



Decision and Reasons for Decision

Application Number: 310737

Applicant: U04ENJ

Respondent: Queensland Health

Decision Date: 9 March 2012

Catchwords: **RIGHT TO INFORMATION – REFUAL OF ACCESS- EXEMPT INFORMATION– DISCLOSURE PROHIBITED BY ACT- applicant seeking information about investigation into allegations of misconduct concerning a Queensland Health facility- whether the information is exempt from disclosure under schedule 3, section 12 of the *Right to Information Act 2009* (Qld) on the ground that its disclosure is prohibited by a listed Act.**

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REASONS FOR DECISION

Summary

1. The applicant applied to Queensland Health (**QH**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to all documents relating to QH's investigation of her whistleblower's complaint to the Health Quality and Complaints Commission (HQCC). The scope of the application was subsequently reduced to the investigation report including its attachments (**Information in Issue**), produced for QH's Ethical Standards Unit.
2. QH refused the applicant access to all the Information in Issue on the grounds that the information was exempt from disclosure because its disclosure was prohibited by section 65(1) of the *Public Interest Disclosure Act 2010* (Qld) (**PID Act**).¹
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of QH's decision to refuse her access to the Information in Issue.
4. I affirm QH's decision to refuse access to the Information in Issue.
5. Significant procedural steps relating to the application and external review are set out in Appendix A.

Reviewable decision

6. The decision under review is QH's decision dated 9 August 2011.

Evidence considered

7. The evidence, submission, legislation and other material I have considered in reaching my decision is disclosed in these reasons (including footnotes and Appendix A).

Information in issue

8. The Information in Issue is the investigation report including its attachments identified at paragraph 1 above.

Relevant law

9. Access must be given to a document unless disclosure would, on balance, be contrary to the public interest.² However, Schedule 3 of the RTI Act sets out information which Parliament considers is exempt from disclosure on the basis that disclosure would, on balance, be contrary to the public interest.³ Schedule 3, section 12 of the RTI Act provides that information is exempt if its disclosure is prohibited by a number of listed provisions, including section 65(1) of the PID Act.⁴
10. The main purpose of the PID Act is to facilitate the disclosure, in the public interest, of information about wrongdoing in the public sector and provide protection from reprisal

¹ Sections 47(3)(a), 48 and Schedule 3, section 12(1) of the RTI Act.

² Section 44(1) and 48(1) of the RTI Act.

³ See also section 48 of the RTI Act.

⁴ See Appendix B for the text of section 65 of the PID Act.

for persons who make public interest disclosures.⁵ Part of that protection lies in section 65 of the PID Act.

11. Section 65 of the PID Act makes it an offence to copy or disclose confidential information gained through a person's involvement with the PID Act's administration. Confidential information is defined broadly in section 65(7) as including information about the identity of the person who made the public interest disclosure and about whom the disclosure is made. It also covers the information disclosed, information about a person's personal affairs and information that if disclosed, may cause detriment to a person.
12. The Information in Issue is an investigation report into alleged official misconduct⁶ following upon allegations made by staff members at a QH facility. The staff members were afforded whistleblower status under the *Whistleblowers Protection Act 1994* (Qld) (**WP Act**), which has since been replaced with the PID Act.
13. The relevant transitional provision of the PID Act⁷ provides that information made under the repealed WP Act before that provision's commencement is taken to be a public interest disclosure made under the PID Act.
14. To be protected information under the PID Act and thus exempt from disclosure under Schedule 3 section 12(1) of the RTI Act, the Information in Issue must:
 - (a) be confidential information as defined in section 65 of the PID Act (as explained in paragraph 11)
 - (b) have been received by a person involved in the PID Act's administration, which is said in the example to section 65(2) to include a person who as a public officer for a public authority receives information⁸
 - (c) not be subject to an exception listed in section 65(3) of the PID Act; and
 - (d) not be subject to the exception listed in Schedule 3, section 12(2) of the RTI Act.

Findings

Application of section 65(1) of the PID Act

Is the Information in Issue confidential information?

15. Yes. I am satisfied that the Information in Issue comprises information which falls within the definition of "confidential information" found in section 65(7) of the PID Act, including information disclosed by a public interest disclosure and information about individuals' personal affairs.⁹

Was the Information in Issue received under the PID Act?

16. Yes. I am satisfied that the Information in Issue was received by an employee of QH. QH is a public sector entity. Therefore the confidential information was received by a public officer employed by a proper authority,¹⁰ and the requirement to gain the

⁵ See preamble to PID Act.

⁶ As defined in section 15 of the *Crime and Misconduct Act 2001* (Qld.)

⁷ Section 74 of the PID Act.

⁸ A 'public officer' is defined in section 7(1) of the PID Act to relevantly mean an employee of a public sector entity. A 'proper authority' is a public sector entity which includes a department pursuant to sections 5(a) and 6(1)(f) of the PID Act.

⁹ See Section 65(7)(ii) and (iii) of the PID Act.

¹⁰ See sections 5(a), 6(1)(f) and 7(1) of the PID Act and paragraph 15(b) of this decision.

information while being involved in the PID Act's administration is fulfilled in this circumstance.¹¹

Is the Information in Issue subject to an exception in section 65(3) of the PID Act?

17. No. Section 65(3) of the PID Act contains a number of exceptions permitting information received under the PID Act to be disclosed. This was also noted by the applicant's solicitors who submit that the relevant Explanatory Notes include a "*discussion about the limits to confidential information referred to in section 65(1)*" of the PID Act. How the exceptions in section 65(3) of the PID Act may operate to permit release to the applicant was not stated.
18. I note that section 65(3)(d) of the PID provides that confidential information may be disclosed or a record of it made, if the person about whom the confidential information relates consents in writing to the making of the record or the disclosure of the information.
19. In this case, the Information in Issue concerns the applicant and other individuals, rather than the applicant alone. Accordingly, even if the applicant consented to disclosure this would be insufficient to enable disclosure under the PID Act to occur. Therefore the exception does not apply.

Application of Schedule 3, section 12 of the RTI Act

Is the Information in Issue exempt from release under Schedule 3 section 12(1) of the RTI Act?

20. Yes. On the basis of the matters set out above, I am satisfied that the Information in Issue is confidential information for the purposes of section 65(1) of the PID Act. It follows that the Information in Issue is exempt from disclosure under Schedule 3 section 12(1) item 11 of the RTI Act on the basis that release is expressly prohibited.
21. The applicant's solicitors submitted that the OIC and QH had a misguided view of this RTI Act exemption. The philosophical origins and objectives of the PID Act at the time of its introduction into the Queensland Parliament were submitted to be a relevant consideration. It was stated that the reason for this external review is that the applicant has never been advised of the result of the investigation in part initiated by her very complaint.
22. I am sympathetic to the applicant and acknowledge the importance of the PID Act's objectives,¹² particularly the need for public interest disclosures to be properly managed. I note the obligation held by a public sector agency under section 32 of the PID Act to provide reasonable information to a person who makes a public interest disclosure. I also note that this obligation is negated if the circumstances prescribed by section 65(4) of the PID Act exist.¹³ Whether the exception is made out, is a matter for determination by the relevant public sector entity, in this case, QH.
23. Any decision to provide information under the PID Act, about the result of an investigation consequent to receipt of a public interest disclosure is a matter for the

¹¹ See the example attached to section 65(2) of the PID Act.

¹² Summarised in paragraph 10 of this decision.

¹³ Section 65(4) of the PID Act provides that the information need not be given out if it would be likely to result in an adverse affect on a) anybody's safety b) the investigation of an offence or possible offence; or c) necessary confidentiality about an informant's existence or identity.

public sector agency concerned. It is not a decision about the release of information under the RTI Act. The two issues are distinct.

24. In making this decision, I am required to apply the RTI Act alone. I am unable to take into account the claim that QH has failed to properly advise the applicant of the results of its investigation. I do not accept the submission that because the applicant made a public interest disclosure under the PID Act then it follows that she is entitled to the Information in Issue pursuant to the RTI Act.

Does the exception in Schedule 3 section 12 (2) of the RTI Act apply?

25. No. Schedule 3 section 12(2) of the RTI Act permits disclosure of otherwise exempt information, if the information is personal information of the applicant.¹⁴
26. I am satisfied that the Information in Issue does not contain the personal information of the applicant alone. It contains the personal information of other complainants, individuals investigated and individuals interviewed for the purposes of the investigation that was undertaken.
27. I have studied the Information in Issue. The personal information of the numerous individuals concerned is intertwined throughout the investigation report. The result is twofold. It is impossible to leave the personal information of the applicant in the Information in Issue without also releasing personal information of other individuals. Secondly, a redaction of all personal information would leave a document that is simply incomprehensible.

DECISION

28. For the reasons, set out above, I affirm QH's decision to refuse access to the Information in Issue.
29. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

Acting Assistant Information Commissioner Lynch

Date: 9 March 2012

¹⁴ Personal information is defined in section 12 of the *Information Privacy Act 2009* (Qld) as information or opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained from the information or opinion.

APPENDIX A**Significant procedural steps**

Date	Event
26 August 2010	QH received the access application
9 August 2011	QH refused access to the Information In Issue under section 47(3)(a) of the RTI Act (initial decision)
18 August 2011	The applicant applied to OIC for external review of the initial decision.
19 August 2011	OIC asked QH to provide documents relevant to the review.
22 August 2011	OIC received relevant documents from QH.
8 September 2011	OIC notified the applicant and QH that the external review application had been accepted and asked QH to provide OIC with a copy of the relevant documents.
12 September 2011	OIC received relevant documents from QH.
20 December 2011	OIC conveyed to the applicant a preliminary view that the Information in Issue comprised exempt information under Schedule 3 section 12 of the RTI Act. OIC invited the applicant to provide submissions.
16 January 2012	The applicant advised the OIC that she did not accept the preliminary view and provided submissions.

APPENDIX B

Section 65 of the PID Act provides:

65 Preservation of confidentiality

- (1) *If a person gains confidential information because of the person's involvement in this Act's administration, the person must not make a record of the information, or intentionally or recklessly disclose the information to anyone, other than under subsection (3).
Maximum penalty—84 penalty units.*
- (2) *A person gains information because of the person's involvement in this Act's administration if the person gains the information because of being involved, or an opportunity given by being involved, in the administration.*
*Example—
If a person gains information because the person is a public officer who receives a public interest disclosure for a proper authority, the person gains the information because of the person's involvement in this Act's administration.*
- (3) *A person may make a record of confidential information or disclose it to someone else—*
- (a) for this Act; or*
 - (b) to discharge a function under another Act including, for example, to investigate something disclosed by a public interest disclosure; or*
 - (c) for a proceeding in a court or tribunal; or*
 - (d) if the person to whom the confidential information relates consents in writing to the making of the record or disclosure of the information; or*
 - (e) if—*
 - (i) the person can not reasonably obtain the consent of the person to whom the confidential information relates; and*
 - (ii) making the record or disclosing the information is unlikely to harm the interests of the person to whom the confidential information relates and is reasonable in all the circumstances; or*
 - (f) if the person reasonably believes that making the record or disclosing the information is necessary to provide for the safety or welfare of a person; or*
 - (g) if authorised under a regulation or another Act.*
- (4) *This section does not affect an obligation a person may have under the principles of natural justice to disclose information to a person whose rights would otherwise be detrimentally affected.*
- (5) *Subsection (4) applies to information disclosing, or likely to disclose, the identity of a person who makes a public interest disclosure only if it is—*
- (a) essential to do so under the principles of natural justice; and*
 - (b) unlikely a reprisal will be taken against the person because of the disclosure.*
- (6) *To remove any doubt, it is declared that if there is an inconsistency between this section and section 10(1), this section prevails.*
- (7) *In this section—*
- confidential information—**
- (a) includes—*

*(i) information about the identity, occupation, residential or work address or whereabouts of a person—
(A) who makes a public interest disclosure; or
(B) against whom a public interest disclosure has been made; and*

*(ii) information disclosed by a public interest disclosure; and
(iii) information about an individual's personal affairs; and
(iv) information that, if disclosed, may cause detriment to a person; and*

(b) does not include information publicly disclosed in a public interest disclosure made to a court, tribunal or other entity that may receive evidence under oath, unless further disclosure of the information is prohibited by law.

law, for a public interest disclosure made to a committee of the Legislative Assembly, includes a standing rule, order or motion of the Legislative Assembly.