



## Decision and Reasons for Decision

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**Application Number:** 210563

**Applicant:** Ms E Murphy

**Respondent:** Health Quality and Complaints Commission

**Third Party:** A Medical Practitioner

**Decision Date:** 9 July 2009

**Catchwords:** ADMINISTRATIVE LAW - FREEDOM OF INFORMATION – QUEENSLAND – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER COMMUNICATED IN CONFIDENCE - whether disclosure of the matter in issue would found an action for breach of confidence under section 46(1)(a) of the *Freedom of Information Act 1992 (Qld)* – whether the matter in issue falls under section 46(2) of the *Freedom of Information Act 1992 (Qld)*

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## REASONS FOR DECISION

### Summary

1. On the information available to me, I am satisfied that section 46(1)(a) of the FOI Act does not apply in this case to exempt the Matter in Issue because the Matter in Issue falls within section 46(2) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**).

### Background

2. By letter dated 29 January 2008, the applicant applied to the Health Quality and Complaints Commission (**Commission**) for access to a range of documents relating to her late husband (**FOI Application**).
3. On 1 April 2008 the Commission decided to grant the applicant full access to 894 documents and partial access to 9 documents (**Original Decision**).
4. By letter dated 9 April 2008, the applicant sought internal review of the Original Decision (**Internal Review Application**).
5. By letter dated 26 June 2008, the Commission sought to affirm the Original Decision. However, as the internal review decision was not made within the time limits prescribed under the FOI Act, the Commission is taken to have affirmed its Original Decision on or about 8 May 2008 (**Affirmed Decision**).<sup>1</sup>
6. By letter dated 15 July 2008 the applicant applied to this Office for external review of the Commission's decision (**External Review Application**).

### Decision under review

7. The decision under review is the Affirmed Decision (referred to at paragraph 5 above).

### Steps taken in the external review process

8. By letters dated 27 August 2008, Acting Assistant Commissioner Jefferies indicated to the parties in this review that this Office would be conducting an external review of the Affirmed Decision to partially exempt/exclude 9 documents under the FOI Act. In her letter to the Commission, Acting Assistant Commissioner Jefferies requested that further submissions in support of its claim for exemption under section 46(1)(a) of the FOI Act be provided.
9. By letter dated 6 September 2008, the applicant provided further written material for consideration in the review.
10. By letter dated 8 September 2008, the Commission responded to Acting Assistant Commissioner Jefferies' letter at paragraph 8 above.
11. By letter dated 2 October 2008, the applicant provided additional written material for consideration in the review.

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<sup>1</sup> However, for the purpose of the review, I will take into account the Commission's views as expressed in its letter of 26 June 2008.

12. By letter dated 14 October 2008 Acting Assistant Commissioner Jefferies advised the Commission and the Third Party of her preliminary view regarding the application of section 46(1)(a) of the FOI Act to the Matter in Issue.
13. In a telephone conversation on 23 October 2008, the Commission confirmed that it accepted the preliminary view above.
14. In a telephone conversation on 4 November 2008, the Third Party indicated he wished to contest the preliminary view and would be providing submissions in support of his case.
15. By letter dated 7 November 2008, the Third Party provided written submissions for consideration in the review.
16. By letter dated 20 January 2009, Assistant Commission Corby responded to the Third Party's letter above and advised the Third Party of her preliminary view.
17. By letter dated 2 February 2009, the Third Party indicated that he maintained his objection to release of the Matter in Issue and did not accept the preliminary view on the basis that the Matter in Issue should qualify for exemption from disclosure under sections 44(1) and 46(1)(a) of the FOI Act.
18. During the period March to May 2009 the Third Party's submissions were considered and further legal research undertaken.
19. By letter dated 9 June 2009, the third party was provided with a further preliminary view concerning the application of sections 44(1) and 46(1)(a) of the FOI Act.
20. By letter dated 9 June 2009, the Commission was provided with a further preliminary view concerning the application of section 46(1)(a) of the FOI Act.
21. By letter dated 26 June 2009, the Commission (also acting on behalf of the Third Party) responded to my preliminary view above in respect of the application of section 46(1)(a) of the FOI Act<sup>2</sup> and indicated that it did not accept my view.
22. In making my decision in this matter, I have taken the following into consideration:
  - the FOI Application, Internal Review Application and External Review Application
  - the Commission's Original Decision and letter dated 26 June 2008
  - written correspondence received from the applicant, the Commission and the Third Party during the course of the review
  - file notes of telephone conversations between a staff member of the Office and the applicant throughout the review
  - file notes of telephone conversations between a staff member of the Office and the Commission throughout the review
  - file notes of telephone conversations between a staff member of the Office and the Third Party throughout the review
  - the Matter in Issue
  - relevant sections of the FOI Act

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<sup>2</sup> As no response was received from the Third Party (or the Commission acting on his behalf) in respect of my preliminary view on section 44(1) of the FOI Act, I have assumed for the purposes of this review that the Third Party accepts my view on the application of that provision.

- previous decisions of the Queensland Information Commissioner and decisions and case law from other Australian jurisdictions as identified in this decision.

### **Matter in issue**

23. The Commission initially claimed that nine of the located documents qualified for partial exemption or exclusion under the FOI Act.
24. During the course of the review, the applicant indicated that she was not interested in pursuing access to information contained within six of the documents.<sup>3</sup>
25. Accordingly the matter in issue in this review comprises the Third Party's name as it appears on three documents<sup>4</sup> (**Matter in Issue**).

### **Findings**

#### ***Relevant law***

##### **Section 46(1)(a) of the FOI Act**

26. Section 46(1)(a) of the FOI Act provides:

##### **46 Matter communicated in confidence**

- (1) *Matter is exempt if -*
  - (a) *its disclosure would found an action for breach of confidence; or*
  - ...

##### ***Application of section 46(1)(a) of the FOI Act***

27. The Information Commissioner set out the correct approach to the interpretation and application of section 46(1) of the FOI Act in the decision of *'B' and Brisbane North Regional Health Authority*:<sup>5</sup>
  - an action for breach of confidence may be based on either a contractual or equitable obligation of confidence
  - the test for exemption under section 46(1)(a) of the FOI Act is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence claimed to bind the agency not to disclose the information in issue.

##### ***Is there an obligation of confidence?***

28. An obligation of confidence may arise, either expressly or impliedly, between the parties to a contract.<sup>6</sup>
29. In the current circumstances the Commission and the Third Party have confirmed the following:

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<sup>3</sup> As confirmed in a letter to the applicant dated 25 November 2009.

<sup>4</sup> Folio 25 of File 1 and folios 19 and 22 of File 2.

<sup>5</sup> (1994) 1 QAR 279 (**'B'**).

<sup>6</sup> *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

- although the Commission did not enter into a written contract with the Third Party, when the Third Party commenced as an independent clinician with the Commission, he was advised by the Commission that his name would not be disclosed
- verbal representations, of the type made to the Third Party were also made to other independent clinicians prior to their commencement with the Commission
- the Commission is currently in the process of drafting a proforma contract for signature by its independent clinicians which will state that the name of the independent clinician will be kept confidential.

30. In view of the information provided, I am satisfied that:

- a contractual obligation of confidence existed between the Commission and the Third Party
- this contractual obligation required the Commission to ensure that the Third Party's name was not disclosed.

31. It is an agreed fact that despite the contractual obligation noted above, the Commission inadvertently disclosed the Third Party's name to the applicant on two prior occasions.

***Is section 46(1) of the FOI Act excluded by section 46(2) of the FOI Act?***

32. While it appears the Matter in Issue is exempt under section 46(1)(a) of the FOI Act, I must also consider whether the Matter in Issue is excluded from the operation of section 46(1) of the FOI Act by section 46(2) of the FOI Act.

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

**46 Matter communicated in confidence**

- ...
- (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.*

34. Section 46(2) of the FOI Act is aimed at ensuring that the protections offered by the two exemptions in section 46(1) are largely for the benefit of 'outside' third party information supplied to government.

35. As stated by the Information Commissioner in 'B'<sup>7</sup> section 46(2) of the FOI Act:

*... has the effect of excluding a substantial amount of information generated within government from the potential sphere of operation of the s. 46(1)(a) and s. 46(1)(b) exemptions.*

36. Similarly, the Information Commissioner noted in *Cairns Port Authority and Department of Lands*<sup>8</sup> that one of the purposes of section 46(2) of the FOI Act is to:

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<sup>7</sup> At paragraph 35.

<sup>8</sup> (1994) 1 QAR 663 at paragraph 41.

*... prevent the possibility of agencies attempting to circumvent the public interest component of the test for exemption of deliberative process matter under s.41(1), by purporting to attach obligations of confidence to intra-agency and inter-agency communications of deliberative process matter, in the hope of attracting exemption under s.46(1).*

37. Consistent with Parliament's intention expressed in section 4(6) of the FOI Act, sections 46(1) and 46(2) of the FOI Act must be interpreted in a way that best achieves the purpose of the FOI Act 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.*

38. Given the objectives of the FOI Act and the policy intent of this legislation being to extend as far as possible the right of the community to have access to government-held information, it is inconsistent for government agencies to attempt to 'contract out' of their obligations under the FOI Act. The prevalence of such arrangements was recently acknowledged by the FOI Independent Review Panel chaired by Dr David Solomon AM in its comprehensive review of the FOI Act.<sup>9</sup>
39. The Commission submits that the independent clinicians provide an important service which enables it to fulfil its functions. Accordingly, the Commission has previously argued<sup>10</sup> that if the names of its independent clinicians were disclosed, it would have difficulty sourcing medical practitioners to this role and the future supply of such advice would be prejudiced. The Third Party also submits that if his identity (in connection with the Commission) was made known, he may be subject to ostracism by colleagues if a Commission decision involving those individuals was unfavourable.
40. In the absence of any supporting evidence, I do not consider the above submissions should be accorded any weight. This is particularly so in light of the fact that other agencies which fulfil similar investigative functions requiring the involvement of appropriately qualified medical practitioners to provide opinions, such as the Medical Board of Queensland:
- do not assure the doctors providing the requested opinion that their identity will remain confidential
  - provide the complainant with the name of the medical practitioner whose opinion was sought during the assessment of the allegation/complaint.
41. The Parliament recognised in the FOI Act that the public interest is served by promoting open discussion of public affairs and enhancing government's accountability. It is therefore inappropriate for agencies, in the absence of circumstances that would justify non-disclosure, to refuse to disclose the names of persons assisting it in the performance of its functions, particularly where those individuals are remunerated for their services.
42. The FOI Act makes provision for certain circumstances where the disclosure of the Matter in Issue may be inappropriate. Those circumstances include where a staff member can reasonably expect that the disclosure of their name may result in a

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<sup>9</sup> See pages 90-96 of the FOI Independent Review Panel, *The Right to Information Reviewing Queensland's Freedom of Information Act (2008)*.

<sup>10</sup> In its letter to this Office dated 8 September 2008.

serious act of intimidation or harassment. In such cases the onus is on the agency to claim an appropriate exemption provision of the FOI Act<sup>11</sup> and provide sufficient evidence in support of such a claim.

43. In this review, to determine whether the Matter in Issue falls under section 46(2) of the FOI Act I must consider whether the Matter in Issue is:
- matter of a kind mentioned in section 41(1)(a) of the FOI Act
  - was communicated by a person other than the individuals mentioned in section 46(2)(a) of the FOI Act.

**Is the Matter in Issue of a kind mentioned in section 41(1)(a)?**

44. Section 41(1)(a) 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;*

*in the course of, or for the purposes of, the deliberative processes involved in the functions of government...*

45. As set out in this Office's FOI Concept: "Deliberative Process" (available at [www.oic.qld.gov.au](http://www.oic.qld.gov.au)) a deliberative process:

- refers to the pre-decisional thinking processes of an agency
- tends to occur toward the end stage of a larger process after information has been obtained from different sources.

46. Upon receiving a complaint, the Commission decides whether to accept it for action (known as an assessment decision).<sup>12</sup>

47. During this assessment phase, and prior to making an assessment decision, it is the usual practice of the Commission<sup>13</sup> to seek clinical advice about the conduct and practice of the health service provider. In relation to this clinical advice I note:

- the purpose of the clinical opinion is to assess whether the health service provided was reasonable
- clinical advice is sought solely for the purpose of statutory assessment under the HQCC Act
- where practicable, internal clinicians (as opposed to external clinicians) are used.

48. In relation to the clinical opinion described above, the Commission submits that the opinions of its independent clinicians are meaningful without the clinicians name. Accordingly it argues that whilst the independent clinician's qualification may

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<sup>11</sup> And as of 1 July 2009, under the *Right to Information Act 2009* (Qld).

<sup>12</sup> See 59 and 60 of *Health Quality and Complaints Commission Act 2006* (Qld) (**HQCC Act**).

<sup>13</sup> under Part 9 of its complaint manual.

accompany the clinical opinion, there is no need for the name of the independent clinician to also be disclosed.

49. In respect of the Commission's submission above, I do not agree that an opinion on its own without the name of the person giving the opinion is fully meaningful to a reader because:
- whilst the clinician's qualifications may indicate he/she is qualified to provide a clinical opinion, it provides no insight into that person's professional background and experience – both of which are relevant to determining whether the independent clinician was suitably qualified to review a particular complaint
  - a reader is unable to identify possible conflicts of interest with an independent clinician if they are not privy to that person's identity
  - a reader should have the ability to scrutinise and be able to satisfy themselves that the opinion has been provided by an appropriately qualified professional.
50. Having regard to the process outlined above, it is my view that:

- the steps taken by the Commission in assessing a complaint prior to making an assessment decision comprise a deliberative process of the Commission
- in the current circumstances the Third Party's advice/opinion was obtained during the assessment of the applicant's complaint and as such occurred during a deliberative process of the Commission
- the Third Party's name is not to be regarded as separate from the advice/opinion given because it is his name and qualifications which give to the advice/opinion its status as 'clinical advice/opinion' and his name and qualifications are an integral part of the opinion
- the Matter in Issue is matter of a kind mentioned in section 41(1)(a) of the FOI Act.

**Is the Third Party an officer of an agency?**

51. As previously stated, if the Matter in Issue is matter of the kind mentioned in section 41(1)(a) of the FOI Act and comprises a communication by any of the persons/bodies identified in section 46(2)(a) of the FOI Act, then section 46(1)(a) of the FOI Act will not apply.
52. In the current circumstances the relevant question is therefore whether the Third Party is an 'officer of an agency' within the meaning of section 46(2)(a)(iii) of the FOI Act.
53. An officer (in relation to an agency) is defined under section 7 of the FOI Act to include:
- a) *the agency's principal officer; and*
  - b) *a member of the agency; and*
  - c) *a member of the agency's staff; and*
  - d) *a person employed by or for the agency.*
54. Therefore provided the Third Party satisfies one of the above situations, he will be regarded as an officer of the Commission for the purposes of section 46(2)(a)(iii) of the FOI Act.



55. In respect of this issue, the Commission submits that the Third Party is neither an employee or officer of the Commission because:
- section 187 of the *Health Quality and Complaints Commission Act 2006* (Qld) (**HQCC Act**) requires that staff of the Commission, other than the chief executive officer are to be employed under the *Public Service Act 2008* (Qld) (**PS Act**)
  - its 'other staff' are employed as public service officers under section 8 of the PS Act
  - the Third Party is not employed under the PS Act.
56. Instead the Commission submits the Third Party fulfills the role of a 'contractor' to the Commission because he:
- is 'contracted' to provide advice to staff at the Commission
  - has no decision-making power and does not act on behalf of the Commission or represent the Commission in any way
  - does not contribute to the business of the Commission except in the provision of his independent clinical opinion
  - does not receive any other benefits (other than remuneration) in terms of superannuation, holiday pay or sick leave
  - does not have free access to the Commission premises other than on the day of his attendance
  - does not have control over any aspect of the Commission's resources, assets or workflows.
57. I note the Commission is established as a body corporate which may sue and be sued in its corporate name.<sup>14</sup> Its office, established under section 174 of the HQCC Act is comprised of the chief executive and other staff, the latter of which are employed under the PS Act. Notwithstanding this, it is clear that the Commission has the statutory authority to engage persons in other capacities given its current employment arrangements with the Third Party.
58. I accept that the Third Party is not employed under the PS Act and is therefore not a member of the agency's staff for the purposes of section 7(c) of the FOI Act. However the Third Party may still be considered to be an officer of the Commission under section 7(d) of the FOI Act if it can be established that he is a person *employed* by or for the Commission.
59. As the term 'employed' is not defined within the FOI Act or the *Acts Interpretation Act 1954* (Qld), in accordance with the rules of statutory interpretation it should be interpreted according to its plain and natural meaning, best ascertained by its dictionary definition. Although the word 'employed' is not specifically defined, derivatives of it include:<sup>15</sup>

*Employ: to use the services of (a person)*

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<sup>14</sup> Section 11 of the HQCC Act.

<sup>15</sup> *Macquarie Dictionary Online* (Fourth Edition) [www.macquariedictionary.com.au](http://www.macquariedictionary.com.au).

*Employee: a person working for another person or a business firm for pay.*

*Self-employed: deriving one's income from one's own work, profession, or business, and not as a salary from an employer.*

and in the New Shorter Oxford Dictionary (4th Edition) include:

*Employ: the state or fact of being employed, esp. for payment; use or retain the services of (a person), esp. in return for payment; pay (a person) to work for oneself or one's organization.*

60. It is clear from the above definitions that the word 'employed' contemplates an individual deriving income as a consequence from working or providing a service to another person or an organisation. Based on the information made by the Commission about the working conditions of the Third Party and the definitions noted above, for the purposes of the FOI Act, the Third Party is a person employed by or for the Commission.
61. The Commission has argued that the Third Party is a contractor not an employee. The test to be met is whether the Third Party is 'employed by or for' the Commission. The FOI Act is silent in what capacity a person might be employed. The Third Party might be employed as a contractor or consultant. The capacity in which the Third Party is employed is not critical. It is whether or not the Third Party is 'employed'. In view of this, I do not consider the factors submitted by the Commission in support of the Third Party being a contractor have any bearing upon whether the Third Party is an officer of the Commission for the purposes of the FOI Act because persons *employed* within agencies:
  - do not necessarily need to have decision-making power or be seen to have control over an agencies' resources
  - all fulfil a role within the agency which contributes to its business and functioning
  - may be remunerated on a basis which takes into account other benefits
  - may be restricted in terms of the hours or days which they may work.
62. The FOI Act covers many groups of persons including individuals employed by certain Government owned corporations and under various awards. Therefore the fact that a person is not employed under the PS Act or considered a 'public service officer' under that Act is irrelevant to a consideration of whether that individual is an officer of the agency under the FOI Act.
63. In my view the nature of the employment relationship between the Commission and the Third Party is such that he is a person employed by or for the Commission under section 7(d) of the FOI Act. Accordingly, I am satisfied that:
  - the Third Party fulfils the role of an officer of the Commission for the purposes of section 46(2)(a)(iii) of the FOI Act
  - section 46(1) of the FOI Act does not apply in the circumstances, meaning the Matter in Issue does not qualify for exemption under this provision of the FOI Act.

## **DECISION**

64. For the reasons stated above, I set aside the decision under review and find that the Matter in Issue:

- falls under section 46(2) of the FOI Act and therefore does not qualify for exemption under either section 46(1)(a) of the FOI Act
- should be disclosed to the applicant.

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**J Kinross**  
**Acting Information Commissioner**

**Date: 9 July 2009**