



Decision and Reasons for Decision

Application Number: 210239

Applicant: VHL

Respondent: Department of Health

Decision Date: 20 February 2009

Catchwords: **FREEDOM OF INFORMATION – section 42(1)(h) - matter relating to law enforcement or public safety - whether disclosure of an Application for a Justices Examination Order issued under the *Mental Health Act 2000* (Qld) could reasonably be expected to prejudice system or procedure**

FREEDOM OF INFORMATION – section 42(1)(ca) – matter relating to law enforcement or public safety – whether disclosure of identifying information about a Justice of the Peace could reasonably be expected to result in that person being subjected to a serious act of harassment or intimidation

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REASONS FOR DECISION

Summary

1. In setting aside the decision under review, I am satisfied that:
 - parts of the Justice Examination Order (**JEO**) and JEO application that could identify the Justice of the Peace (**JP**) are exempt from disclosure under section 42(1)(ca) of the *Freedom of Information Act 1992* (**FOI Act**)
 - the JEO application is exempt from disclosure under section 42(1)(h) of the FOI Act.

Background

2. By letter dated 20 February 2007, the applicant applied to the Department for access to documents concerning the JEO application and the order pursuant to which she had been detained and examined (**FOI Application**).
3. On 21 March 2007, the Department decided that (**Original Decision**):
 - part of folio 12 qualified for exemption from disclosure under section 44(1) of the FOI Act
 - folio 15 is fully exempt from disclosure under section 42(1)(ca) of the FOI Act
 - folios 16 and 17 are fully exempt from disclosure under sections 42(1)(b) and 42(1)(ca) of the FOI Act
 - the remainder of the folios found to respond to the FOI Application may be released to the applicant.
4. By letter dated 26 March 2007, the applicant applied for an internal review of the Original Decision (**Internal Review Application**).
5. On 23 April 2007, Ms McKay, District Manager at the Department decided to affirm the Original Decision (**Internal Review Decision**).
6. By application received by the Office on 24 April 2007, the applicant sought external review of the Internal Review Decision (**External Review Application**).

Decision under review

7. The decision under review is the Internal Review Decision dated 23 April 2007.

Steps taken in the external review process

8. In correspondence to the Office dated 25 April 2007, the applicant withdrew her External Review Application.
9. By letter dated 3 May 2007, the applicant applied to have the external review reopened on the basis that she had withdrawn her External Review Application in the mistaken belief that her concerns could be addressed by the Office of the Health Minister, but now realised that it was necessary to pursue external review under the FOI Act, in order to seek access to the relevant documents.

10. By letters dated 8 June 2008, First Assistant Commissioner Rangihaeata informed the applicant and the Department of her decision to reopen the external review.
11. The Office undertook third party consultation with the JP in telephone conversations on 12 July 2007 and 19 July 2007.
12. The Office undertook third party consultation with the JEO applicant/s in telephone conversations on 12 July 2007 and 23 July 2007.
13. By letter dated 8 November 2007, Acting Information Commissioner Rangihaeata informed the Department of her preliminary view regarding specific parts of the documents in issue.
14. By letter dated 4 December 2007, the Department confirmed that whilst it maintained the same exemption claims that appeared in its Original Decision, it now also sought to claim that folios 16 and 17 were exempt under section 42(1)(h) of the FOI Act.
15. By facsimile dated 18 February 2008, the JEO applicant confirmed the accuracy of the information conveyed in their prior telephone conversations with the Office. The JEO applicant also advised that, with the exception of three parts of folio 16 that concerned the personal affairs of persons other than the applicant, the JEO applicant did not object to the applicant being given access to the balance of folio 16.
16. By letter dated 3 March 2008, the JEO applicant provided information about the JP.
17. In telephone conversations on 11 March 2008 (later confirmed in a facsimile to the Office dated 25 March 2008), the JP supplied additional information to the Office relevant to the external review.
18. In letters dated 20 May 2008, Acting Information Commissioner Rangihaeata informed the applicant, the Department, the JEO applicant and the JP of her preliminary view regarding the exemption provisions sought to be relied upon by the Department.
19. In response to the preliminary view noted at paragraph 18 above:
 - the applicant provided written submissions to the Office on 22 May 2008 and 2 June 2008, and verbal submissions on 27 May 2008.
 - the JEO applicant/s, in their letter dated 1 June 2008, informed Acting Information Commissioner Rangihaeata that they did not accept the preliminary view and now objected to disclosure of folios 15-17. The JEO applicant/s stated that that they would *'take no further part in this process nor submit to any further arguments in regards this matter'*.
 - by letter dated 4 June 2008, the JP provided further submissions for consideration in the external review.
20. By email dated 3 June 2008, the Department requested copies of correspondence received by the Office concerning the issues raised in Acting Information Commissioner Rangihaeata preliminary view of 20 May 2008, in order to better inform its response to that letter. Copies of the following¹ were supplied to the Department:
 - written correspondence received from the JEO applicant dated 18 February 2008, 3 March 2008 and 1 June 2008

¹ With the approval of the JEO applicant and JP.

- written correspondence received from the JP dated 25 March 2008.
21. By letter dated 10 June 2008, First Assistant Commissioner Rangihaeata informed the applicant that it was now her preliminary view that the part of folio 16 that set out the reasons for the JEO application qualified for exemption under section 42(1)(h) of the FOI Act.
 22. By letter dated 10 June 2008, First Assistant Commissioner Rangihaeata informed the Department that it was now her preliminary view that, while the section of the JEO application that set out the reasons for the JEO application qualified for exemption from disclosure under section 42(1)(h) of the FOI Act, the remainder of the JEO application was not exempt from disclosure under sections 42(1)(b) or 42(1)(h) of the FOI Act.
 23. By letter dated 12 June 2008, the applicant responded to the preliminary view at paragraph 21 above.
 24. By letter dated 13 June 2008, First Assistant Commissioner Rangihaeata advised the JP that the reasons for the JEO application in folio 16 qualified for exemption under section 42(1)(h) of the FOI Act.
 25. By letter dated 25 June 2008, the Department provided further submissions in response to both preliminary views,² and claimed, in addition to previous exemption claims, that matter in folios 15 and 17 which identified the JP qualified for exemption from disclosure under section 42(1)(h) and section 42(1)(ca) of the FOI Act.
 26. On the basis that parts of its submission above had inadvertently been omitted, the Department provided a further edited copy of its submissions to the Office on 30 June 2008.
 27. On 11 July 2008 a segment involving the applicant was run by Channel 7 on the Today Tonight programme. The Office wrote to Channel 7 on 15 July 2008 requesting a copy of the segment and a transcript. The Office contacted Channel 7 in writing and by telephone on several occasions during the period July to October 2009 to obtain the documents requested. Channel 7 provided a copy of the segment and a transcript on 14 October 2008.
 28. During the period July to December 2008 the applicant provided further submissions and information by telephone and written correspondence.
 29. OIC revised the preliminary view based on submissions received from all parties and information provided by Channel 7.
 30. In a telephone conversation on 9 January 2009, First Assistant Commissioner Rangihaeata communicated to the applicant the revised preliminary view.
 31. By letter dated 3 February 2009, I confirmed the above preliminary view in writing by informing the applicant that:
 - the residential address and telephone details of a departmental employee contained within folio 12 qualified for exemption under section 44(1) of the FOI Act³

² Including the preliminary views dated 20 May 2008 and 10 June 2008.

³ I confirmed that the applicant had previously advised a staff member of the Office that she did not seek this information and therefore this folio would no longer be considered in the external review.

- parts of folios 15 and 17 qualified for exemption under section 42(1)(ca) of the FOI Act
 - folio 17 is exempt from disclosure under section 42(1)(h) of the FOI Act.
32. By letter dated 4 February 2009, the applicant indicated that whilst she did not accept First Assistant Commissioner Rangihaeata's preliminary view at paragraph 27 above, she had chosen not to spend any further time on this review. Accordingly, I have proceeded on that basis in progressing this external review.
33. In making my decision in this matter, I have taken the following into account:
- the applicant's FOI Application, Internal Review Application and External Review Application
 - the Department's Original Decision and Internal Review Decision
 - file notes of telephone conversations between staff members of the Office and the JEO applicant
 - written correspondence provided to the Office by the JEO applicant
 - written correspondence provided to the Office by the Department throughout the course of the external review
 - written correspondence provided to the Office by the applicant throughout the course of the external review
 - file notes of telephone conversations between staff members of the Office and the applicant
 - written correspondence provided to the Office by, and on behalf of, the JP
 - the Channel 7 Today Tonight programme broadcast on Friday, 11 July 2008
 - the JEO and JEO application
 - relevant sections of the FOI Act and *Mental Health Act 2000* (Qld) (**MHA 2000**)
 - explanatory notes to the *Mental Health Bill 2000* (Qld)
 - previous decisions of the Information Commissioner of Queensland and the decisions and case law from other Australian jurisdictions as identified in this decision
 - factsheets published by the Department on its website
 - relevant provisions of the FOI Act and other legislation, caselaw and decisions of this Office.

Matter in issue

34. The matter remaining in issue in this review comprises the JEO⁴ and JEO application⁵ (**Matter in Issue**).

Relevant legislation

35. Under 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.
36. As noted above, the Department has refused the applicant access to the JEO and JEO application on the basis of sections 42(1)(h) and 42(1)(ca) of the FOI Act. My findings

⁴ Folio 15.

⁵ Folios 16 and 17.

with respect to the application of these provisions to the Matter in Issue are set out below.

Findings

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

37. 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; or*
...
(2) *Matter is not exempt under subsection (1) if –*
- (a) *it consists of-*
- (i) *matter revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law; or*
 - (ii) *matter containing a general outline of the structure of a program adopted by an agency for dealing with a contravention or possible contravention of the law; or*
 - (iii) *a report on the degree of success achieved in a program adopted by an agency for dealing with a contravention or possible contravention of the law; or*
 - (iv) *a report prepared in the course of a routine law enforcement inspection or investigation by an agency whose functions include that of enforcing the law (other than the criminal law or the law relating to misconduct under the Crime and Misconduct Act 2001); or*
 - (v) *a report on a law enforcement investigation that has already been disclosed to the person or body the subject of the investigation; and*
- (b) *its disclosure would, on balance, be in the public interest.*
...

The Department's submissions

38. The Department submits that disclosure of the JEO application could reasonably be expected to prejudice the statutory scheme for the protection of persons set out in Chapter 2, part 3, division 2 of the *MHA 2000*.

The applicant's submissions

39. The applicant's submissions are summarised at paragraph 54 of this decision.

Application of section 42(1)(h) of the FOI Act to the Matter in Issue

40. The Information Commissioner has previously discussed the operation of section 42(1)(h) of the FOI Act and stated that for the provision to apply, the following criteria must be satisfied:⁶

- a) there exists an identifiable system or procedure
- b) it is a system or procedure for the protection of persons, property or environment

⁶ *Ferrier and Queensland Police Service* (1996) 3 QAR 350 at paragraphs 27-36.

- c) disclosure of the information in issue could reasonably be expected to prejudice that system or procedure.

a) Does an identifiable system or procedure exist?

41. Having regard to reference material available on the Department's website, I note the objective of a JEO is to allow a person 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.⁷
42. The procedure is set out under Chapter 2, Part 3, Division 2 of the *MHA 2000* as follows:
- a person may apply to a Magistrate or Justice of the Peace for a JEO for another person⁸
 - 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 examined⁹
 - once a JEO has been issued and sent to an authorised mental health service, a doctor or authorised mental health practitioner may conduct the examination¹⁰
 - 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 service¹¹
 - if the doctor or authorised mental health practitioner does not make a *recommendation for assessment* they must explain their reasons for the Internal Review Decision.¹²
43. Having regard to the above, I am satisfied that the *MHA 2000* establishes '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?

44. Prior to the enactment of the *MHA 2000*, the Information Commissioner considered in *ROSK and Brisbane North Regional Health Authority; Others (Third Parties)*¹³ whether provisions contained within its predecessor, the *Mental Health Act 1974* (Qld) established a procedure or system for the protection of persons, property or environment under section 42(1)(h) of the FOI Act.
45. The relevant provisions of the *Mental Health Act 1974* (Qld) 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.
46. In *ROSK*, the Information Commissioner found that a system or procedure was established:

⁷ See the Department factsheet entitled 'Information about Justice Examination Orders' available on the Department's website: www.health.qld.gov.au/mha2000/documents/jeo_brochure.pdf.

⁸ Section 25 of the *MHA 2000*.

⁹ Section 28 of the *MHA 2000*.

¹⁰ Sections 29 and 30 of the *MHA 2000*.

¹¹ Section 30 of the *MHA 2000*.

¹² Section 32 of the *MHA 2000*.

¹³ (1996) 3 QAR 393 (*ROSK*).

- 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.

47. In *TQN and Royal Brisbane Hospital Health Service District*,¹⁴ it was confirmed that the *MHA 2000*:

- replaces the *Mental Health Act 1974* (Qld)
- establishes a procedure (enabling application for and issuance of a JEO) which is similar to the system set up by the *Mental Health Act 1974* (Qld) for the protection of persons.

48. In relation to treatment which may occur as a consequence of a JEO, the explanatory note to the *Mental Health Bill 2000* (Qld) states:¹⁵

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.

49. In view of the discussion above, I am satisfied that the procedures set out in Chapter 2, Part 3, Division 2 of the *MHA 2000* establish 'a system or procedure for the protection of persons' described in section 42(1)(h) of the FOI Act.

c) Could disclosure of the JEO Application be reasonably expected to prejudice that system or procedure?

50. Requirement (c) asks whether disclosing the document/s in issue could reasonably be expected to prejudice the system or procedure.

51. In *Attorney-General v Cockcroft*,¹⁶ which dealt with the interpretation of the phrase 'could reasonably be expected to prejudice the future supply of information' in the context of the section 43(1)(c)(ii) (business affairs) exemption contained in the Commonwealth FOI Act, Bowen CJ and Beaumont J said:¹⁷

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 ... To construe s.43(1)(c)(ii) as depending in its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability is, in our view, to place an unwarranted gloss upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based ...

¹⁴ (Unreported, Queensland Information Commissioner, 31 October 2002).

¹⁵ Explanatory Note, *Mental Health Bill 2000* (Qld) at page 14.

¹⁶ (1986) 64 ALR 97 (**Cockcroft**).

¹⁷ *Cockcroft*, at 106.

52. The Justices interpretation of the phrase 'could reasonably be expected to' and the proposed line of inquiry, while 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.
53. Accordingly, to determine whether the JEO application 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 to expect that disclosing the JEO application will '*prejudice the system or procedure*' established by Chapter 2, Part 3, Division 2 of the *MHA 2000*.

The applicant's submissions

54. During the course of the review, the applicant made a number of oral and written submissions to the Office. Those submissions are summarised as follows:
- she is concerned that her examination under the *MHA 2000* was conducted without there being a proper basis for the allegations about her. She considers that she has been unjustly made the subject of a JEO, evidenced by the fact that the mental health examination under that process did not lead to any further action.
 - she considers that the person/s who initiated the JEO was/were acting adversely to her interests and perhaps intended to benefit themselves. She believes those person/s may be responsible for acts of vandalism at her home, and/or are seeking to cause her to leave her home.
 - unless she knows the content of the JEO application, she is unable to address any of the issues raised in it, and remains vulnerable to further attempts to have her involuntarily subjected to assessments under the *MHA 2000*.
 - the experience of being subject to the JEO has caused her great distress, both during the process of being involuntarily detained, and subsequently, as she attempted to discover the basis of the application.
 - although she believes her actions at one time may have been regarded as a sign of mental unwellness (and may be one ground for the JEO application), she considers that her behaviour at that time did not affect other persons and her symptoms resolved within a short time.
 - she believes she knows the identity of the JEO applicant/s and considers that a number of people may be involved.
 - she considers the JEO process is flawed because it is based on lies.
55. The applicant's submissions are in the nature of 'public interest' submissions, in that they identify reasons why it is in the public interest that she be given access to the relevant documents. However, there is no public interest test incorporated into section 42(1)(h) of the FOI Act unless one of the exceptions referred to in section 42(2) applies.
56. Having examined the JEO application, I am satisfied that there is nothing in the circumstances of this case, nor any other material before me, that would indicate that section 42(2) of the FOI Act applies. Section 42(2) of the FOI Act is set out at paragraph 37 of this decision.
57. Accordingly, although the applicant raises issues which are clearly of genuine concern to her, they are not matters which I can take into account in reaching a decision in this matter. Similarly, although the applicant has suspicions as to the identity of the JEO

applicant/s, this Office is unable to confirm or deny suspicions regarding the content of the Matter in Issue in the review.¹⁸

58. In making my decision in this matter I can only consider whether the exemption provisions claimed by the Department under the FOI Act have been correctly applied to the specific information to which access has been denied. To that extent I have carefully considered all the information provided to this Office by each of the parties in this review.
59. In relation to the applicant's concerns that the system/procedure being used for an improper purpose and leading to unwarranted involuntary assessment, I note that in passing the *MHA 2000* the Parliament took care to include a number of provisions aimed at protecting people against the inappropriate application of the involuntary processes. Those safeguards include:¹⁹
- *The person making a request for an assessment (e.g. a community member) must have observed the person within the last 3 days before making a request for involuntary assessment so the information is accurate and timely.*
 - *Before the person can be detained involuntarily for assessment, a recommendation for assessment must also be made by a doctor or other specially appointed experienced mental health professional (an "authorised mental health practitioner"), who must be satisfied that the person meets strict criteria.*
 - *Strict penalties are provided for in the [MHA 2000] against a person making documents based on information that the person knows to be untrue. The [MHA 2000] also makes it easier to commence a prosecution under this provision.*
 - *There is now a two-step authorisation process before involuntary treatment is authorised. Before a person can be detained for treatment, specific criteria must be met to authorise an assessment of the person. Once the assessment has occurred, different criteria must be met before involuntary treatment is authorised. The criteria for involuntary assessment and treatment are consistent with the UN Principles and the national model mental health legislation.*
 - *Stricter requirements for seclusion and mechanical restraint are proposed in the [MHA 2000] to replace administrative guidelines, with penalties imposed for contravening the requirements.*
 - *The [MHA 2000] proposes that involuntary treatment must, at an early stage, be authorised by a psychiatrist and not simply any medical practitioner. Orders made by an authorised doctor who is not a psychiatrist must be confirmed by a psychiatrist within 3 days.*
60. A further safeguard is provided by section 522 of the *MHA 2000* which makes it an offence to knowingly provide 'false or misleading' information to the Department. That section provides as follows:

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'.*

¹⁸ See section 87 of the FOI Act.

¹⁹ Explanatory Note, *Mental Health Bill 2000* (Qld) at page 6. See also ROSK at paragraph 24 where the Information Commissioner stated that in respect of the *Mental Health Act 1974* (Qld) '...elaborate safeguards, checks and balances have been built into the statutory scheme.'

61. The inclusion of the above provisions means that Parliament recognised the risk that some people would unnecessarily be subject to the system. However, Parliament also considered the benefit that the system would bring to the community together with the safeguards outweighed the detriment experienced by those people unnecessarily subject to it.
62. Applying the principles established in *ROSK*, *Ferrier* and *Cockcroft*, I consider that disclosure of the JEO application could reasonably be expected to disclose information provided by the JEO applicant/s. I consider that disclosure of information supplied by persons who provide information in support of an application under the *MHA 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 *MHA 2000*.
63. Accordingly, for the reasons discussed above, I am satisfied that the JEO application qualifies for exemption from disclosure under section 42(1)(h) of the FOI Act.

Section 42(1)(ca) of the FOI Act

64. The Department submits that identifying information about the JP qualifies for exemption under section 42(1)(ca) of the FOI Act. The JEO applicant and JP have also expressed similar concerns regarding the disclosure of the JP's identity.
65. Paragraph (ca) of subsection 42(1) of the FOI Act provides:²⁰

42 Matter relating to law enforcement or public safety

(1) Matter is exempt if its disclosure could reasonably be expected to—

...

(ca) result in a person being subjected to a serious act of harassment or intimidation.

Legislative history of paragraph 42(1)(ca) of the FOI Act

66. Paragraph 42(1)(ca) of the FOI Act is a relatively new exemption provision inserted into the FOI Act by the *Freedom of Information and Other Legislation Amendment Act 2005* (Qld) with commencement on 31 May 2005. There is no equivalent provision in other Australian jurisdictions, the United Kingdom or Canada, interpretation of which might provide guidance regarding the provision.
67. Paragraph 42(1)(ca) of the FOI Act was enacted in response to Report No 32 of the Legal, Constitutional and Administrative Review Committee (**LCARC Report**).²¹
68. The LCARC Report referred to paragraph 42(1)(c) of the FOI Act and noted that:²²

²⁰ Subsection 42(1) of the FOI Act is subject to subsection 42(2) which provides that matter is not exempt under subsection (1) if it consists of matter described in paragraph (a) of subsection (2), unless its disclosure would, on balance, be in the public interest. I am satisfied that the relevant information is not of a type described in paragraph (a) and therefore subsection (2) of section 42 does not apply in this matter.

²¹ Legal, Constitutional and Administrative Review Committee, *Freedom of Information in Queensland*, December 2001, Report No 32.

²² At page 203.

In some circumstances the disclosure of matter could risk harm to an individual which falls short of endangering their life or physical safety. For example, the disclosure of information could cause a person to apprehend harassment or intimidation. Harassment does not satisfy s42(1)(c) unless there is evidence of a risk that disclosure of the matter in issue would endanger a person's life or physical safety. (Re Murphy and Queensland Treasury (1995) 2 QAR 744 at paras 53, 90-91.) The QIC submitted that, for these reasons, the provision should be extended to also exempt matter which could reasonably be expected to subject a person to acts of serious harassment.

69. The LCARC Report also stated:²³

The committee agrees that potential harm to an individual, apart from the risk of endangering a person's life or physical safety, justifies the non-disclosure of material under the Act. In particular, people should not be deterred from providing information to investigative authorities, and professionals responsible for preparing reports about individuals should not be deterred from providing full and frank reports. In this regard, s 42(1)(c) should be extended to situations where disclosure of information could be reasonably expected to:

- *subject a person to serious acts of harassment; or*
- *substantially prejudice the mental well-being of a person.*

Each of these components is necessary. The first relates to likely possible acts against the person, whereas the second is focussed on any reasonable apprehension of harm which a person may have. Care should be taken in drafting the new provision to ensure that it is no broader than is necessary to protect the well-being of third parties who might be affected.

The definition of 'detriment' for the purposes of the Criminal Code, chapter 33A (Unlawful stalking) appears to provide an appropriate precedent for an amended provision.

70. The LCARC Report contained the following recommendation:²⁴

In relation to the exemptions contained in s 42 (Matter relating to law enforcement or public safety), s 42(1)(c) should be extended to also exempt matter if its disclosure could reasonably be expected to:

- *subject a person to serious acts of harassment; or*
- *substantially prejudice the mental well-being of a person.*

The definition of 'detriment' for the purposes of the Criminal Code, chapter 33A (Unlawful stalking) appears to provide an appropriate precedent for an amended provision.

71. In the explanatory notes to the Freedom of Information and Other Legislation Amendment Bill, paragraph 42(1)(ca) of the FOI Act was described as follows:²⁵

Clause 24 amends section 42 to create a new exemption to prevent disclosure where it is reasonably expected that such disclosure could subject a person to serious acts of harassment or intimidation. Such harassment or intimidation would be a consequence of, for example, the applicant having knowledge of the content of the information or of the provider of the information. For example, potential disclosure of information provided by a victim about the offence, upon the application of an offender, could constitute harassment or intimidation. Harassment or intimidation includes, for example, the threat of violence. This implements LCARC finding 177.

²³ At page 204.

²⁴ Committee finding 177 – recommendation, at page 204.

²⁵ At page 14.

Interpretation of paragraph 42(1)(ca) of the FOI Act

72. Section 4 of the FOI Act relevantly provides:

4 Object of Act and its achievement

- (1) *The object of this Act is to extend as far as possible the right of the community to have access to information held by Queensland government.*
- (2) *Parliament recognises that, in a free and democratic society—*
 - (a) *the public interest is served by promoting open discussion of public affairs and enhancing government's accountability; and*
 - (b) *the community should be kept informed of government's operations, including, in particular, the rules and practices followed by government in its dealings with members of the community; and*
 - ...
- (3) *Parliament also recognises there are competing interests in that the disclosure of particular information could be contrary to the public interest because its disclosure in some instances would have a prejudicial effect on—*
 - (a) *essential public interests; or*
 - (b) *the private or business affairs of members of the community about whom information is collected and held by government.*
- (4) *This Act is intended to strike a balance between those competing interests.*
- (5) *The object of this Act is achieved by—*
 - (a) *giving members of the community a right of access to information held by government to the greatest extent possible with limited exceptions for the purpose of preventing a prejudicial effect on the public interest of a kind mentioned in subsection (3); and*
 - ...
- (6) *It is Parliament's intention that this Act be interpreted to further the object stated in subsection (1) in the context of the matters stated in subsections (2) to (5).*

73. Consistent with Parliament's intention expressed in subsection 4(6) of the FOI Act, paragraph 42(1)(ca) of the FOI Act must be interpreted in a way that best achieves the purpose of the FOI Act²⁶ as:

*the primary objective of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.*²⁷

74. Subsection 4(1) of the FOI Act recognises that the community has a right to access information held by the Queensland government. However, subsections 4(2)-(5) of the FOI Act provide that the right of access to documents under the FOI Act is subject to a balancing of competing public interests. Accordingly, paragraph 42(1)(ca) should be interpreted in a way that extends as far as possible the right of the community to access information held by agencies whilst recognising that paragraph 42(1)(ca) is one of the limited exceptions that may apply because disclosure 'could be contrary to the public interest' as it 'would have a prejudicial effect' on 'essential public interests' or on 'the private or business affairs of members of the community about whom information is collected and held by government.'

²⁶ Subsection 14A(1) of the AI Act.

²⁷ *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381.

75. Accordingly, in interpreting paragraph 42(1)(ca) of the FOI Act it is necessary to consider any 'essential public interests' and 'private or business interests' that, absent the provision, may be prejudiced by disclosure of documents through the right of access under section 21 of the FOI Act.
76. The LCARC Report specifically addresses the public interest in ensuring that persons are not deterred from providing information to investigative authorities and similarly, that professionals are not deterred from providing full and frank reports to agencies through concern that disclosure could lead to serious harassment or intimidation.²⁸ The Committee agreed that potential harm to an individual justifies non-disclosure.
77. In addition to the public interests identified by LCARC, paragraph 42(1)(ca) also works to protect the public interest in disclosure not having a prejudicial effect on the private or business affairs or individuals.
78. Though the term 'personal affairs' appears throughout the FOI Act, the term 'private affairs' does not otherwise appear.
79. In *ABC v Lenah Game Meats Pty Ltd*²⁹ Gleeson CJ noted that:

There is no bright line which can be drawn between what is private and what is not. Use of the term "public" is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.

80. In accordance with subsection 4(6) of the FOI Act, paragraph 42(1)(ca) of the FOI Act may be interpreted as a limited exception to the right of access which allows non-disclosure of information or professional advice provided to an agency where that disclosure could reasonably be expected to result in serious harassment or intimidation of person/s. Such disclosure would therefore be contrary to the public interest in the supply of this information as well as the public interest in protecting such individuals from conduct that would prejudice their private affairs.

'Could reasonably be expected to'

81. As set out above in relation to section 42(1)(h), *Cockcroft* dealt with the interpretation of the phrase 'could reasonably be expected to prejudice the future supply of information' in the context of the paragraph 43(1)(c)(ii) (business affairs) exemption contained in the Commonwealth FOI Act.
82. Applying the Justices' interpretation to the phrase 'could reasonably be expected to' in this context requires a consideration of whether the expectation that disclosure of the

²⁸ Paragraph 42(1)(ca) of the FOI Act does not contain a public interest test, however, the public interest considerations discussed above are relevant to how paragraph 42(1)(ca) of the FOI Act is interpreted.

²⁹ (2001) 208 CLR 199 at 226.

Information in issue will result in a serious act of harassment or intimidation is reasonably based.

83. Shepherd J also noted in *Cockcroft* that it is not necessary for a decision-maker 'to be satisfied upon a balance of probabilities' that disclosing the document will produce the anticipated prejudice.³⁰
84. Depending on the circumstances of the particular review, a range of factors may be relevant in determining whether an act could reasonably be expected to occur. These factors may include, but are not limited to:
- past conduct or a pattern of previous conduct
 - stated intentions concerning future conduct including threats
 - the nature of the relevant information in issue
 - the nature of the relationship between the parties
 - relevant contextual and/or cultural factors.

'Harassment'

85. The plain meaning of the word 'harass', as defined in the Macquarie Dictionary³¹ includes:

to trouble by repeated attacks, ... to disturb persistently; torment

'Intimidation'

86. The plain meaning of the word 'intimidate',³² includes:

to make timid, or inspire with fear; overawe; cow ... to force into or deter from some action by inducing fear

'A serious act of harassment or intimidation'

87. Paragraph 42(1)(ca) requires that an anticipated act of harassment or intimidation be serious.
88. The plain meaning of the word 'serious',³³ includes:

giving cause for apprehension; critical

89. and in the New Shorter Oxford Dictionary (4th Edition) includes:

having (potentially) important, esp. undesired, consequences; giving cause for concern.

How relevant information is considered

90. The question of whether disclosure disclosing relevant parts of the JEO could reasonably be expected to result in a serious act of harassment or intimidation should

³⁰ *Cockcroft*, at 106.

³¹ *Macquarie Dictionary Online* (Fourth Edition) www.macquariedictionary.com.au.

³² As above.

³³ As above.

be considered objectively, in light of all relevant information, including information from and/or about the claimed source of harassment or intimidation.³⁴

91. Paragraph 42(1)(ca) of the FOI Act does not require a causal link to be drawn between a specific person and the conduct; nor does it require the conduct to be that of the applicant.

Information contained on Channel 7 programme

92. I obtained a copy of a Channel 7 Today Tonight programme broadcast on Friday, 11 July 2008. During the programme the applicant was interviewed about the JEO subject of this review. In the interview, the applicant made a number of statements regarding events that occurred, her distress, how she felt about her treatment by various people involved, and her opinion regarding the need to change the JEO process and relevant legislation.
93. The applicant also made statements regarding what she would do if she obtained the Matter in Issue through this process under the FOI Act:

...
Today Tonight reporter: What will you do when you find out who did this to you?

Applicant: I will hunt them down. I don't care how long it takes. I don't care how much it costs me. ...

94. Such statements are relevant to my consideration, for the purposes of section 42(1)(ca) of the FOI Act, of what could reasonably be expected to result if the relevant parts of the JEO were disclosed to the applicant. "Hunt" is a word that used by itself can mean 'endeavour to find.'³⁵ Alternatively it has also been defined to mean 'to chase (game or other wild animals) for the purpose of catching or killing.'³⁶ There is no alternative meaning when the word is used in conjunction with the word 'down' as in 'hunt them down'. "Hunt down" means to 'pursue with intent to kill or capture.'³⁷
95. In communications with the Office, the applicant has expressed concern that my reliance on the definition of "hunt down" suggests that she is capable of killing another person.
96. The precise definition of the above words is not determinative and should not be interpreted to mean that the applicant necessarily has an intention to kill the person/s responsible for the JEO. The applicant states that during the television interview when she used the words "Hunt them down" she meant 'endeavour to find'. Even if this is her only intention, I consider the use of such words to comprise a threat which in an ordinary and reasonable person will give rise to consternation or fear of harassment. Furthermore, in correspondence and telephone calls to this Office the applicant has further advised that she holds the Department, the JEO applicant/s and the JP³⁸ responsible for the JEO.

³⁴ *Price and Queensland Police Service* (Unreported, Queensland Information Commissioner, 29 June 2007) at paragraph 63; see also the comments of the Information Commissioner at paragraph 47 of *Murphy and Queensland Treasury* (1995) 2 QAR 744 regarding section 42(1)(c) of the FOI Act.

³⁵ Macquarie Dictionary, Macquarie University, 2nd edition, 1992

³⁶ As above

³⁷ As above

³⁸ The applicant has raised concerns regarding the appropriateness of the behaviour of the JP in relation to the JEO, as she believes the JP did not hold appropriate qualifications to exercise the discretion to issue the JEO

97. On the basis of the applicant's public and explicit statement of her intentions, I am satisfied that an expectation that the disclosure of this information to the applicant might result in a serious act of harassment or intimidation is a reasonable expectation.
98. The applicant has expressed an intention to pursue and harass a person who is performing an official and public role, which carries a likely consequence of deterring that person or other persons from performing this or similar roles. Interference with the private affairs of a public official by approaching them as they carry out their private lives or deterring a public official from performing their role are precisely the essential public and private interests the Parliament sought to protect in passing section 42(1)(ca) of the FOI Act. Accordingly, the identity of or any information that might lead the applicant to identify the person/s involved is exempt matter under section 42(1)(ca) of the FOI Act. The use of such information obtained under FOI to further the applicant's expressed intention would amount to an abuse of her access rights under the FOI Act.

Information provided by the Department, JP and JEO applicant/s

99. While I consider the applicant's public statement about her intentions is alone sufficient to make out the claim for exemption under section 42(1)(ca) of the FOI Act, I have also had regard to additional evidence provided to me during the course of this review to which I have not referred in this decision.
100. I have given careful consideration to affording the applicant fairness³⁹ by providing adequate detail of my reasoning in making my decision. However, in the current circumstances I am constrained from providing further information about my reasoning because to do so would, in my view, risk bringing about the consequences that section 42(1)(ca) is intended to protect against. The evidence and reasons by their nature would tend to identify the people involved and therefore the information that is claimed to be exempt.
101. To the greatest extent possible, I have summarised the information where to do so would not identify people whose identities are contained within the Matter in Issue in this review. However, the majority of the submissions relate to matters specifically about the applicant and/or the people and is conveyed in such a manner that to disclose the submission would reveal the identity of the people whose identities are in issue. I have therefore considered such parts of the submissions, and my related specific conclusions, are necessarily confidential.
102. To the extent that those submissions may be summarised without revealing confidential information, I have included them below.
103. A summary of the Department's submissions include:
 - that in the circumstances of this case, the Department 'consider it reasonably likely that [the applicant's] displeasure would be directed at the JP'
 - the particular circumstances of the people involved and concerns raised are important to the consideration of this matter
 - that while the applicant has stated that she 'will not rest until the persons involved in the issuance of the JEO are held to account for their actions', the applicant appears to have exhausted the avenues of pursuing lawful remedies short of initiating legal action.

³⁹ Section 83(3)(a) of the FOI Act.

- that the applicant's previous conduct towards specific people meets the necessary standard required for section 42(1)(ca) of the FOI Act (i.e. repeated or persistent conduct which has disturbed other people to a substantial degree) and that, based on this, her future conduct (should the information be disclosed to her) can reasonably be expected to subject the JP to a serious act of harassment and/or intimidation in the specific context of section 42(1)(ca) of the FOI Act.
104. The Department also submits that it is not necessary to establish that physical violence would result for the purposes of section 42(1)(ca) of the FOI Act. I agree that such past or future action is not required to establish that section 42(1)(ca) of the FOI Act applies.
105. The JEO applicant/s raised specific concerns for the safety and welfare of the JP in the event that person's identity was disclosed to the applicant. Such concerns were made with reference to information that would reveal the identity of the JEO applicant/s and/or the JP and I therefore consider those submissions to be confidential.
106. The JP made specific submissions about their personal concerns if their identity were to be disclosed to the applicant. The JP noted that the applicant had made numerous letters to the editor of newspapers about a range of matters including the JEO and had received significant media coverage. The JP submitted that given the applicant's displeasure regarding the JEO, he/she considered that the applicant would be likely to air her grievances about the people involved publicly and that public statements made by the applicant or others may represent him/her poorly, even where he/she considers they have conducted themselves appropriately and lawfully. Similar submissions were made by Department.
107. The JP also submitted that it was relevant to his/her concerns about the applicant's actions after any disclosure that the JEO applicant/s had been so concerned about the applicant's behaviour that they had sought a JEO. I note in this respect that the applicant has previously advised me that, following the examination she was not detained for treatment.

The applicant's submissions

108. The applicant provided submissions and information through correspondence and telephone conversations during the course of this review.
109. For the most part, the applicant's submissions are in support of her need to know the identities of the people involved in the issue of the JEO. I acknowledge the applicant has strong concerns and issues she wishes to pursue in relation to the JEO, and has expressed concerns about being subject to harassment and intimidation. However, as set out above in relation to the application of section 42(1)(h) of the FOI Act, the legislation does not allow public interest arguments regarding the applicant's need to know to such information to be taken into account.

Findings

110. I have carefully considered the submissions made by all parties to this review and information I have obtained from Channel 7. On the information currently available to me, I am satisfied that:
- the JP is a person whom the applicant considers is responsible for the JEO being made concerning her.

- the applicant appeared on a national television programme in which she and others were interviewed about her experience regarding the JEO, and in response to a question *'what will you do when you find out who did this to you'* she stated *'I will hunt them down. I don't care how long it takes. I don't care how much it costs me.'*
- the Department, the JEO applicant/s and the JP hold strong concerns, based on specific incidents or instances of the applicant's and others conduct, about the likelihood of (adverse behaviour) in the event the information regarding the identity of the JP was disclosed to the applicant.

111. I do not accept a particular confidential submission by the Department and another party regarding events they say occurred and the significance of such events. To the extent that the factual accounts differ, I prefer that of the other person directly involved. I am not satisfied that the preferred facts establish a previous instance of conduct that is persuasive for my consideration of the application of section 42(1)(ca) of the FOI Act. This means that I do not agree with the specific argument put to me that the applicant's previous conduct shows that she has been intimidating or harassing a specific person and therefore that particular submission is not adversely affecting the applicant's case.

Application of the law

112. In determining whether this claim for exemption is made out, it is unnecessary for me to make a finding with respect to each and every past or future act of alleged harassment and intimidation. It is necessary for me to consider whether the expectation of serious harassment and intimidation on the disclosure of the identity of the JP is reasonably based.

Is the expectation of serious harassment and intimidation on the disclosure of the identity of the JP reasonably based?

113. On the information currently available to me, I am satisfied that disclosure of the identity of the JP in this review could reasonably be expected to result in the applicant:

- pursuing the people involved in the JEO process, particularly the JP who issued the JEO
- being very persistent in their pursuit of that person
- confronting that person about their concerns about the consequences of the JEO and opinions regarding the process and their conduct, in a manner that may be regarded as an 'attack' on that person
- publicising such concerns and opinions about the person and their purported conduct
- repeatedly taking such actions
- conducting themselves in a way that attacks, disturbs or torments the JP and causes concern or apprehension or has undesired consequences.

114. In all the circumstances, I consider that disclosure of the identity of the JP in this review could reasonably be expected to result in the JP being subjected to a serious act of harassment or intimidation.

115. I am therefore satisfied that:

- disclosure of the identity of the JP could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation

- the identity of the JP as it appears in the JEO and JEO application is exempt from disclosure under paragraph 42(1)(ca) of the FOI Act.

DECISION

116. For the reasons stated above, I set aside the decision under review by finding that:

- parts of the JEO and JEO application that could identify the JP are exempt from disclosure under paragraph 42(1)(ca) of the FOI Act.
- the JEO application is exempt from disclosure under section 42(1)(h) of the FOI Act

Julie Kinross
Acting Information Commissioner

Date: 20 February 2009