OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2011006 Decision Ref: D0082012

Participants:

'M'
Complainant

- and -

WA Country Health Service – South West
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – medical records – section 28 – access to documents containing information of a medical or psychiatric nature – clause 5(1)(e) – public safety – whether disclosure could reasonably be expected to endanger the life or physical safety of any person – clause 3(1) – personal information about third parties – clause 3(2) – personal information about applicant – clause 3(6) – whether disclosure would, on balance, be in the public interest.

Freedom of Information Act 1992: sections 21, 28, 74, 76(1) and 102(3); Schedule 1, clauses 3(1), 3(2), 3(6), 5(1)(e) and 5(4); Schedule 2, Glossary.

Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550
Attorney General's Department & Australian Iron and Steel Pty Ltd v Cockcroft (1986) 10 FCR 180
Apache Northwest Pty Ltd v Department of Mines and Petroleum & Anor [2011] WASC 283
Re Mossenson and Others and Kimberley Development Commission [2006] WAICmr 3
DPP v Smith [1991] 1 VR 63
McKinnon v Secretary, Department of Treasury (2005) 145 FCR 70
Re Read and Public Service Commission [1994] WAICmr 1
Re Edwards and Ministry of Justice [1994] WAICmr 24
Re West Australian Newspapers Limited and Department of the Premier and Cabinet [2006] WAICmr 23

DECISION

The agency's decision to give the complainant access to his medical records in accordance with section 28 of the FOI Act is set aside.

In substitution, I find that the Category 1 matter in the medical records is exempt under clause 5(1)(e) of Schedule 1 to the FOI Act and that the Category 2 matter in the medical records is exempt under clause 3(1) of Schedule 1 to the FOI Act.

Sven Bluemmel
INFORMATION COMMISSIONER

14 March 2012

REASONS FOR DECISION

1. This complaint arises from a decision made by the WA Country Health Service – South West ('the agency') to give 'M' ('the complainant') access to documents in the manner referred to in section 28 of the *Freedom of Information Act 1992* ('the FOI Act'). In this case, I have exercised my discretion to identify the complainant only as 'M'.

BACKGROUND

2. On 20 August 2010, the complainant applied to the agency under the FOI Act for access to a copy of his medical records, including his mental health records, from the start of November 2003.

3. The complainant paid the $30.00 application fee payable under the FOI Act for non-personal information.

4. By notice of decision dated 19 October 2010, the agency's A/Regional Manager, South West Mental Health Service, advised the complainant that the agency had decided to give him access to his medical case notes in the manner referred to in s.28 of the FOI Act, which provides – in certain specified circumstances – for documents requested by an access applicant to be given to a medical practitioner nominated by the applicant.

5. On 26 October 2010, the complainant wrote to the agency maintaining his request for his medical records to be provided to him directly. The agency did not initially treat that letter as a request for internal review. Instead, on 3 December 2010, the A/Regional Director of the agency wrote to the complainant advising him that it was prepared to grant an extension of time for him to nominate a psychiatrist in order for his medical records to be released to him through that psychiatrist, in accordance with s.28 of the FOI Act.

6. On 9 December 2010, the complainant wrote to the agency's A/Regional Director reiterating his request for direct access to his medical records. Subsequently, by written notice to the complainant dated 15 December 2010, the agency confirmed its original decision.

7. Thereafter, on 1 January 2011, the complainant applied to me for external review of the agency's decision to give access to his medical records by way of s.28 of the FOI Act.

REVIEW BY THE INFORMATION COMMISSIONER

8. Following my receipt of the complaint, the agency produced to me the original of the agency's FOI file maintained in respect of the access application and the complainant's medical records, including his mental health records, for the relevant period held by the agency.

9. In producing those documents, the agency advised me that it had included *"a copy showing deletion of exempt matter under Schedule 1, Clause 3(1) of the*

Freedom of Information Act 1992." The agency was, in fact, proposing to give access to the medical records in an edited form under s.28 of the FOI Act – a matter that was not referred to in the agency's notice of decision.

10. Having examined that material, my Legal Officer sought further information from the agency in relation to its decision. However, the agency did not provide the additional information requested.

11. On 5 December 2011, after considering the material then before me, I informed both parties in writing of my preliminary view of the complaint and my reasons. My preliminary view was that the agency's decision to give the complainant access to his medical records in accordance with s.28 of the FOI Act was not justified, as there was insufficient material before me to establish that the principal officer of the agency held the opinion that direct disclosure of those records to the complainant may have a substantial adverse effect on his physical or mental health.

12. In light of my preliminary view, I invited the agency to give the complainant direct access to his medical records or, alternatively, to provide me with written submissions in support of its position. In particular, I sought further submissions to establish the requirements of s.28 and/or to establish that the information that the agency proposed to delete from the medical records is exempt under one of the exemption clauses in Schedule 1 to the FOI Act.

13. The agency sought, and was granted, an extension of time in which to make submissions. By email dated 23 December 2011, the agency accepted my preliminary view but provided a further opinion from a qualified psychiatrist in support of its claim that certain information in the medical records is exempt under clause 5(1)(e) of Schedule 1 to the FOI Act.

14. Having considered the agency's additional submissions, on 19 January 2012, I informed the parties in writing of my supplementary preliminary view of this matter. My supplementary preliminary view was that the names and other identifying information about officers or former officers of the agency and other government agencies were exempt under clause 5(1)(e) of Schedule 1 to the FOI Act and that personal information about third parties who are not officers or former officers of an agency in the medical records were exempt under clause 3(1).

15. On 1 February 2012, the agency accepted my supplementary preliminary view and, on 8 February 2012, gave the complainant a copy of his medical records, edited in accordance with my supplementary preliminary view. However, the complainant did not withdraw his complaint and sought an extension of time to make submissions. The complainant's further submissions dated 22 February 2012 were received at this office on 24 February 2012.

16. In providing my reasons for this decision, it is necessary that I describe certain matters in general terms only in order to avoid breaching my obligation under s.74(2) of the FOI Act not to reveal exempt matter.

17. Section 74(1) of the FOI Act requires the Information Commissioner to ensure that exempt matter is not disclosed during the course of dealing with a complaint and s.74(2) places a further obligation on the Commissioner not to include exempt matter in a decision on a complaint or in reasons given for a decision. The Supreme Court in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at 556-557 recognised the difficulties faced by complainants and the constraints placed on the Commissioner by such provisions in the FOI Act but took the view that those provisions should be construed strictly according to their tenor.

THE DISPUTED MATTER

18. The complainant's medical records held by the agency are contained in two volumes labelled by the file reference number 'K0750627'. One volume consists of the complainant's medical records from Bunbury Hospital from 2003-2006; the other consists of his South West Community Mental Health records from 2002-2010.

19. The disputed matter is the information which the agency has deleted from the medical records given to the complainant. The disputed matter consists of:

- names and other identifying information about officers or former officers of the agency and other government agencies, deleted under clause 5(1)(e) of Schedule 1 to the FOI Act ('Category 1 matter'); and

- personal information about private individuals who are not officers or former officers of an agency, deleted under clause 3(1) of Schedule 1 to the FOI Act ('Category 2 matter').

CLAUSE 5(1)(e) – ENDANGER LIFE OR PHYSICAL SAFETY

20. The agency claims that all of the Category 1 matter is exempt under clause 5(1)(e) of Schedule 1 to the FOI Act.

21. Clause 5, insofar as it is relevant, provides as follows:

> "***5. Law enforcement, public safety and property security***
>
> *(1) Matter is exempt matter if its disclosure could reasonably be expected to —*
>
> *(a) …*
>
> *(e) endanger the life or physical safety of any person;*
>
> *(h) …*
>
> *(4) Matter is not exempt matter under subclause (1) or (2) if —*
>
> *(a) it consists merely of one or more of the following —*
>
> *(i) information revealing that the scope of a law enforcement investigation has exceeded the limits imposed by the law;*

(ii) a general outline of the structure of a programme adopted by an agency for dealing with any contravention or possible contravention of the law; or

(iii) a report on the degree of success achieved in any programme adopted by an agency for dealing with any contravention or possible contravention of the law;

and

(b) its disclosure would, on balance, be in the public interest."

22. Matter will be exempt under clause 5(1)(e) if its disclosure "*could reasonably be expected to*" cause the harm described in that exemption clause. The phrase 'could reasonably be expected to' appears in a number of the exemption clauses set out in Schedule 1 to the FOI Act and in like provisions in FOI legislation of the Commonwealth and other States.

23. The leading authority on the meaning of this phrase is the decision of the Full Federal Court in *Attorney General's Department & Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180. That case held, at page 190, that those words were intended to receive their ordinary meaning. That is, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous to expect the relevant outcome. In that decision, the Court held that the words 'could reasonably be expected to' did not require a case to be established on the balance of probabilities and to do so would *"place an unwarranted gloss upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based."*

24. In *Apache Northwest Pty Ltd v Department of Mines and Petroleum & Anor* [2011] WASC 283, Edelman J of the Supreme Court of Western Australia reaffirmed the approach taken in *Cockcroft* and said, at [42], that the term 'could reasonably be expected to' should have its plain meaning.

The complainant's submissions

25. In his letter dated 22 February 2012 in response to my supplementary preliminary view, the complainant made the following submissions with respect to the disclosure of the Category 1 matter:

- He requires the names of the doctors, psychiatrists and police that are deleted from his medical records to verify incorrect and false statements made about him while he was at Bunbury Regional Hospital and the adjacent psychiatric compound.

- He was not a threat to the psychiatrists at the agency when he was involuntarily detained by the agency on 4 November 2003 for a period of

16 days. He notes that in eight of those 16 days he was not seen by the psychiatrist.

- He was not violent to the doctors, psychiatrists, nurses or security guards at the agency and their claims of fear of him endangering their welfare, should their names be released, is "*unfounded speculation"*.

- "[The] *names* [of officers of the agency] *should be made transparent so they and the system can be answerable for their unjust actions... it* [is] *the* [d]*octors and* [n]*urses who could be regarded as very dangerous to me"*.

The agency's submissions

26. The agency provided me with a psychiatrist's opinion dated 23 December 2011 and submits, in brief, that:

    - it was (and is) concerned about the complainant's behaviour and mental health;
    - it has documented evidence of the complainant's psychiatric history and history of violence;
    - it has documented evidence of the complainant's aggressive behaviour towards family and staff of the agency, which resulted on at least two recent occasions in contact with the police;
    - disclosure of the Category 1 matter could reasonably be expected to endanger the physical safety of others; and
    - it has a duty as an employer under s.19 of the *Occupational Safety and Health Act 1984*, to *"provide and maintain a working environment in which the employees of the employer… are not exposed to hazards"*.

27. The agency gave me information to illustrate that the disclosure of the Category 1 matter could reasonably be expected to endanger the physical safety of officers of an agency.

Consideration

28. I have considered all of the information before me, including the complainant's submissions and material provided by the agency.

29. The complainant submits that he is not a threat to officers of the agency or other government agencies and therefore clause 5(1)(e) does not apply to the Category 1 matter. However, there is sufficient information before me to satisfy me that certain individuals have fears for their safety if the Category 1 matter is disclosed to the complainant and, in my view, those fears are reasonably based. The material before me evidences threats to the safety of individuals who have been involved with the complainant at the agency. There is also information on the agency's file and in the complainant's medical records which supports the psychiatrist's opinion which was given to me.

30. I accept that the agency has a responsibility for maintaining a safe working environment and that responsibility includes the safety of its employees. As

noted, because of the obligations placed on me by s.74 of the FOI Act, I am prevented from providing detailed information in relation to those matters in order to avoid the disclosure of exempt matter.

31. From my examination of the complainant's medical records, and taking all of the material before me into account, I am satisfied that disclosure of the Category 1 matter to the complainant could reasonably be expected to endanger the physical safety of those individuals and I find that matter to be exempt under clause 5(1)(e) of Schedule 1 to the FOI Act.

32. The complainant identified a number of public interest factors which he claims support disclosure of the Category 1 matter. In particular, he submits that he requires the identity of officers who treated him at the agency so that those officers can be made accountable for their actions and to enhance transparency in the health system. However, as I consider that the Category 1 matter is exempt under clause 5(1)(e), the public interest in the disclosure of that matter does not arise unless one of the limitations in clause 5(4)(a) applies. I am satisfied that none of the limitations in clause 5(4)(a) applies to the Category 1 matter in this case and, accordingly, it is not open to me to consider whether disclosure would, on balance, be in the public interest.

33. As I consider that the Category 1 matter is exempt under clause 5(1)(e), it is therefore not necessary for me to consider whether the exemption in clause 3 also applies to that matter.

CLAUSE 3(1) – PERSONAL INFORMATION

34. Section 76(1) of the FOI Act provides that, in dealing with a complaint under the FOI Act, I have the power to decide any matter in relation to the complainant's access application that could, under the FOI Act, have been decided by the agency.

35. In this case, I note that the medical records also contain personal information about private individuals who are not officers or former officers of an agency ('Category 2 matter'). Although the agency did not claim an exemption for the Category 2 matter, I have considered whether that information is exempt under clause 3(1) of Schedule 1 to the FOI Act.

36. Clause 3, insofar as it is relevant provides:

> ***"3. Personal information***
>
> *(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*
>
> *(2) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.*
>
> *(3) ...*

> *(4) ...*
>
> *(5) ...*
>
> *(6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."*

37. In the Glossary to the FOI Act, personal information is defined as follows:

> *"**'personal information'** means 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".*

38. The definition of 'personal information' in the Glossary to the FOI Act 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 under clause 3(1). In other words, 'personal information' can be information that identifies an applicant or other individuals.

39. In my view, the purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies.

Consideration

40. Having examined the Category 2 matter, I consider that it consists of 'personal information', as defined in the FOI Act, about individuals because it is information or opinion that identifies those individuals, being names and other identifying information about persons other than officers or former officers of an agency. In my view, all of that information is *prima facie* exempt under clause 3(1) of Schedule 1 to the FOI Act.

41. The exemption in clause 3(1) is, however, subject to a number of limitations that are set out in clauses 3(2) - 3(6). In the present case, I consider that clauses 3(2) and 3(6) are relevant.

Clause 3(2) – personal information about the applicant

42. Clause 3(2) provides that matter is not exempt under clause 3(1) merely because its disclosure would reveal personal information about the applicant (in this case, the complainant). In my view, the use of the term 'merely' in clause 3(2), means – according to its ordinary dictionary meaning – 'solely' or 'no more than' personal information about the applicant: *Re Mossenson and Others and Kimberley Development Commission* [2006] WAICmr 3 at [23].

43. A small amount of the Category 2 matter consists of opinions provided by private individuals concerning the complainant. In my view, that information is not 'merely' about the complainant but is inextricably intertwined with personal information about other individuals whose identities can be ascertained from those opinions. Accordingly, disclosure of those opinions in the Category 2 matter would do more than 'merely' reveal personal information about the complainant and it is not possible for the agency to give access to that information without also disclosing personal information about other individuals. Accordingly, I consider that the limit on exemption in clause 3(2) does not apply in this instance.

Clause 3(6) – the public interest

44. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Section 102(3) of the FOI Act provides that the onus is on the access applicant – in this case, the complainant – to establish that disclosure of the Category 2 matter would, on balance, be in the public interest. The complainant has made a number of submissions to me with respect to the public interest.

45. The term 'public interest' is not defined in the FOI Act. In my view, it is best described in the decision by the Supreme Court of Victoria in *DPP v Smith* [1991] 1 VR 63, at page 75, where the Court said:

> *"The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals ... There are ... several and different features and facets of interest which form the public interest. On the other hand, in the daily affairs of the community, events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest per se is not a facet of the public interest."*

46. I understand that the complainant has a personal interest in the disclosure of the Category 2 matter to him as it is information contained in his medical records. However, as noted above, the public interest is a matter in which the public at large has an interest as distinct from the interests of a particular individual or individuals: see also *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70; *Re Read and Public Service Commission* [1994] WAICmr 1.

47. 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.

48. In identifying the public interests favouring disclosure, I recognise a public interest in individuals being able to exercise their rights of access under the FOI

Act (subject to the exemptions) and in their being able to access their own personal information which is held by a government agency. That latter public interest is acknowledged in section 21 of the FOI Act, which provides:

> *"If the applicant has requested access to a document containing personal information about the applicant, the fact that matter is personal information about the applicant must be considered as a factor in favour of disclosure for the purpose of making a decision as to -*
>
> *(a) whether it is in the public interest for the matter to be disclosed".*

49. Accordingly, I have considered that as a factor in favour of disclosure in this case. However, that consideration carries less weight because most of the Category 2 matter does not contain any personal information about the complainant.

50. In favour of disclosure, I also recognise a public interest in patients being given as much information as is reasonably possible to help them understand the actions taken by the agency concerning them. In this case, I note that the agency has given the complainant access to a large amount of personal information about him contained in his medical records. In my view, to a large extent, that public interest has been satisfied by the provision to the complainant of edited copies of his medical records, which fully informs the complainant of the treatment and management he received.

51. Weighing against disclosure, I consider that the public interest in protecting the privacy of individuals is very strong and may only be displaced by some other stronger and more persuasive public interest that requires the disclosure of personal information about one person to another: *Re Edwards and Ministry of Justice* [1994] WAICmr 24 at [15]; *Re West Australian Newspapers Limited and Department of the Premier and Cabinet* [2006] WAICmr 23 at [52]-[53].

52. In addition, I also consider that there is a public interest in the agency maintaining its ability to obtain information about patients or potential patients in order to discharge their responsibilities in respect of such individuals. In this case, none of the third parties referred to in the Category 2 matter has consented to the disclosure of their personal information to the complainant and such disclosure without consent could jeopardise the agency's ability in the future to obtain relevant information.

53. In balancing the competing public interests, I am of the view that the public interest in maintaining the privacy of third parties and the ability of the agency to carry out its functions in respect of mental health on behalf of the wider community outweighs the public interests in favour of disclosure on this occasion.

54. Consequently, I am not persuaded that disclosure of the Category 2 matter would, on balance, be in the public interest and I do not consider that the limit on the exemption in clause 3(6) applies. Accordingly, I find that all of the Category 2 matter is exempt under clause 3(1) of Schedule 1 to the FOI Act.

CONCLUSION

55. For the reasons given above, the agency's decision to give the complainant access to his medical records in accordance with section 28 of the FOI Act is set aside. In substitution, I find that the Category 1 matter in the medical records is exempt under clause 5(1)(e) of Schedule 1 to the FOI Act and that the Category 2 matter in the medical records is exempt under clause 3(1) of Schedule 1 to the FOI Act.

****