OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 01/2003
Application S 54/02

Participants:

"JSD"
Applicant

MEDICAL BOARD OF QUEENSLAND
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – liability to pay access charges under the *Freedom of Information Regulation 1992* Qld – requested documents concern allegations against the applicant of sexual misconduct in the course of treating patients - whether or not the requested documents concern the personal affairs of the applicant - application of s.7 of the *Freedom of Information Regulation 1992* Qld.

FREEDOM OF INFORMATION - calculation of access charges under the *Freedom of Information Regulation 1992* Qld – apportionment of processing charges where some requested documents concern the applicant's personal affairs and some do not - application of s.7, s.8 and Schedule 1 of the *Freedom of Information Regulation 1992* Qld.

Freedom of Information Act 1992 Qld s.29(2), s.29(A)(2), s.44(1)
Freedom of Information Regulation 1992 Qld s.7, s.8, Schedule 1
Freedom of Information Act 1982 Cth

Ainsworth and Criminal Justice Commission, Re (1999) 5 QAR 284
Bleicher v Australian Capital Territory Health Authority (1990) 20 ALD 625
Breen v Williams (1996) 70 ALJR 772
Colakovski v Australian Telecommunications Corporation (1991) 100 ALR 111
Department of Social Security v Dyrenfurth (1988) 80 ALR 533
Griffith and Queensland Police Service, Re (1997) 4 QAR 110
"NHL" and the University of Queensland, Re (1997) 3 QAR 436
Pope and Queensland Health, Re (1994) 1 QAR 616
Price and Surveyors Board of Queensland, Re (1997) 4 QAR 181
Stewart and Department of Transport, Re (1993) 1 QAR 227

DECISION

I set aside the decision under review (being the decision made on 6 February 2002 by Mr G Connell on behalf of the respondent). In substitution for it, I decide, with respect to the documents covered by the terms of the applicant's FOI access application lodged with the respondent on 10 December 2001, that:

(a) one audiotape plus documents comprising 115 folios (being folios 1-14, 14A, 15-26, 26A, 26B, 26C, 26D, 27-30, 30A, 31-33, 36-43 and 43A on file no. 915540/1782 and folios 1-49, 86-89, 111-119 on file no. 915540/1764, and six folios from the complainants' medical records, identified at paragraph 49 of my accompanying reasons for decision) contain some information which is properly to be characterised as information concerning the personal affairs of the applicant, and therefore do not attract access charges under s.7 of the *Freedom of Information Regulation 1992* Qld;

(b) other requested documents, comprising 198 folios (being folios 34-35 and 44-46 on file no. 915540/1782, folio 50 on file no. 915540/1764, and the medical records of the complainants except for the six folios identified at paragraph 49 of my accompanying reasons for decision), contain no information which can properly be characterised as information concerning the applicant's personal affairs, and therefore attract access charges under s.7 of the *Freedom of Information Regulation 1992* Qld;

(c) the charge which the applicant is liable to pay to the respondent, in accordance with item 1 in the Schedule to the *Freedom of Information Regulation 1992* Qld, in respect of the documents which do not concern the applicant's personal affairs, is to be calculated by apportioning, on a pro-rata basis, the total time assessed by the respondent in its s.29A(2) notice for processing the access application (22 hours), less one hour spent processing the audiotape referred to in subparagraph (a) above (22-1=21 hours), by reference to the total number of folios comprising the documents that I have decided do not concern the applicant's personal affairs (198), as a fraction of the total number of folios processed by the respondent (313), multiplied by the hourly charge set out in item 1 of the Schedule, i.e.:

198/313 x 21 hours x $20/hour = **$265.69**; and

(d) the respondent should refund to the applicant the amount by which any access charges paid in respect of item 1 in the Schedule exceeded $265.69, and should refund any charges paid in respect of items 2 or 3 in the Schedule for the provision of access to the documents identified in subparagraph (a) above.

Date of decision: 4 March 2003

….....
G J SORENSEN
DEPUTY INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision that the documents falling within the terms of his FOI access application do not concern his personal affairs, and therefore attract access charges under s.7 of the *Freedom of Information Regulation 1992* Qld (the FOI Regulation).

2. By an undated letter received by the Medical Board of Queensland (the MBQ) on 10 December 2001, the applicant sought access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to:

> … *all information available pertaining to the current investigation of myself by the Board. This matter regards complaints by* [Ms K] *and* [Ms T].

The applicant also enclosed a cheque for $31 in payment of the application fee imposed by s.6 of the FOI Regulation on access applications which cover at least one document that does not concern the personal affairs of the access applicant.

3. By letter dated 9 January 2002, Ms Cochran of the MBQ issued a notice of preliminary assessment of charges under s.29A(2) of the FOI Act, informing the applicant that she considered his application to be "non-personal", and that he was therefore liable to pay access charges in accordance with s.7 and s.8 of the FOI Regulation. Ms Cochran advised that she had assessed the charges at $440.00, and that she required payment by the applicant of a deposit of $110.00.

4. By letter dated 22 January 2002, Mr Harry McCay, Senior Solicitor, United Medical Protection, advised the MBQ that he acted for the applicant and that he sought an internal review of Ms Cochran's decision. By letter dated 6 February 2002, Mr Geoff Connell, Acting Registrar of the MBQ, informed Mr McCay that he had decided *"to uphold the 'non-personal' status of your client's FOI application"*, and that the deposit was required to be paid by the applicant before his access application would be processed.

5. The applicant paid the deposit "under protest" to ensure that his access application would be processed by the MBQ. By letter dated 4 March 2002, the applicant applied to the Information Commissioner for review of Mr Connell's decision.

6. On 11 March 2002, the MBQ gave its decision on access (granting access to some documents and refusing access to others). On 3 April 2002, the applicant paid all charges requested from him by the MBQ in order to obtain access to the documents which the MBQ was prepared to disclose under the FOI Act. However, the applicant has pursued his application for review in respect of charges and, if he succeeds in whole or in part, he can obtain a refund of all or part of the charges paid. The applicant has not sought review by the Information Commissioner of the MBQ's decision to refuse him access to some documents and parts of documents.

7. This is the first case which has required a decision by the Information Commissioner or his delegate (others have been resolved informally) under the amended provisions of the FOI Act and the FOI Regulation which introduced a new and broader charging regime for access applications lodged on or after 23 November 2001. Hence, it may be of interest to a wider audience of FOI administrators and users of the FOI Act.

External review process

8. The MBQ was asked to provide copies of the documents covered by the terms of the applicant's access application, except for copies of the medical records of the two complainants to the MBQ. (It was initially assumed that those medical records would contain no information concerning the applicant's personal affairs. Later in the review, however, the applicant argued that the medical records of the complainants also concerned his personal affairs, and those records too were obtained and examined.) Most of the documents initially obtained for examination relate to complaints of misconduct of a sexual nature made against the applicant by two of his patients. Many of the documents refer expressly to allegations of "sexual misconduct" against the applicant; however, some refer to misconduct or disciplinary proceedings generally, without specifically identifying the nature of the misconduct.

9. By letter dated 8 April 2002, Assistant Information Commissioner (AC) Shoyer informed the MBQ that he had reviewed the documents initially requested and formed the preliminary view that, with the exception of five folios contained on file no. 915540/1782, *viz.*:

- *folio 34 - Health Summary – Ms T;*
- *folio 35 - Receipt for Seized Things; and*
- *folios 44-46 - Doctor's work analysis sheets,*

the documents all contained some information which was properly to be characterised as information concerning the applicant's personal affairs. AC Shoyer acknowledged that most of the documents concerned the applicant's employment or professional affairs, but observed that the bulk of them also referred to complaints of sexual misconduct that had been made against the applicant. AC Shoyer was of the preliminary view that references to alleged sexual misconduct should properly be characterised as information concerning the applicant's personal affairs. In respect of those documents that did not specifically identify the nature of the misconduct alleged against the applicant, but simply referred to misconduct, AC Shoyer expressed the preliminary view that those references should be understood as taking colour from the documents around them, such that they, too, should be characterised as information concerning the applicant's personal affairs.

10. AC Shoyer also conveyed his preliminary view that some documents concerned the personal affairs of the applicant for other reasons. As an example, AC Shoyer referred to folio 27 on file no. 915540/1782 (of which folio 116 on file no. 915540/1764 is a duplicate), which comprises a record of a telephone conversation between the MBQ and the applicant in which, in addition to other matters, the applicant asked for information about the process for making an FOI access application. AC Shoyer expressed his preliminary view that the reference to the making of an FOI access application was properly to be characterised as information concerning the applicant's personal affairs.

11. By letter dated 30 May 2002, the MBQ responded to AC Shoyer's letter, stating that it accepted his preliminary views in relation to folio 27 in file no. 915540/1782 (of which folio 116 in file no. 915540/1764 is a copy), and in relation to folios 34, 35 and 44-46, which accorded with the MBQ's position in any event. However, the MBQ otherwise maintained its position that none of the remaining documents in issue could properly be characterised as documents concerning the applicant's personal affairs, and that the applicant was therefore required to pay access charges in respect of those documents.

12. A copy of the MBQ's letter was provided to the applicant's solicitor for response. By letter dated 10 July 2002, the applicant's solicitor lodged a submission in reply, which, in turn, was sent to the MBQ for its information. I will discuss those submissions in more detail below.

13. On 5 September 2002, AC Shoyer wrote to the MBQ requesting a breakdown of the way in which it had calculated the access charges, including details of the amount of time spent in dealing with the various classes of documents. AC Shoyer subsequently met with Mr John Posner, the MBQ's Information Co-ordinator, to discuss those matters.

14. By then it had become apparent that it was necessary to obtain and examine copies of the medical records of the two complainants (totalling 198 folios) that were held by the MBQ. In a letter to the applicant's solicitor dated 23 December 2002, AC Shoyer stated that he had reviewed the complainants' medical records and formed the preliminary view that, with the exception of a small amount of matter, those medical records did not concern the applicant's personal affairs. AC Shoyer also gave the applicant's solicitor a summary of the information provided by the MBQ regarding its calculation of the access charges. AC Shoyer informed the applicant's solicitor that, based on the information provided by the MBQ, there did not appear to be any simple way to differentiate between time spent by the MBQ in processing documents concerning the personal affairs of the applicant, and time spent in processing documents that did not concern the applicant's personal affairs. It appeared that the time spent in processing all documents was relatively evenly distributed. AC Shoyer conveyed his view that the most practical approach would be to apportion, on a pro-rata basis, the time spent by MBQ staff on processing the access application, depending on the number of pages which the Information Commissioner or his delegate ultimately decided did not concern the applicant's personal affairs, as against those which did concern his personal affairs. In the event that the applicant wished to contend that this was not an appropriate method of apportioning the time spent in processing the access application and to suggest an alternative method, AC Shoyer invited the applicant's solicitor to lodge written submissions and/or evidence in support of his client's case.

15. The applicant's solicitor responded by letter dated 7 January 2003 (a copy of which was sent to the MBQ for its information), advising that the applicant did not accept AC Shoyer's preliminary view. The applicant's submissions in that regard are discussed below.

16. The applicant's solicitor was contacted on 24 January 2003 and 25 February 2003 to discuss some of the matter in issue in more detail. As a result of those discussions, the applicant's solicitor advised that the applicant accepted AC Shoyer's preliminary view that folio 34, folio 35 (and its duplicate, folio 50 on file no. 915540/1764) and folios 44-46 on file no. 915540/1782, did not contain any information which could properly be characterised as information concerning the applicant's personal affairs.

17. In summary, there are a total of 313 folios, plus one audiotape, in issue in this review. During the course of the review, the MBQ and the applicant agreed that two folios (folio 27 on file no. 915540/1782 and folio 116 on file no. 915540/1764) contained information concerning the applicant's personal affairs, and that six folios (folios 34-35 and 44-46 on file no. 915540/1782, and folio 50 on file no. 915540/1764) contained no information which concerned the applicant's personal affairs. Accordingly, I will not refer to those documents in the discussion below concerning the proper characterisation of the documents in issue. However, it will, of course, be necessary to include them when calculating the access charges that are payable by the applicant (see paragraph 59 below).

18. In making my decision in this matter, I have taken into account:

- the contents of the documents in issue;
- the terms of the applicant's FOI access application, and arguments made in his respective applications for internal review and external review;
- the reasons for decision given in the MBQ's initial and internal review decisions;
- written submissions by the MBQ dated 30 May 2002 and 19 July 2002, and information provided by Mr Posner at a meeting on 31 October 2002; and
- written submissions by the applicant dated 10 July 2002 and 7 January 2003.

FOI charging regime – statutory framework

19. Amendments to the FOI Act and the FOI Regulation which took effect from 23 November 2001 introduced a significantly broader charging regime. In respect of an application for access to documents that do not concern the applicant's personal affairs, and provided the total time spent by an agency in dealing with the access application exceeds two hours, charges can now be levied for the time spent by an agency in searching for and retrieving documents, doing things related to making a decision, making arrangements for providing access to documents, and supervising the inspection of documents. The statutory provisions relating to charges are set out in s.29 - s.29D of the FOI Act, and s.7 - s.12 and Schedule 1 of the FOI Regulation, of which the following are relevant for present purposes.

20. Section 29(2) of the FOI Act provides:

> ***29.(2)*** *A regulation may require an applicant applying for access to a document that does not concern the applicant's personal affairs to pay a charge at the time required under the regulation.*

21. Section 7 of the FOI Regulation relevantly provides:

> ***7.(1)*** *For section 29A(1) of the Act, the agency or Minister must decide the applicant is liable to pay a charge in relation to an application for access to a document if the agency or Minister is satisfied that—*
>
> *(a) the document does not concern the applicant's personal affairs; and*
>
> *(b) the total amount of time spent by an officer or officers doing a thing mentioned in the schedule, item 1 or 2, or a combination of the things mentioned in the schedule, items 1 and 2, is likely to be more than 2 hours.*
>
> …
>
> ***(4)*** *In this section—*
>
> *"**access**" includes provision of access.*

22. Section 8 of the FOI Regulation relevantly provides:

> ***8.(1)*** *The schedule sets out charges payable by an applicant for access to a document.*
>
> ***(2)*** *However, a charge is not payable for doing, for a particular application, a thing mentioned in the schedule, item 1 or 2, or a combination of the things mentioned in the schedule, items 1 and 2, if the total amount of time spent by an officer or officers doing the thing or things is 2 hours or less.*
>
> …

23. The Schedule to the FOI Regulation relevantly provides:

> ***CHARGES***
>
> *section 8(1)*
>
> ***1.*** *Charge for time spent by an agency or Minister in searching for or retrieving a document, or making, or doing things related to making, a decision on an application for access—$5 for each 15 minutes or part of 15 minutes.*
>
> ***2.*** *Charge if an agency or Minister makes an officer available to supervise the inspection of a document—$5 for each 15 minutes or part of 15 minutes.*
>
> ***3.*** *Charge for giving access to a written document by providing a black and white photocopy of the document in A4 size—$0.20 for each page.*
>
> …

24. In a review by the Information Commissioner under Part 5 of the FOI Act, the application of these provisions logically falls into three distinct stages:

(1) The question of whether an applicant is liable to pay access charges first requires a decision as to whether, and to what extent, documents sought in the relevant access application concern the personal affairs of the applicant.

(2) If it is established that some or all of the requested documents do not concern the personal affairs of the applicant, it is necessary to determine whether, in respect of those documents only, the time spent (or to be spent, if the Information Commissioner is reviewing a decision to affirm a s.29A(2) notice of preliminary assessment of charges in a case where the access application is still to be processed) by agency officers in doing things mentioned in items 1 and 2 of the Schedule to the FOI regulation has exceeded (or will exceed) two hours.

(3) In respect of those requested documents which do not concern the applicant's personal affairs, it must be determined that the total amount of time spent by agency staff on chargeable activities specified in the Schedule to the FOI Regulation has been correctly assessed (or that the time to be spent on those chargeable activities has been fairly estimated, as the case may be) and that the charges (or estimated charges) have been accurately calculated at the prescribed rate.

Application to the documents in issue

(1) Liability to pay access charges – whether, and to what extent, the requested documents concern the applicant's personal affairs

25. The criterion that attracts the requirement to pay an access charge under s.7 of the FOI Regulation, i.e., that a requested document "does not concern the applicant's personal affairs", has undergone no material change since the Information Commissioner explained the application of the test imported by that phrase (in the former s.7 of the FOI Regulation) in *Re Price and Surveyors Board of Queensland* (1997) 4 QAR 181, at paragraphs 26-29. At paragraph 29, the Information Commissioner concluded:

> *I consider that s.7 of the FOI Regulation requires an assessment of whether a document to which access has been requested contains some information which can be properly characterised as information concerning the personal affairs of the applicant for access (see also* Re Ryder and Department of Employment, Vocational Education, Training and Industrial Relations *(1994) 2 QAR 150 at pp.155-156, paragraph 19, and* Re Jesser and University of Southern Queensland *(Information Commissioner Qld, Decision No. 97015, 8 October 1997, unreported) [now reported at (1997) 4 QAR 137] at paragraph 24). If so, it will be a document that concerns the applicant's personal affairs, and no charge will be payable for access to the document… . If not, it will be a document that does not concern the applicant's personal affairs, and the applicant must pay any charge that is prescribed for obtaining access to the document (see s.7(1) of the FOI Regulation).*

This statement of principle is equally applicable to s.7 of the FOI Regulation in its current form.

26. In *Re Stewart and Department of Transport* (1993) 1 QAR 227, the Information Commissioner 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, in the FOI Act (see *Re Stewart* at pp.256-267, paragraphs 79-114). In particular, the Information Commissioner 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:

- affairs relating to family and marital relationships;
- health or ill health;
- relationships with 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.

27. The core of the dispute between the applicant and the MBQ is over the proper characterisation of the documents to which the applicant requested access. The MBQ insists that the documents concern incidents which occurred in the course of the applicant's treatment of patients, and so concern the applicant's professional or employment affairs, and not his personal affairs. It is clear on their face that many of the documents in issue concern the applicant's professional or employment affairs: they relate to the conduct of his professional activities as a medical practitioner. Usually, information about a person's employment or professional affairs could not properly be characterised as information concerning his/her personal affairs. However, the applicant asserts that the fact that the documents concern allegations about his sexual conduct means that they are also documents concerning his personal affairs. In that regard, the applicant relies on the Information Commissioner's decision in *Re "NHL" and the University of Queensland* (1997) 3 QAR 436, where the matter in issue concerned allegations of sexual harassment made by a student against a lecturer.

28. In *Re "NHL"*, the Information Commissioner decided that information relating to allegations of sexual harassment, even sexual harassment occurring in the workplace, was properly to be characterised as information concerning the personal affairs of the subject of the allegations. At paragraph 29 of *Re "NHL"*, the Information Commissioner said:

> *I also consider that the alleged sexual harasser's involvement in the incidents which produced the complaints referred to in pages 23-33 of document 3, falls into the area of matters concerning his personal affairs, notwithstanding that the incidents occurred in a workplace context. In* Re Stewart *(at p.261, paragraph 92), I said that there is a relevant distinction to be drawn in respect of matters that relate to an employee as an individual, rather than an employee as agent or representative of the employer, and that some matters in the former category may fall within the meaning of the phrase "personal affairs". Conduct amounting to sexual harassment would not be conduct that an employee is authorised to perform as agent or representative of his or her employer. … Where misconduct in employment becomes an issue, that grey area between "personal affairs" and employment affairs (discussed in* Re Stewart *at pp.261-264) is encountered. <u>However, I consider that an individual's sexual conduct, and relations with others, has such a strong</u>

> *element of the personal about it that the information in issue concerning those matters should properly be characterised as information concerning the personal affairs of the person against whom the complaints of sexual harassment (mentioned in pages 23-33 of document 3) were made. I also consider that the actions taken by that person, in response to the actions taken by the University in respect of the complaints of sexual harassment, are properly to be characterised in this instance as matters concerning that person's personal affairs.*
>
> [my underlining]

29. In its submissions, the MBQ sought to distinguish the Information Commissioner's decision in *Re "NHL"*. I will discuss the MBQ's arguments in that regard in more detail below.

30. Having regard to the principle explained at paragraph 25 above, it is necessary to examine each document in issue and to decide whether or not it contains some information that is properly to be characterised as information concerning the applicant's personal affairs. I will discuss the documents in issue under the following categories:

(a) documents relating to the complaints made against the applicant and the MBQ's investigation of those complaints; and
(b) the medical records of the complainants.

(a) Documents relating to the complaints made against the applicant and the MBQ's investigation of those complaints

31. The bulk of the documents falling within this category (including an audiotape of an interview with one of the complainants) relate to the MBQ's investigation of the allegations of sexual misconduct made against the applicant. Those documents can be further divided into the following sub-categories:

(i) documents which refer specifically to the allegations of sexual misconduct made against the applicant;

(ii) documents which refer generally to misconduct or disciplinary proceedings, without specifically identifying the nature of the misconduct; and

(iii) documents which refer to an investigation by the Queensland Police Service (the QPS) and to possible criminal proceedings against the applicant (it appears that the MBQ referred some matters to the QPS for investigation).

32. In support of its case that the above-mentioned categories of documents do not contain any information that could properly be characterised as information concerning the applicant's personal affairs, the MBQ argued as follows, in its submission dated 30 May 2002:

> *The respondent submits that a distinction should be drawn between sexual misconduct arising out of a relationship between a doctor and his patient and sexual harassment or other conduct between employees.*
> …

The respondent relies upon the passages set out above [paragraphs 49 to 51 of the Information Commissioner's decision in Re Griffith and Queensland Police Service (1997) 4 QAR 109]. *In the application now before the Information Commissioner, the alleged sexual acts occurred during the course of medical consultations. I submit that this case parallels the example provided by the Information Commissioner in* Re Griffith [at paragraph 51] *of the police officer who arrests and interrogates a suspect and later that conduct is alleged or proven to have involved excessive force and therefore to have involved misconduct or a breach of discipline.*

The alleged sexual acts related to and arose from medical consultations between the applicant and the complainant patients. They occurred as the applicant was examining his patient and providing treatment to his patient.

At paragraph 53 of Re Griffith*, the Information Commissioner went on to state:*

> … Of course, the disciplinary process itself is an incident of the employment relationship, and an employee's involvement in the disciplinary process must, in my opinion, be properly characterised as an aspect of his or her employment affairs, rather than his or her personal affairs. However, there would remain an issue as to whether mention of the employee's name in connection with some alleged or possible (but still unproven) wrongdoing is properly to be characterised as information concerning the employee's personal affairs. In my opinion, it cannot ordinarily be characterised in that way where the impugned conduct occurred in the course of the performance by the employee of his or her duties of employment.

In reliance on this passage the respondent submits that all documents brought into existence in respect of the respondent's investigation of complaints about the applicant must be characterised as concerning the applicant's professional affairs and not his personal affairs.

I note your reliance upon the Information Commissioner's decision in Re "NHL" ….

I submit that the case of Re "NHL" *can be distinguished on its facts from the present case. The matter currently before the Information Commissioner does not involve documents concerning allegations of sexual harassment made by one employee against another. The allegations in issue here are ones of sexual contact between a doctor and his patient arising from medical consultations. In determining whether or not the documents in issue … concern the applicant's personal affairs, it is necessary to consider the nature of the relationship between a doctor and his patient.*

33. The MBQ then went on to discuss the High Court's decision in *Breen v Williams* (1996) 70 ALJR 772 and the comments made by the High Court about the nature of the relationship between doctor and patient:

> *The High Court in* Breen v Williams *and the law of undue influence establishes that the relationship between a doctor and his patient is based on trust and often dependence. It is clear from the matter remaining in issue that the*

> *applicant is alleged to have developed such relationships with patients. I submit that, given the alleged sexual acts arose from, occurred at the time of, and were inextricably linked with, a professional consultation with* [the applicant], *the documents cannot be said to concern* [the applicant's] *personal affairs, but clearly concern his professional affairs.*
>
> …
>
> *Further, it should not be forgotten that one of the complainants has raised allegations of prescribing inappropriate medication, and information concerning this allegation would clearly concern the applicant's professional affairs and not his personal affairs.*

34. (As regards the final point made by the MBQ, I note that the documents which refer to a complaint made against the applicant that he prescribed inappropriate medication, also contain references to the allegations of sexual misconduct made against the applicant. I accept that references to the complaint of inappropriate prescription of medication are properly to be characterised as information concerning the applicant's professional or employment affairs, and not his personal affairs (there being no element of the personal about such a complaint). However, that characterisation will be irrelevant to the issue of whether or not charges are payable if I am satisfied that references contained in the same documents to allegations of sexual misconduct are properly to be characterised as information concerning the applicant's personal affairs. As indicated at paragraph 25 above, the Information Commissioner has previously decided that if any information contained in a document can properly be characterised as information concerning the applicant's personal affairs, then the whole document is to be characterised as a document concerning the applicant's personal affairs, and no access charges are payable in respect of it.)

35. There is no doubt that the MBQ is correct in asserting that most of the documents now under consideration concern the applicant's employment or professional affairs. However, that does not mean that they are incapable of also containing information which concerns the applicant's personal affairs.

36. The Information Commissioner's detailed examination in *Re Stewart* of the meaning of the term "personal affairs" in the many different contexts in which it is used in the FOI Act (see *Re Stewart* at paragraphs 9-11) drew heavily on judgments of the Federal Court of Australia interpreting the term "personal affairs" as it appeared in the *Freedom of Information Act 1982* Cth (the Commonwealth FOI Act) prior to 1991. Those Federal Court judgments recognised a basic dichotomy in the scheme of the Commonwealth FOI Act between personal affairs and business or professional affairs. The Information Commissioner observed that the same basic dichotomy was present in the scheme of the Queensland FOI Act. However, it is also clear from those Federal Court authorities that the two categories are not necessarily and always mutually exclusive. Thus, in *Department of Social Security v Dyrenfurth* (1988) 80 ALR 533, a Full Court of the Federal Court of Australia observed (at pp.538-540):

> *… it is not permissible to construe the phrase* ["information relating to … personal affairs" in s.41(1) of the Commonwealth FOI Act, as then in force], *as the tribunal appears to have done, as being incapable of application to information contained in an assessment of capacity or work performance. We do not understand Beaumont J to have adopted, in* Young v Wicks *or* Re Williams, supra, *any such rigidly exclusionary interpretation of the phrase. …*

…

> *It is sufficient for present purposes to indicate our view that information relating to the personal affairs of a person, such as information concerning his or her state of health, the nature or condition of any marital or other relationship, domestic responsibilities or financial obligations, may legitimately be regarded as affecting the work performance, capacity or suitability for appointment or promotion of that person. In those circumstances, it is conceivable that an assessment of work performance, capacity or suitability for appointment or promotion might contain such information.*

37. In *Bleicher v Australian Capital Territory Health Authority* (1990) 20 ALD 625, Wilcox J of the Federal Court of Australia summarised the result in *Dyrenfurth* as follows (at pp.629-630):

> *The members of the Full Court, in* Dyrenfurth … *accepted that, ordinarily, statements in documents which relate to a person's work performance or capacity do not constitute information regarding that person's 'personal affairs'. But they pointed out, upon some occasions, such documents may contain information of a personal nature, of which they gave examples. It was not possible to say that, because a document related to work performance or capacity, it was necessarily not a document containing information about somebody's 'personal affairs'. …*
>
> *… The document's contents must be considered; it is not enough merely to characterise it as dealing with a person's work performance or capacity.*

(See also comments to the same effect by Lockhart J in *Colakovski v Australian Telecommunications Corporation* (1991) 100 ALR 111 at p.117.)

38. Thus, in summarising the effect of relevant authorities in *Re Pope and Queensland Health* (1994) 1 QAR 616 at p.660 (paragraph 116), the Information Commissioner made the important reservation (which I have underlined for emphasis) in the following passage:

> *Based on the authorities to which I have referred, I consider that it should now be accepted in Queensland that information which merely concerns the performance by a government employee of his or her employment duties (<u>i.e., which does not stray into the realm of personal affairs in the manner contemplated in the</u>* Dyrenfurth *<u>case</u>) is ordinarily incapable of being properly characterised as information concerning the employee's "personal affairs" for the purposes of the FOI Act.*

39. I am satisfied that, consistently with the principle stated in the passage from *Re NHL* quoted at paragraph 28 above, references in many of the documents in issue to the applicant's alleged sexual conduct must properly be characterised as information concerning the applicant's personal affairs, notwithstanding that the alleged incidents occurred in the performance of the applicant's professional or employment duties. Consistently with the principle stated in the passage from *Re Price* quoted at paragraph 25 above, the documents in issue which contain references to the applicant's alleged sexual conduct are documents which concern the applicant's personal affairs, and no access charges are payable by the applicant in respect of those documents.

40. I do not accept the basis upon which the MBQ has sought to distinguish *Re "NHL"*. That case involved allegations of sexual harassment made by a student against a University lecturer. I acknowledge the unique relationship that exists between doctor and patient. However, I consider that, for the purposes of characterising allegations of sexual harassment or sexual misconduct as personal affairs information (or not), the nature of the relationship between the complainant and the subject of the complaint, and the context in which the alleged inappropriate behaviour occurred, would ordinarily be immaterial (even though those issues may be material when the application of the public interest balancing test in s.44(1) of the FOI Act is under consideration). It is the intensely personal nature of information concerning sexual conduct and relationships with others, and the strong privacy interest that *prima facie* attaches to information of that kind, that warrants its characterisation as information concerning personal affairs. (In contrast to the s.44(1) exemption, where public interest considerations warranting disclosure may ultimately prevail over the privacy interest inherent in the characterisation of information as personal affairs information, the only issue in the application of s.7 of the FOI Regulation is whether a requested document contains some information that is properly to be characterised as information concerning the applicant's personal affairs.)

41. The MBQ referred in its submissions to the Information Commissioner's decision in *Re Griffith* and submitted that the present case parallels the example given in paragraph 51 of *Re Griffith* of a police officer who arrests and interrogates a suspect, and whose conduct in that regard is subsequently alleged or proven to have involved excessive force and therefore to have involved misconduct or a breach of discipline. The Information Commissioner expressed the view that such conduct nevertheless remained part of the police officer's employment affairs, and not his or her personal affairs. The MBQ argued that, in the same way, sexual misconduct by a doctor should be characterised as misconduct occurring in the context of the doctor's professional obligations, and as therefore concerning his professional and not his personal affairs. But in the example used in *Re Griffith* which has been relied upon by the MBQ, the only additional element that could arguably have warranted characterisation of information concerning employment affairs as also concerning personal affairs, was the mention of the employee's name in connection with some alleged wrongdoing. In that regard (having noted that, for a public servant, the disciplinary process itself is an incident of the employment relationship), the Information Commissioner observed that allegations of wrongdoing could not ordinarily be characterised in that way where the impugned conduct occurred in the course of performing employment duties: see *Re Griffith* at p.127, paragraph 53. However, it is clear from a reading of paragraphs 49-52 which preceded that observation that, in making it, the Information Commissioner intended no qualification to the principle stated in *Re "NHL"*.

42. Even accepting that the applicant's alleged misconduct occurred in the context of his performance of his professional obligations and therefore concerned his professional affairs, the fact that the alleged misconduct was sexual in nature is sufficient to also characterise the references to it in the documents in issue as information concerning the applicant's personal affairs.

43. Accordingly, as regards the documents falling within category (i) (see paragraph 31 above), I find that each of them contains information which is properly to be characterised as information concerning the applicant's personal affairs, and that no access charges are payable by the applicant in respect of them. I note that the category (i) documents include an audiotape of an interview with one of the complainants that is approximately 45 minutes long.

44. As to the documents in category (ii), it is clear that they contain references to alleged misconduct and disciplinary proceedings involving the applicant, but they do not expressly refer to alleged sexual misconduct. However, I consider that a common sense approach must be taken to the question of characterising those references, which take their colour from the surrounding documents in the MBQ files. Both the MBQ and the applicant know that the incidents of alleged misconduct referred to involved alleged sexual misconduct, and that would also be apparent to any reader of all of the documents requested by the applicant. I note that in *Re "NHL"* at paragraphs 23-24, the Information Commissioner observed that information which the decision-maker must have understood (from its surrounding context and other documents examined in the course of processing the relevant access application) was about the personal affairs of the access applicant, even though it did not mention her by name, was properly to be characterised as information concerning the applicant's personal affairs. Similarly, in the present case, I am satisfied that the documents in category (ii) are properly to be characterised as documents concerning the applicant's personal affairs.

45. The documents falling within category (iii) could be treated on the same basis as the category (ii) documents. They refer to police investigations of possible criminal conduct, but in the fuller context of the files in which they appear, it would be apparent to any reader that the conduct proposed for investigation by the QPS is the same alleged sexual misconduct being investigated by the MBQ. However, the reference to police investigations adds an extra element that tells in favour of characterising the category (iii) documents as documents concerning the applicant's personal affairs. The Information Commissioner decided in *Re Ainsworth and Criminal Justice Commission* (1999) 5 QAR 284 (at p.330, paragraph 141) that:

> *Information that indicates or suggests that an identifiable individual has been involved in some alleged (but unproven) criminal activity or other wrongdoing is properly to be characterised as information concerning the personal affairs of that individual: see* Re Stewart *at p.257, paragraph 80;* Re Wong and Department of Immigration and Ethnic Affairs *(1984) 2 AAR 208;* Re Kahn and Australian Federal Police *(1985) 7 ALN N190.*

While there may be a qualification to that principle in respect of conduct by a public servant, in the course of performing employment duties, that attracts disciplinary action in an employment context (see paragraph 41 above), the principle applies to the references to a QPS investigation of the applicant that appear in the category (iii) documents. Accordingly, I find that documents falling within category (iii) are documents concerning the applicant's personal affairs, and that access charges are not payable by the applicant in respect of them.

(b) Medical records of the complainants

46. The medical records of the complainants comprise 198 folios - folios C51-C85 and a further 109 unnumbered documents contained on file no. 915540/1764; and 54 unnumbered documents contained on file no. 915440/1782.

47. In his letter dated 23 December 2002, AC Shoyer conveyed to the applicant's solicitor his preliminary view that, with the exception of a small amount of matter, the above-mentioned documents contain no information that could properly be characterised as information concerning the applicant's personal affairs. In response, the applicant's solicitor argued that:

> *…if it is accepted that records concerning a complaint of sexual misconduct are records concerning the doctor's personal affairs, then the entries made by the doctor about whom a complaint is made by a patient, with respect to*

> *the consultation during which it is alleged misconduct of a sexual nature occurred, ought also be construed as documents which relate to the doctor's personal affairs. This is because they are the most contemporaneous written account of the consultation and may prove or disprove the complaint.*

48. Applying the principles stated in *Re "NHL"*, I accept that any reference, appearing in the medical records of the complainants, to incidents of sexual conduct involving the applicant, is properly to be characterised as information concerning the applicant's personal affairs. However, if there is no such reference, and the records merely comprise the ordinary details of a patient consultation, then the documents will not satisfy the basic requirement (for a document to attract no access charges) of containing some information about the personal affairs of the access applicant (see paragraph 25 above). That will remain the case even though the patient later alleged that sexual misconduct occurred during that particular consultation.

49. Having reviewed the medical records in issue, I am satisfied that there are segments of information contained in the following six folios that refer to alleged sexual misconduct involving the applicant:

- notes of consultations with Ms T on 13 October 2001, 25 October 2001, 6 November 2001 and 13 November 2001 (comprising two pages) on file no. 915540/1782;
- notes made by the applicant relating to his records of consultations with Ms T on 25 October 2001, 6 November 2001 and 13 November 2001 (comprising two pages) on file no. 915540/1782; and
- notes of consultations with Ms K on 10 September 2001 and 4 October 2001 (comprising two pages) on file no.915540/1764.

I am satisfied that those documents contain segments of information that are properly to be characterised as information concerning the applicant's personal affairs. Accordingly, I find that those documents concern the applicant's personal affairs, and that no access charges are payable by the applicant in respect of them.

50. However, in respect of the remaining 192 folios which comprise medical records of the two complainants, I am satisfied that those folios contain no information which can properly be characterised as information concerning the applicant's personal affairs. They are records of professional consultations with patients. They record health concerns raised by the patients and the doctor's assessment of those concerns.

51. Accordingly, I find that, apart from the six folios identified in paragraph 49 above, the medical records of the complainants are not documents concerning the personal affairs of the applicant, and that the applicant is therefore liable to pay access charges under s.7 and s.8 of the FOI Regulation in respect of those 192 folios.

(2) Liability to pay access charges – total time expended

52. I am satisfied from the information provided by the MBQ in its initial and internal review decisions, and from the calculations set out below, that the time which the MBQ spent in processing the 198 folios which do not concern the applicant's personal affairs (comprising 192 pages of medical records of the complainants, together with folios 34, 35 and 44-46 on file no. 915540/1782, and folio 50 on file no. 915540/1764) exceeded two hours.

(3) Liability to pay access charges – type of activity and calculation of amount

53. I am satisfied, on the basis of the information contained in the MBQ's initial and internal review decisions, and the information provided by Mr Posner of the MBQ in his meeting with AC Shoyer on 31 October 2002 (which information was communicated to the applicant's solicitor in a letter dated 23 December 2002), that the activities carried out by the MBQ in processing the applicant's FOI access application fall within the chargeable activities specified in Item 1 of the Schedule to the FOI Regulation.

54. There are 313 folios in issue, plus one audiotape. I have explained above my reasons for finding that access charges are payable in respect of 198 folios, but not in respect of the other 115 folios or the audiotape.

55. In his meeting with Mr Posner, AC Shoyer sought information from the MBQ regarding the way in which the relevant FOI access application was processed. As noted, the total processing time was 22 hours. However, Mr Posner advised that he did not record the amount of time spent considering each document, as to do so would unreasonably increase the amount of time spent processing access applications. Mr Posner said that he spent considerable time listening to the audiotape tape of the interview with one of the complainants. It was approximately 45 minutes long and there was no transcript. Mr Posner said he had to listen to all of the interview to assess whether its disclosure could prejudice the MBQ's investigation, warranting application of the s.42(1)(a) exemption provision. I have decided (at paragraph 43 above) that no access charges are payable in respect of the audiotape. Since approximately one hour was spent in assessing the audiotape for decision-making purposes, I consider that there should be no charge payable in respect of one hour of the 22 hours assessed by the MBQ as chargeable time for dealing with the access application.

56. Mr Posner stated that, apart from the audiotape, he did not recall spending more time on any particular document or class of documents. It therefore appears that the time spent on processing all of the folios in issue was relatively evenly distributed. Mr Posner advised that the MBQ accepted that the most practical approach to calculating the charges was to apportion time on a pro-rata basis, depending on the number of folios which the Information Commissioner or his delegate ultimately decided did not concern the applicant's personal affairs, as against those which did concern his personal affairs.

57. However, in his letter dated 7 January 2003, the applicant's solicitor submitted as follows, regarding the issue of apportioning time:

> *…the appropriate approach is to identify the dates on which complainants allege certain matters occurred. Any records between those dates ought to be considered relevant to the personal affairs of* [the applicant]. *Any records outside those dates would fall within the definition of records relating to the business or professional affairs of* [the applicant]. *It would not be necessary for Mr Posner in that situation to read the medical records in detail, but only to identify dates on which records were made.*
>
> *Interpretation of records, particularly hand-written notes, can be quite difficult. It would be inappropriate to simply apportion matters on the basis of the number of pages, especially if it is accepted that it was not necessary to read the medical records in detail. In my submission the appropriate apportionment in that case would be to allocate some period of time to determining the dates of the various records which ought not, in my submission, take more than an hour in total and then apportion time by that method.*

58. This submission appears to be bound up with the contention (rejected at paragraph 48 above) that records of any patient consultations subsequently alleged to have involved sexual misconduct by the applicant are documents concerning the applicant's personal affairs. If that contention had been accepted, then perhaps only the time taken to assess whether or not the documents concerned the applicant's personal affairs (for the purpose of assessing whether charges were payable) would be allowable as a chargeable activity. However, on the conclusion I have reached in respect of the medical records of the complainants, all time spent by Mr Posner in dealing with those records, including reading them in detail to assess the application of exemption provisions and providing written reasons for decision in the notice of decision given under s.34 of the FOI Act, was chargeable time.

59. In the absence of any other information to assist me to make an assessment of the amount of time spent by the MBQ in processing "personal affairs" documents, compared to the amount of time spent in processing non- "personal affairs" documents, I am satisfied that it is appropriate to apportion, on a pro-rata basis, the total time assessed by the MBQ in its s.29A(2) notice for processing the access application (22 hours), less one hour spent in processing the audiotape referred to in paragraph 55 above (22-1=21 hours), according to the number of folios comprised in documents which I have decided do not concern the personal affairs of applicant, as a proportion of the total number of folios processed by the MBQ, multiplied by the hourly rate contained in item 1 of Schedule 1 to the FOI Regulation ($20/hour). On that basis, in view of my finding that, out of 313 folios processed under the FOI Act, 198 attract access charges, the access charges are calculated as:

198/313 x 21 hours x $20/hour = **$265.69**.

Conclusion

60. For the foregoing reasons, I set aside the decision under review (being the decision made on 6 February 2002 by Mr G Connell on behalf of the MBQ). In substitution for it, I decide, with respect to the documents covered by the terms of the applicant's FOI access application lodged with the MBQ on 10 December 2001, that:

(a) one audiotape plus documents comprising 115 folios (being folios 1-14, 14A, 15-26, 26A, 26B, 26C, 26D, 27-30, 30A, 31-33, 36-43 and 43A on file no. 915540/1782 and folios 1-49, 86-89, 111-119 on file no. 915540/1764, and six folios from the complainants' medical records, identified at paragraph 49 above) contain some information which is properly to be characterised as information concerning the personal affairs of the applicant, and therefore do not attract access charges under s.7 of the FOI Regulation*;*

(b) other requested documents, comprising 198 folios (being folios 34-35 and 44-46 on file no. 915540/1782, folio 50 on file no. 915540/1764, and the medical records of the complainants except for the six folios identified at paragraph 49 above), contain no information which can properly be characterised as information concerning the applicant's personal affairs, and therefore attract access charges under s.7 of the FOI Regulation;

(c) the charge which the applicant is liable to pay to the MBQ, in accordance with item 1 in the Schedule to the FOI Regulation, in respect of the documents which do not concern the applicant's personal affairs, is to be calculated by apportioning, on a pro-rata basis, the total time assessed by the MBQ in its

s.29A(2) notice for processing the access application (22 hours), less one hour spent in processing the audiotape referred to in subparagraph (a) above (22-1=21 hours), by reference to the total number of folios comprising the documents that I have decided do not concern the applicant's personal affairs (198), as a fraction of the total number of folios processed by the MBQ (313), multiplied by the hourly charge set out in item 1 of the Schedule, i.e.:

198/313 x 21 hours x $20/hour = **$265.69**; and

(d) the MBQ should refund to the applicant the amount by which any access charges paid in respect of item 1 in the Schedule exceeded $265.69, and should refund any charges paid in respect of items 2 or 3 in the Schedule for the provision of access to the documents identified in subparagraph (a) above.

61. I have made this decision as a delegate of the Information Commissioner's powers under s.90 of the FOI Act.

.....
G J SORENSEN
DEPUTY INFORMATION COMMISSIONER