



Decision and Reasons for Decision

Application Number: 310264

Applicant: Hardy

Respondent: Department of Health

Decision Date: 27 June 2011

Catchwords: **INFORMATION PRIVACY ACT – Grounds on which access may be refused – section 67(1) of the *Information Privacy Act 2009* (Qld) – sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld) – whether document comprises information the disclosure of which would, on balance, be contrary to the public interest — individual’s right to privacy – information communicated in confidence – information which could reasonably be expected to prejudice the management function of an agency – statements taken by an investigator during a workplace investigation regarding the treatment of a patient**

Contents

REASONS FOR DECISION.....	2
Summary	2
Background.....	2
Reviewable decision	2
Evidence considered	2
Information in issue.....	3
Applicant’s submissions.....	3
QH’s submissions	4
Scope	4
Relevant law	5
Findings	5
DECISION	10

REASONS FOR DECISION

Summary

1. The applicant made a complaint to the Department of Health, also known as Queensland Health (**QH**), about the level of care provided to her father. QH commissioned an external party to conduct an investigation into the complaint.
2. The applicant applied under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to full copies of the externally appointed investigator's:
 - **Draft Report** on Townsville District's (QH) Treatment of the applicant's deceased father dated 6 June 2008; and
 - **Final Report** on Townsville District's (QH) Treatment of the applicant's deceased father dated 2 March 2009.
3. QH located 721 pages and decided to grant the applicant full access to 505 pages, partial access to 41 pages and to refuse access to 175 pages. QH refused access to this information on the basis that its disclosure would, on balance, be contrary to the public interest under section 47(3)(b) of the *Right to Information Act 2009* (**RTI Act**).
4. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of QH's decision.
5. After carefully considering all of the information before me, I am satisfied that access to the information in Issue¹ can be refused under section 67 of the IP Act and section 47(3)(b) of the RTI Act on the basis that its disclosure would, on balance, be contrary to the public interest under section 49 of the RTI Act.²

Background

6. Significant procedural steps relating to the application and external review are set out in the Appendix.

Reviewable decision

7. The decision under review is QH's considered decision dated 21 May 2010.³

Evidence considered

8. In making this decision, I have taken the following into account:
 - applicant's access application dated 25 February 2010
 - QH's considered decision dated 21 May 2010
 - applicant's external review application dated 16 June 2010
 - file notes of telephone conversations held between OIC staff members and the parties during the external review
 - the information in Issue⁴ and the information released by QH to the applicant
 - submissions provided by the parties to the OIC

¹ As defined in paragraph 9.

² Section 67 of the IP Act provides that QH may refuse access to a document in the same way and to the same extent that QH could refuse access to the document under section 47 of the RTI Act, were the document to be the subject of an access application under that Act.

³ Which is the relevant decision for the purpose of the IP Act, given section 55(4) of the IP Act.

⁴ As defined in paragraph 9.

- statutory declarations by the General Manager of Quality & Ethics for the investigator and the Executive Director, Mental Health Reform, Townsville Health Service District dated 24 May 2011 and 25 May 2011 respectively
- previous decisions of the Information Commissioner as referred to in these reasons; and
- relevant provisions of the RTI and IP Acts.

Information in issue

9. The information in issue in this external review comprises 175 full pages and 41 part pages to which the applicant was refused access, except for the names of those people interviewed during the investigation (as the applicant advised that she does not seek access to this information).⁵ (**Information in Issue**)
10. The Information in Issue consists of:
- statements taken by an investigator during a workplace investigation regarding the treatment of a patient; and
 - excerpts, summaries or analyses⁶ of the statements in the Draft Report and Final Report.

Applicant's submissions

11. The applicant made a number of submissions throughout the external review, including:⁷
- she was concerned that she was refused access to nearly all of the interviews, as she considered that the Final Report's findings were based on them
 - she could not have faith that recommendations in the Final Report would be implemented, given that no staff were to undergo any disciplinary processes
 - she did not wish to access the investigation participants' names, but sought access to the rest of the information (including the interviews) on the basis that such information was required for the investigator to make a decision, and would enable the applicant to establish why nearly every point in the terms of reference was unsubstantiated
 - there was a lack of transparency in the investigation
 - where there is no transparency, there is no efficiency
 - QH staff and the public have no confidence in QH and this is not going to change while the culture of cover-ups remains
 - public disclosure is not only in the public interest but is entirely necessary to facilitate credibility of QH's investigative procedures
 - QH staff know they can say "whatever they want" as their responses are confidential
 - the Final Report relies on "hearsay which does not have to be proven"
 - procedural fairness requires that complainants such as the applicant get an opportunity to consider investigation participants' responses; and
 - there was no transparency with regard to disclosure as to who were the *'reference group of independent aged care specialists who provided expert input into the process with the result being a second & final report'* as stated in QH's decision.

⁵ External review application dated 16 June 2010.

⁶ The excerpts, summaries and analyses are inextricably interwoven with the personal information of those people who provided the statements.

⁷ External review application dated 16 June 2010 and correspondence dated 13 June 2011.

QH's submissions

12. QH made a number of submissions throughout the external review, including:⁸

- at the outset of the investigation, assurances were given to the staff involved that the process was not being undertaken to apportion blame to any individual/s, but rather that it was to ensure that the Townsville Health Service District was heading down a pathway of improvement and to do so, the issues and problems needed to be explored
- a 'no blame' framework was used as part of the terms of reference, and if at any time during the investigation process a blameworthy act was identified, then the investigation was to be stopped and a disciplinary pathway would be initiated
- a Root Cause Analysis (**RCA**) process was used as the framework for the investigation⁹
- an RCA process is undertaken on a strictly confidential basis in order to ensure staff meaningfully participate in investigations of clinical incidents
- participation in such a process is voluntary and is intended to identify problems and take corrective action without attributing blame
- unless assurances of confidentiality are given to those participating in it, it is reasonable to expect that individuals will either decline to participate or will be reluctant to provide full and frank input
- following the interviews, a number of staff were extremely traumatised and felt harassed
- there were significant concerns by staff that what had been said during the interviews was not accurately transcribed and was not reflected in the written versions of the statements handed back to them for signing
- staff felt they had not been given the opportunity to have the statements corrected or clarified and therefore some did not sign them
- staff were distressed—one had sought counselling and others had been provided with information on access to confidential support
- as a result of this case and its investigation, some senior staff required considerable support to regain professional confidence; one left the service citing this case as a primary cause for their departure; and another had chosen not to work in the area again
- the Draft Report was not accepted due to a number of significant concerns and inaccuracies within it and concerns that the terms of reference had not been followed; and
- given the above, QH maintains that disclosure of the information would be contrary to the public interest.

Scope

13. The applicant referred to the following passage from QH's decision in her submissions:

'... a new investigation was undertaken in conjunction with a reference group of independent aged care specialists who provided expert input into the process with the result being a second and final report...'

⁸ Correspondence dated 11 April 2011 and statutory declaration of the Executive Director, Mental Health Reform, Townsville Health Service District dated 25 May 2011.

⁹ I note that the RTI Act does not apply to a document created for a root cause analysis of a reportable event under the *Health Services Act 1991* (Qld), part 4B (section 9, schedule 1). However, this did not apply in these circumstances as there was no 'reportable event' as defined under section 33B of the *Health Services Regulation 2002* (Qld).

14. To the extent that the applicant seeks access to information regarding this reference group, I note that the scope of the access application extends to information in the Draft and Final Reports only. Having had access to full copies of both of these reports, I confirm that the only reference to a reference group of independent aged care specialists is in the Terms of Reference and the Methodology (to which the applicant has already been given access) which refer to advice being obtained from independent qualified professionals practicing in Queensland in the following areas: Nursing, Physiotherapy, Neurophysiology, and General Medical Practitioner (Confidential telephone calls and face to face interview on process related questions) as material used in defining the allegations.
15. I am satisfied that the Information in Issue does not contain further information concerning the reference group of independent aged care specialists.

Relevant law

16. Access must be given to a document unless disclosure would, on balance, be contrary to the public interest.¹⁰
17. To decide whether disclosure of the Information in Issue would, on balance, be contrary to the public interest, I must:
- identify any irrelevant factors and disregard them
 - identify relevant public interest factors favouring disclosure and nondisclosure
 - balance the relevant factors favouring disclosure and nondisclosure; and
 - decide whether disclosure of the information would, on balance, be contrary to the public interest.¹¹

Findings

18. No irrelevant factors arise in this case.

Factors favouring disclosure

19. Taking into account all of the information before me, I am satisfied that disclosure of the Information in Issue could reasonably be expected to provide further contextual information about the investigation which would promote open discussion of public health affairs and enhance QH's accountability for the provision of public sector health services.¹²
20. In particular, I am satisfied that factors favouring disclosure of the Information in Issue include:
- disclosure of the information could reasonably be expected to contribute to public confidence in the integrity of QH's decision making processes particularly in relation to the management of staff and resolution of disputes¹³
 - disclosure of the information could reasonably be expected to inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with

¹⁰ Sections 64 and 67 of the IP Act and section 47(3)(b) of the RTI Act.

¹¹ Section 49(3) of the RTI Act.

¹² *Summers and Cairns District Health Service* (1997) 3 QAR 479 at paragraph 27.

¹³ Raised in QH's decision letter dated 21 May 2010. I note that the list of factors favouring disclosure set out in schedule 4, part 2 of the RTI Act is not exclusive.

members of the community¹⁴

- the information is the personal information of an individual who is deceased and the applicant is an eligible family member of the deceased person¹⁵
- disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability;¹⁶ and
- disclosure of the information could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.¹⁷

21. As well as effectively raising these factors, the applicant's submissions raised "procedural fairness"¹⁸ as a factor favouring disclosure of the Information in Issue. However, the duty to act fairly, in the sense of according procedural fairness in the making of an administrative decision, relates to persons whose rights, interests and legitimate expectations could be affected by the decision.¹⁹ While the applicant is not entitled to procedural fairness in this sense, she is—as the complainant whose complaint initiated the investigation that resulted in the Information in Issue—entitled to be provided with an adequate explanation of the outcome of the complaint and the reasons for that outcome. In this regard, I note that the applicant has already been provided with:

- the summary of findings
- the executive summary
- background to the investigation
- the terms of reference and methodology; and
- an overview of each allegation along with the findings and recommendations of the investigator.

Factors favouring non-disclosure

22. Taking into account all of the information before me, I am satisfied that factors favouring non-disclosure of the Information in Issue include:

- disclosure of the information could reasonably be expected to prejudice an individual's right to privacy²⁰
- disclosure of the information would disclose personal information of a person, whether living or dead²¹
- disclosure of the information could reasonably be expected to prejudice an agency's ability to obtain confidential information²²
- the information consists of information of a confidential nature that was communicated in confidence and disclosure of the information could reasonably be expected to prejudice the future supply of information of this type;²³ and
- disclosure of the information could reasonably be expected to prejudice the management function of an agency.²⁴

¹⁴ Schedule 4, part 2, item 3 of the RTI Act.

¹⁵ Schedule 4, part 2, item 9 of the RTI Act.

¹⁶ Schedule 4, part 2, item 1 of the RTI Act.

¹⁷ Schedule 4, part 2, item 11 of the RTI Act.

¹⁸ Schedule 4, part 2, item 16 of the RTI Act.

¹⁹ *Kioa v West* (1985) 159 CLR 550 at paragraph 31.

²⁰ Schedule 4, part 3, item 3 of the RTI Act.

²¹ Schedule 4, part 4, item 6 of the RTI Act.

²² Schedule 4, part 3, item 16 of the RTI Act.

²³ Schedule 4, part 4, item 8 of the RTI Act.

²⁴ Schedule 4, part 3, item 19 of the RTI Act.

23. My reasoning regarding the applicability of these factors in the circumstances of this external review is set out below.

Personal information and privacy

24. The applicant agreed to the deletion of names from the Information in Issue. However, personal information is defined in the IP Act as '*information or an opinion... whether true or not ... about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*'²⁵ [emphasis added]
25. The removal of names from the Information in Issue would not remove all personal information, especially considering the applicant's intimate knowledge of the events giving rise to the investigation. It is on this basis that the approach taken in *Courier Mail and the Department of Health*²⁶ (where Right to Information Commissioner Smith found that QH should give access to the information in de-identified form) may be distinguished. Given the applicant's involvement in and/or awareness of these events, it is impossible to de-identify the Information in Issue. Therefore, it is still necessary to consider the public interest in the right to privacy.
26. The concept of 'privacy' is not defined in either the IP Act or the RTI Act. It can, however, essentially be viewed as the right of an individual to preserve their personal sphere free from interference from others.²⁷ This can be distinguished from routine work information—that is, information that is solely and wholly related to the routine day to day work duties and responsibilities of a public service officer. I consider the provision of information to QH about a person's thoughts and opinions in relation to a workplace investigation process is not wholly related to routine day to day work duties and responsibilities, but rather, falls within an individual's 'personal sphere'.
27. Therefore, on the information available to me, I am satisfied that disclosure of the Information in Issue could reasonably be expected to prejudice the right to privacy of people who provided their thoughts and opinions in the investigation.
28. Also, under part 4 of schedule 4 of the RTI Act, it is assumed that disclosure of this personal information could reasonably be expected to cause a public interest harm.

Information communicated in confidence

29. Disclosure could reasonably be expected to cause a public interest harm if:
- the information consists of information of a confidential nature
 - the information was communicated in confidence; and
 - disclosure of the information could reasonably be expected to prejudice the future supply of information of this type.²⁸

Information of a confidential nature

30. The Information Commissioner has previously stated that the following matters are relevant in determining whether information is of a confidential nature:²⁹

²⁵ Section 12 of the IP Act.

²⁶ (Unreported, Queensland Information Commissioner, 22 February 2011).

²⁷ Paraphrasing the Australian Law Reform Commission's definition of the concept in "For your information: Australian Privacy Law and Practice" *Australian Law Reform Commission Report No. 108* released 11 August 2008, at paragraph 1.56.

²⁸ Schedule 4, part 4, item 8 of the RTI Act.

²⁹ *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at paragraph 71.

- the basic requirement is inaccessibility
- it is not necessary to demonstrate absolute secrecy or inaccessibility
- secrecy may attach to a way in which publicly available information has been utilised
- the question of confidentiality is to be determined by assessing the substance of the information rather than by reference to any express marking of 'confidential' on a document
- confidentiality may be lost with the passage of time; and
- the confider's own attitude and conduct toward preserving the secrecy of allegedly confidential information may be relevant to whether it should properly be characterised as confidential information.

31. As the Information in Issue contains thoughts and opinions provided in the context of a workplace investigation, which have not, to my knowledge, been otherwise disclosed, I am satisfied that it is information of a confidential nature.

Information communicated in confidence

32. Whether information is communicated in confidence is a question of fact to be determined by consideration of all relevant circumstances including but not limited to:

- the nature of the relationship between the parties
- the nature and sensitivity of the information; and
- the circumstances relating to its communication.³⁰

33. QH submitted that a strictly confidential RCA process was used as the framework for the investigation in order to ensure that staff participated meaningfully and were forthcoming with information.

34. The confidential nature of the investigation is evidenced by the following passages in the letters provided to investigation participants and support parties respectively:³¹

Employees involved in the investigation process have an obligation to make sure that the process remains confidential. This means that you should not discuss this matter with other employees in the workplace other than your support person.

You must respect the confidentiality of the issues that will be discussed during the interview. The information that you will be privileged to cannot be discussed outside the interview with anyone other than the person who invited you to be his or her support person.

35. In addition, a statutory declaration provided by the Executive Director, Mental Health Reform, Townsville Health Service District³² confirmed that:

The District Executive planned to use the "No Blame" framework... If there was at any time in the investigation "any blameworthy act" then we would stop the investigation and go down a disciplinary pathway.

This process fits with any clinical investigation normally undertaken by the District, inline with Queensland Health protocols, utilising Root Cause Analysis framework for a sentinel event where information provided to the investigators is held confidentially...

³⁰ *McCann and Queensland Police Service* (1997) 4 QAR 30 at paragraphs 33-34.

³¹ QH confirmed by statutory declaration provided by the General Manager of Quality & Ethics for the investigator, that these template documents would have been provided to investigation participants.

³² Dated 25 May 2011. The declarant had, in her former capacity as District Director of Nursing, provided overarching coordination regarding the investigation that led to the Final Report.

36. Taking into account the above information, I am satisfied that the investigation participants provided information in the investigation on the understanding that it was to remain confidential.

Prejudice the future supply of information

37. The phrase *'could reasonably be expected to'* in this context requires consideration of whether the expectation that disclosure of the Information in Issue could result in prejudice to the future supply of such information is reasonably based.

38. In her statutory declaration, the Executive Director, Mental Health Reform, Townsville Health Service District confirmed that:

- a number of staff felt extremely traumatised and harassed by the interviews
- concerns were raised by staff that what they had said during the interview was not reflected in the written statements that had been handed back to them
- some staff had signed their statements under what they considered was significant duress and harassment by the investigator
- a number of staff were in tears at the meeting she organised to discuss the investigation
- one experienced member of staff was seeking counselling as a result of the investigation process
- other staff were advised to seek confidential support
- staff were given assurances that their statements would not be utilised in any outcome if they were inaccurate
- some very senior staff required significant support to regain professional confidence
- one member of staff left the service citing the investigative process as a significant cause; and
- another member of staff chose never to work in the area again.

39. In light of the problems caused by the investigation as outlined above and considering that participation in this type of investigation is voluntary, I am satisfied that it would be reasonable to expect that supply of information which was given on the basis of assurances of confidentiality would be prejudiced in future voluntary processes of a similar nature if the Information in Issue were disclosed.

Information which could prejudice the management function of an agency

40. In relation to this factor, the phrase *'could reasonably be expected to'* requires that I determine whether the expectation that disclosure of the Information in Issue could result in prejudice to the management function of an agency is reasonably based.

41. My abovementioned finding—regarding prejudice to the future supply of confidential information—is relevant in this context. On the basis of that finding, I am satisfied that it is reasonable to expect that if the Information in Issue was disclosed, QH's ability to use the voluntary RCA process as a framework to identify and examine situations adverse to patients' health and safety³³ and to respond with corrective action would be impeded. This outcome appears particularly likely in the circumstances of this external review, given the nature of the Information in Issue (where staff have contested the accuracy of the statements and questioned the investigative processes used to obtain

³³ Excluding circumstances where a blameworthy act is identified and diversion to disciplinary processes occurs.

them). In this manner, I am satisfied that QH's ability to effectively manage its staff would be prejudiced.³⁴

Balancing relevant public interest factors

42. Whilst release of the Information in Issue could reasonably be expected to reveal further background and contextual information in relation to the investigation and therefore promote open discussion of public affairs and enhance QH's accountability, I am satisfied that the weight to be attributed to these pro-disclosure factors is relatively low,³⁵ considering that the applicant has already been provided with:
- the summary of findings
 - the executive summary
 - background to the investigation
 - the terms of reference and methodology; and
 - an overview of each allegation along with the findings and recommendations of the investigator.
43. I am satisfied that prejudice to the right of privacy of the investigation participants should be afforded a moderate weight due to the nature of the Information in Issue, that is, thoughts and opinions in relation to a workplace investigation, not just routine work information.
44. I am also satisfied that disclosure of the Information in Issue would disclose information which was obtained by QH under an understanding of confidentiality and that the disclosure of that information would prejudice the future supply of that type of information to QH. Further, given the circumstances surrounding the investigation process and the gathering of confidential information, I am satisfied that disclosure of the Information in Issue would prejudice the management function of QH. I am satisfied that these factors should be afforded a significant weight.
45. Therefore, on balance, I am satisfied that the public interest is not in favour of the disclosure of the Information in Issue.

DECISION

46. I affirm the reviewable decision and find that access to the Information in Issue can be refused under section 67(1) of the IP Act and section 47(3)(b) of the RTI Act on the basis that disclosure of this information would, on balance, be contrary to the public interest.
47. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

Jenny Mead
Right to Information Commissioner

Date: 27 June 2011

³⁴ *Daw and Queensland Rail* (Unreported, Queensland Information Commissioner, 24 November 2010) at paragraph 17.

³⁵ Cf. *Villanueva and Queensland Nursing Council and Ors* (2000) 5 QAR 363 at paragraph 137 and *Jackson and Department of Health* (Unreported, Queensland Information Commissioner, 10 February 2010) at paragraph 42.

APPENDIX**Significant procedural steps**

Date	Event
25 February 2010	Date of applicant's access application
24 March 2010	QH received access application
30 April 2010	QH sent letter to applicant advising that it would be unable to finalise application by due date and requesting an additional 15 business days
21 May 2010	QH issued considered decision
16 June 2010	Date of applicant's external review application
22 June 2010	OIC received applicant's external review application
8 July 2010	OIC notified parties that external review application accepted
12 October 2010	OIC provided update to applicant
14 March 2011	OIC requested further submissions from QH
29 March 2011	QH granted an extension to provide further submissions
5 April 2011	OIC received some submissions from QH and granted extension to provide further submissions
11 April 2011	OIC received submissions from QH
29 April 2011	OIC received further submissions from QH
3 May 2011	OIC requested further submissions from QH
24 May 2011	QH granted an extension to provide further submissions
25 May 2011	QH provided Statutory Declaration from General Manager of Quality & Ethics for the investigator
27 May 2011	QH provided Statutory Declaration from Executive Director, Mental Health Reform, Townsville Health Service District
1 June 2011	OIC sent preliminary view to applicant
15 June 2011	OIC received applicant's submissions in response to the preliminary view