OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 02/2001
Application S 223/00

Participants:

EDWARD RICHARD LOVELOCK
Applicant

QUEENSLAND HEALTH
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - medical records of a person other than the applicant - that person gave evidence during the trial at which the applicant was convicted of murder - applicant contends that access to the witness's medical records will assist the applicant to challenge his conviction - information does not concern the applicant's personal affairs - whether disclosure would, on balance, be in the public interest - application of s.44(1) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.44(1)
Criminal Code Qld s.672A

Fotheringham and Queensland Health, Re (1995) 2 QAR 799
McPhedran and Minister for Health, Re (Australian Capital Territory Administrative Appeals Tribunal, Professor L J Curtis (President) and Mr N J Attwood (Member), No. C92/103, 2 June 1994, unreported)
R v Lovelock [1999] QCA 501, 3 December 1999
Stewart and Department of Transport, Re (1993) 1 QAR 227
Summers and Cairns District Health Service, Re (1997) 3 QAR 479

DECISION

I affirm the decision under review (being the decision of Mr A G Hayes made on 15 September 2000 on behalf of Queensland Health) that the matter in issue is exempt from disclosure to the applicant under s.44(1) of the *Freedom of Information Act 1992* Qld.

Date of decision: 12 February 2001

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F N ALBIETZ
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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse him access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to medical records of a witness who gave evidence at the trial at which the applicant was convicted of murder. The applicant has unsuccessfully appealed his conviction to the Queensland Court of Appeal, and is currently seeking special leave to appeal to the High Court of Australia in relation to the conviction. In that application for special leave to appeal, the applicant contends that the trial judge erred in failing to direct the jury concerning the effect of a "bi-polar mood disorder" on the credibility of the evidence of a particular witness. In his FOI access application, the applicant has sought access to any medical records of that witness concerning mental disorders, and medication prescribed. Queensland Health contends that any such documents qualify for exemption under s.44(1) of the FOI Act.

2. The applicant initially sought access to documents, of the type described above, that were held by the West Moreton District Health Service, but later extended the scope of his access application to cover any such documents held by a number of other health service facilities in south east Queensland. By letter dated 14 August 2000, Ms S Heal of Queensland Health informed the applicant of her decision that any documents of the type sought would be exempt under s.44(1) of the FOI Act. In doing so, Ms Heal referred to the strength of the public interest in maintaining the privacy of an individual's medical records. She also referred to a number of passages from the Queensland Court of Appeal decision in the applicant's case, as indicative of the strength of the Crown case against the applicant, and, in her view, the corresponding weakness of the public interest considerations claimed by the applicant to favour disclosure.

3. By letter dated 29 August 2000, the applicant sought internal review of Ms Heal's decision. He attached extracts from the transcripts of his trial and appeal hearings, setting out evidence given by the witness concerning the disorder. By letter dated 15 September 2000, Mr A Hayes of Queensland Health affirmed Ms Heal's decision. By letter dated 26 September 2000, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Hayes' decision.

External review process

4. In the course of this review, Queensland Health has provided me with copies of the witness's medical records (obtained from the relevant health facilities), which I have examined. Queensland Health has also provided me with a copy of the judgment of the Queensland Court of Appeal, dismissing the applicant's appeal against conviction. By letter dated 27 October 2000, the Assistant Information Commissioner informed the applicant of his preliminary view that any documents in issue were likely to be exempt under s.44(1) of the FOI Act, referring to comments by the Queensland Court of Appeal about the strength of the Crown case against the applicant. He invited the applicant to lodge submissions and/or evidence in support of his case for access to the medical records in issue, should the applicant wish to contest that preliminary view. The applicant responded by letter dated 2 November 2000, making brief submissions in support of his case and attaching a copy of his *Summary of Argument* in the High Court proceedings.

5. In making my decision, I have taken into account the contents of the matter in issue, the reasons for decision given in Queensland Health's initial and internal review decisions, and the submissions made in the applicant's correspondence to Queensland Health and to my office.

Application of s.44(1) of the FOI Act

6. Section 44(1) of the FOI Act provides:

> ***44.(1)*** *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*

7. In applying s.44(1) of the FOI Act, one must first consider whether disclosure of the matter in issue would disclose information that is properly to be characterised as information concerning the personal affairs of a person. If that requirement is satisfied, a *prima facie* public interest favouring non-disclosure is established, and the matter in issue will be exempt, unless there exist public interest considerations favouring disclosure which outweigh all identifiable public interest considerations favouring non-disclosure, so as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.

Information concerning personal affairs

8. In *Re Stewart and Department of Transport* (1993) 1 QAR 227, I identified the various provisions of the FOI Act which employ the term "personal affairs", and discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations thereof) as it appears in the FOI Act (see pp.256-257, paragraphs 79-114, of *Re Stewart*). In particular, I said that information concerns the "personal affairs of a person" if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:

- family and marital relationships;
- health or ill health;
- relationships and emotional ties with other people; and
- domestic responsibilities or financial obligations.

Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, to be determined according to the proper characterisation of the information in question.

9. The matter in issue comprises medical records of the witness. I am satisfied that the whole of the matter in issue comprises information which concerns the personal affairs of the witness. No part of the matter in issue consists of information concerning the personal affairs of the applicant.

Public interest balancing test

10. Because of the way in which s.44(1) of the FOI Act is worded and structured, the mere finding that information concerns the personal affairs of a person other than the applicant for access must always tip the scales against disclosure of that information (to an extent that will vary from case to case according to the relative weight of the privacy interests attaching to the particular information in issue in the particular circumstances of any given case), and must decisively tip the scales if there are no public interest considerations which tell in favour of disclosure of the information in issue. It therefore becomes necessary to examine whether there exist public interest considerations favouring disclosure, which outweigh all identifiable public interest considerations favouring non-disclosure, such as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.

11. The public interest in respecting the privacy of an individual's medical records is a strong one, which will ordinarily be deserving of considerable weight in the application of a public interest balancing test: see, for example, *Re Summers and Cairns District Health Service* (1997) 3 QAR 479 at p.484, paragraphs 18-19; *Re Fotheringham and Queensland Health* (1995) 2 QAR 799 at paragraphs 11, 24-25, and 33; and *Re McPhedran and Minister for Health* (Australian Capital Territory Administrative Appeals Tribunal, Professor L J Curtis (President) and Mr N J Attwood (Member), No. C92/103, 2 June 1994, unreported) at paragraph 8.

12. In his application for internal review, the applicant contended that the fact that the witness had referred to the disorder in evidence given at the applicant's trial "waves [sic] any public interest immunity on her behalf". Clearly, the witness was required to answer the questions put to her in the course of the trial. I do not consider that the disclosure of that information by her, as required at the applicant's trial, diminishes the public interest in maintaining the privacy of the detailed medical records of the witness.

13. The applicant contends that information about any mental disorder of the witness, or drugs taken by the witness, would be of assistance to him in challenging the credibility of the evidence given by the witness. In his submission dated 2 November 2000, the applicant stated:

> *It is my submission that the rights of the individual to access such information as may be necessary to establish one's innocence within the operation of the criminal justice system must, other than in the most extraneous of circumstances outweigh any perceived infringement of another's personal privacy. Presumably, such would especially be the case in circumstances where the failure to establish innocence on the part of the accused will result in the imposition of a term of life imprisonment.*
>
> …
>
> *It is my submission that until such time as every avenue of appeal available to me pursuant to the criminal justice system has been exhausted then I ought to be afforded every opportunity to defend my innocence. Further, with respect, the comments made by members of the judiciary either at first instance or on appeal can not be taken to be conclusive determination of one's guilt or innocence. I am sure you would be well aware of the fact that many cases are left to the High Court in order for mistakes made within the criminal justice system to be addressed.*

> *Such an application is a legitimate pursuit of my rights of redress and as such ought not to be discarded out of hand. Further, although you correctly refer to various aspects of the transcript from my appeals to date, I am sure that you will be well aware of matter such as the ultimate outcome in the case of* ***R v Condren*** *or, perhaps even more appropriately, the matter of* ***R v Chamberlain*** *where in each case it was suggested that the Crown had "overwhelming" evidence of the accused's guilt, only to have their innocence established at a later date. It is, in itself, a miscarriage of justice for you to presume that the espousings of certain judges presupposes that any appeals by me will prove unsuccessful.*

14. In his external review application, the applicant referred to a number of cases concerning claims to public interest immunity. While I am here considering a claim to exemption under the FOI Act, rather than a claim of public interest immunity in court proceedings, I accept that those cases point to situations where there may be a public interest consideration favouring disclosure, to a person in the position of the applicant, of relevant, potentially exculpatory material. Given that criminal justice legislation affords avenues for correcting a miscarriage of justice (e.g., appeal rights; s.672A of the *Criminal Code*), there may be a public interest in a person obtaining information that would assist the *bona fide* use of those avenues (as distinct from, say, accessing information merely to pester or harass a victim or witness).

15. I acknowledge a public interest in enhancing the operation of the criminal justice system, and in persons in a position such as the applicant having access to matter which may assist in establishing that they should regain their liberty. However, in the present case, that public interest must be weighed against the public interest in protecting the legitimate privacy interests of the witness with respect to her medical records. I consider that it is appropriate (in assessing the weight to be accorded to the public interest considerations identified in the first sentence of this paragraph) to take into account the strength of the Crown case against the applicant, and the likelihood that disclosure of the matter in issue would assist the applicant to mount a reasonably arguable case that an appellate court should set aside his conviction.

16. In that regard, it is relevant to consider the comments of the learned appellate judges who have been required to analyse the evidence given at the applicant's trial. In the reasons for judgment delivered by the Queensland Court of Appeal on 3 December 1999 in *R v Lovelock* [1999] QCA 501, Thomas JA (with whom Pincus JA and Helman J agreed) said:

> *The degree of emphasis which is required from a trial judge concerning the caution with which a jury should approach the evidence of indemnified witnesses varies considerably according to the particular case. The present case was not one where* [the witness] *had an interest in minimising her own role or in building up that of someone else. Hers is not a case raising unease on the score that a false story may have been told in order to secure an advantage. This is not a case like those where the witness receives an obvious advantage (such as a lesser sentence) by seeking and obtaining an indemnity. Neither is it a case where extra concern needs to be expressed to the jury because her evidence was the sole and uncorroborated evidence that would convict the accused person. There was a wealth of other evidence corroborative of hers and independently establishing the guilt of the appellant. Neither is it a case where animosity can be seriously suggested on the part of the witness toward the accused.*
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> *In all the circumstances I do not consider that any error is disclosed through any lack of emphasis or warning concerning acceptance of* [the witness's] *evidence.*

> *Mr Hunter submitted that the last three sentences of the passage quoted above from the summing-up diluted the warning and was tantamount to a direction to treat* [the witness's] *evidence in the same way as the other witnesses in the case. However, when the passage is read in its context it would seem to be advice to the jury, following warnings in relation to* [the witness's] *evidence, to look at the evidence as a whole and to remind them of the need for careful scrutiny of the four major witnesses …*
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> …
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> *It seems to me that the appellant has no valid ground for complaint in relation to the conduct of the trial or the summing up. It is hardly necessary to make further reference to the exceptional strength of the Crown case. I would dismiss the appeal.*

17. Pincus JA commented that: *The overwhelming strength of the Crown case was not diminished by the evidence which the appellant gave; there was absolutely no reason to doubt that it was the appellant who killed Nautas.*

18. As indicated above, the witness gave evidence at the trial that she suffered bi-polar mood disorder (commonly also referred to as manic depression). The issue raised by the applicant in his *Summary of Argument* for special leave to appeal is that the trial judge *"failed to warn the jury with respect to the weight that should be attributed to the evidence of* [the witness] *and to the effect that evidence of her psychiatric condition should have on same"*. That issue does not appear to me to be one in respect of which the High Court would be assisted by further detailed evidence concerning the medical history of the witness. The question is whether the trial judge, in light of the evidence given at the trial about the disorder suffered by the witness, adequately instructed the jury.

19. In any event, I have examined the medical records of the witness which Queensland Health has located, and I am satisfied that they contain no information which could reasonably be expected to assist the applicant's challenge to his conviction. I note in that regard that the medical records predate the murder by a number of years.

20. Bearing in mind the substantial weight which ought properly to be accorded to the public interest in protecting the privacy of the witness's medical records, I am not satisfied that disclosure of the matter in issue to the applicant would, on balance, be in the public interest. I find that the matter in issue is exempt matter under s.44(1) of the FOI Act.

Conclusion

21. For the foregoing reasons, I affirm the decision under review (which is identified in paragraph 3 above) that the matter in issue is exempt from disclosure to the applicant under s.44(1) of the FOI Act.

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INFORMATION COMMISSIONER