



Decision and Reasons for Decision

Citation: *Malfliet and Department of Justice and Attorney-General*
[2015] QICmr 5 (19 March 2015)

Application Number: 312013

Applicant: Malfliet

Respondent: Department of Justice and Attorney-General

Decision Date: 19 March 2015

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – CONTRARY TO PUBLIC INTEREST INFORMATION – concerns raised by other individuals about the conduct of an employee of another agency – information about another agency’s show cause and disciplinary process – whether disclosure would, on balance, be contrary to the public interest – sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – LEGAL PROFESSIONAL PRIVILEGE – information subject to legal professional privilege – whether the information would be privileged from production in a legal proceeding – sections 47(3)(a) and 48 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – INVESTIGATION BY PRESCRIBED CRIME BODY – information obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in performing the prescribed functions of the prescribed crime body – sections 47(3)(a) and 48 of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Justice and Attorney-General (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to the workplace health and safety investigation file into the death of her partner, Mr Gavin Woods.
2. The Department located 754 pages and decided to grant full access to 442 pages, part access to 72 pages and refuse access to 240 pages. Access to this information was

refused on the basis that it comprised exempt information or its disclosure would, on balance, be contrary to the public interest.

3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision to refuse access to the relevant information.
4. For the reasons set out below, the Department's decision is affirmed and access to the information in issue can be refused on the basis that its disclosure would, on balance, be contrary to the public interest or it comprises exempt information.

Background

5. Significant procedural steps relating to the external review are set out in the appendix to these reasons.

Reviewable decision

6. The decision under review is the Department's decision dated 1 April 2014.

Evidence considered

7. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).

Issue for determination

8. The Department agreed to release some additional information to the applicant during the external review. The applicant also agreed to exclude certain information from consideration. The issue for determination is whether access to the remaining information can be refused on the basis that:
 - its disclosure would, on balance, be contrary to the public interest
 - it comprises exempt information because it is subject to legal professional privilege; and
 - it comprises exempt information because it is information obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in the performance of the prescribed functions of the prescribed crime body.

Contrary to public interest information

Relevant law

9. Under the RTI Act, an individual has a right to be given access to documents of an agency subject to certain limitations, including grounds for refusal of access. An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.¹

¹ Section 47(3)(b) and 49 of the RTI Act. The term '*public interest*' refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

10. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest² and explains the steps that a decision-maker must take³ in deciding the public interest as follows:
- 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 in issue would, on balance, be contrary to the public interest.

Findings

11. The applicant's partner, Mr Woods, passed away in 2011. At the time of his death, Mr Woods was an employee of the Department of Education, Training and Employment (DETE).⁴ His death and a number of related issues were the subject of an investigation by various entities including DETE's Ethical Standards Unit, Workplace Health and Safety Queensland (WHSQ), the Crime and Corruption Commission (CCC)⁵ and the Queensland Coroner.
12. The contrary to public interest information relates to other individuals who raised concerns with the relevant agencies and information about DETE's show cause and disciplinary process.
13. No irrelevant factors arise in the circumstances of this case. I will now address the relevant factors favouring disclosure and nondisclosure of this information.

Accountability and transparency

14. The applicant relevantly submits that:⁶

Releasing these documents could reasonably be expected to enhance the Government's accountability, specifically for the proper conduct of its complaint management processes and in investigating workplace complaints. I hope that through the release of the documents that public confidence in the administration of the Education and Workplace Health and Safety system is maintained and that the secrecy that perpetuates workplace bullying is exposed so that all employees can stand up to the perpetrators without fear.

15. The RTI Act gives rise to factors favouring disclosure in circumstances where disclosing information could reasonably be expected to:
- promote open discussion of public affairs and enhance the Government's accountability⁷
 - contribute to positive and informed debate on important issues or matters of serious interest⁸
 - inform the community of the Government's operations, including the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community;⁹ and

² Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant.

³ Section 49(3) of the RTI Act.

⁴ Now known as the Department of Education and Training.

⁵ The CCC was previously known as the Crime and Misconduct Commission.

⁶ Applicant's submissions received by OIC on 29 April 2014 and 9 January 2015.

⁷ Schedule 4, part 2, item 1 of the RTI Act.

⁸ Schedule 4, part 2, item 2 of the RTI Act.

⁹ Schedule 4, part 2, item 3 of the RTI Act.

- reveal the reason for a government decision and any background or contextual information that informed the decision.¹⁰
16. The information is generally relevant to the WHSQ investigation into the management and actions of employees of DETE. I acknowledge that disclosing this information would provide the applicant with a more comprehensive overview of the type of information before WHSQ as part of the investigation process. However, this information does not, on its own, reveal the reasons for WHSQ's decision or indicate how the investigation was handled.
17. The issues canvassed by the WHSQ investigation have been investigated by a number of entities. The applicant has received a very significant amount of information about the investigations resulting from Mr Woods' death as a result of her involvement in the coronial process, investigations by other agencies and RTI processes, including this external review. For example, the coronial brief of evidence, which the applicant received during the coronial process, included:
- coronial documents and documents from DETE, WHSQ and WorkCover Queensland
 - transcripts of interviews with numerous people who provided evidence as part of the investigations by DETE and WHSQ; and
 - a redacted version of DETE's Ethical Standards Unit investigation report.
18. The disclosure of this information to the applicant significantly advances these factors. The information which remains in issue in this review is limited and I consider its disclosure would not advance these factors. As a result, I afford these factors limited weight.

Personal information of the applicant and Mr Woods

19. Factors favouring disclosure will arise where the relevant information comprises:
- the applicant's personal information;¹¹ or
 - the personal information of a deceased person and the applicant is an eligible family member of the deceased.¹²
20. None of the remaining information comprises the applicant's personal information. However, a small part of it relates to Mr Wood and comprises his personal information. I am satisfied that the applicant is an *'eligible family member'* of Mr Woods and, accordingly, I have considered the factor at schedule 4, part 2, item 9 of the RTI Act. I afford this factor significant weight in relation to that small amount of information.
21. Because of the way in which this information is presented, the personal information of the deceased is intertwined with the personal information of other individuals and it cannot be separated from the documents. I note the applicant's submission that she will accept a version of the documents with the names of individuals deleted to protect their identity. However, having carefully reviewed the way in which the information is

¹⁰ Schedule 4, part 2, item 11 of the RTI Act.

¹¹ Schedule 4, part 2, item 7 of the RTI Act. Section 12 of the *Information Privacy Act 2009 (Qld)* defines 'personal information' as 'information or an 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'.

¹² Schedule 4, part 2, item 9 of the RTI Act. An eligible family member of a deceased person includes a spouse of the deceased person: schedule 6 of the RTI Act.

presented, it is not possible to de-identify this information by deleting the names of the relevant individuals.

Personal information and privacy of other individuals

22. The RTI Act also recognises that:

- a factor favouring nondisclosure will arise where disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy;¹³ and
- disclosing information could reasonably be expected to cause a public interest harm if it would disclose personal information of a person, whether living or dead.¹⁴

23. The information was provided to the Department by other individuals raising concerns with the relevant agencies and making allegations about the conduct of a DETE employee. It includes people's accounts of their feelings, opinions and reactions to workplace events. In most cases, the information is highly personal and sensitive. This information comprises the personal information of other individuals. I consider its disclosure under the RTI Act would be a significant intrusion into the privacy of the complainants. I am satisfied that the extent of the public interest harm that could be anticipated from disclosure is significant. I afford these factors favouring nondisclosure significant weight.

Prejudice the flow of information

24. I have also considered whether disclosing this information could reasonably be expected to:

- prejudice an agency's ability to obtain confidential information¹⁵
- prejudice the management function of an agency;¹⁶ and
- cause a public interest harm if disclosure could have a substantial adverse effect on the management or assessment by an agency of the agency's staff.¹⁷

25. I consider disclosing confidential information provided by individuals who participated in a workplace investigation to a third party under the RTI Act, where there can be no restriction on its use, dissemination or republication, could reasonably be expected to erode confidence in the investigation process and prejudice the flow of information from individuals who would otherwise provide relevant information.¹⁸ This, in turn, could reasonably be expected to adversely impact the agency's ability to conduct workplace investigations and manage staff. For these reasons, I afford these nondisclosure factors significant weight in the circumstances.

Balancing the relevant factors

26. The RTI Act is to be administered with a pro-disclosure bias meaning that access to information should be granted unless giving access would, on balance, be contrary to

¹³ Schedule 4, part 3, item 3 of the RTI Act.

¹⁴ Schedule 4, part 4, item 6(1) of the RTI Act.

¹⁵ Schedule 4, part 3, item 16 of the RTI Act.

¹⁶ Schedule 4, part 3, item 19 of the RTI Act.

¹⁷ Schedule 4, part 4, item 3(c) of the RTI Act.

¹⁸ *Malfliet and Department of Education, Training and Employment [2014] QICmr 31 (17 July 2014)* at paragraph 50.

the public interest.¹⁹ I have taken into account the pro-disclosure bias in balancing the relevant factors.

27. Disclosing this information would not advance the Government's accountability or transparency and I afford limited weight to the four related factors identified above. To the extent the information is the deceased's personal information, this gives rise to a public interest factor favouring disclosure to which I afford significant weight.
28. However, this information is also the personal information of other individuals and its disclosure could reasonably be expected to prejudice the protection of their right to privacy and cause a public interest harm. I am also satisfied that disclosing this information could reasonably be expected to prejudice DETE's management function and prejudice the flow of information to relevant agencies including DETE and WHSQ. Given the sensitive nature of this information, and the context in which it appears, I consider these factors warrant significant weight.
29. For these reasons, disclosing this information would, on balance, be contrary to the public interest. Accordingly, I find that the Department was entitled to refuse access to this information under sections 47(3)(b) and 49 of the RTI Act.

Legal professional privilege

Relevant law

30. An agency may refuse access to documents to the extent they comprise exempt information.²⁰ Schedule 3 of the RTI Act sets out categories of information the disclosure of which Parliament has deemed to be contrary to the public interest, and therefore exempt from disclosure.²¹
31. Schedule 3, section 7 of the RTI Act provides that information will be exempt from disclosure if it would be privileged from production in a legal proceeding on the ground of legal professional privilege. This exemption reflects the requirements for establishing legal professional privilege at common law.²²
32. The general principles of legal professional privilege were summarised by the High Court of Australia in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*²³ as follows:

It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings...

Findings

33. The relevant information comprises emails, reports and file notes recording communications between WHSQ legal officers and its investigators for the purpose of seeking and providing legal advice on the WHSQ investigation and coronial inquest.

¹⁹ Section 44 of the RTI Act.

²⁰ Section 47(3)(a) of the RTI Act.

²¹ Section 48(2) of the RTI Act.

²² *Hewitt and Queensland Law Society Inc* (1998) 4 QAR 328 at paragraph 11 and *Ozcare and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 13 May 2011) at paragraph 12.

²³ (2002) 213 CLR 543 at paragraph 9.

34. I am satisfied that this information was created for the dominant purpose of obtaining or providing legal advice. The communications were made in the course of a lawyer-client relationship and I am satisfied that the communications are confidential.
35. The applicant submits that legal professional privilege does not apply to this information because the Attorney-General agreed to waive legal professional privilege in relation to a report relating to the DETE investigation.²⁴ The report to which the applicant refers does not form part of the information in issue in this review. Any decision to waive privilege in relation to that report has no bearing on the question of whether access can be granted to the information in this review. There is no evidence that privilege has been waived in relation to the information which is the subject of this review.
36. The applicant submits that legal professional privilege does not apply to this information because the purpose of the WHSQ investigation was primarily administrative and legal professional privilege was incorrectly cited to deliberately withhold access to the report.²⁵ The applicant's submission that the purpose of the investigation was, in her view, administrative is not relevant to the operation of this provision. It is the purpose of the *communication*, rather than the purpose of the *investigation*, which I must consider in determining whether legal professional privilege applies. In this case, I am satisfied that the dominant purpose of the relevant communications was to seek or provide legal advice, or for use in existing or reasonably anticipated legal proceedings.
37. The applicant also submits that it is in the public interest for this information to be disclosed as it would enhance accountability and transparency.²⁶ However, Parliament has decided that disclosing the types of information identified in schedule 3 of the RTI Act would, on balance, be contrary to the public interest.²⁷ As I am satisfied that this is exempt information, the applicant's submissions on public interest factors in relation to this information are not relevant and I have not taken them into account.
38. For the reasons set out above, I find that the Department was entitled to refuse access to this information on the basis that it is exempt because it is subject to legal professional privilege.²⁸

Information obtained used or prepared for an investigation by a prescribed crime body, or another agency, in the performance of the prescribed functions of the prescribed crime body

Relevant law

39. Schedule 3, section 10(4) of the RTI Act provides that information is exempt if it consists of information obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in performing the prescribed functions of the prescribed crime body. The exemption will not apply, however, where the information consists of information about the applicant and the investigation has been finalised.²⁹

²⁴ Applicant's submissions received by OIC on 29 April 2014 and 9 January 2015.

²⁵ Applicant's submissions received by OIC on 29 April 2014 and 9 January 2015.

²⁶ Applicant's submissions received by OIC on 29 April 2014 and 9 January 2015.

²⁷ Section 48(2) of the RTI Act.

²⁸ Sections 47(3)(a), 48 and schedule 3, section 7 of the RTI Act.

²⁹ Schedule 3, section 10(6) of the RTI Act.

Findings

40. A number of allegations were referred to the CCC by DETE and WHSQ. The CCC determined that the allegations would, if proven, amount to what is now known as corrupt conduct.³⁰ The CCC referred the matters to DETE and WHSQ to deal with, subject to the CCC's monitoring role.
41. The relevant information to which access is refused comprises a two page letter from the CCC to the Coroner which conveys information about these investigations.³¹ Based on my review of the letter, I am satisfied that the information was obtained, used or prepared for the purpose of these investigations. However, I must also be satisfied that the relevant investigations were conducted by these agencies in performing the prescribed functions of a prescribed crime body.
42. The CCC is a prescribed crime body under the RTI Act.³² The CCC's prescribed functions include its corruption function as defined in section 33 of the CC Act.³³ The CCC's corruption function includes dealing with complaints about corrupt conduct by itself or in cooperation with a unit of public administration.³⁴
43. In conducting these investigations, DETE and WHSQ were performing the CCC's corruption function by ensuring the complaints were dealt with in accordance with the requirements of the CC Act, with oversight by the CCC. I am satisfied that DETE and WHSQ were therefore performing the prescribed functions of a prescribed crime body within the meaning of this provision. Therefore, the information meets the requirements of schedule 3, section 10(4) of the RTI Act.
44. The exception to this exemption which appears in schedule 3, section 10(6) of the RTI Act will apply only if the investigation is finalised *and* the relevant information is about the applicant. At the time of the Department's decision, the relevant investigation had not been finalised. However, even if the investigation has now been finalised, this information must also be *about* the applicant.
45. The applicant submits that '*I instigated the investigations, the subsequent inquest, represented [the deceased's] position to the best of my ability ... I submit that the Commissioner finds that the information is about me and as such is not exempt. Stopping workplace bullying is everyone's business*'.³⁵
46. In *G8KPL2 and Department of Health*,³⁶ the Right to Information Commissioner considered the meaning of '*about*' in schedule 3, section 10(6) of the RTI Act and found that the investigation report in that case, while created as a result of the applicant's complaint, was not about the applicant but was about the persons who were the

³⁰ As a consequence of amendments to the *Crime and Corruption Act 2001* (Qld) (**CC Act**) effected by the *Crime and Misconduct and Other Legislation Amendment Act 2014* (Qld), the concept of 'corrupt conduct' has replaced what was previously referred to as 'official misconduct': see section 400(c) of the CC Act. Dealing with corrupt conduct comprises an aspect of the CCC's corruption function: schedule 2 and section 15 of the CC Act. Corruption is a 'prescribed function' of the CCC for the purpose of schedule 3, section 10(4) of the RTI Act.

³¹ It is relevant to note that the Department consulted with the CCC under section 37 of the RTI Act when processing the applicant's request and the CCC objected to disclosing the information relying on the exemption under schedule 3, section 10(4) of the RTI Act.

³² Schedule 3, section 10(9) of the RTI Act.

³³ Schedule 3, section 10(9) of the RTI Act.

³⁴ Sections 35(1)(e) of the CC Act.

³⁵ Applicant's submissions received by OIC on 29 April 2014 and 9 January 2015.

³⁶ (Unreported, Queensland Information Commissioner, 31 January 2011) (**G8KPL2**). In considering the appeal of *G8KPL2*, the Queensland Civil and Administrative Tribunal did not disagree with the Information Commissioner's interpretation of '*about*' in schedule 3, section 10(6) of the RTI Act. See *Minogue v Office of the Information Commissioner Queensland and Anor* [2012] QCATA 191. See also *Cameron and Queensland Police Service* (Unreported, Queensland Information Commissioner, 7 August 2012) and *Dickinson and Queensland Police Service* [2014] QICmr 30 (20 June 2014).

subject of the allegations and related investigation. On this basis, the Right to Information Commissioner concluded that the exception in schedule 3, section 10(6) of the RTI Act did not apply.

47. While I acknowledge in this case that the applicant has a personal interest in the CCC's investigation, I note that the letter does not refer to the applicant in any way and the applicant was not the subject of the allegations or investigation. Therefore, in accordance with the reasoning in *G8KPL2*, I find that this information is not *about* the applicant and the exception does not apply to this information.
48. For the reasons set out above, I am satisfied that the Department was entitled to refuse access to this information on the basis that it comprises exempt information under schedule 3, section 10(4) of the RTI Act.

DECISION

49. I affirm the Department's decision and find that access to the relevant information can be refused under sections 47(3)(a) and 47(3)(b) of the RTI Act.
50. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Tara Mainwaring
A/Assistant Information Commissioner

Date: 19 March 2015

APPENDIX

Significant procedural steps

Date	Event
6 January 2014	The Department received the access application under the RTI Act.
1 April 2014	The Department issued its decision to the applicant.
29 April 2014	The applicant applied to OIC for external review of the Department's decision.
1 May 2014	OIC requested various procedural documents from the Department.
15 May 2014	OIC received the requested documents from the Department.
16 May 2014	OIC notified the applicant and the Department that the external review application had been accepted and asked the Department to provide the documents in issue to OIC by 30 May 2014.
30 May 2014	OIC received the documents in issue from the Department.
27 November 2014	OIC conveyed its preliminary view to the Department that there was no basis to refuse access to a small amount of information and invited the Department to provide submissions supporting its case by 12 December 2014.
11 December 2014	<p>The Department accepted OIC's preliminary view and agreed to release the additional information to the applicant.</p> <p>OIC contacted the Office of the State Coroner and requested a copy of the list of Coronial exhibits which identified the information released to the applicant during the Coronial inquest.</p>
12 December 2014	OIC received the requested information from the Office of the State Coroner.
17 December 2014	<p>OIC conveyed its preliminary view to the applicant by phone. The applicant accepted the preliminary view on some but not all issues and requested the preliminary view in writing.</p> <p>OIC asked the Department to release the relevant information to the applicant by 24 December 2014.</p>
5 January 2015	OIC confirmed the preliminary view in writing and invited the applicant to provide submissions supporting her case by 19 January 2015 if she did not accept the preliminary view.
9 January 2015	The applicant notified OIC she did not accept the preliminary view and provided submissions supporting her case.