



Decision and Reasons for Decision

Application Number: 210376

Applicant: FLT

Respondent: Queensland Transport

Decision Date: 3 January 2008

Catchwords: **FREEDOM OF INFORMATION – Section 42(1)(b) of the *Freedom of Information Act 1992* (Qld) – matter relating to law enforcement or public safety.**

Section 46(1)(b) of the *Freedom of Information Act 1992* (Qld) – matter communicated in confidence.

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REASONS FOR DECISION

Summary

1. The decision of Queensland Transport (QT) to refuse the applicant access to the Matter in Issue is affirmed on the basis that the documents are exempt from disclosure under sections 42(1)(b) and 46(1)(b) of the *Freedom of Information Act 1992* (Qld) (FOI Act).

Background

2. On 17 August 2007 the applicant applied to QT for freedom of information (FOI) access to 'Medical and other information held about me', with reference to QT's Medical Reporting Unit.
3. On 29 August 2007, QT issued its decision (Initial Decision):
 - giving full access to two documents
 - refusing access to four documents under sections 42(1)(b) and 46(1)(a) of the FOI Act.
4. By letter dated 1 September 2007, the applicant stated '*this is not adequate*' and requested '*[QT] investigate this matter*'. QT interpreted this letter as an application for an internal review of their Initial Decision.
5. On 1 October 2007, QT advised that it had decided to refuse the applicant access to four documents pursuant to sections 42(1)(b) and 46(1)(b) of the FOI Act (Internal Review Decision)¹.
6. By letter dated 31 October 2007, the applicant applied to this Office for an external review of QT's Internal Review Decision.

Decision under review

7. The decision under review is the Internal Review Decision made by Mr Hillier, Acting Director (Legal and Legislation), QT on 1 October 2007.

Steps taken in the external review process

8. On 19 December 2007, I provided my preliminary view to the applicant that the Matter in Issue:
 - discloses a confidential source in relation to the enforcement or administration of the law and qualifies for exemption from disclosure under section 42(1)(b) of the FOI Act
 - is information communicated in confidence, which is exempt from disclosure under section 46(1)(b) of the FOI Act.
9. By letter dated 19 December 2007, the applicant contested my preliminary view and made submissions regarding her claim that the Matter in Issue should be provided to her.

¹ I note the Internal Review Decision states the Initial Decision has been affirmed rather than varied. I believe this to be an inadvertent error, given that Mr Hillier relied on section 46(1)(b) of the FOI Act in this decision rather than section 46(1)(a) of the FOI Act (as relied upon in the Initial Decision).

10. In making my decision in this matter, I have taken the following into account:
- the applicant's initial application, application for internal review and application for external review dated 17 August 2007, 1 September 2007 and 31 October 2007 respectively
 - the Initial Decision and Internal Review Decision
 - the applicant's letter dated 19 December 2007 contesting my preliminary view.

Matter in issue

11. The Matter in Issue comprises three letters² (four pages) to which QT has denied the applicant access (Matter in Issue).

Findings

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

12. Section 42(1)(b) provides:

42 Matter relating to law enforcement or public safety

(1) *Matter is exempt matter if its disclosure could reasonably be expected to –*

...

(b) *enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained; or*

...

13. The following requirements must be satisfied in order to establish that information is exempt under this provision³:
- (a) a confidential source of information must exist;
 - (b) the information the confidential source has supplied (or is intended to supply) must relate to the enforcement or administration of the law; and
 - (c) disclosure of the information in issue could reasonably be expected to—
 - (i) enable the existence of a confidential source of information to be ascertained; or
 - (ii) enable the identity of the confidential source of information to be ascertained.
14. Section 42(1)(b) of the FOI Act is aimed at ensuring that citizens are not discouraged from co-operating with agencies engaged in the enforcement or administration of the law, by providing information which might assist such agencies to more effectively perform their functions.⁴

² Two of the letters were authored by third parties and one by a government employee.

³ *McEniery and Medical Board of Queensland* (1994) 1 QAR 349 (*McEniery*) at paragraph 16.

⁴ The importance which Parliament attached to this is apparent from the fact that section 42(1)(b) of the FOI Act is not qualified by a public interest balancing test. Thus, in the application of this provision, no account is to be taken of public interest considerations which might favour disclosure of information which otherwise satisfies the test for exemption under section 42(1)(b) of the FOI Act.

Confidential source of information

15. A confidential source of information, for the purposes of section 42(1)(b) of the FOI Act, is a person who supplies information on the understanding, express or implied, that his or her identity will remain confidential.⁵
16. In the present case, there is no written evidence of an express assurance or agreement that QT would keep the identity of each source of information confidential. However, this requirement can still be satisfied if it is clear from the circumstances in which the information was given that there was a common implicit understanding that the identity of the source would be kept confidential.
17. A summary of factors which may be relevant in deciding whether or not such an understanding exists include⁶:
 - the nature of the information conveyed
 - the relationship of the informant to the person informed upon
 - whether the informant stands in a position similar to that of an informer
 - whether it could reasonably have been understood by the informant and recipient that appropriate action could be taken in respect of the information conveyed while still preserving the confidentiality of its source
 - whether there is any real (as opposed to fanciful) risk that the informant may be subjected to harassment or other retributive action or could otherwise suffer detriment if the informant's identity were to be disclosed
 - whether there are any indications demonstrating a desire on the part of the informant to keep his or her identity confidential (e.g. a failure or refusal to supply a name and/or address)
18. In its Initial Decision, QT maintains that it regularly receives complaints relating to driver licensing issues. QT confirms it is the usual practice in such cases to treat the identity of all complainants with the strictest of confidence.
19. Irrespective of who wrote the letters, I note the identities/sources of information are identified in each document comprising the Matter in Issue.
20. Given the sensitive nature of the information conveyed and the circumstances in which it was provided⁷, it is my view that it was reasonable for the source in each instance to expect that QT would keep their identity confidential. I also note that QT has not found it necessary, in the proper performance of its functions, to disclose the identity of the sources of information to the applicant. Therefore, in my view the expectations of confidential treatment continue to apply.
21. Accordingly, I am satisfied that the first requirement for exemption under section 42(1)(b) of the FOI Act has been met, and that in each instance the source qualifies as a confidential source of information for the purposes of section 42(1)(b) of the FOI Act.

⁵ see *McEniery* at paragraphs 20-21.

⁶ *McEniery* at paragraph 50.

⁷ On page 4 of its Internal Review Decision, QT applied the factors stated in *McEniery* to the current situation.

Enforcement or administration of the law

22. QT submits that the Matter in Issue is important to the administration of the *Transport Operations (Road Use Management) Act 1995* (Qld) (TORUM Act) and the *Transport Operations (Road Use Management – Driver Licensing) Regulation 1999* (Qld) (TORUM Regulation).
23. In this regard, I note the following:
- the TORUM Act establishes a scheme to manage the use of Queensland’s roads
 - under this scheme, QT has a responsibility to manage non performing drivers⁸
 - in furtherance of this objective, QT has authority to amend, suspend or cancel a driver’s licence if the licensee has a mental or physical incapacity that is likely to adversely affect the licensee’s ability to drive safely⁹
 - QT exercises this authority by issuing a licensee with a show cause notice¹⁰.
24. In my view QT’s ability to cancel a driver’s licence under the TORUM Regulation relies heavily on information provided by members of the general public on people who pose a safety risk to other road users. I am satisfied, that in the current circumstances, the Matter in Issue contain information related to the administration of both the TORUM Act and the TORUM Regulation.
25. As a consequence, I find that the second requirement for exemption under section 42(1)(b) of the FOI Act has been met.

Existence or identity of confidential source of information

26. In its Internal Review Decision, QT state that disclosure of the Matter in Issue would:
- unequivocally identify the confidential source of information
 - identify the nature of the relationship between the source and the applicant
 - identify the source from the source’s knowledge of information about or relating to the applicant, which is of a private nature.
27. Although the applicant has stated that she does not wish to know the name of each source¹¹, having examined the Matter in Issue in detail, it is my view that disclosure of any part of this information would reasonably be expected to enable the applicant to ascertain the identity of each confidential source. I say this because some of the information consists of the name of the source, while other information would enable the applicant to determine the identity of the source.
28. For the reasons explained above, I am satisfied that the Matter in Issue is exempt matter under section 42(1)(b) of the FOI Act

⁸ section 3(2) of the TORUM Act.

⁹ section 32(a) of the TORUM Regulation.

¹⁰ section 33 of the TORUM Regulation.

¹¹ as emphasised in her request for external review.

Section 46(1)(b) of the FOI Act

29. Section 46(1)(b) provides:

46 Matter communicated in confidence

(1) *Matter is exempt if -*

...

(b) *it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*

Section 46(2) of the FOI Act

30. Under section 46(2) of the FOI Act, if the information in issue consists of deliberative process matter¹² under section 41(1)(a) of the FOI Act¹³ it will not qualify for exemption under section 46(1)(b) of the FOI Act.

31. Section 46(2) of the FOI Act provides:

...

(2) *Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless it consists of information communicated by a person or body other than—*

(a) *a person in the capacity of—*

(i) *a Minister; or*

(ii) *a member of the staff of, or a consultant to, a Minister; or*

(iii) *an officer of an agency; or*

(b) *the State or an agency.*

32. Section 41(1)(a) of the FOI Act provides:

41 Matter relating to deliberative processes

(1) *Matter is exempt if its disclosure -*

(a) *would disclose -*

(i) *an opinion, advice or recommendation that has been obtained, prepared or recorded; or*

(ii) *a consultation or deliberation that has taken place;*

(iii) *in the course of, or for the purposes of, the deliberative processes involved*

in the functions of government; and

...

33. I am satisfied that the application of section 46(1)(b) of the FOI Act to the Matter in Issue is not excluded by section 46(2) of the FOI Act because:

- two of the letters were communicated to QT by a third party, that is, not a person/entity listed in section 46(2) of the FOI Act

¹² described as being the policy forming processes and decision-making functions of an agency which occur towards the end stage of a larger process following investigations of various kinds and obtaining inputs from relevant sources – see *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at paragraphs 28 and 30.

¹³ as communicated by a person/entity identified in section 46(2) of the FOI Act.

- one of the letters, although written by a government employee (ie an officer of an agency), is not deliberative process matter and does not fall within section 41(1)(a) of the FOI Act.

Requirements for exemption under section 46(1)(b) of the FOI Act

34. QT claims that the Matter in Issue is exempt under this provision on the basis that it contains information which was communicated to them in confidence.
35. Documents will be exempt under section 46(1)(b) of the FOI Act if¹⁴:
- a) it consists of information of a confidential nature;
 - b) it was communicated in confidence;
 - c) its disclosure could reasonably be expected to prejudice the future supply of such information; and
 - d) the weight of the public interest considerations favouring non-disclosure equals or outweighs that of the public interest considerations favouring disclosure.
36. I will consider each of these requirements below.

Requirement (a) - Is the information of a confidential nature?

37. The following points are relevant in deciding whether information is of a confidential nature¹⁵:
- 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 reference to the substance of the information for which protection is sought, not by reference to an express marking of 'confidential' on a document
 - 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

38. In this review, the Matter in Issue contains information about the applicant's medical condition and how this allegedly impacts on her ability to drive. I am satisfied that the information claimed to be exempt is not known to the applicant and is sufficiently inaccessible that it cannot be obtained from sources available to the public.

39. Accordingly, requirement (a) is satisfied.

Requirement (b) - Was the information communicated in confidence?

40. Whether this requirement is satisfied is a question of fact to be determined by a consideration of all of the relevant circumstances including but not limited to:
- the nature of the relationship between the parties
 - the nature and sensitivity of the information
 - the circumstances relating to its communication¹⁶.

¹⁴ *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at paragraphs 146-147(B).

¹⁵ *B* at paragraph 71.

41. In *McCann and Queensland Police Service*¹⁷ the Information Commissioner noted that in the context of a police investigation, it would be unreasonable for people who provided information to an investigator to expect that information to remain unconditionally confidential for all time. In that decision, the Information Commissioner indicated that the scope of the understanding of confidence must have been contingent and conditional, with the relevant touchstone being the limited purpose for which the information was communicated.¹⁸
42. QT relevantly submits that:
- the information was provided to QT on the understanding that it would not be made widely available
 - complaints of this nature are always dealt with by QT in the strictest confidence.
43. Although QT has not provided me with evidence supporting the above submissions, I accept, having regard to the sensitivity of the information provided, that an implicit mutual understanding existed between QT and the third parties that the Matter in Issue would be treated in confidence so as to preserve their identities.
44. With reference to the document provided by the government employee, the Information Commissioner has previously found that where a document does no more than pass on concerns expressed by members of the public, who are not named in the letter or identifiable from its contents, then it is unlikely to have been communicated in confidence, as no threat of detriment to identifiable individuals is likely to result from its disclosure.¹⁹ This contrasts with the current circumstances, in that the relevant letter contains information which clearly identifies the third parties and discusses their concerns. I am satisfied given the substance of this letter, that the implicit mutual understanding found to exist between the third parties and QT also applies to this letter, thereby requiring the information contained in it to be treated in confidence.
45. Accordingly, requirement (b) is satisfied.

Requirement (c) – Is the information reasonably expected to prejudice the future supply of such information?

46. Requirement (c) asks whether disclosing the Matter in Issue could reasonably be expected to prejudice the future supply of similar information to QT.
47. The phrase ‘could reasonably be expected to’ requires the decision-maker applying section 46(1)(b) of the FOI Act to discriminate between:
- unreasonable expectations and reasonable expectations

¹⁶ such as those referred to by a Full Court of the Federal Court of Australia in *Re Smith Kline and French Laboratories (Aust) Limited and Ors ats Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at paragraph 46 (see *B* at paragraph 82).

¹⁷ (1997) 4 QAR 30 (*McCann*).

¹⁸ *McCann* at paragraph 57.

¹⁹ *Member of the Legislative Assembly and Queensland Corrective Services Commission* [1997] QICmr 12 (25 July 1997); (1997) 4 QAR 100 at paragraph 17, where a letter passing on concerns expressed to a member of the legislative assembly was found not to have been communicated in confidence.

- what is merely possible and expectations which are reasonably based, that is, expectations for the occurrence of which real and substantial grounds exist²⁰.
48. In my view, the current circumstances are similar to situations where persons submit information to assist with investigations. For example, in *McCann*²¹, the Information Commissioner stated that:
- the co-operation by members of the community with investigators, through the supply of relevant information, is essential to successful enforcement of the law
 - there is little doubt that members of the community who choose to co-operate may suffer inconvenience, imposition on their time and anxiety at possible harassment or retributive action if their identity or the information provided was disclosed to the public
 - disclosure could prejudice the future supply of such information from a substantial number of sources on the basis of reluctance to participate or co-operate in future investigations.
49. I believe the comments made above apply equally in these circumstances as QT clearly relies on information such as that contained within the Matter in Issue to fulfil its obligations under the TORUM Act and TORUM Regulation.
50. When considering the document provided to QT by the government employee it may be that the information supplied was as an incident of that person's employment, in which case its disclosure would not ordinarily be expected to prejudice the future supply of information.²² Although I have no information of this, it is my view that in any event the described situation can be distinguished from the current circumstances because:
- the government employee wrote in support of the third parties
 - the information conveyed in this letter identifies and details the concerns of the third parties
 - the likely prejudice to the future supply of information could be two-fold and may apply to both QT and the agency where the government employee works.
51. On the information available to me, it is my view that:
- disclosure of the Matter in Issue could reasonably be expected to lessen the quantity and quality of information received by QT in the future, as people may fear identification or adverse repercussions
 - requirement (c) is satisfied.
52. As a consequence of having satisfied the first three requirements for exemption under section 46(1)(b) of the FOI Act, the Matter in Issue is prima facie exempt subject to the public interest balancing test.

Requirement (d) – Public interest balancing test

53. This requirement requires a determination of whether there are sufficient public interest considerations favouring full disclosure of the documents in issue to justify a finding that disclosure of the documents would on balance be in the public interest.

²⁰ B at paragraphs 154-160.

²¹ at paragraph 73.

²² See B at paragraph 161.

54. This involves a weighing up of any public interest considerations favouring disclosure against public interest considerations favouring non-disclosure, with a significant consideration in this balancing exercise being that disclosure of matter under the FOI Act is considered to be disclosure to the 'world at large'²³.

Public interest considerations in favour of disclosure

55. When considering this test, three significant public interest factors which apply for the benefit of individuals, may be relevant. These include:
- accountability of government
 - ensuring individuals receive fair treatment in their dealings with government agencies
 - providing an individual with information where they have a justifiable need to know.

Accountability of government

56. Facilitating the accountability of government is a public interest consideration recognised by section 4 of the FOI Act. The question in this case is whether disclosure of the Matter in Issue would materially enhance this public interest consideration to an extent that warrants it being accorded significant weight in favour of disclosure.
57. I note that in the applicant's application for external review she indicated that:

I want to know what evidence or opinion is being used to decide that I cannot hold a licence.

58. In her letter dated 19 December 2007, which disputed my preliminary view, the applicant reiterated the above and insisted that she has a right to know of this evidence. However, the applicant did not provide me with any relevant submissions to support this assertion or alter my preliminary view.²⁴
59. Whilst I appreciate the applicant's reasons for wanting the Matter in Issue, having examined the reasons put to her by QT in their Internal Review Decision, I am satisfied that QT has endeavoured to provide the applicant with as much detail of the cancellation of her driver's licence as the circumstances allow. I am therefore unable to identify how the Matter in Issue would significantly enhance QT's accountability.
60. In my view this public interest consideration is not established and therefore carries no weight in the balancing test.

Fair treatment

61. The applicant states in her application for internal review that:

I do not believe I have a medical condition which would prevent me from driving, and I am not on any medication. The Decision of Show Cause indicates that they have had information made available to them (the Dept of Transport) of an aggravation of my existing condition (?). This is not true & I have not had such an aggravation...I was

²³ see page 482 of *Dwyer and Department of Finance and Ors* (1985) 8 ALD 474.

²⁴ In this letter the applicant discusses her ongoing conflict with a family member, which she believes has led to a deterioration of her reputation and position.

denied access to any information other than what they have provided me with...This is not adequate.

62. The public interest in the fair treatment of persons in accordance with the law in their dealings with government agencies is, in my opinion, a legitimate category of public interest.²⁵ It is an interest common to all members of the community, and for their benefit. For example, in an appropriate case, an applicant's reasons for requiring access to particular documents may justify them being given access to the documents so that they may assess whether or not they have received fair treatment.
63. The current circumstances are that, as a consequence of receiving the Matter in Issue (which detailed concerns held by others about the applicant's driving), QT requested that the applicant 'show cause' by issuing her with the appropriate notice on 13 July 2007. Although the applicant maintains that illness prevented her from responding to this notice within the time limit prescribed, as far as I am aware, the applicant did not provide QT with any evidence which rebuts the concern that she has a 'permanent or long term medical condition [which is] likely to adversely affect your ability to drive a motor vehicle safely'²⁶. By letter dated 9 August 2007, QT decided to revoke the applicant's driver's licence, but in doing so, provided her with an opportunity to apply to QT for a reconsideration of this decision or lodge an appeal against this decision at her local court house.
64. On the information available to me and in the absence of any submissions to the contrary, it is my view that QT's dealings with the applicant have been fair and in accordance with the law²⁷. In any event, I do not consider that withholding the Matter in Issue will deprive the applicant of any opportunity to assess whether or not she has received fair treatment by QT.
65. Accordingly, it is my view this public interest consideration has little weight.

Justifiable 'need to know'

66. In certain cases, information contained within a document sought by the applicant may affect or concern an applicant to such a degree that it gives rise to a public interest in the applicant having a justifiable need to know, that is more compelling than for other members of the public.²⁸
67. Although it has been established that the Matter in Issue comprises information about the applicant's health²⁹ and driving ability, I am not convinced that the stated public interest arises here because:
- the information concerning the applicant's personal affairs cannot be separated from information that would identify the third parties
 - the information released to the applicant so far, although limited, in my view has been adequate, given the circumstances in which it was communicated and the purpose for which it was provided.

²⁵ *Pemberton and The University of Queensland* (1994) 2 QAR 293 at paragraph 190 (*Pemberton*).

²⁶ as stated in the show cause notice provided to you by QT.

²⁷ Under sections 32(a) and 33 of the TORUM Regulation, the chief executive is empowered to cancel a person's licence (and issue a show cause notice) if the licensee has a mental or physical incapacity that is likely to adversely affect their ability to drive safely.

²⁸ *Pemberton* at paragraph 193.

²⁹ a matter which falls within the core meaning of 'personal affairs' see *Re Stewart and Department of Transport* (1993) 1 QAR 227 at paragraph 78.

Public interest considerations against disclosure

68. Against those considerations favouring disclosure, I must balance considerations favouring non-disclosure of the Matter in Issue, which include:
- the prejudice to the future supply of such information if the Matter in Issue were to be disclosed
 - the applicant's reasons for requiring the Matter in Issue are private and not a public interest
 - disclosure of confidential information.
69. After carefully considering each of the considerations set out above, it is my view that disclosure of the Matter in Issue would not have a positive or beneficial consequence for the applicant (that is recognised to be in favour of the public interest), and certainly none of sufficient substance to outweigh the possible detriment that would be occasioned to the third parties, nor the potential prejudice to the future supply of such information to QT (upon which it relies in order to ensure road safety which, of itself, is a significant public concern).
70. I am therefore satisfied that:
- the weight of the public interest considerations favouring non-disclosure outweighs the public interest considerations favouring disclosure
 - requirement (d) is satisfied.
71. On this basis I am satisfied that the Matter in Issue qualifies for exemption from disclosure under section 46(1)(b) of the FOI Act.

DECISION

72. I affirm the decision under review by deciding that the Matter in Issue is exempt from disclosure under sections 42(1)(b) and 46(1)(b) of the FOI Act.

R Rangihaeata
Acting Information Commissioner

Date: 3 January 2008