



Decision and Reasons for Decision

Application Number: 310233
Applicant: 8U3AMG
Respondent: Department of Communities
Decision Date: 15 September 2011

Catchwords:

RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – INFORMATION DISCLOSURE PROHIBITED BY ACT – applicant seeking information about adoption and birth parents – 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.

RIGHT TO INFORMATION – DOCUMENTS NOT IN POSSESSION – whether agency has taken all reasonable steps to locate the documents – whether access to documents can be refused under section 47(3)(e) of the *Right to Information Act 2009* (Qld) on the ground set out in section 52(1)(b) of the *Right to Information Act 2009* (Qld)

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REASONS FOR DECISION

Summary

1. On 31 March 2010, the applicant applied to the Department of Communities (**Department**) for access to all documents relating to his birth and adoption and information about his biological parents.
2. On 10 May 2010, the Department decided to:
 - refuse access to 36 pages because they were outside the scope of the application
 - omit parts of 18 pages on the basis that these parts were irrelevant
 - refuse access to 143 pages on the grounds that the information was, on balance, contrary to the public interest
 - partially release 42 pages subject to the deletion of material considered to be contrary to the public interest; and
 - release 153 pages in full.
3. On 22 May 2010, the applicant applied to the Office of the Information Commissioner (**OIC**) for external review.
4. During the course of the external review, the Department agreed to partially release six pages.
5. The applicant raised concerns¹ on external review about the Department's failure to locate his birth mother's consent to adoption form. The Department subsequently conducted additional searches but was unable to locate the form.
6. After carefully considering all of the information before me, I am satisfied that:
 - 67 pages of documents are outside the scope of the access application
 - the Department is entitled to refuse access to parts of the 18 documents it identified as irrelevant under section 73 of the *Right to Information Act 2009* (Qld) (**RTI Act**)
 - the Department is entitled to refuse access to the consent to adoption form under section 47(3)(e) of the RTI Act on the ground in 52(1)(b) of the RTI Act; and
 - release of the balance of the information is exempt under section 48 of the RTI Act because disclosure of the information is prohibited by an Act listed in schedule 3, section 12 of the RTI Act.²

Significant procedural steps

7. Significant procedural steps relating to the application and external review are set out in Appendix A.

Reviewable decision

8. The decision under review is the Department's decision dated 10 May 2010.

¹ In submissions dated 2 January 2011 and 31 January 2011.

² Specifically, section 314 of the *Adoption Act 2009* (Qld) (**Adoption Act**) and section 187 of the *Child Protection Act 1999* (Qld) (**Child Protection Act**).

Evidence considered

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

Findings

Scope

10. The terms of the access application are:

Entire file and any information relating to my birth and adoption in the entirety, case notes, diary notes, files associated information on both parents and any and all computer records from the time of pregnancy 1965 onwards.

11. The Department decided 36 documents were outside the scope of the access application. Of these documents, 34 were created after the date the Department received the access application and do not form part of the review.³ The final two documents are documents which relate to the applicant's siblings and I am satisfied that they are within the scope of this review.⁴
12. I have identified a further 33 pages which fall outside the date range⁵ of the access application.
13. I am therefore satisfied that a total of 67 pages are outside the scope of this review and cannot be considered further in this decision.

Deletion of irrelevant information

14. Where giving access to a document will disclose to the applicant information that the Department reasonably considers is not relevant to the access application, the Department may give access to a copy of the document with the irrelevant information deleted.⁶ The Department may only give access in this way if it considers from the terms of the application, or after consultation with the applicant, that the applicant would accept the copy and it is reasonably practicable to give access to the copy.⁷
15. I have considered the parts of the 18 pages that the Department blacked out on the basis of irrelevance and I am satisfied that:
- the deleted information is not relevant to the applicant's access application—the information is predominantly administrative and to do with the Department's efforts to respond to the access application;
 - the Department was entitled to consider from the access application that the applicant would accept a copy of the documents with the irrelevant information deleted given that the information clearly falls outside the scope of the access application because it does not relate to the applicant's 'birth and adoption' rather it relates to the Department's efforts to respond to the access application.

³ See section 27(1) of the RTI Act.

⁴ I consider these two documents below at paragraphs 25 to 33.

⁵ The access application seeks information from the 'time of pregnancy 1965 onwards'. The applicant was born, near full term, in the second week of June, 1966, so information dating prior to September 1965 is outside the scope of the access application.

⁶ Section 73 of the RTI Act.

⁷ Section 73(3) of the RTI Act.

Sufficiency of search

16. The Department has been unable to locate the consent to adoption form signed by the applicant's birth mother. This raises the question of whether the consent to adoption form is nonexistent or unlocatable or whether the Department's searches for the consent to adoption form have been sufficient.

Relevant law

17. The RTI Act provides that access to a document may be refused if the document is nonexistent or unlocatable.⁸
18. If there are reasonable grounds to be satisfied that an agency has had or should have the document sought, access can only be refused if all reasonable steps are taken to locate the document.⁹ What comprises all reasonable steps will vary according to the particular circumstances of the matter, but will be informed by the key factors identified in *PDE and the University of Queensland*.¹⁰ In that decision, the Information Commissioner explained that, to be satisfied that a document does not exist, an agency must rely on its particular knowledge and experience, having regard to various key factors including:
- the administrative arrangements of government
 - the agency structure
 - the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
 - the agency's practices and procedures (including but not exclusive to its information management approach)
 - other factors reasonably inferred from information supplied by the applicant including
 - the nature and age of the requested document/s
 - the nature of the government activity the request relates to.

Has the Department taken all reasonable steps to locate the document?

19. The Department submitted:¹¹

...generally it would expect to hold a copy of a consent to adoption form with the microfilmed copies of adoption reports, however it is not unusual for some of the documents to be missing from the records. Following the 1974 floods in Brisbane some adoption records were destroyed or significantly damaged, therefore the original records were scanned onto microfilm tapes to be preserved. We know from experience that not all of the original records were scanned and some of the original records were also destroyed after they were scanned. It is believed in this case the copy of the birth mother's consent to adoption form was not scanned onto microfilm and that the original records were not kept.

⁸ Sections 47(3)(e) and 52 of the RTI Act.

⁹ Section 52(1)(b) of the RTI Act.

¹⁰ Unreported, Queensland Information Commissioner, 9 February 2009. Note—Although *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld), the requirements of that section are replicated in section 52 of the RTI Act.

¹¹ Dated 30 March 2011.

20. Adoption Services Queensland, at the Department's request, also checked with Queensland State Archives who confirmed that they do not hold any other copy of the adoption records other than microfilm copies.
21. In view of the Department's submission and the additional searches undertaken by Queensland State Archives, I am satisfied that the Department has taken all reasonable steps to locate the consent to adoption form and is entitled to refuse access to the document on the grounds that it is unlocatable.¹²

Disclosure prohibited by Act

22. The Department decided not to release the remaining information in issue on the grounds that release would, on balance, be contrary to the public interest. After careful consideration of the information in issue, the relevant law, the Department's decision and the applicant's submissions, I am satisfied that it is more appropriate to consider the application of schedule 3, section 12 of the RTI Act. I explain my reasons below.

Relevant law

23. Access must be given to a document unless disclosure would, on balance, be contrary to the public interest.¹³ Schedule 3 of the RTI Act sets out information which Parliament considers is exempt information on the basis that disclosure would, on balance, be contrary to the public interest.¹⁴ 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 314 of the Adoption Act¹⁵ and section 187 of the Child Protection Act.¹⁶
24. The remaining information in this review falls into two categories; 141 pages¹⁷ of information about adoption (**Adoption Information**) and 10 pages of information from Children's Services files (**Child Protection Information**). I discuss each category of information below.

Adoption Information

25. Section 314 of the Adoption Act makes it an offence to disclose certain information obtained under the Adoption Act. As noted above, if this provision applies to the Adoption Information, it will be exempt from disclosure under Schedule 3, section 12 the RTI Act.
26. To be exempt from disclosure, the Adoption Information must:
 - a) be protected information as defined in section 314 of the Adoption Act (that is, information about a person's personal affairs or personal history)
 - b) have been received by a listed person performing functions under or relating to the administration of the Adoption Act; and
 - c) not be subject to an exception listed in section 314 of the Adoption Act.

¹² Under section 47(3)(e), in accordance with section 52(1)(b) of the RTI Act.

¹³ Section 44(1) and 48(1) of the RTI Act.

¹⁴ See also, section 48 of the RTI Act.

¹⁵ See Appendix B for the text of the relevant parts of section 314 of the Adoption Act.

¹⁶ See Appendix B for the text of the relevant parts of section 187 of the Child Protection Act.

¹⁷ 104 full pages and 37 pages which the Department has partially released to the applicant.

a) Is the information protected information?

27. The information is about the applicant's siblings' adoption and the applicant's birth mother. I am satisfied it is about their personal affairs and personal history and is therefore protected information as defined in section 314(10) of the Adoption Act.

b) Was the information received under the Adoption Act?

28. The Adoption Information is from Departmental files. Section 314 of the Adoption Act lists a public service employee as a person to whom section 314 applies.
29. I have examined the Adoption Information and am satisfied that it was received by Departmental officers in the course of performing functions under or relating to the Adoption Act.

c) Do any exceptions listed in section 314 of the Adoption Act apply?

30. Section 314 of the Adoption Act contains a number of exceptions where information received under the Adoption Act may be disclosed.
31. In this review, section 314(4) is relevant. This section allows a person to consent to disclosure of their information to either themselves or another person.
32. The Adoption Information is about the applicant's siblings and birth mother. However, part II of the Adoption Act sets out detailed consultation procedures which OIC staff are not authorised to use.¹⁸ I do not have evidence before me to indicate that there has been any consent to release the Adoption Information.
33. I am satisfied that this exception does not apply and therefore the Adoption Information cannot be disclosed.

Child Protection Information

34. Section 187 of the Child Protection Act makes it an offence to disclose certain information obtained under the Child Protection Act. If this provision applies to the Child Protection Information, it will be exempt from disclosure under the RTI Act.
35. To be exempt from disclosure, the Child Protection Information must:
- a) be information about a person's personal affairs
 - b) have been received by a listed person performing functions under or relating to the administration of the Child Protection Act; and
 - c) not be subject to an exception in section 187 of the Child Protection Act.

(a) Is the information about a person's personal affairs?

36. I have examined the information and I am satisfied that it contains information about the applicant's siblings' and birth mother's personal affairs.

¹⁸ See section 258 of the Adoption Act which states that *'the chief executive must take steps to contact the person and ask if the person wishes to give the consent.'*

(b) Was the information received under the Child Protection Act?

37. The Child Protection Information is information received by Departmental officers (public servants) under the *Children's Services Act 1965* (Qld) (**Children's Services Act**). The Children's Services Act has been repealed and replaced by the Child Protection Act. The confidentiality provisions in the Child Protection Act are applicable to Children's Services Act documents because section 251 of the Child Protection Act states that a reference to the Children's Services Act may, if the context permits, be taken to be a reference to the Child Protection Act.¹⁹
38. Section 187 of the Child Protection Act lists a public service employee as a person to whom section 187 applies.
39. I have examined the Child Protection Information and am satisfied that it was received by Departmental officers in the course of performing functions under or relating to the Child Protection Act.

(c) Do any of the exceptions listed in section 187 of the Child Protection Act apply?

40. Section 187 of the Child Protection Act contains a number of exceptions where information received under the Child Protection Act may be disclosed.
41. In this case, section 187(4)(a) is relevant. It provides that a person may disclose the information or give access to the document to another person, to the extent that the information or document is about the other person.
42. The Child Protection Information is about the applicant's siblings and birth mother, not the applicant. I am satisfied that this exception does not apply and therefore the Child Protection Information cannot be disclosed.

DECISION

43. For the reasons set out above, I vary the decision under review by finding that:
 - access to the consent to adoption form can be refused under section 47(3)(e) of the RTI Act on the ground set out in 52(1)(b) of the RTI Act
 - access to the Adoption Information can be refused on the basis that it is information disclosure of which is prohibited by an Act under section 47(3)(a) of the RTI Act; and
 - access to the Child Protection Information can be refused on the basis that it is information disclosure of which is prohibited by an Act under section 47(3)(a) of the RTI Act.
44. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

Jenny Mead
Right to Information Commissioner

Date: 15 September 2011

¹⁹ The Children's Services Act had substantially similar confidentiality provisions as the Child Protection Act in section 144.

Appendix A

Significant procedural steps

Date ²⁰	Event
31 March 2010	The applicant applied to the Department of Communities (Department) for documents relating to his birth and adoption.
10 May 2010	The Department issued its decision.
22 May 2010	The applicant applied to the Office of the Information Commissioner (OIC) for external review.
2 June 2010	OIC informed the applicant that his application had been accepted for external review.
2 January 2011	The applicant wrote to OIC seeking an update, providing submissions.
21 January 2011	OIC responded to the applicant providing an update.
31 January 2011	The applicant provided additional submissions to OIC.
30 March 2011	The Department provided submissions responding to sufficiency of search issues raised by OIC.
2 June 2011	OIC provided a preliminary view to the applicant. The Department agreed to release an additional 6 pages to the applicant.
20 June 2011	The applicant responded to the preliminary view indicating that he did not accept it.
15 July 2011	OIC provided additional information to the applicant.
31 July 2011	The applicant provided submissions to OIC in response to the additional information.
30 August 2011	OIC provided an additional preliminary view to the applicant.
11 September 2011	The applicant responded to the preliminary view.

²⁰ Of correspondence or relevant communication unless otherwise stated.

Appendix B

Section 314 of the Adoption Act provides:

314 Confidentiality of information obtained by persons involved in administration of Act

- (1) *This section applies to a person who—*
- (a) *is, or has been, any of the following persons performing functions under or relating to the administration of this Act or the repealed Act:*
 - (i) *a public service employee; and*
 - ...
 - (b) *in that capacity, acquired protected information about another person or has access to, or custody of, protected information about another person.*
 - (2) *The person must not use the information or disclose the information to anyone else except to the extent the use or disclosure is required or permitted under this Act or necessary to perform the person's functions under or relating to this Act.*
 - (3) *The information may be used or disclosed if the use or disclosure is otherwise required or permitted under another law.*
 - (4) *To the extent that the information is about a person (the relevant person), it may be disclosed to the relevant person or to someone else with the relevant person's consent.*
 - (5) *However, if the information is information that may be requested from the chief executive by the relevant person under part 11, subsection (4) applies to the disclosure of information by or on behalf of the chief executive only to the extent the information may be disclosed under that part.*
 -
 - (10) *In this section—*
 - protected information**, *about a person, means information about the person's personal history or the person's affairs*

Section 187 of the Child Protection Act provides:

187 Confidentiality of information obtained by persons involved in administration of Act

- (1) *This section applies to a person who—*
- (a) *is or has been—*
 - (i) *a public service employee; and*
 - ...
 - (b) *in that capacity acquired information about another person's affairs or has access to, or custody of, a document about another person's affairs.*
 - (2) *The person must not use or disclose the information, or give access to the document, to anyone else.*
 - ...
 - (4) *Also, the person may disclose the information or give access to the document—*
 - (a) *to another person, to the extent that the information or document is about the other person;*