



Decision and Reasons for Decision

Application Number: 311126

Applicant: Sandy

Respondent: Department of Community Safety

Decision Date: 25 June 2013

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – applicant seeks access to de-identified clinical complaints about Queensland Ambulance Service – whether disclosure would found an action for breach of confidence – sections 47(3)(a) and 48 and schedule 3, section 8(1) of the *Right to Information Act 2009 (Qld)*

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – CONTRARY TO PUBLIC INTEREST – applicant seeks access to de-identified clinical complaints about Queensland Ambulance Service – 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)*

REASONS FOR DECISION

Summary

1. The applicant sought¹ access from the Department of Community Safety (**Department**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) to de-identified clinical complaints about Queensland Ambulance Service (**QAS**) since 1 January 2010 that had been substantiated or the investigation was ongoing.
2. On 13 July 2012, the Department decided to refuse access to 152 pages² on the basis that disclosure of the information would prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law.³
3. The applicant applied⁴ to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision.

¹ By access application dated 22 May 2012 received on 24 May 2012.

² Comprising pages 2 to 153 of File I. In its decision the Department also refused access to further information on other grounds; however, the applicant has not sought review in relation to those refusals.

³ Under sections 47(3)(a) and 48 and schedule 3, section 10(1)(f) of the RTI Act.

⁴ By application dated 1 August 2012 received on 6 August 2012.

4. During the course of the review, the applicant agreed that the Department was entitled to refuse access to personal information⁵ of other individuals.⁶ Also, during the course of the review, the Department altered its exemption claim from prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law⁷ to breach of confidence⁸.
5. For the reasons set out below, the Department's decision that the remaining information is exempt from disclosure is set aside and a decision that the information is neither exempt from disclosure nor would its disclosure, on balance, be contrary to the public interest is substituted.

Background

6. Significant procedural steps relating to the application and external review, including the Department's exemption claim alterations, are set out in the appendix.

Reviewable decision

7. The decision under review is the Department's decision dated 13 July 2012.

Evidence considered

8. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and appendix).

Information in issue

9. The information remaining under consideration in this external review is the de-identified information contained within parts of 47 pages⁹ and all of 11 pages¹⁰ (**Information in Issue**).

Issues for determination

10. The issues for determination in this external review are whether:
 - (i) the Information in Issue is exempt information;¹¹ or
 - (ii) disclosure of the Information in Issue would, on balance, be contrary to the public interest.¹²

⁵ Personal information is defined in section 12 the *Information Privacy Act 2009 (Qld)* 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".

⁶ On 8 March 2013, a view was conveyed to the applicant that while the Department was entitled to refuse access to the personal information of individuals, the Department was not entitled to refuse access to the remaining information under consideration in this review. The applicant was advised that if she accepted OIC's view, she did not need to respond. No response was received from the applicant. This information is therefore no longer in issue in this external review.

⁷ Schedule 3, section 10(1)(f) of the RTI Act.

⁸ Schedule 3, section 8(1) of the RTI Act.

⁹ Pages 2-4, 8-18, 22-35, 56-57, 68, 98, 118-119, 127-130, 133-134, 136, 138-140, 142 and 144-145 of File I.

¹⁰ Pages 5-7, 67, 99, 135, 137, 141, 143, and 146-147 of File I.

¹¹ Under sections 47(3)(a) and 48 and schedule 3 of the RTI Act.

¹² Under sections 47(3)(b) and 49 of the RTI Act.

Relevant law

Right to access information

11. Under section 23 of the RTI Act, a person has a right to be given access to documents of an agency. However, this right is subject to a number of exclusions and limitations, including grounds for refusal of access. These grounds are contained in section 47 of the RTI Act.

Findings

Does the Information in Issue comprise exempt information?

12. No, for the reasons that follow.
13. An agency may refuse access to information where it comprises exempt information.¹³
14. Information is exempt information if its disclosure would found an action for breach of confidence.¹⁴
15. The requirements for establishing the breach of confidence exemption consist of five cumulative criterion:¹⁵
 - a) information must be capable of being specifically identifiable as information that is secret, rather than generally available
 - b) information must have the necessary quality of confidence
 - c) circumstances of the communication must create an equitable obligation of confidence
 - d) disclosure to the applicant for access must constitute an unauthorised use of the confidential information; and
 - e) disclosure must result in detriment to the plaintiff.
16. The crucial criterion in this instance is that the information must have the necessary quality of confidence.
17. The Department submits¹⁶ that disclosure of the Information in Issue would reveal information which is the subject of a settlement the terms of which are to be held confidential between the parties.
18. I have considered the settlement referred to by the Department. I am satisfied that the parties to the settlement are bound by an obligation of confidence in relation to the terms of the settlement.

¹³ Sections 47(3)(a) and 48 of the RTI Act.

¹⁴ Schedule 3, section 8(1) of the RTI Act.

¹⁵ See the Information Commissioner's analysis in *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (**B and BNRHA**), applying section 46(1)(a), the equivalent exemption under the repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**). For a restatement of the five criteria in the context of the RTI Act, see Right to Information Commissioner Mead's decision in *TSO08G and Department of Health* (Unreported, Queensland Information Commissioner, 13 December 2011) (**TSO08G**). See also *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) and Anor* (1987) 14 FCR 434 at 437 per Gummow J, and *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 (**John Fairfax**) per Mason J at 51.

¹⁶ Correspondence dated 12 June 2013.

19. The Information in Issue is contained within the following documents:
- QAS Executive Briefing Note about a conciliation
 - QAS Clinical Investigation Checklist
 - QAS Clinical Investigation Report and attachments; and
 - correspondence between QAS and the Health Quality and Complaints Commission (**HQCC**) about the complaint, the internal investigation by QAS, the investigation by HQCC and the decision by HQCC to conciliate the complaint.
20. I am not satisfied that the obligation of confidence imposed on the parties by the settlement can be extended to the Information in Issue as disclosure of the Information in Issue would not reveal the terms of the settlement.
21. Accordingly, the Information in Issue is not exempt from disclosure under schedule 3, section 8 of the RTI Act as disclosure could not reasonably be expected to found an action for breach of confidence.

Does the Information in Issue comprise information the disclosure of which would, on balance, be contrary to the public interest?

22. No, for the reasons that follow.
23. An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.¹⁷
24. 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.
25. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest¹⁸ and explains the steps that a decision-maker must take¹⁹ 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.²⁰

Irrelevant factors

26. No irrelevant factors arise on the information before me.

¹⁷ Sections 47(3)(b) and 49 of the RTI Act.

¹⁸ 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 in a particular case.

¹⁹ Section 49(3) of the RTI Act.

²⁰ As to the correctness of this approach, see *Gordon Resources Pty Ltd v State of Queensland* [2012] QCATA 135.

Factors favouring disclosure and nondisclosure

27. The Department submits:²¹

... as this matter is now over three years old [disclosure] is not likely to further government accountability because of the amount of time that has elapsed since the case concluded. This approach was supported in Moriarty and Department of Health (Unreported, Queensland Information Commissioner, 15 September 2010), where it was found that the protection of a person's right to privacy held significant weight.

28. The RTI Act recognises that the public interest will favour disclosure of information where disclosure could reasonably be expected to:

- promote open discussion of public affairs and enhance the government's accountability;²² and
- contribute to positive and informed debate on important issues or matters of serious interest.²³

29. The RTI Act recognises that the public interest will favour nondisclosure of information where disclosure could reasonably be expected to:

- prejudice the protection of an individuals' right to privacy;²⁴ and
- cause a public interest harm as the information is personal information of another individual.²⁵

Balancing the public interest

30. As stated at paragraph 19 of this decision, the Information in Issue is contained within the following documents:

- QAS Executive Briefing Note about a conciliation
- QAS Clinical Investigation Checklist
- QAS Clinical Investigation Report and attachments; and
- correspondence between the QAS and the HQCC about the complaint, the internal investigation by the QAS, the investigation by HQCC and the decision by HQCC to conciliate the complaint.

31. As detailed at paragraph 10 of this decision, the documents containing the Information in Issue have been de-identified to remove information which is encompassed by the concept of personal information in this case.²⁶ Accordingly, I find that the public interest factors relating to personal information and protection of an individual's right to privacy do not apply in this case.

32. I am therefore satisfied that this matter can be distinguished from the decision in *Moriarty and Department of Health*²⁷ where the information under consideration contained an individual's personal information.

²¹ Correspondence dated 12 June 2013.

²² Schedule 4, part 2, item 1 of the RTI Act.

²³ Schedule 4, part 2, item 2 of the RTI Act.

²⁴ Schedule 4, part 3, item 3 of the RTI Act.

²⁵ Schedule 4, part 4, item 6 of the RTI Act.

²⁶ See the significant procedural steps located in the Appendix for a list of the types of information removed.

²⁷ Queensland Information Commissioner, 15 September 2010.

33. Given the nature of the Information in Issue, disclosure would allow the community to scrutinise the QAS' response to a complaint about the standard of medical services provided to an individual. On this basis, I am satisfied that disclosure would enhance government accountability and promote open discussion of public affairs.
34. The QAS' response to complaints about medical services provided to members of the community is an issue of serious interest within the community.²⁸ I consider that disclosure of the Information in Issue would allow members of the public to scrutinise the nature of the incident which led to the complaint and the actions taken by the QAS in response to the issues identified. I am satisfied that this would contribute to positive and informed debate on matters of serious interest to the community.
35. I acknowledge that the age of the information potentially reduces its utility for the purpose of public discussion. However, I am satisfied that disclosure of the Information in Issue, despite the incident it relates to occurring over three years ago, could still reasonably be expected to enhance government accountability and contribute to discussion and debate within the community on matters of serious interest.
36. On balance, and in the circumstances of this case, I am satisfied that the public interest favours disclosure and find that disclosure of the Information in Issue would not be contrary to the public interest.

DECISION

37. I set aside the decision of the Department dated 13 July 2012 and substitute a decision to grant access to the Information in Issue on the basis that it is neither exempt from disclosure nor would its disclosure, on balance, be contrary to the public interest.
38. I have made this decision as a delegate of the Acting Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

Assistant Information Commissioner Corby

Date: 25 June 2013

²⁸ For example, see <http://www.couriermail.com.au/news/queensland/widow-accuses-queensland-ambulance-service-of-covering-up-botched-response/story-e6freoof-1226610511644> and <http://www.couriermail.com.au/news/queensland/fatigue-not-a-factor-in-mans-death-says-queensland-ambulance-service/story-e6freoof-1226546787097>

APPENDIX

Significant procedural steps

Date	Event
24 May 2012	The Department receives the access application dated 22 May 2012.
13 July 2012	The Department issues its decision.
6 August 2012	OIC receives the applicant's application for external review.
16 August 2012	The applicant confirms the scope of the external review.
21 August 2012	OIC informs the applicant and the Department that the external review application has been accepted.
11 September 2012	The Department provides OIC with a copy of the relevant documents.
21 November 2012	<p>OIC conveys a view to the Department that the Department is:</p> <ul style="list-style-type: none"> • entitled to refuse access to some of the information under consideration on the basis that disclosure would, on balance, be contrary to the public interest; and • not entitled to refuse access to the remaining information as it is not exempt from disclosure nor would its disclosure, on balance, be contrary to the public interest. <p>If the view is contested, the Department is invited to provide a submission by 5 December 2012.</p>
30 November 2012	The Department seeks an extension to provide a submission until 19 December 2012.
3 December 2012	OIC grants the Department an extension to provide a submission until 19 December 2012.
12 December 2012	The Department verbally advises OIC that it accepts the view conveyed by correspondence dated 21 November 2012.
13 December 2012	The Department verbally advises OIC that it no longer accepts the view conveyed by correspondence dated 21 November 2012 and that it will provide written submissions.
13 December 2012	<p>The Department provides an oral submission that:</p> <ul style="list-style-type: none"> • the matter the subject of the information under consideration is in conciliation which is ongoing; and • with reference to section 32 of the RTI Act, the information under consideration is exempt as the HQCC is an entity to which the RTI Act does not apply. <p>OIC receives an email from the Department attaching an information sheet provided to the Department by the Health Quality and Complaints Commission (HQCC) about documents (in accordance with schedule 1 of the RTI Act) and entities (in accordance with Schedule 2 of the RTI Act) to which the RTI Act does not apply.</p>
17 December 2012	<p>OIC writes to the Department advising that section 32 of the RTI Act does not apply in the circumstances of this review as the application was not made to the HQCC.</p> <p>OIC confirms that the information under consideration comprises documents of the Department in accordance with section 12 of the RTI Act and that an applicant therefore has a right to be given access to the documents under consideration subject to the grounds of refusal set out in section 47 of the RTI</p>

	Act. OIC also confirms the view conveyed by correspondence dated 21 November 2012.
18 December 2012	The Department provides a submission confirming its position that as the matter the subject of the information under consideration was currently in conciliation, pursuant to section 82 of the <i>Health Quality and Complaints Act 2006</i> and schedule 2, part 2, item 12(b) of the RTI Act, the documents are privileged and therefore fall out of the scope of documents capable of release.
19 December 2012	OIC conveys an oral view to the applicant that the Department is: <ul style="list-style-type: none"> entitled to refuse access to some of the information under consideration on the basis that disclosure would, on balance, be contrary to the public interest as it comprises personal information of other individuals; and not entitled to refuse access to the remaining information as it is not exempt from disclosure nor would its disclosure, on balance, be contrary to the public interest. <p>The applicant accepts the view.</p>
7 January 2013	The applicant queries what is encompassed by the concept of personal information in the circumstances of this review.
8 March 2013	OIC conveys a written view to the applicant confirming the oral view conveyed on 19 December 2013. OIC confirms that, in the circumstances of this review, the following types of information are encompassed by the concept of personal information: <ul style="list-style-type: none"> Patient name, age (including date of birth), physical attributes, signature, address, contact details, occupation and hobbies Gender including words that are gender specific Patient reference numbers including hospital, QAS and HQCC reference and/or case numbers Patient medical history Contextual information about injury or health by which a patient's identity might reasonably be ascertained, including treatment dates, locations and origin of QAS service Details of the complaint made by the patient including the letter of complaint Name, signature, education details and transcripts of interviews of QAS officers involved Dates relating to disciplinary processes <p>The applicant is invited to provide a submission by 28 March 2013 if the view is contested. If the applicant accepts, OIC advises that they do not need to do anything further.</p>
4 April 2013	OIC advises the Department that as the applicant has not responded to OIC's view conveyed by correspondence dated 8 March 2013, OIC has taken that to mean that the applicant accepts the view. OIC invites the Department to provide a submission by 12 April 2013 if it maintains its objection to disclosure of all of the information under consideration.
12 April 2013	The Department seeks an extension to provide a submission until 30 April 2013. OIC grants an extension to provide a submission until 30 April 2013.
23 April 2013	The Department seeks a further extension to provide a submission until 7 May 2013. OIC grants an extension to provide a submission until 7 May 2013.

7 May 2013	The Department provides a submission claiming that the information under consideration is exempt from disclosure on the basis that it would be privileged from production in a legal proceeding on the ground of legal professional privilege under schedule 3, section 7 of the RTI Act.
8 May 2013	<p>OIC writes to the Department confirming that, given the Department is now claiming legal professional privilege, the Department no longer relies on previous claims that the information under consideration is exempt from disclosure pursuant to schedule 3, section 10(1)(f) of the RTI Act or that the documents fall outside the scope of the RTI Act pursuant to schedule 2, part 2 of the RTI Act on the basis that they relate to a conciliation before the HQCC. The Department is asked to advise OIC if this is not correct.</p> <p>OIC conveys a view to the Department that the dominant purpose test for the legal professional privilege exemption was not met as it appears the documents were created for the dominant purpose of investigating and assessing the complaint to HQCC by the complainant about the service provided by the QAS.</p> <p>OIC confirms the view that the Department is entitled to refuse access to some of the information under consideration on the basis that its disclosure would, on balance, be contrary to the public interest as it comprises the personal information of individuals. The remainder of the information under consideration is neither exempt from disclosure nor would its disclosure, on balance, be contrary to the public interest.</p> <p>OIC invites the Department to provide any further submissions by 29 May 2013.</p>
29 May 2013	The Department seeks an extension of 10 business days to provide a submission to enable it to undertake consultation with a third party.
30 May 2013	<p>OIC advises the Department that the extension is not granted on the basis that consultation is not necessary as the information under consideration has been de-identified.</p> <p>The Department advises OIC that the consultation correspondence was sent to the third party on 29 May 2013.</p> <p>OIC writes to the Department granting an extension until 12 June 2013 on the basis that the consultation correspondence had already been sent to the third party.</p>
12 June 2013	<p>The Department accepts OIC's view that it is not entitled to refuse access under schedule 3, section 7 of the RTI Act. However, the Department provides a submission claiming that the information under consideration is exempt from disclosure under schedule 3, section 8 of the RTI Act as disclosure would found an action for breach of confidence on the basis that it would reveal the terms of a settlement which are to be held as confidential between the parties.</p> <p>As the Department does not advise otherwise, the Department is taken to no longer rely on the previous claim that the information under consideration is exempt from disclosure pursuant to schedule 3, section 10(1)(f) of the RTI Act.</p> <p>OIC notes the Department's submission that as the HQCC conciliation has concluded, <i>'the documents are capable for consideration under the RTI Act.'</i> Thus the question of scope is no longer in issue in this review.</p>
14 June 2013	OIC requests a copy of the "Release Discharge and Indemnity" referred to in the Department's submission dated 12 June 2013 in support of its claim that disclosure of the information under consideration would found an action for breach of confidence.
24 June 2013	OIC receives a copy of the "Release Discharge and Indemnity" referred to in the Department's submission dated 12 June 2013.