



Decision and Reasons for Decision

Application Number: 210795

Applicant: 44ZNEO

Respondent: Department of Health

Decision Date: 31 March 2010

Catchwords: ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER CONCERNING PERSONAL AFFAIRS – applicant sought access to his deceased son’s medical records – whether public interest considerations favouring disclosure outweigh public interest considerations favouring non disclosure

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REASONS FOR DECISION

Summary

1. For the reasons set out below, the agency decision that the matter in issue is exempt from disclosure under section 44(1) of the *Freedom of Information Act 1992* (**FOI Act**) is confirmed.

Background

2. By letter dated 30 September 2008, the applicant¹ applied to the Royal Children's Hospital for access to '*all relevant information and/or documentation*' regarding his deceased son (**FOI Application**).
3. By letter dated 16 October 2008, the FOI decision maker at the Royal Children's Hospital explained to the applicant that:
 - there was no record of the applicant's son having attended the Royal Children's Hospital for treatment
 - the FOI Application had been forwarded to the Royal Brisbane and Women's Hospital (**RBWH**).
4. By letter dated 27 October 2008, the applicant's solicitors asked the 'Legal Department', RBWH to make a 'special exception' in relation to the FOI Application and to treat the matter as an urgent request.
5. By letter dated 27 October 2008, the RBWH, requested that the applicant provide:
 - the application fee for documents of a non-personal nature
 - detailed reasons in relation to why the disclosure of the information would be in the public interest and why these reasons outweighed the exempt status of personal affairs information under section 44(1) of the FOI Act.
6. By letter dated 10 November 2008, the applicant's solicitors provided the application fee and public interest submissions to the RBWH.
7. By letter dated 7 January 2009, the RBWH informed the applicant that it had decided to refuse him access to his son's medical records on the basis that the records were exempt matter under section 44(1) of the FOI Act (**Original Decision**).
8. By facsimile dated 13 January 2009, the applicant's solicitors applied for internal review of the Original Decision (**IR Application**).
9. By letter dated 20 February 2009, the Department of Health known as Queensland Health (**QH**) affirmed the Original Decision (**IR Decision**).
10. By facsimile dated 4 March 2009, the applicant's solicitors applied for external review (**ER Application**).

¹ Johnsons Solicitors (**applicant's solicitors**) made this application on behalf of the applicant. The applicant's solicitors are also acting on behalf of the applicant in relation to this review.

Decision under review

11. Under section 52(6) of the FOI Act, if on internal review, an agency does not decide an application and notify the applicant of the decision within 28 days after receiving the application, the agency's principal officer is taken to have made a decision at the end of the period affirming the original decision.
12. The applicant was notified of the Internal Review Decision outside of the statutory time limit. QH's principal officer is therefore taken to have affirmed the Original Decision, and on this basis, the deemed affirmation of the Original Decision is the decision under review.
13. I have taken the IR Decision to be an explanation of QH's position and have taken this into account in making this decision.

Applicable legislation

14. The FOI Act was repealed by the *Right to Information Act 2009 (Qld) (RTI Act)*² which commenced on 1 July 2009.³ However, because the FOI Application was made under the FOI Act and has not yet been finalised, for the purposes of this external review, I am required to consider the application of the FOI Act (and not the RTI Act) to the matter in issue.⁴

Steps taken in the external review process

15. By letters dated 6 March 2009, the Office of the Information Commissioner (**OIC**) indicated to the parties that the ER Application had been accepted and asked QH to provide OIC with:
 - copies of documents relevant to the external review⁵
 - copies of the documents to which the applicant had been refused access (**Matter in Issue**)
 - any submissions regarding the basis on which QH refused the applicant access to the documents.
16. On 19 March 2009, QH provided copies of the documents requested at paragraph 15 above to OIC. QH indicated to OIC that it would rely on its submissions as set out in the Original Decision and the IR Decision.
17. By letter dated 27 April 2009, Assistant Commissioner Corby provided an update on progress of the external review to the applicant's solicitor.
18. On 5 June 2009, an OIC staff member discussed procedural matters relevant to the ER Application with the applicant's solicitor.

² Section 194 of the RTI Act.

³ With the exception of sections 118 and 122 of the RTI Act. Though these provisions have since commenced.

⁴ Section 199 of the RTI Act.

⁵ Including the FOI Application, Original Decision, Internal Review Application and documents generated or received as a result of consultation with third parties.

19. By letter dated 24 June 2009, the applicant's solicitor raised concerns about the length of time taken by the OIC in relation to the external review and provided further submissions.
20. By letter dated 24 June 2009, the Information Commissioner that the length of reviews varied according to various factors and that on average, reviews take four to five months. The Information Commissioner explained to the applicant that OIC would be in a position to issue a preliminary view to one or both parties by the end of July 2009.
21. By letter dated 30 July 2009, the Information Commissioner conveyed a preliminary view to the applicant's solicitor that the matter in issue was exempt from disclosure under section 44(1) of the FOI Act.
22. By letter dated 14 August 2009, the applicant's solicitor indicated that the applicant did not accept the preliminary view and provided submissions in response to the preliminary view. The applicant also raised concerns in relation to procedural fairness.
23. By letter dated 18 August 2009, Assistant Commissioner Corby addressed the applicant solicitor's comments regarding procedural fairness.
24. During a telephone discussion with an OIC staff member on 21 August 2009, the applicant's solicitor indicated that the applicant did not have concerns in relation to procedural fairness and that the applicant had a good prospect of success in an action against QH and his son's school, but did not disclose the nature of the action.
25. By letter dated 21 August 2009, the applicant's solicitor confirmed that the applicant was satisfied that the OIC had afforded him procedural fairness.
26. On 24 September 2009, the applicant's solicitor provided four newspaper articles concerning the prescription of anti-depressants including the drug Prozac to teenagers.
27. By letter dated 30 September 2009, the applicant's solicitor indicated that the applicant would defer instituting any further action until 16 October 2009 on the basis that a decision from OIC would be received by that date.
28. During October 2009, further discussions were held with the applicant's solicitor regarding matters relevant to this review.
29. By email dated 13 October 2009, the applicant's solicitor provided a statement from the applicant in relation to this review.
30. During November 2009, further discussions were held with the applicant's solicitors regarding matters relevant to this review.
31. In an effort to resolve this matter informally, on 10 November 2009, Assistant Commissioner Corby asked QH whether it would be agreeable to an open discussion between QH and the applicant in relation to the applicant's son's medical record. QH said it would review the file and provide a response by 16 November 2009.
32. During a telephone discussion on 16 November 2009, Assistant Commissioner Corby indicated to the applicant's solicitor that QH was considering the OIC's proposal to resolve the matter informally. The applicant's solicitor indicated that the applicant was not necessarily seeking access to the entire medical record.

33. On 16 November 2009, QH indicated that it would make further enquiries with RBWH in relation to informal resolution options.
34. On 23 November 2009, QH indicated that it was still waiting upon a response from RBWH.
35. On 30 November 2009, Assistant Commissioner Corby indicated to the applicant's solicitor that the OIC was still awaiting a response from QH in relation to resolving the matter informally.
36. By email dated 1 December 2009, QH indicated that enquiries had been made with RBWH and further enquiries were being made with the relevant doctor.
37. By email dated 9 December 2009, QH indicated that having reviewed the file and given the circumstances of this review, it would not be appropriate to meet with the applicant to discuss the contents of the applicant's son's medical record. QH reiterated its submission that the matter in issue is exempt from disclosure.
38. By letter dated 21 December 2009, the applicant's solicitor indicated that unless the applicant received a positive response from the Information Commissioner by 11 January 2010, the applicant would be seeking judicial review of the matter.
39. By letter dated 22 December 2009, Assistant Commissioner Corby indicated to the applicant's solicitor that in light of the possibility that the applicant did not seek access to the entire medical record, there remained a possibility of informally resolving the review. Assistant Commissioner Corby also informed the applicant's solicitor that OIC would not be in a position to provide a decision by 11 January 2010.
40. By letter dated 13 January 2010, the applicant's solicitor provided a list of specific documents to which the applicant was seeking access.
41. During a telephone discussion on 8 February 2010, Assistant Commissioner Corby informed QH that the applicant had provided a list of specific documents to which he was seeking access.
42. On 16 February 2010, OIC received a letter from the applicant's solicitor dated 21 January 2010 enclosing a copy of a report concerning the applicant by a psychologist.
43. By letter dated 23 February 2010, Assistant Commissioner Corby, in an effort to informally resolve the review, provided QH with written confirmation of the specific documents the applicant seeks access to. Assistant Commissioner Corby asked QH to inform the OIC by 9 March 2010 whether it would be agreeable to disclosing any or all of the documents listed.
44. By letter dated 23 February 2010 (sent by email at 11:45 am on 23 February 2010), Assistant Commissioner Corby updated the applicant's solicitors in relation to this further attempt to informally resolve the review.
45. In the afternoon of 23 February 2010, OIC was served with an Application for a Statutory Order of Review (**Court Application**) by the applicant's solicitors. In support of the Court Application, the following affidavits (**Affidavits**) were also filed:
 - Affidavit of applicant sworn 22 February 2010
 - Affidavit of applicant's solicitor sworn 22 February 2010.

46. By letter dated 5 March 2010, Assistant Commissioner Corby indicated to QH that the contents of these affidavits would be taken into account if the external review proceeded to a decision. Assistant Commissioner Corby indicated to QH that if it wanted to make any submissions in response to the affidavits, these should be received by 19 March 2010.⁶
47. By letter dated 9 March 2010, QH indicated that despite the itemised list of documents provided by the applicant, which somewhat narrowed the scope of the application, it was not agreeable to releasing these documents and relied upon its reasoning as set out in the Original Decision and IR Decision.
48. On 11 March 2010, QH informed OIC that the applicant had been provided with a copy of his son's medical records under the *Personal Injuries Proceedings Act 2002 (PIP Act)* in relation to the applicant's claim against his son's school and the RBWH.
49. Despite this, the applicant's solicitors indicated that the applicant still wished to proceed with the external review for access to his son's medical records from RBWH.
50. By letter dated 22 March 2010, QH confirmed that the applicant had been provided with a copy of the medical record that is the subject of this review and reiterated the submissions as set out in the Original Decision and IR Decision with specific reference to the matter in issue.
51. By letter dated 24 March 2010, the applicant's solicitors confirmed that the applicant:
 - had received a copy of the medical records from QH
 - required a decision from the OIC on the external review
 - is seeking access to all of the matter in issue.
52. By letter dated 29 March 2010, the applicant's solicitors referred specifically to two additional documents they had received from QH under the PIP Act.
53. By letter dated 30 March 2010, the OIC indicated to the applicant's solicitor that a copy of the additional documents referred to in their letter dated 29 March 2010 formed part of the matter in issue in this review.
54. In making my decision, I have taken into account the following:
 - the applicant's FOI Application, IR Application and ER Application
 - the Original Decision and the IR Decision
 - written correspondence received from the applicant's solicitor and the applicant during the course of the review
 - written correspondence received from QH during the course of the review
 - file notes of various telephone conversations between OIC staff and the applicant's solicitor during the course of the review
 - file notes of various telephone conversations between OIC staff and QH during the course of the review
 - the Affidavits
 - relevant provisions of the FOI Act and other legislation as identified in this decision

⁶ An extension of time was subsequently granted until 22 March 2010.

- case law and previous decisions of the Information Commissioner as referred to in this decision
- the content of the material claimed to be exempt.

Matter in issue

55. The matter in issue in this review is the applicant's son's medical records from the Mental Health Unit at the RBWH (**Matter in Issue**).

Findings

Relevant law – section 44(1) of the FOI Act

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

44 Matter affecting personal affairs

(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.*

57. To determine whether the matter in issue is exempt under section 44(1) of the FOI Act, I must consider the following:

- firstly, does the matter in issue concern the personal affairs of a person/s (other than the applicant)? (**Personal Affairs Question**) If so, a public interest consideration favouring non-disclosure of the matter in issue is established
- secondly, are there public interest considerations favouring disclosure of the matter in issue which outweigh all public interest considerations favouring non-disclosure of the matter in issue? (**Public Interest Question**).

Personal Affairs Question

What are the personal affairs of a person?

58. In *Stewart and Department of Transport*,⁷ the Information Commissioner discussed in detail the meaning of the phrase 'personal affairs of a person' as it appears in the FOI Act. In particular, the Information Commissioner found 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
- domestic responsibilities or financial obligations.

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

⁷ (1993) 1 QAR 227 (**Stewart**) at pages 256-267, paragraphs 79-114.

60. In *Fotheringham and Department of Health*,⁸ the Information Commissioner recognised that section 44(1) of the FOI Act clearly extends the scope of its protection to information concerning the personal affairs of deceased persons.⁹

Personal affairs of a parent and personal affairs of a minor

61. The Information Commissioner recognised in *FMG and Queensland Police Service*¹⁰ that an applicant's familial relationship to another person does not confer any entitlement to be given access to information concerning the personal affairs of that other person under the FOI Act.

Shared personal affairs

62. The Information Commissioner has previously discussed the concept of 'shared personal affairs' in the context of section 44(1) of the FOI Act¹¹ and stated that if the information concerning the personal affairs of the applicant cannot be separated from the personal affairs of another person, then:

- severance under section 32 of the FOI Act will not be practical;
- the exception under section 44(2) of the FOI Act¹² will not apply; and
- the information will be prima facie exempt under section 44(1) of the FOI Act, subject to the public interest test.

Public Interest Question

63. The words 'public interest' are not specifically defined and generally refer to considerations affecting the good order and functioning of community and the well-being of citizens. In general, a public interest consideration is one which is common to all members of the community, or a substantial segment of them, and for their benefit. The public interest is usually treated as distinct from matters of purely private or personal interest. However, some recognised public interest considerations may apply for the benefit of individuals in a particular case.

64. As to what constitutes the public interest, Justice Beazley of the Federal Court of Australia stated:¹³

The question of what constitutes the public interest is not a static or circumscribed notion. As was said in D v National Society for the Prevention of Cruelty to Children [1997] UKHL 1; (9178) AC 171 at 230, per Hailsham LJ "the categories of public interest are not closed...". See also Sankey v Whitlam per Stephen J at 60.
[my emphasis]

65. In *Fox and Department of Police*,¹⁴ the Information Commissioner indicated that:

⁸ (1995) 2 QAR 799 (**Fotheringham**).

⁹ *Fotheringham* at paragraph 14.

¹⁰ (S69/97; 24 April 1998) at paragraph 22 (**FMG**).

¹¹ *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at paragraph 176 (**B**).

¹² **44 Matter affecting personal affairs**

...

(2) *Matter is not exempt under subsection (1) merely because it relates to information concerning the personal affairs of the person by whom, or on whose behalf, an application for access to a document containing the matter is being made.*

¹³ *Australian Doctors' Fund Limited v Commonwealth of Australia* [1994] FCA 1053 at paragraph 34.

¹⁴ (2001) 6 QAR 1 at paragraph 19.

Because of the way that section 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 are public interest considerations favouring disclosure, and if so, whether they outweigh all public interest considerations favouring non-disclosure.

66. The Information Commissioner has recognised that in some instances the public interest in the privacy of a person's medical record may be diminished where a close relative can demonstrate that they were privy to the type of medical information contained in the matter in issue.¹⁵

67. In particular, the Information Commissioner has said:

The substantial weight which the privacy interest in a person's medical records ordinarily carries (as against the world at large) may be reduced, however, in the case of a close relative of a deceased person ... where there is satisfactory evidence that that close relative has been privy to medical information of the kind covered in the particular matter in issue. ... (There will also be situations in which treating medical practitioners must disclose medical information about a person to a close relative of that person, e.g., in the case of a child of tender years ...) Although it is largely a question of degree, and would be dependent on the existence of satisfactory evidence, the extent of the knowledge which a close relative has about particular medical information concerning a deceased person ... could be sufficient to reduce the weight of the privacy interest in that medical information (where disclosure to that close relative is in contemplation) to such an extent that a strong public interest consideration favouring disclosure could, in the application of a public interest balancing test, tip the scales in favour of disclosure.¹⁶

68. The Information Commissioner has also considered the situation where information, the subject of an FOI application, has been released to an applicant by other means and the effect of this on the public interest in privacy. In relation to this, the Information Commissioner has said:¹⁷

"The disclosure ... could arguably be used to support a contrary proposition, i.e., that the extent of the disclosure that has been made to the applicant diminishes the weight of the privacy interests to be protected, at least so far as disclosure to the applicant is concerned. However, the consequences of disclosure of information under the FOI Act are, with few exceptions, to be evaluated as if disclosure were to any person (or, as is sometimes said, to 'the world at large'), there being no restriction (apart from any imposed by the general law) on the use or further dissemination, by an applicant for access, of information obtained under the FOI Act.

...

... disclosure under the FOI Act (with no restriction on further use or dissemination) of the matter in issue, in documentary form, would, in my opinion, constitute a serious invasion of privacy.

¹⁵ *Summers and Cairns District Health Service; Hintz (Third party)* (1997) 3 QAR 479 (**Summers**).

¹⁶ *Summers* at paragraph 19.

¹⁷ *FMG* at paragraph 29.

69. There is also an implied undertaking on a person who obtains access to a document in court proceedings (such as through the discovery process) that they may only use that document in those proceedings.¹⁸
70. The Information Commissioner has previously accepted that there is a legitimate public interest in the accountability of public hospitals for the provision of medical services in accordance with proper professional standards, and for timely and cost-effective service delivery.¹⁹
71. However, accountability must be weighed against the public interest in protecting information about the private affairs of individuals which is collected and held by public hospitals. On this issue, the Information Commissioner has said previously:

*If one were considering, in the absence of any competing considerations, the public interest in accountability of public hospitals for the provision of medical services, one could argue that it favoured the disclosure of any information that would enhance accountability – whether it disclosed performance that was good, bad or indifferent. However, **when one attempts to apply the public interest in accountability of public hospitals for the provision of medical services, as a consideration favouring disclosure of the medical records of a particular individual (other than the applicant for access), there is an immediate collision with the public interest in protecting the privacy and confidentiality of an individual's medical records.** In my opinion, the former would not ordinarily outweigh the latter unless there were a particularly strong public interest in accountability to be served by disclosure, for example, by exposing unsatisfactory or negligent performance and enabling remedial and/or compensatory action to be taken. [my emphasis]*

If disclosure of a deceased's medical records would provide information to support the existence of a proper basis for complaint to the Health Rights Commission, or the Medical Board of Queensland, concerning medical treatment of the deceased person, disclosure to a close relative, or executor, in the interests of accountability might outweigh the public interest in protecting the privacy of the deceased's medical records taken.²⁰

72. In *Willsford and Brisbane City Council*,²¹ the Information Commissioner recognised that there may be a public interest in a person being able to access information to pursue a legal remedy in certain circumstances.
73. The Information Commissioner reasoned in *Willsford* that a public interest consideration favouring disclosure may be established if an applicant can demonstrate all of the following:²²
- (i) loss or damage or some kind of wrong has been suffered in respect of which a remedy is, or may be available under the law
 - (ii) the applicant has a reasonable basis for seeking to pursue the remedy
 - (iii) disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available or worth pursuing.
74. The existence of a public interest consideration of this kind represents one consideration to be taken into account in the weighing process along with any other relevant public interest considerations.²³

¹⁸ See *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 33.

¹⁹ *Summers* at paragraph 27.

²⁰ *Summers* at paragraphs 28 and 29.

²¹ (1996) 3 QAR 368 (***Willsford***) at paragraph 16.

²² *Willsford* at paragraph 17.

75. Finally, I also note that in *Shi v Migration Agents Registration Authority*,²⁴ the High Court found that the Administrative Appeals Tribunal was not limited to taking into account the facts and circumstances as they existed at the time the original decision was made. Accordingly, the OIC, as a body empowered to conduct a full review of the merits of an administrative decision under challenge, is entitled to consider the facts as they are at the time of its decision.

Submissions of participants

Applicant's submissions

76. In the ER Application, the applicant's solicitors submitted, in part, that:

Pursuant to section 44(1) of the Freedom of Information Act, previous decisions were made under the misconception that determining whether an education facility failed in its duty of care which led to the suicide of [applicant's son] fails on the balance, to be "in the public interest."

...

Breach of duty of care with respect to an education facility is, on the balance, in the public interest. Our client, like other parents who place their children in the care of education facility (sic) seek to rely on the skill and care of others.

In the event that parents are denied access to relevant information from these education facilities, particularly in this case, regarding the child's mental state, the consequences are vast. It is our submission that where an education facility deliberately withholds information from a parent of such an important nature, this is without a doubt, in the public interest to determine what information was in fact withheld.

...

We submit that a Government Hospital facility and Queensland Health owes a duty of care to advise both parents when their child has been admitted to hospital.

...

Our client instructs that no discussion took place informing of his son's medical diagnosis, treatment, or follow-up options. And further, at no time were any of the medications discussed with our client. At no time were any of the risks regarding medication and/or treatment discussed with our client.

It is clear that had this information been provided first hand to our client, our client would not have had to seek this information through the education facility that [applicant's son] was attending and we would not hold instructions to access this information through the Freedom of Information Act.

We submit that our client did not know the name of the doctor treating his son, or the medication and/or risks associated with the medication that his son was being provided with by the doctor.

Clearly there has been a breach of duty of care to warn our client about those medications and risks associated with the medication that our client's son was being prescribed. We further submit that it is not the duty of parents (who we note do not speak to each other) to discuss medical issues of such gravity with one another.

²³ *Willsford* at paragraph 18.
²⁴ (2008) 235 CLR 286 (*Shi*).

It is not a private matter between our client and his ex-wife to determine what treatment their son with clear psychological issues should pursue. Queensland Health and the hospital owed a duty of care to our client to inform him of all issues surrounding [applicant's son] health and treatment. The fact that our client has to endure the steps of accessing this information through these avenues is evidence enough that he was not informed of any of the fundamental issues surrounding his son. This is clearly in the public interest.

We would submit that "on the balance" a breach of duty of care by a hospital to a parent is definitely in the public interest and certainly not a matter between our client and his ex-wife.

*In the recent decision of *Rooke v Minister for Health* [2009] WASCA, "Where a medical practitioner is under a duty [sic] adequately to warn his or her patient of the consequences of the treatment the patient is contemplating, and the medical practitioner fails to warn the patient of a particular consequence and that consequence in fact eventuates, then, subject to the question of materiality, causation requires satisfaction of two criteria. First, there must be a breach of the duty to warn of a material risk, that risk having eventuated and caused, in the physical sense, injury to the plaintiff. Secondly, it must be established that, had the warning been given, the injury would have been averted, in the sense that the patient would not have had the treatment in question.*

We submit that as a result of [applicant's son] having psychological and/or mental issues, the duty shifted to warning the parents. Had our client been provided with "brochures" and had our client had the discussions that you allege, as your medical records apparently indicate, it is possible that our client could have prevented [applicant's son] attending school and taken steps to seek further help (had it been necessary). The complete failure on the part of the hospital, Queensland Health and [son's school] to advise our client of the health [applicant's son] contributed to the eventual suicide which may have been prevented.

77. By letter dated 24 June 2009, the applicant's solicitors submitted, in part, that:

[Applicant's son] was at the time of his death a minor. It may have been unfortunate due to our client and his wife being estranged that our client was not fully informed with respect to his son's mental health but that surely does not prevent each parent from being entitled to the relevant information with respect to a minor.

Our client has reason to believe that both the medical authorities and [son's school] where his son boarded were in breach of their duty of care with respect to his son. Our client, however, doesn't want to institute Supreme Court proceedings with respect of apparent breaches of such duty if indeed he can be satisfied by production of the relevant medical reports, clinical notes, etc., that his son was in fact treated in a proper manner by those in charge of his mental health and that [son's school] did not breach its duty of care in failing to appreciate the urgency of having [applicant's son] immediately referred for proper medical attention when he ([applicant's son]) requested that be done the day prior to his death.

It is our view that a parent in these circumstances is not only entitled to all relevant documentation with respect to his son's condition and treatment but that it would be entirely unreasonable for medical authorities to refuse to provide such with respect to a child.

It might be arguable that the obligations to provide such records may change when a person reaches adulthood but that was not the case with respect to [applicant's son]. [Applicant's son] was 17 at the time he took his life and the refusal on the part of the relevant authorities to provide the information and documentation requested not only adds significantly to the continued grief suffered by our client but to the risk that if there have been breaches of duty that to deny our client the opportunity to address those

issues perpetuates the possibility that others will suffer similarly if such breaches are not addressed.

...

What is clear is that our client's son had significant mental problems which required hospitalisation; he was released back into the boarding school environment at [son's school] and that on the day prior to his death requested a staff member at [son's school] to arrange for him to see a psychiatrist. We have received copies of relevant email exchange between staff at [son's school] concerning that request. Despite the request [applicant's son] was allowed to return home to [location] the following day where he committed suicide. The contents of the emails combined with those circumstances support reasonable grounds upon which an action against the school and the Education Department can be instituted. However, our client would prefer not to make that decision without the benefit of having access to the information and records requested. It might be that information and documents requested might persuade our client not to institute proceedings. If disclosure confirms breaches of duty then those responsible should be brought to account and not permitted to rely on a refusal to provide records.

78. By email dated 13 October 2009, the applicant's solicitors submitted, in part, that:

We would also emphasise the fact that we are dealing with the records of a deceased minor NOT an adult child that has elected to refrain from sharing medical detail with a parent. Obviously from [applicant's] attached statement his son did share medical information with him.

79. Attached to this email was a statement from the applicant which provided some detail of his relationship with his son and his observations of his son while his son was hospitalised at the RBWH. The statement included reference to the medication his son had been prescribed.

80. In their submissions dated 14 August 2009 in response to my preliminary view, the applicant's solicitors submitted, in part, that:

3. In our client's opinion you fail to take into account that his son was suffering from a major depressive disorder. [Applicant's son] was unfortunately mentally ill. He took his own life. He does not equate to a patient that dies as a result of a physical trauma during surgical procedures. Such patients are much more likely to share medical knowledge with close relatives. To deduce that there was a lack of a close relationship between our client and his son based on a perceived lack of knowledge of his medical condition just overlooks the fact that [applicant's son] was mentally ill and a male adolescent with major depressive disorders causing symptoms of withdrawal.

...

It is our client's view that he did have a close relationship with his son. As would be normal with a boy of [applicant's son] age our client sacrificed time with his son to allow him to pursue his sailing interests but he kept in close contact.

...

Our client has not made this application without mature consideration and is not driven by emotional issues... he is moved by the desire to ensure that practices and procedures in dealing with adolescents such as his son in the Health and Education systems are such that the risk of a person suffering major depressive disorder committing suicide is not increased by a failure to follow proper practice and procedure.

...

We are dealing with a mentally disturbed adolescent exhibiting suicidal tendencies admitted for psychiatric treatment for major depressive disorders. We would respectfully submit that in the normal course (sic) consultation with family members, particularly both mother and father, would for part of proper practice and procedure. Our client thought his son was participating in a sailing competition. It was only after his son failed to respond to his text messages that he discovered he had been hospitalised, having been admitted by [applicant's son] mother without any collaboration or contact with my client, who was totally unaware of the crisis which had occurred. He then visited his son on a number of occasions in hospital. He was available for consultation and to participate in counselling (sic) if required. ... With respect, the privacy interest in the medical information is substantially reduced by the very fact of [applicant's son] mental and emotional capacity.

...

If practice and procedure as regards ongoing treatment of psychiatric patients fails to provide for the proper briefing of family and caregivers then it is deficient and the Public Hospital system should be held accountable for the rectification of that deficiency.

If it was a matter that the doctors concerned simply failed in their duty to issue the appropriate advice and warnings to family (including our client) and caregivers as to the risk of suicide and the necessity for the careful management of ongoing treatment they were than negligent and in breach of their duty of care.

Youth suicide in Australia is a significant problem. It has been so for many years. In fact according to the British Medical Journal the World Health Organisation previously rated Australia first among 16 industrialised countries in youth suicide.

To release [applicant's son] from hospital after an extended stay and 166 pages of medical reports (including on our information the prescribing of anti-depressant drugs with known side effects of increased suicidal risk) without proper follow up for ongoing management and treatment is NOT indicative of a public health system that ensures practice and procedure is such that psychiatric patients are afforded every reasonable chance of achieving recovery. The hospital and staff need to be accountable and that will not be achieved by allowing them to hide behind confidentiality provisions with respect to a patient suffering mental illness and more particularly for a patient who is a minor.

...

(ii) You say that on the information currently before you that you are not satisfied that there is a reasonable basis for pursuing a remedy. With respect, it is not remedy (sic). With respect, it is not our client's obligation to prove to you that he can be successful in an action against Queensland health (sic) and/or [son's school]. There is without doubt sufficient evidence to support the institution of proceedings against both the hospital and the school.

(iii) Even though we have advised our client that there are sufficient grounds NOW to institute proceedings our client would prefer to obtain the medical records so that they may be referred to medical experts in the fields of the treatment of MDD (including the prescription of PROZAC and the necessity to ensure proper patient management) and proper practice an procedure to be followed to reduce suicidal risk.

(iv) The public interest consideration exists because:

Our client has lost his son. He has a right to pursue an action in damages at law

...

81. Additionally, the applicant's solicitors submitted that doctors prescribed the drug Prozac to the applicant's son without adequate follow-up treatment and information being provided regarding the increased risks of suicidal ideation.

82. The applicant's solicitors further submitted that disclosure of the medical records will:

- record whether the applicant's son was prescribed Prozac or other anti-depressant drugs
- disclose what occurred in terms of ongoing management and monitoring of the applicant's son including discussions with the family and the son's school in respect of this

and that:

If PROZAC or other anti-depressant drugs were prescribed that would necessitate the need to alert those responsible for the management and monitoring of his behaviour to the increased risks of suicide associated with the use of such drugs in persons of [applicant's son] age. This includes our client and we are instructed that certainly in his case that was not done.

83. The applicant's solicitors submitted in relation to the son's school that:

(v) There was a very clear obligation for the School to contact both parents in the circumstances that existed to alert them to the fact that [applicant's son] had requested psychiatric attention. The facts are more than sufficient to raise a reasonable basis for a claim against [son's school]. Their knowledge of [applicant's son] mental problems to the extent revealed in the in-house emails combined with the request for psychiatric referral is more than sufficient to raise breach by the School of its duty of care. It is a matter for the School before the Court to dispute that no duty existed or if it did that no breach occurred. That is not a matter for you to determine.

...

(vii) The evidence against [son's school] more than establishes a reasonable basis upon which proceedings can be instituted. For the reasons set out disclosure of the medical records will assist our client to pursue the remedy or at the very least to evaluate whether the remedy is worth pursuing.

84. The applicant's solicitors also submitted in their response to my preliminary view that in relation to the case of *Summers*:

- the factual circumstances of *Summers* can be distinguished from this matter and could not be further removed from the facts in this case, particularly because:
 - the deceased in that case was an adult, married woman
 - the person opposing release was the deceased's husband
 - the deceased appeared to be mentally stable
 - the deceased died as a result of physical procedures not as a result of suicide associated with a major depressive disorder.

85. On 24 September 2009, the applicant's solicitors also provided OIC with the following newspaper articles:

- *K Donaghey, 'Prozac for teens', Gold Coast Bulletin, 15 September 2009*
- *JA Davies, 'Probe into anti-depressants being conducted in secret', The Australian, 1 November 2008*
- *JA Davies, 'Cure worse than the ill', The Australian, 20 March 2008*
- *JA Davies, 'Subsidised Prozac prescribed to children', The Australian, 23 July 2008,*

86. In his affidavit sworn on 22 February 2010, the applicant provided the following information:

- he instructed his solicitors to seek access to his deceased son's medical records from the RBWH
- his son was born on 23 July 1990
- he is divorced from the mother
- there were Family Court of Australia orders (**Court Orders**) in place in relation to the parenting arrangements for the applicant's son
- after the divorce, he was estranged from the mother
- he would relinquish his right to spend time his son so that he could participate in sailing events on weekends and during school holidays
- his son had his own room at each of his residences
- he had a close relationship with his son as did his partner
- prior to his death, his son was a full-time boarder at his school
- he had tried to be an actively interested and involved father, but during his son's education at the school he was ignored with respect to being provided any information of a personal nature relating to his son
- neither the mother nor the school contacted him about medical and/or counselling issues concerning his son
- his son had been admitted to the Mental Health Unit (**MHU**) at the RBWH sometime in March 2008
- he was not advised when his son was admitted to the RBWH
- once the applicant was aware of his son's admission to RBWH , he visited his son several times, but was never formally interviewed by any of the MHU staff
- he was not advised when his son was discharged from the MHU on 21 April 2008 nor was he involved by RBWH in any post-discharge arrangements for his son
- he spoke to his son on several occasions following his discharge and his son was supposed to reside with him on the weekend he committed suicide
- he was not notified that his son had a depressive episode at his school on 7 May 2008 and that the mother had picked up his son from the school on 9 May 2008
- his son committed suicide on 10 May 2008.

87. In his affidavit, the applicant particularly stated in relation to his son's hospitalisation that:

46. On the occasion of my first visit with [applicant's son] I spoke at length to a carer called "Dan" in the Mental Health Unit.

...

48. Just prior to my son being discharged from RBH, I spoke with Dr. G. Beames (psychiatrist) and Andrew Carr (mental health case worker) on 8th April 2008, who supplied me with a brochure about Prozac. I say that this was the first and only communication I had with [applicant's son] psychiatrist.

88. A copy of the Court Orders were annexed to the applicant's affidavit. The terms of the Court Orders were such that:

- the son was to reside with the mother
- the mother was charged with the responsibility for the long term care, welfare and development of the son

- the applicant would have contact with the son as agreed and failing agreement, one weekend per month and for four weeks holiday during the year
- each party would have responsibility for the son when in his/her care.

89. In his affidavit, the applicant also set out the basis for his claim against his son's school and the RBWH:

65. I believe that [son's school] and RBH have breached their duty of care by:

- failing to advise me of [applicant's son] admission to the RBH Juvenile Mental Health Unit;*
- failing to involve me in the treatment of [applicant's son], whilst admitted;*
- failing to involve me in the planning of on-going treatment for [applicant's son];*
- failing to advise me of the depressive incident [applicant's son] had at [son's school] on 7 May 2008; and*
- failing to seek immediate medical attention on 7th and/or 8th May 2008.*

66. I have suffered emotionally as a result of the breach of duty of care by [son's school] and RBH, which has resulted in my seeking the psychological assistance of Mr. David Nowland (psychologist), who has diagnosed me as having symptoms of severe post traumatic stress disorder. I have now consulted Dr. David Straton (psychiatrist), with respect to my disorder.

90. The applicant's solicitor confirmed in his affidavit sworn on 22 February 2010 that the relevant initial notice under the PIP Act had been served on the RBWH and the relevant notice of claim had been served on the son's school.

91. By letter dated 24 March 2010, the applicant's solicitors confirmed that the applicant had been provided with a copy of his son's medical record by QH pursuant to PIP Act requirements. The applicant's solicitors indicated that they were not convinced that the records provided were complete. The applicant's solicitors also made further submissions that:

The public interest in the circumstances which resulted in the deceased being discharged unsupervised and without proper arrangements being made for ongoing care significantly outweigh any need to protect the deceased's privacy. Given the fact that [applicant's son] unfortunately is not able to express a preference one might speculate that he would encourage public interest as opposed to invoking privacy issues to protect those who certified his discharge and returned him to the very environment that appeared to be the root cause of his depression and suicidal ideation (Sailing and [son's school]).

QH's submissions

92. In its Original Decision, QH stated that:

In this instance, the matter of whether [son's school] has provided your client with his late son's performance or any other type of information, is a matter between your client and [son's school] and represent in my view private interests of your client, rather than your public interest considerations that need to be taken into account in undertaking the analysis required under Section 44(1) of the FOI Act.

...

As stated in the Information Commissioner's decisions (Re Bultitude), the 'pursuing legal remedy' argument does not serve as a basis for unfettered access to records, it has to be premised on whether the person has a legal remedy and whether documents will assist. In your letter you have not indicated whether your client is or will be pursuing a legal action against [son's school], therefore as far as the situation currently stands this is a hypothetical argument.

...

In your client's reasons for seeking access you also further state:

"We are currently instructed by [applicant] to investigate the circumstances that led to the Deceased committing suicide which is fundamentally in the public interest ..."

In Re Summers and Cairns District Health Service the Information Commissioner held that, even though a mother had sought the documents of her deceased daughter on the basis that disclosure would help her cope with her daughter's death and clear up doubts about whether the Hospital treatment contributed in any way to her death, the documents should remain exempt.

...

In addition, in this instance, your assertion that "... [son's school] has refused to provide our client with the medical records that they allegedly were provided with by the mother, despite our requests..." are in my view private interests of your client, rather than public interest considerations that need to be taken into account in undertaking the analysis required under section 44(1) of the FOI Act.

93. In the IR Decision, QH stated that:

Queensland Health's view is that there is a very strong public interest in preserving the privacy of an individual's medical records even after their death. This is supported by the wording of section 44(1).

...

In his 10 November 2008 letter the applicant stated that despite the father having equal and shared parental rights (in accordance with Court Orders) of the late [applicant's son], the father was never informed of the admission and/or treatment of the deceased.

However, the records reveal that although [applicant] was not initially informed of [applicant's son] admission, he subsequently visited [applicant's son] while he was an inpatient at the Adolescent Mental Health Unit (AMHU). The notes also indicate that [applicant] met with [applicant's son] Case Manager and the consultant (Dr Beames) and discussed the reasons for [applicant's son] referral, diagnosis and treatment. Information about [applicant's son] medication and follow-up options as well as brochures about the medication and the AMHU was also provided to [applicant]. [Applicant] also requested and was provided with the contact details of the Southport Child and Youth Mental Health Service.

...

... I consider the fact that [applicant] was not initially informed of [applicant's son] admission is a private matter between him and his ex-wife and has no bearing on the decision to exempt the documents under s.44(1).

...

I note that the applicant stated that the records are relevant to the issue and release is in the public interest. However, at no time has the applicant provided sufficient information to enable either Ms Luque or me to establish exactly how they are relevant.

...

From the information provided in the internal review application, it would appear that the main purpose for seeking access to the late [applicant's son] health record is to confirm whether the information currently in the possession of the applicant conflicts with the information contained in that record. However, given that their client had met with both [applicant's son] Case Manager and the consultant and been informed of the reasons for [applicant's son] referral, diagnosis and treatment, I am of the view that this information would be sufficient to establish whether [son's school] had breached its duty of care to [applicant's son] and that release of [applicant's son] health record would be an unwarranted invasion of his privacy.

94. By letter dated 22 March 2010, QH confirmed that pursuant to the PIP Act, the applicant had been provided with a copy of his son's medical record, the matter in issue in this review.

Other Material

95. QH states on its website:

We know you need to trust your health provider before you give them sensitive personal information. You can expect that we will deal with this information in an ethical, lawful and confidential way. Your health information will only be discussed or made available to those involved in your care.

During your hospital stay, confidential medical records will be kept of your illness and treatment. This includes test results, x-rays and scans. These will be put with any previous records if you have been a patient before. If you are transferred to another hospital, a copy of your medical record will usually go with you so you receive the appropriate care.

If you wish to see your medical record ask a staff member. Our Administrative Access to Health Records Policy (1994) manages this access. Information concerning you will not be given to anyone else unless you give your consent in writing.

Some government organisations may be legally allowed to access information about you such as births and deaths, or notice of infectious diseases. Please ask the staff if you would like to know more.

You have the right to choose whom your doctor will talk to about your condition. During your stay you may choose to have one person in your family or a friend be the main point of contact between the hospital and your family. This person can contact the hospital with enquiries about your condition.²⁵

...

Queensland Health has a longstanding commitment to ensuring the privacy and confidentiality of personal information collected by the department. That commitment is supported by nine National Privacy Principles in the Information Privacy Act 2009 (Qld) (in relation to all personal information held by the department) and strict confidentiality obligations found in Part 7 of the Health Services Act 1991 (Qld) (in relation to health information held by the department).²⁶

²⁵ Website: <http://www.health.qld.gov.au/hospital/records.asp>.

²⁶ Website: <http://www.health.qld.gov.au/privacy/default.asp>.

Findings of fact

96. Having carefully considered the matter in issue and the above submissions, I make the following findings of fact:

- the applicant's son was born on 23 July 1990 and was approximately two months off of his 18th birthday when he passed away
- prior to his death, the applicant's son resided at boarding school
- Family Court Orders in place at the time of hospitalisation required the applicant's son was to reside with his mother and spend time with the applicant as agreed and failing agreement one weekend per month and for four weeks holiday during the year. The Orders charged the mother with the responsibility for the long term care, welfare and development of the son
- the applicant is estranged from the mother
- the applicant would forgo spending weekends and holidays with his son to enable his son to pursue his sailing commitments
- in March 2008, the applicant's son was hospitalised at the MHU at the RBWH
- the applicant was informed by the mother some time after this date that his son had been admitted to the MHU at the RBWH
- the applicant subsequently visited his son at the MHU at the RBWH
- the applicant met with Dr G. Beames, psychiatrist and Andrew Carr, his son's Case Manager at the RBWH in relation to his son's condition and was provided with the reasons for his son's referral, diagnosis and treatment, information about his son's medication and follow-up options as well as brochures about the medication and the MHU. The Applicant also requested and was provided with the contact details of the Southport Child and Youth Mental Health Service.
- in April 2008, the applicant's son was discharged from the MHU at the RBWH
- on 10 May 2008 the applicant's son committed suicide
- the applicant instructed his solicitors to seek access to the RBWH medical records concerning his deceased son
- the applicant's solicitors on the applicant's behalf have commenced proceedings under the PIP Act against both his son's school and the RBWH
- the applicant's solicitors have been provided a copy of the applicant's son's medical record (the matter in issue in this review) by QH pursuant to the proceedings under the PIP Act
- the matter in issue records the inpatient health care treatment of the applicant's son and includes:
 - observations, medication records and progress notes about the applicant's son
 - observations of the applicant's son and his interaction with family members, other than the applicant
 - observations of the interactions between the applicant and his son
 - observations of interactions between the applicant's son and another patient.

Analysis**Application of section 44(1)**

97. As previously noted the test for whether matter qualifies for exemption under section 44(1) of the FOI Act is in two parts, as follows:

- (i) would disclosure of the matter in issue disclose information that is properly characterised as information concerning the personal affairs of a person (**Personal Affairs Question**)?
- (ii) if (i) is answered affirmatively, a public interest consideration favouring non-disclosure is established and the matter in issue will be *prima facie* exempt. However, if the public interest considerations favouring disclosure outweigh all identifiable public interest considerations favouring non-disclosure, a finding that disclosure of the matter in issue would, on balance, be in the public interest, is warranted (**Public Interest Question**).

Would disclosure of the matter in issue disclose the personal affairs information of someone other than the applicant?

- 98. The answer to this question is yes. In the case of *Stewart* the Information Commissioner identified that matters that disclose family relationships, health or ill health and relationships with, and emotional ties to, other people was matter that fell within the core meaning of the phrase 'personal affairs'. Accordingly, as the matter in issue in this review is the medical record of the applicant's son, which documents the inpatient health care treatment provided to the applicant's son including medication records and progress notes, and also documents observations of interactions between the applicant's son and family members (other than the applicant), and the applicant, and another patient, it clearly falls within the core meaning of personal affairs information.
- 99. The matter in issue concerns the personal affairs of the applicant's son and is *prima facie* exempt.
- 100. Before leaving the question of whether the information is personal affairs information, I note that some of the information in the record (e.g. notes that document the interactions between the applicant and his son, and the discussion between the applicant and his son's case manager) can be categorised as information that concerns both the personal affairs of the applicant and his son. That is, the information is the shared personal affairs of the applicant and his son.
- 101. The concept of 'shared personal affairs' in the context of section 44(1) of the FOI Act was discussed in *B*. According to that decision, I must determine whether the information that concerns the applicant's personal affairs, which is contained in the matter in issue in this review, can be severed from the personal affairs information of his son.
- 102. In this case, the personal affairs information of the applicant, such as, his interactions with his son, is so inextricably interwoven with the personal affairs information of his son, in that the same record is conversely about his son's interaction with his father, that it is not possible to sever the information.
- 103. Accordingly, I find that all of the matter in issue in this review is *prima facie* exempt pursuant to section 44(1) of the FOI Act.

Public Interest Question

- 104. Because the matter in issue concerns the personal affairs of persons other than the applicant, consideration must be given as to whether there are sufficient public interest considerations favouring disclosure of the matter in issue to outweigh the public interest considerations favouring non-disclosure of the matter in issue.

105. The following public interest considerations are relevant in the circumstances:

- the public interest in an individual's right to pursue a legal remedy
- the public interest in ensuring the accountability of public services
- the public interest in the privacy of medical records

Public interest considerations favouring non-disclosure

Protecting an individual's privacy

106. The Information Commissioner has previously found that the public interest in maintaining the privacy of an individual's medical records is a strong one, which would ordinarily be given considerable weight in the application of a public interest balancing test.²⁷

107. In *Summers* the Information Commissioner recognised that the weight of the privacy interest in a person's medical records may be reduced, in the case of a close relative applying for access to the medical record of a deceased person, where there is satisfactory evidence that the applicant has been privy to medical information of the kind covered in the particular matter in issue. Additionally, the Information Commissioner observed that the extent of the knowledge of the close relative would be determinative of the degree to which the weight of the privacy interest is reduced.²⁸

108. The applicant has submitted that he had a close and loving relationship with his son. It is certainly evident from the applicant's submissions that he was a supportive and caring parent, who was proud of his son's achievements, particularly in his sporting endeavours. It is equally evident that he has suffered from the loss of his son.

109. I note from the matter in issue and the applicant's submissions that:

- when the applicant became aware that his son had been hospitalised he visited his son at the RBWH
- the estrangement of the applicant and his former wife resulted in poor communication between the parents, which consequently resulted in the applicant not being made aware of his son's hospitalisation earlier in his admission
- the applicant's son was not particularly forthcoming during the applicant's hospital visits with information about his health and treatment, being a quiet and reserved type of person, providing little information to the applicant although they did generally discuss his son's medication²⁹
- the applicant discussed his son's condition with his case manager and a psychiatrist and was provided with a brochure in relation to Prozac.

110. However, I also note from the matter in issue that the applicant was not party to decisions about his son's treatment plans, including medication regimes, such information generally being discussed with the mother. Further, the applicant did not enunciate in his submission's a detailed level of knowledge of the kind of information contained within the matter in issue. Rather the applicant's submission's concerning

²⁷ *Summers* at paragraph 18, referring to *Fotheringham* at paragraphs 11, 24-25 and 33.

²⁸ At paragraph 19.

²⁹ As submitted in the applicant's statement attached to an email from the applicant's solicitors dated 13 October 2009.

his son's treatment were largely based on the information he had obtained during his discussion with his son's case manager and information he has gleaned subsequent to his son's death.

111. In my view, none of the material before me is sufficient to demonstrate that the applicant had a level of knowledge about the kind of information contained in the matter in issue of sufficient detail to reduce the weight of the privacy interest attaching to the matter in issue.

112. I acknowledge that the applicant's level of knowledge of the information contained in the matter in issue may be attributed to the nature of the relationship between the applicant and his former wife. In relation to this, I note the applicant's solicitor's submission that:

*The fact that our client has to endure the steps of accessing this information through these avenues is evidence enough that he was not informed of any of the fundamental issues surrounding his son...*³⁰

... ..

*It may have been unfortunate that due to our client and his wife being estranged that our client was not fully informed with respect to his son's mental health but that surely does not prevent each parent from being entitled to the relevant information with respect to a minor.*³¹

113. However, while it is certainly an unfortunate circumstance, when combined with the nature of responsibilities placed upon the mother by the Family Court, it explains the reason the applicant did not have a requisite knowledge of the kind of information contained in the matter in issue sufficient to reduce the weight of the privacy interest.

114. Referring to the applicant's solicitor's submissions at paragraph 112 above and other submissions provided during the course of this review, there are three further issues raised by the applicant that are relevant to a consideration of the public interest in ensuring an individual's privacy. Firstly, that as a parent the applicant is entitled to the medical record of his son. Secondly, that this is particularly so given that his son was a minor; and, thirdly, the fact that his son suffered from a mental illness reduced the privacy interest in his son's medical record.

115. In the matter of *FMG*, the Information Commissioner noted that an applicant's familial relationship to another person does not confer any entitlement to be given access to information concerning the personal affairs of that other person under the FOI Act. That case concerned a father seeking access to police interviews conducted with his children who were minors. In this case the applicant has argued that his status as a parent entitles him to access the medical record of his son.

116. In its submissions QH point to the confidentiality requirements imposed on health practitioners and that QH clearly conveys to patients an expectation that medical records are confidential and that patient privacy is maintained.³²

³⁰ ER Application

³¹ By letter dated 24 June 2009.

³² See for example, the Department's statements on its website at <http://www.health.qld.gov.au/hospital/records.asp> and <http://www.health.qld.gov.au/privacy/default.asp> as outlined in paragraph 95.

117. The *Health Services Act 1991 (HS Act)* provides that it is a punishable offence for a health practitioner to disclose to another person, whether directly or indirectly, any information acquired if a person (including a deceased person) who is receiving or has received a public sector health service could be identified from the confidential information. While the Act permits disclosure of confidential information required or permitted by another Act, such as the FOI Act, the HS Act sets out the requirements of statutory confidentiality on health practitioners. This law overrides any entitlement a parent may assume is associated with parental responsibility. A health practitioner may disclose confidential information where the person to whom the confidential information relates is a child and the health practitioner reasonably believes the child is of sufficient age and mental and emotional maturity to understand the nature of consenting to the disclosure and the child has consented to the disclosure.³³
118. The *Family Law Act (Cth) 1975* provides that each of the parents of a child who is not 18 has parental responsibility for the child, subject to any court order in place. In this matter there was a relevant court order in place. The Act makes clear where the responsibility for the child lies but does nothing to override a child's rights including any entitlement to privacy, nor the statutory responsibilities placed on others. The Act is silent with respect to the responsibilities of others toward the parents of children, in particular, educational or health facilities with respect to communication with both parents when they are estranged.
119. In light of the matters addressed in the two preceding paragraphs and the fact that the applicant's son was nearly of the age of majority at the time of his admission, I am not persuaded that there is any reason to reduce the weight of the privacy interest in that medical information on the basis of the applicant's familial relationship with his son and his son's minority.
120. In relation to the third issue the applicant submitted that the privacy interest in the medical information is substantially reduced by the very fact of the applicant's son mental and emotional capacity. The Information Commissioner discussed in Stewart the fact that a person's health or ill health is clearly that person's personal affairs information and accordingly carries with it a significant privacy interest.
121. I do not accept this submission. The fact that the medical records concern the mental health status of a person as opposed to say, the removal of a splinter, may in fact strengthen the privacy interest on the basis of reputational risks to the person, and desirability of protecting the confidentiality of the relationship between the health provider and the health consumer to promote trust and openness in that relationship. Disclosure of such information may dissuade people in need from seeking treatment or from providing treating practitioners with information that is necessary for quality care.
122. Finally, in relation to the relative weight of the privacy interest, I note that in the course of this review QH provided the applicant's solicitors a copy of the medical record, the matter in issue in this review, pursuant to the PIP Act.
123. As such the question arises whether, as a consequence of the PIP Act disclosure, the weight of the public interest in maintaining the privacy of the matter in issue is diminished.
124. There is an implied undertaking on a person who obtains access to a document in court proceedings that they may only use that document in those proceedings.³⁴

³³ Section 62C(b) of the HS Act.

³⁴ See *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 33.

Therefore, the information released by QH to the applicant under the PIP Act is confined to that purpose.

125. As noted previously in this decision, in *FMG*, the Information Commissioner noted the distinction between accessing information under the FOI Act and accessing that same information through other means. The Information Commissioner noted that disclosure under the FOI Act brought with it no restriction. In particular, the Information Commissioner stated:

*... the consequences of disclosure of information under the FOI Act are, with few exceptions, to be evaluated as if disclosure were to any person ... there being no restriction (apart from any imposed by the general law) on the use or further dissemination, by an applicant for access, of information obtained under the FOI Act.*³⁵

126. The Information Commissioner went on to say that:

... disclosure under the FOI Act (with no restriction on further use or dissemination) of the matter in issue, in documentary form, would, in [his] opinion, constitute a serious invasion of privacy.

127. Accordingly, although the matter in issue has been released to the applicant for a limited purpose, this does not significantly diminish the public interest in maintaining the privacy of the applicant's son's medical record under the FOI Act.
128. As such, I find that the weight of the public interest in maintaining the privacy of the matter in issue remains high.

Public interest considerations favouring disclosure

Right to pursue a legal remedy

129. A public interest consideration will arise when an applicant can demonstrate:³⁶
1. loss or damage or some kind of wrong has been suffered, in respect of which a remedy is, or may be, available under the law;
 2. the applicant has a reasonable basis for seeking to pursue the remedy; and
 3. disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available, or worth pursuing.
130. At the commencement of this review, the applicant's solicitors submitted that the applicant was seeking access to the matter in issue on the basis that: the RBWH and the school owed a duty of care to the applicant and that the duty of care had been breached. These submissions centred upon the RBWH not advising the applicant when his son was admitted and the lack of information provided to the applicant by the RBWH in respect of his son's condition and the school not advising the applicant about his son's mental health.
131. The applicant's solicitors subsequently submitted in their letter dated 24 June 2009, that the applicant was seeking access to the matter in issue to determine whether his son was treated in a proper manner by the RBWH and that the school did not breach its duty of care.

³⁵ At paragraph 29.

³⁶ *Willsford* at paragraph 17.

132. In the submissions dated 14 August 2009, the applicant's solicitors then submitted that the applicant had sufficient evidence and a reasonable basis to pursue a claim against the RBWH and the son's school in particular in relation to the lack of notification of the applicant by the RBWH and the school as to his son's condition and the RBWH in relation to the prescription of Prozac without adequate follow-up treatment and consultation.
133. The applicant in his affidavit then enunciated the basis for his claim that the school and the hospital breached their duty of care by:
- (i) failing to advise him of his son's admission to the hospital
 - (ii) failing to involve him in his son's treatment whilst admitted
 - (iii) failing to involve him in the planning of on-going treatment for his son
 - (iv) failing to advise him of the depressive incident his son had at the school on 7 May 2008
 - (v) failing to seek immediate medical attention on 7th and/or 8th May 2008.
134. As previously noted, the applicant has now commenced proceedings under the PIP Act against both the school and the RBWH.
135. On the basis of the material provided by the applicant and applying the principles of *Willsford's* case as identified above, I am satisfied that the applicant has suffered a loss as a result of his son's death. However, I am not satisfied that there is necessarily a reasonable basis for the applicant to pursue a legal remedy in respect of that loss.
136. In accordance with the Information Commissioner's decision in *Willsford*, although I do not have to be satisfied that there is "*the likelihood of a successful pursuit of a legal remedy in the event of obtaining access to the information in issue*", I do have to be satisfied that there may be a remedy available under the law and that the applicant has a reasonable basis for seeking to pursue the remedy.
137. While I acknowledge the tragic circumstances of this case and I am aware that the applicant has commenced proceedings under the PIP Act against both the son's school and the RBWH, I am not satisfied that there is a reasonable basis for the applicant's claim. Having considered the submissions provided by the applicant and the matter in issue, I am of the view that any duty to notify the applicant has not been established, particularly with reference to the Family Court order and the applicant's son's domestic living arrangements nor that there is any satisfactory causal or contributory link between any failure to advise the applicant or involve the applicant and the suicide of his son.
138. In relation to the third limb in *Willsford*:
- the applicant's solicitor's submissions make it plain that they were already of the view that they had sufficient evidence to commence proceedings at the outset of this review
 - the applicant has now commenced proceedings against the school and the RBWH under the PIP Act
 - I am aware that QH has provided the applicant with a copy of the matter in issue pursuant to the proceedings under the PIP Act.
139. In accordance with *Shi*, the fact that the applicant has commenced proceedings under the PIP Act and the fact that QH has provided the applicant with a copy of the matter in

issue are facts that I may consider in determining whether this public interest ground is established.

140. In light of the applicant's solicitors' submissions and the subsequent PIP Act claims and the provision of the matter in issue to the applicant pursuant to the PIP Act claims, it is clear that the applicant did not and does not need access to the matter in issue in order to assist him to pursue a legal remedy or to evaluate whether a legal remedy was available or worth pursuing.
141. Given my findings in relation to the second and third limbs of the test set out in *Willsford*, I find that the release of the matter in issue would not advance the public interest in relation to the right of an individual to pursue a legal remedy.

Accountability of public hospitals

142. There is a legitimate public interest in the accountability of public services including hospitals for the provision of medical services in accordance with proper professional standards, and for timely and cost-effective service delivery,³⁷ but such accountability must be weighed against the public interest in protecting information about the private affairs of individuals.
143. In most cases, the public interest in government accountability is not sufficient to tip the scales in favour of disclosure because of the resulting collision with the public interest in protecting personal privacy.
144. In relation to this public interest consideration the applicant has argued that the actions of the RBWH in not consulting or involving him in relation to the treatment of his son, failing to follow proper practice and procedure in dealing with an adolescent suffering from a major depressive disorder and giving deficient information to family and caregivers, particularly in relation the prescription of the drug Prozac, should be open to public scrutiny.
145. In cases where a collision between public interest considerations is inevitable, the Information Commissioner has found there must be a particularly strong interest in accountability to be served by disclosure if it is to outweigh the public interest in protecting the privacy of a person's medical records for example by exposing unsatisfactory or negligent performance and enabling remedial and/or compensatory action to be taken.³⁸
146. In *Summers*, the Information Commissioner recognised that there may be a public interest in the disclosure of a deceased's medical records to a close relative where the information would support the existence of a proper basis for complaint to what is now titled the Health Quality and Complaints Commission (**HQCC**), or the Medical Board of Queensland (**Medical Board**), concerning the medical treatment of the deceased person.
147. In the present case, the applicant has not established that the information is required to support the existence of a proper basis for complaint to HQCC or the Medical Board nor as previously noted in this decision that the information is required to pursue a legal remedy.

³⁷ *Summers* at paragraph 27.

³⁸ *Summers* at paragraph 29.

148. Additionally, I have carefully reviewed the matter in issue and I am satisfied that the information contained in the matter in issue would not assist in establishing grounds for a proper basis to make a complaint.

Summary – weighing the public interest considerations

149. In summary, I consider that the weight of the public interest in maintaining the privacy of the applicant's son's medical record is substantial and that the weight to be attributed to the public interests in favour of disclosure is minimal. Accordingly, on balance, I consider that the public interest in favour of non-disclosure of the matter in issue outweigh those in favour of disclosure.

150. Therefore, the matter in issue is exempt under section 44(1) of the FOI Act.

DECISION

151. I affirm the decision under review.

Julie Kinross
Information Commissioner

Date: 31 March 2010