



## Decision and Reasons for Decision

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**Application Number:** 210393

**Applicant:** GIM

**Respondent:** Department of Health

**Decision Date:** 26 November 2008

**Catchwords:** **FREEDOM OF INFORMATION - section 42(1)(h) of the *Freedom of Information Act 1992* (Qld) - matter pertaining to a Justices Examination Order issued under the *Mental Health Act 2000* (Qld) - whether disclosure could reasonably be expected to prejudice a system or procedure for the protection of persons**

**FREEDOM OF INFORMATION - section 44(1) of the *Freedom of Information Act 1992* (Qld) - matter affecting personal affairs - public interest balancing test**

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## REASONS FOR DECISION

### Summary

1. In this decision I have found that all of the matter in issue in this review is exempt from disclosure under either section 42(1)(h) or section 44(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**).

### Background

2. By letter dated 18 September 2007, the Applicant applied to the Department of Health (**Department**) for access to all documents relating to a Justices Examination Order (**JEO**) that was issued to the Applicant on 13 August 2007 (**FOI Application**). The Applicant also sought access to *'the findings of the Mental Health team'*.
3. By letter dated 25 September 2007, Ms A Thompson<sup>1</sup> informed the Applicant that she had located 34 folios relevant to the FOI Application. In respect of those folios, Ms Thompson decided to (**Original Decision**):
  - grant full access to 25 folios
  - refuse access to certain matter in six folios<sup>2</sup> on the basis that the matter was exempt from disclosure under section 42(1)(h) of the FOI Act
  - refuse access to certain matter in two folios<sup>3</sup> on the basis that the matter was exempt from disclosure under section 44(1) of the FOI Act
  - refuse access to certain matter in one folio<sup>4</sup> on the basis that the matter was exempt from disclosure under section 46(1)(b) of the FOI Act.
4. By letter dated 1 November 2007, the Applicant applied for internal review of the Original Decision (**Internal Review Application**).
5. By letter dated 19 November 2007, Mr J Hollywood<sup>5</sup> informed the Applicant that:
  - the Internal Review Application had been made outside the timeframe required under the FOI Act
  - in the circumstances of the case, he had decided to exercise his discretion to grant the Applicant an extension of time within which to make the Internal Review Application
  - his decision was to affirm the Original Decision in its entirety (**Internal Review Decision**).
6. By letter dated 29 November 2007, the Applicant applied to this Office for external review of the Internal Review Decision (**External Review Application**). The External Review Application comprised submissions from the Applicant and supporting documentation.

### Decision under review

7. The decision under review is the Internal Review Decision of Mr Hollywood dated 19 November 2007.

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<sup>1</sup> Medicolegal Manager/FOI Coordinator, Gold Coast Health Service District.

<sup>2</sup> Folios 3 and 30-34.

<sup>3</sup> Folios 6 and 7.

<sup>4</sup> Folio 23.

<sup>5</sup> District Manager, Gold Coast Health Service District.

### Steps taken in the external review process

8. Following receipt of the External Review Application, this Office obtained copies, from the Department, of the Original Decision, Internal Review Application, Internal Review Decision and documents containing matter to which the Department refused the Applicant access.
  9. On 11 January 2008, a staff member of this Office phoned the Applicant to confirm the scope of the External Review Application. The Applicant confirmed that she was seeking review in respect of all documents to which the Department refused her access and not just the JEO Application.
  10. By letter dated 21 February 2008, this Office requested submissions from the Department with respect to the matter in issue and FOI Act exemption provisions relevant to this review. The Department provided further submissions in response to that request on 14 March 2008.
  11. During this review, this Office attempted to consult with the person/persons who made the JEO Application (**JEO Applicant/s**). However, no contact was established and therefore, I have not taken the JEO Applicant/s views on disclosure of the matter in issue into account in making this decision.
  12. On 4 November 2008, I met with a representative of the Department, Ms Susan Heal, to obtain further information with respect to the documents in issue and exemption claims raised by the Department. At that meeting, Ms Heal advised that the Department had revised its exemption claims with respect to folios 3 and 23 and relied on its written submissions dated 14 March 2008 to support those claims.<sup>6</sup>
  13. By letters dated 6 November 2008, I informed the Applicant and Department that I had formed the following preliminary view with respect to the matter in issue in this review (**Preliminary View**):
    - all of the matter in issue in folios 30-34 (**JEO Application**) and folio 23 (**Clinical Notes**) is exempt from disclosure under section 42(1)(h) of the FOI Act
    - all of the matter in issue in folios 3, 6 and 7 (**Mental Health Assessment**) is exempt from disclosure under section 44(1) of the FOI Act.
- In that correspondence, I invited the Applicant, if she did not accept the Preliminary View, to provide submissions in response by 21 November 2008.<sup>7</sup>
14. By letter dated 17 November 2008, the Applicant provided submissions and supporting documents in response to the Preliminary View.
  15. In making this decision, I have taken the following material into account:
    - FOI Application
    - Original Decision
    - Internal Review Application
    - Internal Review Decision
    - External Review Application

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<sup>6</sup> The revised exemption claims are set out in the table below.

<sup>7</sup> I did not seek submissions from the Department because the Preliminary View was not adverse to the interests of the Department in that it upheld the exemption claims raised by the Department with respect to the matter in issue.

- Applicant's submissions to this Office dated 17 November 2008
- Department's submissions to this Office dated 12 March 2008
- records of telephone conversations held between staff of this Office and the Applicant on 11 January 2008, 20 June 2008 and 7 November 2008
- record of the meeting I held with the Department on 4 November 2008
- documents containing matter to which the Department refused the Applicant access under the FOI Act
- documents released to the Applicant by the Department
- relevant sections of the FOI Act and *Mental Health Act 2000* (Qld)<sup>8</sup>
- explanatory notes to the *Mental Health Bill 2000* (Qld)
- previous decisions of the Information Commissioner of Queensland and decisions from other Australian jurisdictions as identified in this decision
- factsheet titled '*Information about Justices Examination Orders*' published by the Department<sup>9</sup>
- parts of the report titled '*The Right to Information: Reviewing Queensland's Freedom of Information Act*' published by the independent FOI review panel in June 2008.<sup>10</sup>

### Matter in issue

16. The matter in issue in this review is set out in the table below.

Table 1				
Folio no.	Document date	Document description	Matter in issue	FOI Act provision relied on by the Department
3	14.08.07 <sup>11</sup>	Mental Health Assessment – page 1	All matter appearing in section labelled " <i>Precipitants</i> "	Section 44(1)
6	14.08.07	Mental Health Assessment – page 4	Certain matter appearing in section labelled " <i>Family History</i> "	Section 44(1)
7	14.08.07	Mental Health Assessment – page 5	Certain matter appearing in section labelled " <i>Personal History</i> "	Section 44(1)
23	13.08.07	Clinical Notes	Certain matter appearing under the heading " <i>Nursing Notes</i> "	Section 42(1)(h)
30-34	13.08.07	JEO Application	Certain matter in folios 30, 31 & 34 and the whole of folios 32 and 33	Section 42(1)(h)

<sup>8</sup> Referred to in this decision as the ***MH Act 2000***.

<sup>9</sup> Referred to in this decision as the **JEO Factsheet**. Available on the Department's website at: [www.health.qld.gov.au/mha2000/documents/jeo\\_brochure.pdf](http://www.health.qld.gov.au/mha2000/documents/jeo_brochure.pdf).

<sup>10</sup> Referred to in this decision as the **RTI Report**. The RTI Report can be viewed online at: [http://www.foireview.qld.gov.au/documents\\_for\\_download/FOI-review-report-10062008.pdf](http://www.foireview.qld.gov.au/documents_for_download/FOI-review-report-10062008.pdf)

<sup>11</sup> This date appears on page 10 of the Mental Health Assessment which was released to the Applicant in full by the Department.

## Findings

### Relevant legislation

17. Pursuant to section 21 of the FOI Act, a person has a legally enforceable right to be given access to documents of an agency and official documents of a Minister. This right of access is subject to other provisions of the FOI Act, in particular, section 28 of the FOI Act, under which an agency can refuse access to exempt matter or an exempt document.
18. As set out in Table 1 above, the Department refused access to documents sought by the Applicant on the basis of sections 42(1)(h) and 44(1) of the FOI Act. My findings with respect to the application of those provisions to the matter in issue is set out below.

### Section 42(1)(h) of the FOI Act

19. The Department submits that the matter in issue in the JEO Application and Clinical Notes qualifies for exemption under section 42(1)(h) of the FOI Act.
20. Section 42(1)(h) of the FOI Act provides:

**42 Matters relating to law enforcement or public safety**

- (1) *Matter is exempt matter if its disclosure could reasonably be expected to –*
  - ...
  - h) prejudice a system or procedure for the protection of persons, property or environment; ...*

### **Application of section 42(1)(h) of the FOI Act to the matter in issue**

21. The Information Commissioner has previously discussed the operation of section 42(1)(h) of the FOI Act and has stated<sup>12</sup> that for the provision to apply, the following criteria must be satisfied:
  - a) there must be an identifiable system or procedure
  - b) the system or procedure must be for the protection of persons, property or environment
  - c) disclosing the documents in issue could reasonably be expected to prejudice that system or procedure.
22. I have examined each of those requirements below. As the Department has raised the application of section 42(1)(h) of the FOI Act with respect to matter in issue in both the JEO Application and Clinical Notes, I have addressed those documents together.
  - a) Does an identifiable system or procedure exist?**
23. The JEO Factsheet explains that the objective of a JEO is to allow a person or persons in the community to request a non-urgent (and involuntary) mental health assessment for a person who they believe may be experiencing mental health problems.<sup>13</sup>

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<sup>12</sup> *Ferrier and Queensland Police Service* (1996) 3 QAR 350 at paragraphs 27-36.

<sup>13</sup> See page 1 of the JEO Factsheet.

24. The procedure for issuing and enforcing a JEO is set out in Part 4, Division 2 of the *Mental Health Act 2000* as follows:
- a person or persons may apply to a Magistrate or Justice of the Peace for a JEO for another person<sup>14</sup>
  - the Magistrate or Justice of the Peace may issue a JEO if he/she reasonably believes that the relevant person has a mental illness and should be examined<sup>15</sup>
  - once a JEO has been issued and sent to an authorised mental health service, a doctor or authorised mental health practitioner may conduct the examination<sup>16</sup>
  - the doctor or authorised mental health practitioner may make a *recommendation for assessment* requiring an involuntary assessment of that person at an authorised mental health service<sup>17</sup>
  - if the doctor or authorised mental health practitioner does not make a *recommendation for assessment* they must explain their reasons for their decision.<sup>18</sup>
25. Following analysis of the relevant *MH Act 2000* provisions, I am satisfied that the JEO procedure set up under the *MH Act 2000* is 'a system or procedure' for the purpose of section 42(1)(h) of the FOI Act.

**b) Is the procedure for the protection of persons, property or environment?**

26. The Department submits that the statutory framework set out in the *MH Act 2000* comprises a 'carefully constructed system or procedure for the protection of persons within the meaning of section 42(1)(h) of the FOI Act' referring to the decisions in *ROSK and Brisbane North Regional Health Authority; Others (Third Parties)*<sup>19</sup> and *TQN and Royal Brisbane Hospital Health Service District*<sup>20</sup> and the *Mental Health Bill 2000*<sup>21</sup> in support of this position.
27. Prior to the enactment of the *MH Act 2000*, the Information Commissioner considered, in *ROSK*, whether provisions contained within the *Mental Health Act 1974 (Qld)*<sup>22</sup> established a procedure or system for the protection of persons, property or environment under section 42(1)(h) of the FOI Act.
28. The relevant provisions of the *MH Act 1974* enabled a warrant to be issued for the removal (by police and a medical officer) of a person (suspected as being mentally ill and a danger) to a place of safety.
29. In *ROSK*, the Information Commissioner found that a system or procedure was established:

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<sup>14</sup> Section 25 of the *MH Act 2000*.

<sup>15</sup> Section 28 of the *MH Act 2000*.

<sup>16</sup> Sections 29 and 30 of the *MH Act 2000*.

<sup>17</sup> Section 30 of the *MH Act 2000*.

<sup>18</sup> Section 32 of the *MH Act 2000*.

<sup>19</sup> (1996) 3 QAR 393 (*ROSK*).

<sup>20</sup> Unreported, Queensland Information Commissioner, 31 October 2002. Referred to as *TQN* in this decision.

<sup>21</sup> Referred to as the *MH Bill 2000* in this decision.

<sup>22</sup> Referred to in this decision as the *MH Act 1974*. That legislation that was superseded by the *MH Act 2000*.

- whereby members of the community who held a genuine belief that a person was mentally ill, and a danger to himself/herself or to others, could initiate action to protect that person or others from the apprehended danger
  - which answered the description of 'a system or procedure for the protection of persons' within the meaning of section 42(1)(h) of the FOI Act.
30. Once enacted, the Assistant Information Commissioner confirmed in *TQN and Royal Brisbane Hospital Health Service District*,<sup>23</sup> that the *MH Act 2000*:
- replaces the *MH Act 1974*
  - establishes a procedure (enabling application for and issuance of a JEO) which is broadly similar to the system set up by the *MH Act 1974* for the protection of persons.
31. In the Explanatory Notes to the *MH Bill 2000*, the JEO procedure was explained as follows:<sup>24</sup>

*The scheme for involuntary treatment is necessary to protect the health and safety of persons with a mental illness and to ensure the safety of the community. A significant feature of some mental illnesses is the person's inability to recognise the presence of illness and the need for treatment. Without treatment, the person is likely to remain unwell for an extended period to the detriment of their own quality of life, health and safety and in a small number of cases, the safety of others.*

32. Having considered the Department's submissions, relevant legislation and decisions of this Office set out above, I am satisfied that the procedures set out in Part 4, Division 2 of the *MH Act 2000* establish 'a system or procedure for the protection of persons' as described in section 42(1)(h) of the FOI Act.

**c) Could disclosure of the matter in issue be reasonably expected to prejudice that system or procedure?**

***Reasonably be expected to***

33. To determine whether the matter in issue in the JEO Application and Clinical Notes is exempt from disclosure under section 42(1)(h) of the FOI Act, I must examine whether it is reasonable ('as distinct from something that is irrational, absurd or ridiculous'<sup>25</sup>), to expect that disclosing that matter will 'prejudice a system or procedure' that is established by Part 4, Division 2 of the *MH Act 2000*.

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<sup>23</sup> Unreported, Queensland Information Commissioner, 31 October 2002.

<sup>24</sup> Explanatory Notes to the *MH Bill 2000* at page 14.

<sup>25</sup> In *Attorney-General v Cockcroft* (1986) 64 ALR 97 (**Cockcroft**) (at paragraph 106) which dealt with the interpretation of the phrase 'could reasonably be expected to prejudice the future supply of information' in the context of section 43(1)(c)(ii) of the Commonwealth FOI Act, Bowen CJ and Beaumont J said:

*In our opinion, in the present context, the words "could reasonably be expected to prejudice the future supply of information" were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act...*

In my view, the Court's interpretation of the phrase 'could reasonably be expected to' and the proposed line of inquiry, though made in the context of the business affairs exemption contained in Commonwealth legislation, is relevant in the context of the exemption contained in section 42(1)(h) of the FOI Act.

*Department's submissions*

34. The Department submits that disclosure of the matter in issue in the JEO Application and Clinical Notes:
- could reasonably be expected to prejudice the system or procedure for the protection of persons that is set up by the *MH Act 2000* primarily because the matter in issue identifies the person or persons who made the JEO Application
  - would prejudice the efficacy of the system as members of the community would be less inclined to raise their concerns about individuals who they consider may require assessment under the *MH Act 2000* if their identities are made public.

*Applicant's submissions*

35. During the processing of the FOI Application and in the course of this review, the Applicant made the following submissions to support her right of access to the matter in issue:
- it is unfair to withhold the reasons for the JEO because it denies the recipient the right of response
  - the experience of having two mental health officers knock on her door was a shock to the Applicant
  - any person, sane or otherwise, should be protected from false and/or misleading information being accepted as '*valid information*'
  - the provision of false and/or misleading information is not only irrelevant— it is downright dangerous.
36. In response to the Preliminary View, the Applicant made the following additional submissions:
- the person who made the JEO Application gave misleading information
  - the process has been a waste of public resources
  - until the Applicant's response to the JEO Application is 'lodged in all relevant departments the '*process*' is incomplete and unjust
  - the Applicant does not intend to share the behaviour of the person who made the JEO Application with anyone except her enduring power of attorney/executors.
37. The Applicant's submissions are in the nature of public interest concerns, in that they identify reasons why the Applicant considers it is in the public interest that she be given access to the matter in issue.
38. I acknowledge the concerns the Applicant raises, however, as there is no public interest test incorporated into section 42(1)(h) of the FOI Act<sup>26</sup> I am unable to take the Applicant's submissions into account in the application of this exemption provision to the matter in issue in the JEO Application and the Clinical Notes.
39. The Applicant also submits that the signature of a family member appears on some of the documents provided to her in response to the FOI Application. The Applicant has informed this Office that she suspects that this family member made the JEO

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<sup>26</sup> An examination of public interest considerations is only required if the documents in issue are documents/matter of a type listed in section 42(2) of the FOI Act. That sub-section does not apply to the documents in issue in this review.



Application, and the Applicant is seeking to have this confirmed so that she has “the means of making” the family member accountable for his/her actions, if he/she was in fact the applicant for the JEO.

40. The FOI Act cannot be used to answer questions<sup>27</sup> nor to confirm or deny suspicions where there has been no confirmation of identity from an information provider or official source. In reaching a decision in this matter I can only consider whether the exemption claimed by the Department has been correctly applied to the specific information to which access has been denied.

#### *RTI Report*

41. The FOI Independent Review Panel (**Review Panel**) chaired by Dr David Solomon AM recently undertook a comprehensive review of the FOI Act and issued the RTI Report.
42. In the RTI Report, the Review Panel discussed the circumstances surrounding the issue of JEOs and the refusal of access to the orders and corresponding applications by the Department.<sup>28</sup>
43. In her submissions, the Applicant has focused on the Review Panel’s discussion in relation to the disclosure of documents relating to a JEO and contends that the recommendation made by the Panel supports her right of access to the JEO Application. The Applicant also provided this Office with a copy of the submission she made to the Review Panel and the Panel’s response.
44. I acknowledge that the Review Panel made the following recommendation in relation to this type of information:

*Where an agency receives personal information from a third party in confidence, the agency in considering the public interest and an applicant’s right of access, should provide the applicant with a summary of the information (unless information can not be “de-identified”) and/or provide the information through an independent intermediary.<sup>29</sup>*

45. I recognise that the procedure which has followed from the issue of the JEO against the Applicant has caused the Applicant significant concern and resulted in her having a sense of injustice in relation to the process. However, as noted at paragraph 38 above, the section of the FOI Act relied on by the Department in refusing access to the JEO Application, i.e. section 42(1)(h) of the FOI Act, does not in its present form require consideration of public interest arguments. The FOI Act has not been amended to take account of the recommendations made by the Review Panel in the RTI Report.
46. Accordingly, for the purpose of this review, I am bound to apply section 42(1)(h) of the FOI Act in its present form, without having regard to public interest considerations.

#### *Section 522 of the MH Act 2000*

47. I also note the operation of section 522 of the *MH Act 2000*. That section provides as follows:

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<sup>27</sup> *Hearl and Mulgrave Shire Council* (1994) 1 QAR 557.

<sup>28</sup> See pages 54-58 of the RTI Report.

<sup>29</sup> See Recommendation 15 on Page 58 of the RTI Report.

## **522 False or misleading documents**

- (1) *A person must not state anything in any document required or permitted to be made under this Act the person knows is false or misleading in a material particular.*

*Maximum penalty—40 penalty units.*

- (2) *It is enough for a complaint against a person for an offence against subsection (1) to state the statement made was, without specifying which, 'false or misleading'.*

48. This section is intended to provide a necessary safeguard to people who are the subject of the involuntary assessment process under the *MH Act 2000* as a consequence of a person having knowingly provided 'false or misleading' information about them to the Department.

### **Prejudice to the system or procedure**

49. In *ROSK*, the Information Commissioner stated<sup>30</sup> that:

*In my opinion, it is essential for the efficacy of this system or procedure for the protection of persons, that members of the community should not be unduly inhibited from using the scheme if they honestly believe that a person may be mentally ill and a danger to himself/herself or to others. An informant under s.25(1) of the Mental Health Act may have an honest belief that turns out (in the opinion of the health professionals who assess the subject of a mental health warrant) to be a mistaken belief. That is why elaborate safeguards, checks and balances have been built into the statutory scheme. The interests of the community are best served, in my opinion, by having a system or procedure which encourages disclosures which may prevent mentally ill persons harming themselves or others, even if warrants under s.25 of the Mental Health Act are sometimes issued on the basis of mistaken (though honestly held) apprehensions about the subject of the warrant. (I note in this regard that s.57 and s.58 of the Mental Health Act are intended to punish, and thereby inhibit, wilful misuse of the statutory scheme).*

*I consider it important for the efficacy of this system or procedure for the protection of persons, that those who supply information which supports the issue of a warrant under s.25(1) of the Mental Health Act should (in the absence of their consent to disclosure) be entitled to expect (consistently with indications given in the terms of the statutory scheme itself) that the information would not be disclosed to the subject of the warrant (except in the circumstances referred to in paragraph 21 above<sup>31</sup>, or where the circumstances of a particular case are such that, in practical terms, disclosure of the identity of the informant, or some of the information supplied by the informant, is unavoidable). If information used to support a warrant under s.25(1) of the Mental Health Act were routinely open to disclosure, under the FOI Act, to the subject of the warrant, I consider it reasonable to expect that many members of the community would be inhibited from using this system or procedure for the protection of persons, in cases where it should appropriately be used, or else would feel constrained to give information in such guarded terms that it would be of little or no assistance to a justice of the peace, or health care professional, attempting*

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<sup>30</sup> At paragraphs 24 and 25.

<sup>31</sup> At paragraph 21 the Information Commissioner notes:

*'[i]n my view, the medical practitioners would be implicitly authorised to selectively disclose parts of the information, to the extent that that was considered necessary for the effective assessment, treatment or care of the person removed to a place of safety, but I have no doubt that medical practitioners would take care to treat the information in confidence, and in particular to avoid disclosure of the source(s) of the information, so far as possible'.*

*to make the difficult assessment of whether action should be taken in respect of a person to protect that person, or others, from harm.*

In my view, the statement above from *ROSK*, though described within the framework of the *MH Act 1974* is nonetheless relevant to a consideration of the application of section 42(1)(h) of the FOI Act in the context of the *MH Act 2000*.

### **Summary**

50. Based upon my examination of the matter in issue in the JEO Application and Clinical Notes, the Applicant's submissions and those made by the Department in this review, relevant legislation and previous decisions of this Office, I am satisfied that:
- disclosure of the matter in issue in the JEO Application and Clinical Notes would reveal the identity of the JEO Applicant/s
  - in accordance with the principles established in *ROSK*<sup>32</sup>, disclosure of information supplied by persons who provide information in support of a JEO Application under the *MH Act 2000* could reasonably be expected to result in other potential informants being less likely to provide relevant information, thereby prejudicing the system or procedure for the protection of persons which is established by the provisions of the *MH Act 2000*.
51. Accordingly, I am satisfied that the matter in issue in the JEO Application and Clinical Notes constitutes exempt matter under section 42(1)(h) of the FOI Act.

### **Section 44(1) of the FOI Act**

52. The Department contends that certain matter appearing in pages of the Applicant's Mental Health Assessment<sup>33</sup> is exempt from disclosure under section 44(1) of the FOI Act.
53. This section 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.*

54. The test for whether matter qualifies for exemption under section 44(1) of the FOI Act comprises 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?
  - (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.

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<sup>32</sup> At paragraph 25 of that decision.

<sup>33</sup> Folios 3, 6 and 7.

55. In *Stewart and Department of Transport*<sup>34</sup> the Information Commissioner discussed the meaning of the phrase '*personal affairs of a person*' as it appears in the FOI Act.<sup>35</sup> In particular, the Information Commissioner said that:
- information concerns a person's personal affairs if it concerns the private aspects of a person's life
  - there is a substantial grey area within the ambit of the phrase '*personal affairs*', but that phrase has a well-accepted core meaning which includes matter relating to:
    - family and marital relationships
    - health or ill health
    - relationships and emotional ties with other people
    - domestic responsibilities or financial obligations.
56. Whether or not information 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.

***Application of section 44(1) of the FOI Act to the matter in issue***

57. The matter in issue in folios 3, 6 and 7 relates to other individuals who were the subject of discussion at the Applicant's Mental Health Assessment.
58. The Department submits that the matter in issue in these folios comprises sensitive personal information relating to the medical and/or social history of the Applicant's family members and therefore, falls within the core meaning of '*personal affairs*' under section 44(1) of the FOI Act.
59. Following analysis of the matter in issue in folios 3, 6 and 7, I am satisfied that this information concerns the personal affairs of persons other than the Applicant because it describes personal characteristics, medical conditions, life experiences, emotional concerns and relationships.
60. Accordingly, I am satisfied that the matter in issue in those folios is *prima facie* exempt from disclosure under section 44(1) of the FOI Act.

***Public interest balancing test***

61. On account 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 weigh against disclosure of that information.
62. The weight afforded to such a finding varies from case to case depending on the weight of relevant privacy interests (which favour non-disclosure) attaching to the information.
63. If there are no public interest considerations in favour of disclosure, a finding in support of non-disclosure will be made.
64. In general terms, a matter of public interest must be a matter that concerns the interests of the community generally. However, it has been recognised that '*the public*

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<sup>34</sup> (1993) 1 QAR 227 (*Stewart*).

<sup>35</sup> See paragraphs 79-114 of *Stewart*.

*interest necessarily comprehends an element of justice to the individual*.<sup>36</sup> In this regard, the Information Commissioner has previously stated as follows:

*Thus, there is a public interest in individuals receiving fair treatment in accordance with the law in their dealings with government, as this is an interest common to all members of the community. Similarly, the fact that individuals and corporations have, and are entitled to pursue, legitimate private rights and interests can be given recognition as a public interest consideration worthy of protection, depending on the circumstances of any particular case.*<sup>37</sup>

65. Accordingly, it is necessary for me to examine whether there are any public interest considerations favouring disclosure of the matter in folios 3, 6 and 7, which I have found is *prima facie* exempt under section 44(1) of the FOI Act, and if there are, whether they outweigh the interest in maintaining the privacy of the other individuals.
66. The Department contends that there is a public interest in support of release of the matter in issue in terms of the general public interest in the Department's accountability for the delivery of public sector health services. However, the Department submits that consideration is outweighed by the significant public interest in protecting the privacy of other individuals and their personal information.
67. After careful consideration of this issue, I consider that the following public interest considerations in support of disclosure may be relevant in the circumstances:
  - the Department's accountability for the delivery of public sector health services
  - openness and transparency and increased public understanding of government processes
  - fair treatment of individuals in accordance with the law in their dealings with government agencies
68. However, I am satisfied that disclosure of the personal affairs information concerning the other individuals referred to in the Mental Health Assessment will not further the above public interest considerations and accordingly, these considerations should be afforded little weight in the circumstances. At the same time, the weight that should be afforded to protecting those individuals' privacy is significant.
69. On balance, I find that the public interest considerations favouring disclosure **do not** outweigh the public interest considerations favouring non-disclosure of the matter in issue in folios 3, 6 and 7.
70. Accordingly, I am satisfied that:
  - the matter in issue in folios 3, 6 and 7 concerns the personal affairs of other individuals
  - disclosure of the matter in issue in folios 3, 6 and 7 would not, on balance, be in the public interest
  - the matter in issue in folios 3, 6 and 7 is exempt from disclosure under section 44(1) of the FOI Act.

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<sup>36</sup> *Attorney-General (NSW) v Quin* (1990) 64 ALJR 627 per Mason CJ.

<sup>37</sup> *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at paragraph 55.

## **Conclusion**

71. Based on the material before me in this review, I am satisfied that:

- all of the matter in issue in the JEO Application and Clinical Notes is exempt from disclosure under section 42(1)(h) of the FOI Act
- all of the matter in issue in the Mental Health Assessment is exempt from disclosure under section 44(1) of the FOI Act.

## **DECISION**

72. I vary the decision under review, being the Internal Review Decision of Mr Hollywood dated 19 November 2007 and find as follows:

- all of the matter in issue in the JEO Application and Clinical Notes is exempt from disclosure under section 42(1)(h) of the FOI Act
- all of the matter in issue in the Mental Health Assessment is exempt from disclosure under section 44(1) of the FOI Act.

73. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

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**Acting Assistant Commissioner Jefferies**

**Date: 26 November 2008**