



Decision and Reasons for Decision

Citation:	<i>R63 and Department of Transport and Main Roads [2021] QICmr 36 (14 July 2021)</i>
Application Number:	315938
Applicant:	R63
Respondent:	Department of Transport and Main Roads
Decision Date:	14 July 2021
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - applicant seeks information about health professional notification concerning fitness to drive - whether disclosure could reasonably be expected to enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained - whether information is exempt from disclosure under section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(a) and 48 and schedule 3, section 10(1)(b) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Department of Transport and Main Roads (**Department**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) seeking '*the letter the doctor wrote to [the Department] that stated the reason why I should not be driving my car*'.
2. The Department located two documents in response to the application and released one to the applicant. It refused access to the second document, which is comprised of a notification form (**Medical Notification Form**),² on the basis that its disclosure could reasonably be expected to enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained.³
3. The applicant applied⁴ for internal review of this decision, and on internal review the Department affirmed its original decision.⁵

¹ Compliant on 9 December 2020.

² Decision dated 28 January 2021.

³ Section 67(1) of the IP Act and section 47(3)(a) and schedule 3, section 10(1)(b) of the *Right to information Act 2009* (Qld) (**RTI Act**).

⁴ Dated 4 February 2021.

⁵ Dated 3 March 2021.

4. The applicant then applied⁶ to the Office of the Information Commissioner (**OIC**) for external review. During the review, the Department released a copy of the Medical Notification Form but redacted information that would identify the notifying health professional.⁷
5. For the reasons set out below, I affirm the Department's decision to refuse access to the redacted information under section 67(1) of the IP Act and sections 47(3)(a) and section 48 of the RTI Act.⁸

Reviewable decision

6. The reviewable decision is the Department's internal review decision dated 3 March 2021.

Evidence considered

7. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix).
8. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁹ I consider a decision-maker will be '*respecting and acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the IP Act and the RTI Act.¹⁰ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:¹¹ '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.*'¹²
9. In this case, the applicant has raised concerns about our preliminary view process,¹³ noting that our Office '*seem[s] to be in a hurry*' to finalise the matter.¹⁴ In this regard, I note that the procedure to be followed on external review is, subject to the IP Act, within the discretion of the Information Commissioner.¹⁵ To ensure procedural fairness,¹⁶ OIC routinely issues a written preliminary view to an adversely affected party. In terms of the timing of the matter, reviews are to be conducted with as much expedition, as the requirements of this Act and a proper consideration of the matters before me allow.¹⁷ In this case, I have carefully considered all of the information before me, including the access application, the Department's decision and internal review decision, the applicant's external review application and submissions, and the Medical Notification Form. While I note the applicant's discontent, I am satisfied that he has been afforded procedural fairness throughout the review process and has been given a reasonable opportunity to put forward his view. I do not accept the applicant's contentions that our

⁶ Application received on 11 March 2021.

⁷ The Department advised OIC on 5 July 2021 that the Medical Notification Form had been posted to the applicant.

⁸ Because the information is exempt under schedule 3, section 10(1)(b) of the RTI Act.

⁹ Section 21 of the HR Act.

¹⁰ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

¹¹ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹² *XYZ* at [573].

¹³ A preliminary view was conveyed to the applicant on 29 March 2021 (and was sent by post and email).

¹⁴ As set out in submissions received on 13 April 2021.

¹⁵ Section 108(1)(a) of the IP Act.

¹⁶ As required by section 110 of the IP Act and common law.

¹⁷ Section 108(1)(b) of the IP Act.

Office is not independent, or more fanciful allegations that our Office is acting for a religious organisation.¹⁸

10. Significant procedural steps relating to the external review are set out in the Appendix.

Background

11. The factual background to this matter is related to the applicant's fitness to drive. As noted in paragraph 1 above, the applicant is seeking a copy of the notification (ie. the letter) about his fitness to drive that was provided to the Department. The applicant has expressed concerns¹⁹ about the veracity of information provided to the Department, and has indicated that the content of the Medical Notification Form was '*fantasised behind [his] back as an excuse in order to stop [him] from driving*'.²⁰
12. The notification regime is established by the *Transport Operations (Road Use Management) Act 1995* (Qld) and the *Transport Operations (Road Use Management—Driver Licensing) Regulation 2010* (Qld). Under this regime, the holder of a Queensland driver licence must give notice to the Department of any permanent or long-term mental or physical incapacity if it is likely to adversely affect the holder's ability to drive safely.²¹ This regime places the primary responsibility for notification with the individual licence holder, but the Department also encourages medical professionals to notify it if they believe that a person will not notify them about their medical condition and their medical condition poses a risk to public safety, or if their advice not to drive, or their recommended treatment will not be complied with.

Information in issue

13. The information in issue in this matter is the health professional details and length of time that the relevant health professional had known/treated the applicant (**Identifying Details**) as set out in a Medical Notification Form. The remainder of this form has been released to the applicant and is no longer in issue in this review.²²

Issue for determination

14. The issue for determination is whether access to the Identifying Details may be refused on the basis that disclosure could reasonably be expected to enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained.²³

Relevant law

15. Under the IP Act, a person has a right to be given access to documents of an agency to the extent they contain the individual's personal information²⁴ subject to certain limitations. One such limitation is that an agency may refuse access to a document to the extent it comprises exempt information.²⁵

¹⁸ Submissions received on 13 April 2021.

¹⁹ External review application, and submissions received on 11 March 2021 and 13 April 2021.

²⁰ External review application received on 11 March 2021.

²¹ Section 51 of the *Transport Operations (Road Use Management—Driver Licensing) Regulation 2010* (Qld).

²² The Department confirmed, by email to our Office on 5 July 2021, that the Medical Notification Form (with Identifying Details redacted) had been released to the applicant by post. One other document was released by the Department following its original decision. This document was also not in issue in the review.

²³ Section 67(1) of the IP Act, sections 47(3)(a) and 48, and schedule 3, section 10(1)(b) of the RTI Act.

²⁴ Section 40 of the IP Act.

²⁵ Under section 67(1) of the IP Act, sections 47(3)(a) and 48 of the RTI Act.

16. Relevantly, information is exempt if its disclosure could reasonably be expected to enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained.²⁶
17. In evaluating this exemption, a decision maker must also consider the exceptions outlined in schedule 3, section 10(2) of the RTI Act, in accordance with the comments of Chief Justice Holmes in *Commissioner of the Police Service v Shelton & Anor*.²⁷

...an agency cannot reach the view necessary...in relation to information which may be exempt under sch 3 s 10 without a consideration of the documents the subject of the application to ascertain whether they fall within s 10(2).

Findings

18. Information will be exempt under schedule 3, section 10(1)(b) of the RTI Act if:
 - there exists a confidential source of information
 - the information which the confidential source has supplied is in relation to the enforcement or administration of the law
 - disclosure of the information in issue could reasonably be expected²⁸ to enable the existence or identity of the confidential source of information to be ascertained;²⁹ and
 - none of the exceptions to the exemption apply.
19. I consider each of these factors are satisfied in this case, as set out below.

Is the source of the information confidential?

20. Yes, for the following reasons.
21. A confidential source of information supplies information on the understanding that their existence or identity will remain confidential.³⁰ This understanding may arise as a result of an express agreement between the parties.³¹ Alternatively, the surrounding circumstances may indicate an implicit mutual understanding of confidentiality of the identity of the source between the parties.³²
22. In this case, the Department provides the following express assurance on the PDF version of its Medical Notification Form:³³

Privacy Statement: *The Department of Transport and Main Roads (the department) provides this form under the Transport Operation (Passenger Transport) Act 1994, Transport Operations (Road Use Management) Act 1995 and the Tow Truck Act 1973 so that you may*

²⁶ Schedule 3, section 10(1)(b) of the RTI Act.

²⁷ [2020] QCA 96 at [47].

²⁸ The phrase 'could reasonably be expected to' requires an objective consideration of all the relevant evidence and consideration of whether the expectation is reasonably based. A reasonable expectation is not irrational, absurd or ridiculous. *Sheridan and South Burnett Regional Council and Others* [2009] QICmr 26 (9 April 2009) at paragraphs [189]-[193] referring to *Attorney-General v Cockcroft* (1986) 64 ALR 97; see also *Nine Network Australia Pty Ltd and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 14 February 2012) at [31].

²⁹ *McEniery and Medical Board of Queensland* (1994) 1 QAR 349 (***McEniery***) at [16]. *McEniery* considered the application of section 42(1)(b) of the repealed *Freedom of Information Act 1992* (Qld), identical in terms to schedule 3, section 10(1)(b) of the RTI Act, and has been relied upon in subsequent decisions applying schedule 3, section 10(1)(b) of the RTI Act, including *94HQWR and Queensland Police Service* [2014] QICmr 45 (10 November 2014) at [16]-[31] and *Shirrone Pty Ltd and Department of Agriculture, Fisheries and Forestry* [2014] QICmr 46 (18 November 2014) at [13]-[45].

³⁰ *McEniery* at [20]-[22].

³¹ *McEniery* at [35].

³² *McEniery* at [50].

³³ Available at <[https://www.support.transport.qld.gov.au/qt/formdat.nsf/forms/QF4842/\\$file/F4842_ES.pdf](https://www.support.transport.qld.gov.au/qt/formdat.nsf/forms/QF4842/$file/F4842_ES.pdf)>, accessed on 23 June 2021.

notify the department about a patient's medical fitness to drive a motor vehicle. The information collected on this form is accessible by authorised departmental persons and some of this information may be disclosed to the Queensland Police Service and interstate driver licensing authorities, as allowed under the relevant transport acts. The department will not disclose your personal information or documents to any other third parties without your consent unless authorised or required by law.

23. I note, however, that the above statement is not shown on the *online* notification form which appears to have been used by the health professional in this case. Accordingly, I have considered the surrounding circumstances to determine whether there is an implicit mutual understanding of confidentiality.
24. Turning first to the legislative regime under the *Transport Operations (Road Use Management) Act 1995* (Qld) and the *Transport Operations (Road Use Management—Driver Licensing) Regulation 2010* (Qld), as noted at paragraph 12 above, there is no positive obligation on health professionals to make notifications. Rather, the Department 'encourages' health professionals to make a notification where they believe the licence holder will not do so themselves.³⁴ The legislative regime supports this voluntary approach by providing protection from civil and administrative processes for health professionals who give information in good faith about a person's medical fitness to hold, or continue to hold, a drivers licence.³⁵ In circumstances where health professionals have voluntarily reported information about their own patient, it is reasonable for them to expect that their identity be kept confidential (except where it is necessary to be provided to authorities such as Queensland Police Service). This is consistent with the Department's position,³⁶ which is that it '*regularly receives notifications relating to driver licensing issues, which often contain sensitive information. The department does not generally reveal the identity of a notifier unless it is necessary or relevant to the management of the information being provided. This is in accordance with the complaints handling process, which aims to handle information in line with privacy obligations.*'
25. Another factor that points towards confidentiality is the Department's ability to independently verify fitness to drive without revealing the source of the information. On this issue, the Information Commissioner has previously noted:³⁷

The most common situation in which a source of information and the agency receiving the information could reasonably expect that confidentiality could be preserved in respect of the identity of the source, is where the information provided can be independently verified by the agency's own investigators, or the source draws the agency's attention to the existence of physical or documentary evidence which speaks for itself (i.e. which does not require any direct evidence from the source to support it). Thus a person may inform the proper authority that a neighbour is illegally carrying on an unlicensed business from the neighbour's premises, and that investigators can observe this for themselves if they visit the premises at certain hours; or a source may alert the revenue authorities to precisely where they may discover the second set of accounting records which will establish that a business has been fraudulently understating its income.

26. Following notification from a health professional, the Department may require that a person take a practical driving test.³⁸ While a notice with reasons is required to be given,

³⁴ As noted on the Department's website: Information for health professionals, '*Notifying us about a person's medical condition*' <<https://www.qld.gov.au/transport/licensing/update/medical/professionals>>, accessed on 23 June 2021.

³⁵ Section 142 of the *Transport Operations (Road Use Management) Act 1995* (Qld). In addition, section 143 creates an offence for disclosing information gained through involvement in the administration of the Act or because of an opportunity provided by involvement (with certain exceptions).

³⁶ As set out in its original decision dated 28 January 2021.

³⁷ *McEnery* at [27].

³⁸ Section 130 of the *Transport Operations (Road Use Management—Driver Licensing) Regulation 2010* (Qld).

the notice is not required to include the identity of the source of the information.³⁹ The practical driving test allows the agency to determine for itself (without reference to the source of the notification) the individual's medical fitness to drive.

27. Having regard to the express assurances on the PDF form, the voluntary nature of the notification regime, the Department's stated understanding of confidentiality, and the ability to verify fitness to drive without revealing the source, I am satisfied there is an implied mutual understanding of confidentiality between the Department and the source in this case.

Was the information supplied in relation to the enforcement or administration of the law?

28. Yes. I am satisfied that notifications by health professionals (including their identifying details) are supplied to the Department in relation to⁴⁰ its administration of the *Transport Operations (Road Use Management) Act 1995* (Qld) and the *Transport Operations (Road Use Management—Driver Licensing) Regulation 2010* (Qld).
29. Whilst the notification itself is voluntary, it allows the Department to undertake administrative action set out in the legislation, including - in certain circumstances - immediately amending or suspending a licence,⁴¹ or requiring a person to take a practical driving test.⁴²

Would disclosure of the Identifying Details reasonably be expected to enable the identity of the confidential source of information to be ascertained?

30. Yes. The Identifying Details either directly identify the source of the information (by name, address and contact details) or would allow the applicant to readily ascertain the source, by cross referencing this information with other information known by the applicant, such as the length of time the patient has known or received treatment from the health professional.
31. The applicant has made submissions⁴³ about the motivations of the relevant health professional, and the costs imposed by his residential aged care facility. I do not consider these matters are relevant to the application of the exemption.

Do any of the exceptions apply?

32. The applicant is of the view that the Medical Notification Form was submitted by a doctor with ulterior motivations, and that the notification is comprised of lies and fabrication. In particular, he submits that the notification was retaliation for seeing another doctor and/or to restrict his ability to find alternative accommodation.⁴⁴ The Department has now disclosed to the applicant the specific information that was provided by the notifier. The only information the applicant does not have is information that could identify the notifier. Any concerns regarding the veracity of the information provided by the notifier can be addressed with reference to the information that has now been released to the applicant.

³⁹ There is also, in some cases, the option of immediate suspension under section 126 of the *Transport Operations (Road Use Management—Driver Licensing) Regulation 2010* (Qld). This also requires a notice, including reasons, but once again, the identity of the source of the information is not necessarily provided.

⁴⁰ In *Carmody v Information Commissioner & Ors* (5) [2018] QCATA 18 at [39], Hoeben J notes the wide meaning of this term (and other relational terms such as 'connected with'), citing French CJ in *R v Khazaal* (2012) 246 CLR 601 at [30].

⁴¹ Section 126 of the *Transport Operations (Road Use Management—Driver Licensing) Regulation 2010* (Qld).

⁴² Section 130 of the *Transport Operations (Road Use Management—Driver Licensing) Regulation 2010* (Qld).

⁴³ Received 11 March 2021 and 13 April 2021.

⁴⁴ Submissions received 11 March 2021 and 13 April 2021.

33. I have considered the applicant's submissions in light of the exceptions in schedule 3, section 10(2)(a)-(e) of the RTI Act and the particular information in issue. Even if I accepted the contentions of the applicant on these matters, it would not give rise to an exception in so far as the disclosure of the information in issue is concerned. For example, the Identifying Details could not, due to their nature, reveal that the scope of a law enforcement investigation has exceeded the limits imposed by law.

Conclusion

34. For the reasons set out above, I am satisfied that the Identifying Details could reasonably be expected to enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained. I have considered the exceptions set out in schedule 3, section 10(2)(a)-(e) of the RTI Act, and I am satisfied that they do not apply.

DECISION

35. I affirm the Department's decision to refuse access to the Identifying Details under section 67(1) of the IP Act, and section 47(3)(a), section 48 and schedule 3, section 10(1)(b) of the RTI Act.
36. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

S Martin
Assistant Information Commissioner

14 July 2021

APPENDIX**Significant procedural steps**

Date	Event
11 March 2021	<p>OIC received the external review application.</p> <p>OIC requested, and received, the preliminary documents and information in issue from the Department.</p>
29 March 2021	OIC accepted the external review application and conveyed a preliminary view to the applicant.
13 April 2021	OIC received submissions from the applicant (dated 10 April 2021).
10 June 2021	OIC received further submissions from the applicant (dated 6 June 2021).
22 June 2021	OIC conveyed a view to the Department that some additional information in issue could be released to the applicant.
29 June 2021	The Department agreed to release the additional information to the applicant.
5 July 2021	The Department advised it posted the additional information to the applicant.