



## **Decision and Reasons for Decision**

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**Application Number:** 210152

**Applicant:** Mr P Johnson

**Respondent:** Queensland Health

**Decision Date:** 29 June 2007

**Catchwords:** **FREEDOM OF INFORMATION – Section 44(1) of the *Freedom of Information Act 1992 (Qld)* – personal affairs – applicant convicted of offence – applicant seeks access to DNA and forensic evidence – whether release of information is in the public interest**

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## Reasons for Decision

### Background

1. The applicant seeks review of a decision of Queensland Health (QH) to refuse him access, under the *Freedom of Information Act 1992 (Qld)* (FOI Act) to documents in response to his freedom of information application dated 23 December 2005 (FOI application).
2. In his FOI Application to QH the applicant stated:

*I am currently imprisoned at the Wolston Correctional Centre where I am serving a ten year sentence for two counts of rape of .... Pursuant to section 25 of the Freedom of Information Act 1992 (Qld) I am seeking any information that your department may have on me, ... 's rape and/or the relevant court cases. In particular, I am seeking:*

  - *a copy of the laboratory case file (Peter Johnson) and concerning all samples recorded under F17152 and F17234 including: sample receipts; examination records; all testing procedures, sample sheets and results; printed colour copies of electropherograms; Genotyper files;*
  - *details of any forensic evidence and/or pathology tests; and*
  - *any other information, statements or other documents held by Queensland Health pertaining to my case or the rape of ....*
3. The Griffith University Innocence Project (GUIP) has assisted the applicant throughout the review process, though the GUIP is not the applicant's legal representative.
4. In a decision dated 28 September 2006, Kevin Barwick, A/Policy Officer, Administrative Law Team, QH, decided to grant the applicant full access to 6 pages and partial access to 27 pages and to refuse access to 31 pages.
5. By application dated 17 October 2006 the applicant sought internal review of Mr Barwick's decision.
6. In a decision dated 20 December 2006, received by the GUIP on 2 January 2007, Dr Jeanette Young, Chief Health Officer, QH, affirmed Mr Barwick's decision.
7. By application dated 22 January 2007, attaching a letter dated 10 January 2007, received by this Office on 25 January 2007, the applicant sought external review of Dr Young's decision.

### Steps taken in the external review process

8. By letter dated 2 February 2007 this Office sought copies of the Matter in Issue and other relevant documentation from QH.
9. On 30 January 2007, a staff member of this Office sought information from a Senior Crown Prosecutor of the Department of Public Prosecutions (DPP) regarding disclosure processes in criminal trials.
10. On 9 February 2007, QH provided copies of the documents requested at 8 above.
11. As the Matter in Issue contains highly technical information, on 14 May 2007, a staff member of this Office and I met with 3 members of the QH administrative law team and the Chief Scientist. At that meeting:
  - the Chief Scientist explained how to read the Matter in Issue

- I indicated to QH that it was my preliminary view that the Matter in Issue was prima-facie exempt
  - QH provided oral submissions regarding the public interest considerations against disclosure of the Matter in Issue.
12. In an email dated 28 May 2007, QH provided further submissions regarding the public interest considerations against disclosure.
  13. By letter dated 28 May 2007, I indicated to the applicant that it was my preliminary view that the Matter in Issue qualified for exemption pursuant to section 44(1) of the FOI Act.
  14. In a telephone discussion on 29 May 2007, a staff member of this Office conveyed to Ms Weathered my preliminary view that the Matter in Issue qualified for exemption pursuant to section 44(1) of the FOI Act.
  15. In a letter received by this Office on 14 June 2007, the applicant provided submissions in support of his case.
  16. In making my decision in this matter, I have taken the following into account:
    - the applicant's FOI application dated 23 December 2005, application for internal review dated 17 October 2006 and application for external review dated 22 January 2007
    - Mr Barwick's initial decision dated 28 September 2006 and Dr Young's internal review decision dated 20 December 2006
    - email from QH dated 28 May 2007
    - the applicant's undated submissions received by this Office on 14 June 2007
    - File notes of telephone conversations and discussions between staff of this Office and:
      - a) Senior Crown Prosecutor, DPP, regarding disclosure processes in criminal trials
      - b) administrative law personnel and the Chief Scientist, QH, regarding the matters set out above in paragraph 11
      - c) Ms Weathered, GUIP, regarding the matters set out above in paragraph 14.

### **Matter in issue**

17. The matter in issue in this review comprises 31 full pages and 27 partial pages to which the applicant has been refused access by QH (Matter in Issue).

### **Findings**

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

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

#### **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.*

19. The test for whether matter qualifies for exemption under section 44(1) of the FOI Act is in two parts, as follows:
  - a) Would disclosure of the Matter in Issue disclose information that is properly characterised as information concerning the personal affairs of a person?

- b) If a) is answered affirmatively, a public interest consideration favouring non-disclosure is established and the matter in issue is exempt, unless there are public interest considerations favouring disclosure which outweigh all identifiable public interest considerations favouring non-disclosure, so as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.

***Does the Matter in Issue concern the personal affairs of a person?***

20. I am satisfied that the first limb of the above test is satisfied. My reasons are set out below.

21. The Matter in Issue is comprised of documents relating to:

- DNA profiling
- personal information concerning a complainant
- medical examinations and pathology testing

I have considered each of these categories of information in turn below.

22. In *Stewart and Department of Transport* (1993) 1 QAR 227 (*Stewart*), 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:

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

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

***DNA profiling***

24. Deoxyribonucleic acid (DNA) is a molecule found in all living organisms that is comprised of genetic information that allows the organism to develop and reproduce. DNA can be used in forensic science to 'match' individuals to matter found at a crime scene.

25. An individual's DNA provides sufficient information to allow the individual to be identified. It also provides information about the individual's genetic constitution and pre-disposition to genetic conditions.

26. I have carefully reviewed the Matter in Issue. Information relating to your DNA has been released to you.

27. In relation to DNA information about other persons, I am satisfied that this information is properly characterised as the personal affairs of the individuals tested.

### **Information about a sexual assault complainant and their complaint**

28. In *Cheney v Sydney West Area Health Service* [2007] NSWADT 75 (*Cheney*), the applicant sought access to a copy of the 'complete Sexual Assault Investigation Kit for FS: 93/837' because he required the documents 'for use in his future legal proceedings'. In that matter, Montgomery S noted that notwithstanding that the applicant may be aware of the identity of the victim, this fact did not assist in characterising the documents because release of information under the FOI Act is not a limited release to the applicant but constitutes release to the 'whole world'.
29. I am therefore satisfied that notwithstanding that you may be aware of a complainant's identity, information that:
- identifies an individual as a victim of sexual assault and information relating to their complaint (see *NHL and the University of Queensland* (1997) 3 QAR 436)
  - personal details about a complainant (see *Stewart*)

is sensitive and personal information that is properly characterised as the complainant's personal affairs.

### **Complainant's examination and pathology testing**

30. The records of medical examinations of a complainant and pathology testing undertaken in relation to a complainant are medical records of the complainant. In *Stewart*, the Information Commissioner surveyed both case law and administrative decisions in a number of jurisdictions and accepted that information about a person's health or ill-health falls within the core meaning of 'personal affairs'.
31. I am satisfied that information about a complainant's examination and pathology testing are properly characterised as their personal affairs.

### **Public Interest Test**

32. Satisfaction of the first limb of the test under section 44(1) of the FOI Act establishes a public interest consideration in protecting the privacy of an identifiable individual. In the absence of any other public interest considerations, satisfaction of the prima-facie exemption justifies non-disclosure of the matter in issue. However, in this case, there are a number of public interest considerations that must be balanced and accorded appropriate weight.
33. In *Page and Metropolitan Transit Authority* (1988) 2 VAR 243 at 245-246, the Victorian AAT discussed the concept of 'unreasonable disclosure', that is, the test under the equivalent Victorian FOI legislation in respect of the personal affairs exemption. The EARC Report in Queensland has noted that the public interest test in section 44(1) of the FOI Act is not significantly different to the test of 'unreasonable disclosure' in other Australian jurisdictions. In *Page*, the Tribunal stated that determining whether disclosure is unreasonable:

*Requires a balancing of interest: the right to personal privacy of an individual whose personal affairs may be unreasonably disclosed by granting access to the information and the object of the Act to extend as far as possible the right of the community to access to information in the possession of the Government or agencies ... More particularly, this balancing of interests requires a consideration of all of the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance. It is apparent that the purpose of s33(1) of the Act is to prevent unreasonable invasion of privacy of third parties.*

### **Public interest considerations favouring disclosure**

34. The applicant submits that:

*Wrongful conviction is recognised as an international problem. DNA exonerations, particularly in the United States have highlighted the problem of wrongful convictions in the criminal justice systems in common law jurisdictions. In response, various countries have enacted legislative reforms to enable the investigation and correction of wrongful convictions.*

*In the experience of the Griffith University Innocence Project, people who may be wrongly convicted are being prevented from having an opportunity to prove their innocence. This is because of the absence of a legislative framework that enables the investigation and correction of wrongful convictions in Queensland. The United States has over 200 DNA exonerations to date. The absence of any DNA exonerations post-appeal in Queensland and Australia reflects, in part, the inability of wrongful conviction applicants in this State and country to access DNA testing to support their claims. Without access to DNA evidence, there is no chance of being exonerated by it.*

*Access to information is the essential starting point of the reform needed to enable the proper investigation of claims of wrongful conviction. Importantly, confirming the existence or otherwise of DNA evidence to wrongful conviction applicants is essential so that it is known whether or not DNA evidence will be a probative tool in investigations into claims of innocence. However, because Queensland has undertaken no legislative reform in this area, applicants are reliant on FOI procedures to a significant degree.*

*Rights of access to information in place during trial and appeal cease once these hearings are concluded. While some information is available upon request, other relevant information may be hidden or deemed unavailable. Naturally too, one must know of the existence of a specific document to be able to request it, so evidence that has been previously withheld is likely to remain that way. It is imperative to ascertain what DNA tests have previously been undertaken and what evidence remains for the purpose of re-testing as well as accessing other scientific evidence relevant to each case.*

*Without proper disclosure, comprehensive investigation of cases cannot occur and opportunities for the correction of wrongful convictions are thereby thwarted.*

35. I acknowledge that Queensland does not have a specific statutory scheme to facilitate re-testing of DNA evidence.<sup>1</sup> In my view, the absence of such a scheme does not mean that the FOI Act is able to be interpreted in such a way as to make up for any perceived shortfall.<sup>2</sup>
36. I note that in *Lovelock and Queensland Health* (2001) 6 QAR 24 (*Lovelock*), the applicant made the following submissions regarding public interest considerations in favour of disclosure (reproduced at paragraph 13 of the decision):

*It is my submission that the rights of the individual to access such information as may be necessary to establish one's innocence within the operation of the criminal justice system must, other than in the most extraneous of circumstances outweigh any perceived infringement of another's personal privacy. Presumably, such would especially be the*

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<sup>1</sup> I am aware that a number of other common law jurisdictions operate statutory schemes to re-examine DNA and other evidence including:

- the United Kingdom's Criminal Cases Review Commission (CCRC) which is a specialist independent public body that has extensive investigatory powers and which is charged with determining whether or not a matter should be re-heard by the Court of Criminal Appeal (CCA). Decisions for referral to the CCA are made by a Commissioner or a panel of Commissioners, many of whom have extensive experience in criminal law. The CCRC also has extensive policies and procedures in place governing whether or not to contact a victim of crime when an application is received and how to deal sensitively and appropriately with the crime victim if consultation is determined to be necessary
- New South Wales' DNA Review Panel which was established by recent amendment to the *Crimes (Local Courts Appeal and Review) Act 2001* (NSW)

<sup>2</sup> I note that both New South Wales and the United Kingdom also have freedom of information legislation in place.

*case in circumstances where the failure to establish innocence on the part of the accused will result in the imposition of a term of life imprisonment.*

...

*It is my submission that until such time as every avenue of appeal available to me pursuant to the criminal justice system has been exhausted then I ought to be afforded every opportunity to defend my innocence. Further, with respect, the comments made by members of the judiciary either at first instance or on appeal can not be taken to be conclusive determination of one's guilt or innocence. I am sure you would be well aware of the fact that many cases are left to the High Court in order for mistakes made within the criminal justice system to be addressed.*

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

37. Further, in *Fox and Queensland Police Service* (2001) 6 QAR 1 (Fox), the Information Commissioner recognised (at paragraph 23) that there is a public interest in enhancing the operation of the criminal justice system and an applicant having access to information that may assist them to regain their liberty.
38. I acknowledge that instances of wrongful conviction have been identified in Australia,<sup>3</sup> and that inconclusive expert evidence is one factor which may lead to actual or possible miscarriages of justice.<sup>4</sup>
39. In light of the matters set out above, I recognise that there are public interest considerations favouring disclosure of some of the Matter in Issue.
40. However, as set out above in paragraphs 32 and 33, I must balance these interests against the right to personal privacy of individuals whose personal affairs may be unreasonably disclosed by granting access to the Matter in Issue.

#### ***Public interest considerations favouring non-disclosure***

41. In my view, there are 2 categories of relevant public interest considerations favouring non-disclosure.

##### ***(i) Victim of violent crime***

42. Non-disclosure is consistent with section 10(1) of the *Criminal Offence Victims Act 1995* (Qld) (COV Act) which provides that:

#### **10 Privacy of victim to be protected and property returned**

(1) *A victim's privacy should be protected ...*

43. A 'victim' is defined in section 5 of the COV Act as a person who has suffered harm from a violation of the State's criminal laws because of violence committed directly

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<sup>3</sup> For example, *Chamberlain v The Queen* [No 2] (1984) 153 CLR 521, *Alister v The Queen* (1984) 154 CLR 404 and *R v Anderson* (1991) 53 A Crim R 421

<sup>4</sup> Juliette Langdon and Professor Paul Wilson, "When Justice Fails: A follow up examination of serious criminal cases since 1985" (2005) 17 (2) *Current Issues in Criminal Justice* 1

against the person or because of a relationship with or having intervened to assist a person against whom violence was committed.

44. I anticipate that consulting a victim of crime about the possible release of documents under the FOI Act is likely to cause a significant degree of suffering to the crime victim and possibly their family.
45. Notwithstanding section 103 of the FOI Act which provides that if access is permitted by the Act, the persons authorising or giving access do not commit a criminal offence merely because of authorising or giving the access, disclosure may otherwise breach Part 3 of the *Criminal Law (Sexual Offences) Act 1978* (Qld) which institutes various protections for witnesses in trials concerning sexual offences.
46. The applicant's case has been heard in both the District Court and the Queensland Court of Criminal Appeal.
47. Having carefully reviewed the Matter in Issue, it is my view that:
  - a) a considerable amount of the Matter in Issue concerns a victim of a violent crime
  - b) there are very strong public interest considerations:
    - against disclosure of information concerning victims of violent crime in circumstances where the matters have been dealt with by the courts
    - in not inflicting further suffering and concern on victims of crime and their families

**(ii) Intensely personal information**

48. QH submits that DNA information constitutes intensely personal information. If publicly disclosed, this information could have significant ramifications for the person providing the DNA information, including for example, implications regarding insurance and non-authorised use of the person's DNA.
49. In *GDW and Queensland Police Service*, S373/03, (20 November 2003, Unreported), the applicant sought access to information regarding sexual abuse allegations made to the Queensland Police Service by his daughter. The Information Commissioner recognised in this decision that there is a very strong public interest in protecting intensely personal information.
50. With respect to medical records which form part of the Matter in Issue in this external review, I note that at paragraph 11 of the *Lovelock* decision, the Information Commissioner stated that:

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

51. Having carefully reviewed the Matter in Issue, it is my view that:
  - a) a considerable amount of the Matter in Issue concerns intensely personal information

- b) there are very strong public interest considerations against disclosure of intensely personal information.

## **Conclusion**

- 52. In my view, disclosure of the Matter in Issue would disclose information that is properly characterised as information concerning the personal affairs of a person, thereby establishing a public interest consideration favouring non-disclosure.
- 53. After carefully considering the public interest considerations for and against disclosure of the Matter in Issue, I am satisfied that the arguments in favour of disclosure do not outweigh the privacy interests favouring non-disclosure.
- 54. I therefore find that the Matter in Issue qualifies for exemption under section 44(1) of the FOI Act.

## **Decision**

- 55. I affirm the decision of Dr Jeanette Young made on 20 December 2006.
- 56. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

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**F Henry**  
**Assistant Commissioner**

**Date: 29 June 2007**