written comment. The investigator's report and the medical practitioner's response, if any, will be referred to the Board of Management and/or the Regional Director.*

h The Board of Management and/or the Regional Director, on receipt of the reports from the above parties, within a reasonable time period, will take appropriate action and will advise the hospital's management and Medical Advisory Committee of its decision.

i An unresolved and/or serious complaint requiring an independent investigator and found to be justified shall form part of the record of clinical practice of a medical practitioner which may be considered when their contract of appointment to the hospital is reviewed, or its terms applied.

3.15.10 Nothing in paragraphs 3.15.1 to 3.15.9 shall prevent a medical practitioner who is the subject of a complaint from acting in accordance with advice he receives from his Medical Defence Body or legal counsel."

15. Document 1 is a letter to the Chairman of the MAC from the agency's Medical Director in relation to certain management matters at the agency. The role of the MAC in such matters is found at part 1.1 in the agreement as follows:

"1.1 ***ROLE OF THE MEDICAL ADVISORY COMMITTEE***

The Committee is responsible to the Board of Management of the Hospital. Its role is to advise the Hospital Board/Hospital Management on matters of medical policy, and specifically:

1.1.1 To act in liaison between the body of appointed medical practitioners and the Board of Management/Hospital Management on matters relating to clinical practice; and

1.1.2 To advise the Board of Management/Hospital Management on clinical matters affecting patient care and on any other matters referred to it for advice, including -

a The co-ordination and integration of medical and other clinical services.

b The appropriate range of services and equipment required.

c The medical workforce needs and the clinical staff establishment of the hospital.

d The utilisation of medical resources within the hospital.

e The quality assurance of medical care.

f The ethical aspects of patient care and medical research.

1.1.3 ...
1.1.4 ...
1.1.5 ...
1.1.6 ...
1.1.7 ...
1.1.8 ..."

16. Document 1 and the attachments to that document contain opinions of the author about certain management issues. From my reading of that document and my understanding of the role and function of the MAC, I am satisfied that Document 1 and its attachments are documents of a type described in clause 6(1)(a).

17. Document 2 is a record of the minutes of a meeting of the CAC. The responsibility of the CAC is to consider, and recommend to the Board of Management or the Regional Director, medical practitioners for appointment to a hospital, and to consider and recommend the scope of the clinical privileges that they may exercise. "Clinical privileges" refers to the areas of medical practice in which a medical practitioner is accredited to practise in relation to hospital patients. The agreement prescribes matters which the CAC must take into account in determining the scope of such privileges and the type of appointment to be made.

18. The agreement also requires the CAC to conduct investigations in certain circumstances. The relevant parts of the agreement are as follows:

"3.16.2 The Clinical Appointments Committee will initiate and investigation on the recommendation of the Board of Management and/or Regional Director. The investigation shall be conducted in the same manner as described under Item 3.15.9 (procedure for unresolved complaints). However, where the investigation of a complaint has already occurred under 3.15.9, the Clinical Appointments Committee may decide that a further investigation is not required and may instead consider the findings of that investigation and make its recommendations pursuant to 3.16.4 and 3.16.5 accordingly.

3.16.3 The investigation report will be referred to :

a Clinical Appointments Committee

b the medical practitioner involved

c the Hospital Management and

d the Board of Management and/or the Regional Director

3.16.4 The Clinical Appointments Committee will recommend an appropriate course of action to the Board of Management and/or Regional Director.

3.16.5 The Clinical Appointments Committee may recommend any of the following outcomes:

a no action to be taken

b counselling
c reprimand

d temporary conditions or restriction on clinical privileges

e amendments to clinical privileges

f probation

g referral for consideration of actions at the time of reappointment application

h suspension for a nominated period

i termination of appointment

3.16.6 The recommendation will be directed to the Regional Director, and Board of Management, through the hospital management for action. The Regional Director or Board of Management will notify the medical practitioner concerned, the Clinical Appointments Committee, the Hospital Management and the Medical Advisory Committee.

3.16.7 At any stage following a complaint or the initiation of an investigation the Board of Management and/or Regional Director after consultation with the Chairperson of the Clinical Appointments Committee has the right to summarily suspend any or all of the privileges of the medical practitioner where the conduct of the medical practitioner is such that there is a risk of a serious breach of the hospital's legal duty of care or serious harm to patients which requires that immediate action be taken."

19. In my view, the CAC is the administrative vehicle through which the deliberative processes of the agency in respect of investigations and inquiries in accordance with clauses 3.16.2 - 3.16.7, as outlined in paragraph 18 above, are conducted. From my examination of Document 2, and taking into account the role and responsibilities of the CAC, I am satisfied that Document 2 contains opinions and recommendations recorded in the course of the deliberative processes of the agency. That is, Document 2 is of a type described in clause 6(1)(a) of Schedule 1 to the FOI Act. It is my understanding that Documents 3-13 inclusive were

tabled at the meeting of the CAC referred to in Document 2. I am also satisfied from reading those documents that some, but not all of them, are deliberative process documents that meet the requirements of clause 6(1)(a), in that their disclosure would reveal opinion obtained in the course of, or for the purpose of, the deliberative processes of an agency. In my view, Documents 3, 4, 6, 7, 8, 9 and 10 satisfy the requirements of sub-clause 6(1)(a). That is, their disclosure would reveal opinion, advice or recommendations that were obtained, prepared or recorded for the purpose of the deliberative processes of the agency.

20. In my view, Documents 5, 11, 12 and 13 are administrative documents resulting from meetings of the MAC and the CAC. In my opinion, none of those documents satisfies the test for a deliberative process document described in *Re Waterford* at paragraph 13 above. In fact, in my opinion, they are the type of documents which in *Re Waterford* were specifically excluded from the ambit of this exemption clause. I find, therefore, that Documents 5, 11, 12 and 13 are not exempt under clause 6(1). However, the agency has claimed those documents are exempt from disclosure under other clauses of Schedule 1 to the FOI Act. Those claims are discussed at paragraphs 35-42 below.

21. As I have found that they meet the requirements of sub-clause 6(1)(a), the exempt status or otherwise of the Documents 1, 2, 3, 4, and 6-10, must be determined by a consideration of the requirements of part (b) of clause 6(1). That is, those documents will be exempt under clause 6(1) if it would, on balance, be contrary to the public interest to disclose them. The onus of persuading me that this is the case lies on the agency by virtue of s.102(1) of the FOI Act.

The party's submissions

22. In a submission dated 19 October 1994, the agency expanded upon its claims for exemption under various clauses of Schedule 1 to the FOI Act. In relation to its claims for exemption based on clause 6(1) the agency said:

> *"The deliberative processes of the agency when dealing with a matter such as this are detailed in 3.15.8, 3.15.9 and 3.15.10 of the "Terms of Agreement Concerning the Provision of Visiting Medical Services in State Government Non-Teaching Hospitals of Western Australia 1992-1995".*
>
> *We believe that release of these documents would, on balance, be contrary to the public interest as it is intrinsic to the ability of any hospital in the State to provide a safe medical service to the community. This safe medical service is upheld by the processes of the agency in dealing with complaints/concerns regarding practitioners and the ability for them to be reviewed by their peers.*
>
> *Most of concern is the Medical Advisory Committee and the Clinical Appointments Committee, whose members are entirely voluntary. If practitioners were aware that information could be released, it is reasonable to expect that they would not participate in such peer reviews. If they did participate, their considerations would be limited in that they*

would be wary as to what information was provided, etc, due to the possibility of information being accessed by someone outside of the agency.

The provision of such information to the deliberative process of the agency is voluntary, as is the participation of practitioners on the Committee that conducts peer review. If we did force peer review and the provision of information, this would be an ineffective exercise, in that the review itself would be distorted by lack of information, and possibly participation.

The deliberative process of the agency basically hinges on the assurance of confidentiality. It is essential that the agency, and indeed other hospitals in the State, be able to conduct a confidential review of practitioners if concerns are raised, as it ultimately reflects on the provision of a safe medical service.

We also consider that, in law, we have a contractual obligation to maintain the confidentiality of the investigation and its processes under [the agreement]. *Release of this information would impair the effectiveness of the conduct of an investigation into medical competency of any practitioner.*

We also consider the issue of maintaining quality control an important argument for the non-release of these documents. It is essential that we have practitioners participation in any Quality Assurance activities conducted, in order to ensure the provision of safe practices within the hospital. There is currently no legislation protecting Quality Assurance activities, unlike in other States, and release of this information would reasonably be expected to dissuade practitioners from participating in any quality control activities, and providing details of their treatment, due to the belief that this information could be released to someone outside the agency..."

23. I recognise a public interest in the provision of a high standard of medical services in rural Western Australia, as well as elsewhere. Given that it has been widely publicised that there is a difficulty in attracting suitably qualified medical practitioners to certain rural areas in this State, I also recognise a public interest in the establishment of procedures to enable private medical practitioners to treat public and private patients at public hospitals and in the efficiencies of such practices.

24. I also recognise a public interest in State and local government agencies establishing procedures for the receipt and investigation of grievances and complaints, whether from employees or the public, about the behaviour of staff members or management practices in general, and in the maintenance of a system that enhances the accountability of agencies in that regard.

25. Where such a system exists, the exemption in clause 6(1) of the FOI Act is, in my view, designed to protect the integrity of that system. In my opinion, integrity is preserved when the deliberative processes employed by an agency are of a nature and type that facilitates the presentation of all relevant information to the decision-makers, ensures adherence to the principles of natural justice and, following a decision, enables those people affected by that decision to be informed of the decision and the reasons for the decision. It is also my view that the accountability to the public at large of an agency that operates a closed system will be enhanced if procedures are in place that also inform and educate the public about the decision-making processes of that agency.

26. The applicant claimed that, as the only daily newspaper in the region, the paper had a responsibility to ensure that the only public hospital in that region was publicly accountable. In this regard, it was the submission of the applicant that complaint procedures and investigations should not be kept secret because the public could not have confidence in a system that operated in secrecy. Further, it was his contention that a quality assurance system needed to be accountable to the public and to patients, not merely to doctors and nurses, and that such assurance would not be present if the public were kept in the dark about decisions that were made.

27. The agency claimed that confidentiality of information, including the identity of committee members, was necessary in order for the peer review process to work effectively when such a review concerned a member of the medical staff or a visiting practitioner with clinical privileges. I accept that such a review necessarily involves the various committee members bringing their combined professional expertise to bear on the issue and making a collective assessment about the appropriateness, in a medical and ethical sense, of the actions of a colleague in circumstances where subjective judgements are necessary and desirable.

28. In circumstances in which the availability of medical practitioners is limited, and the deliberative process depends on volunteers accepting the responsibility of sitting in judgement on a colleague, I accept the claim that the effectiveness of any system operating under those conditions is likely to be compromised if there is no assurance of confidentiality. In my view, the integrity of such a system requires proceedings to occur in relative secrecy so that each participant can be accorded the same level of anonymity in order to preserve the on-going working relationships within the agency as a whole.

29. However, I reject any suggestion that professional people, whether medical practitioners, nurses or other clinical staff, will not be as candid and frank as they otherwise might be, without the assurance of confidentiality. The "candour and frankness" argument has been frequently raised in other jurisdictions to deny access to documents. It has been constantly rejected by the Commonwealth Administrative Appeals Tribunal as being without foundation and it was also rejected by the Queensland Information Commissioner in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (30 June

1993, unreported). In *Re Murtagh and Commissioner of Taxation*(1984) 54 ALR 313 at 326, the Commonwealth Administrative Appeals Tribunal said:

> *"The candour and frankness argument is not new. It achieved pre-eminence at one time but now has been largely limited to high level decision-making and to policy-making...No cogent evidence has been given to this Tribunal either in this review or, so far as we are aware, in any other, that the enactment of the FOI Act 1982 has led to an inappropriate lack of candour between officers of a department or to a deterioration in the quality of the work performed by officers. Indeed, the presently perceived view is that the new administrative law, of which the FOI Act 1982 forms a part, has led to an improvement in primary decision-making."*

30. No evidence has been provided in this instance to support the assertion and, in the absence of such evidence, I also reject the "candour and frankness" argument. I accept that there is a need for the internal processes of peer review to proceed unhindered and that maintaining confidentiality of participants and the evidence presented assists to make this process effective. However, I also recognise a need for some checks and balances in a closed system in which investigations are undertaken internally by members of the same organisation or professional group, to ensure the rights of all parties and to address requirements of accountability that go beyond mere organisational needs. In my view, the accountability requirements of the present system are defective in three areas.

31. Firstly, the agreement allows complaints to be made by a patient, a patient's relatives or legal guardian, medical practitioners or hospital management. Whilst there are procedures to advise a medical practitioner under review of the results of that review, the agreement is silent on the means of advising complainants of the results of the review, even when the complainant is a patient or a patient's relative or legal guardian.

32. Secondly, medical practitioners under review have rights of "appeal" if they are dissatisfied with the findings of the CAC. However, there are no corresponding rights of "appeal" for patients or other complainants who may be dissatisfied with the results of investigations by the agency into their complaints.

33. Thirdly, there is no public reporting requirement in the agreement. In my view, the system of accountability would be enhanced if the agreement contained a requirement to report, in general terms only, matters such as the number and frequency of meetings of the CAC, the type of matters subject to reviews and the outcomes, without necessarily identifying the particular individuals concerned.

34. In spite of these deficiencies in accountability, in weighing up the public interest factors for and against disclosure, I am of the view that the disclosure of Documents 1, 2, 3, 4, and 6-10 will not assist to make the agency more accountable in this instance which does not directly involve members of the public as complainants. In this instance, I am of the view that disclosure would have the potential to mislead because the reasons for the ultimate decision will not be

apparent from the documents and because a final decision on the recommendations of the CAC has not yet been made by the agency. Disclosure of documents which do not fairly reflect the process of reasoning of an agency, in my view, has a potential for creating harm through ill-informed speculation, conjecture and rumour. In my view, it would be contrary to the public interest to disclose documents the disclosure of which would prejudice the integrity of a system of quality assurance. I consider that disclosure of Documents 1, 2, 3, 4, and 6-10 would prejudice the integrity of the existing system and, accordingly, I find that they are exempt under clause 6(1) of Schedule 1 to the FOI Act.

Clause 3 - Personal Information

35. The agency also claimed that Documents 5, 11, 12 and 13 were exempt under clause 3(1). Clause 3(1) provides:

> *"**3. Personal information***
>
> ***Exemption***
>
> *(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*
>
> ***Limits on exemption***
>
> *(2)...*
> *(3)...*
> *(4)...*
> *(5)...*
>
> *(6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."*

36. In the Glossary in Schedule 2 to the FOI Act, "**personal information**" is defined to mean: *"...information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead -*

> *(a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or*
>
> *(b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample."*

37. As I have said in previous decisions, and most recently in *Re Edwards and Ministry of Justice* (12 December 1994, unreported), in my view, this exemption is designed to protect the privacy of individuals. The protection of personal privacy is an important feature of the legislation in Western Australia and I consider there to be a strong public interest in maintaining that privacy, subject

only to some clearly demonstrated countervailing public interest that requires the disclosure of such information.

38. From my examination of Documents 5, 11, 12 and 13 I find that those documents contain matter that is, *prima facie*, personal information about third parties. That information consists of a name and address and it identifies a particular medical practitioner who was subject to peer review. The onus of persuading me that it would, on balance, be in the public interest to disclose that information lies on the applicant by virtue of s.102(3).

39. The applicant informed me that he was not seeking disclosure of the names of patients or complainants. However, he was attempting to find out if a certain medical practitioner had been suspended and, if so, why this had occurred.

40. Freedom of Information legislation is intended to open the processes of decision making by government and its agencies to public scrutiny and thereby to promote greater understanding, accountability and public participation in the processes of government. However, FOI is not intended to open the private and professional lives of its citizens to public scrutiny in circumstances where there is no demonstrable public benefit.

41. In my view, this is a case in which the public interest in maintaining the privacy of an individual outweighs any other public interest in the disclosure of personal information about that person. I have reached that conclusion after considering how the processes of government decision-making would be enhanced by disclosure of this information and I have concluded that there would be no demonstrable public benefit sufficient to tilt the scales in favour of disclosure. I find that the following information in Documents 5, 11, 12 and 13 is matter that is exempt under clause 3(1) of Schedule 1 to the FOI Act:

Document 5

* the title and name and address of the recipient and the name in the salutation; and
* all the words after the word "raised" in the first paragraph only.

Document 11

***** the title and name (in both places where it appears) and address of the recipient of the letter;
* all of the text of the letter except the first nine words of the first line; and
* the author's signature.

Document 12

***** the title and name (in both places where it appears) and address of the recipient of the letter;
* all the words in the first paragraph after the word "by" in the second line; and
* the author's signature.

Document 13

***** the name and title (in both places where they appear) of the recipient of the letter;
* the initial and name appearing as the subject of the letter, immediately above the text of the letter;
* all the words in the first paragraph after the word "by" in the second line;
* the title and name of the chairperson of the CAC (in both places where it appears);
* the first word of the third line of the second paragraph; and
* the author's signature.

Attachment to Document 13

***** the title and name (in both places where they appear) and the address of the chairperson of the CAC;
* the title, initial and name appearing under the salutation and immediately before the text of the letter;
* all the words of paragraph 1 appearing after the words "raised by" in line 2;
* the author's signature; and
* the title and name appearing after the abbreviation "cc" in the lower, left-hand corner.

42. Accordingly, I find that the balance of the matter contained in documents 5, 11, 12 and 13 is not exempt under clause 3(1). However, exemption was also claimed for document 12 under clause 11(1)(a) and (b). I must, therefore, consider whether those parts of document 12 which I have found are not exempt under clause 3(1) are, in any event, exempt under either of clause 11(1)(a) or 11(1)(b). The relevant parts of clause 11 provide as follows:

> *"(1) Matter is exempt matter if its disclosure could reasonably be expected to -*
>
> *(a) impair the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency;*
>
> *(b) prevent the objects of any test, examination or audit conducted by an agency from being attained;*
>
> *(c) ..*
>
> *(d) ...*
>
> ***Limit on exemptions***
>
> *(2) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."*

43. The agency claimed, in respect of document 12, that *"[d]isclosure would impact significantly on the willingness of* [complainants] *to volunteer sensitive information that is relevant to the auditing of activities of medical officers."* The agency claimed that release of the documents would *"...significantly diminish the ability of the Clinical Appointments Committee to conduct investigations."* It was claimed that the likelihood of the reporting or documenting of concerns would be reduced and that there would be a direct impact on the ability of the agency to recruit qualified practitioners to serve on the MAC. This, it was claimed, would impair the effectiveness of *"...the important role that the Committee undertakes."*

44. The agency identified the public interest factors it considered both for and against disclosure of the document and explained why, on balance, it had concluded that the public interest would *"...be better served by not releasing the documentation and maintaining the ability of the hospital to maintain an effective quality assurance system."*

45. I have found in a previous decision (*Re Hassell and Health Department of Western Australia*, 13 December 1994, unreported), that the term "audit" is defined in the Concise Oxford Dictionary as *"an official examination of accounts"*. As indicated in that decision, whilst I am prepared to accept that in common usage the term "audit" is understood to have a wider meaning, I do not accept that it encompasses the process of investigations undertaken by the CAC into complaints against medical practitioners.

46. Accordingly, the documents do not, in my view, relate to the conduct of tests, examinations or audits by the agency and cannot, therefore, attract the exemptions provided by clause 11(1)(a) and clause 11(1)(b). In my view, their disclosure could not reasonably be expected to impair the effectiveness or prevent the objects of any of those processes from being obtained. I find that those parts of document 12 which I have found to be not exempt under clause 3(1), are also not exempt under clause 11(1)(a) or (b).

47. In the course of dealing with this complaint, one of the third parties informed me that there was no objection to personal information concerning a member of the third party's family being released to the applicant. I have considered that advice which relates to a document that I have found to be exempt under clause 6(1). In my view, the personal information in that document is interwoven with advice and opinion recorded as part of the deliberative processes of the agency. Notwithstanding that the third party does not object to its release, and the personal information in the document is, therefore, not exempt under clause 3(1), I am of the view that that document is exempt under clause 6(1) for the reasons given in paragraphs 23-34 above.

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