



Decision and Reasons for Decision

Application Number: 310303

Applicant: Australian Broadcasting Corporation

Respondent: Psychologists Board of Australia

Decision Date: 3 January 2012

Catchwords: ADMINISTRATIVE LAW – RIGHT TO INFORMATION – QUEENSLAND – INFORMATION AS TO EXISTENCE OF PARTICULAR DOCUMENTS – applicant sought access to an investigation report about a named practitioner – whether access application is for a document containing prescribed information – whether document would contain personal information the disclosure of which would, on balance, be contrary to public interest – section 55 of the *Right to Information Act 2009 (Qld)*

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REASONS FOR DECISION

Summary

1. The applicant applied to the Psychologists Board of Queensland¹ under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to an investigation report about a particular named practitioner (**Requested Report**).
2. The agency decided to:
 - refuse to deal with the access application because:²
 - it was expressed to relate to all documents, or to all documents of a stated class, that contain information of a stated kind or relate to a stated subject matter; and
 - all of the documents to which the application relates are comprised of exempt information
 - neither confirm nor deny the existence of the Requested Report because, assuming its existence, it would be a document to which access would be refused to the extent it comprised prescribed information.³
3. The applicant applied to the Office of Information Commissioner (**OIC**) for external review of the decision.
4. For the reasons set out below, I affirm the decision under review by finding that the agency was entitled to neither confirm nor deny the existence of the Requested Report. Given this finding, nothing in these reasons should be taken to confirm or deny the existence of the Requested Report.
5. Significant procedural steps relating to the application are set out in the Appendix.

Reviewable decision

6. The decision under review is the internal review decision dated 30 June 2010.

Evidence considered

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

Issues for determination

8. The issues for determination are as follows:

¹ The decision under review was made by the Psychologists Board of Queensland on 30 June 2010. On 1 July 2010, the Psychologists Board of Queensland was replaced by the Psychologists Board of Australia and the Australian Health Practitioner Regulation Agency (**AHPRA**). Section 9 of the *Health Practitioner Regulation National Law (Transitional) Regulation 2010* (Qld) provides that, for the purpose of decisions made under the RTI Act, the relevant transitional board is taken to be the agency that made the reviewable decision. In this case, the relevant transitional board and the agency for the purpose of this external review is the Psychologists Board of Australia (**agency**).

² Section 40 of the RTI Act.

³ Section 55 of the RTI Act and also section 47(3)(b) and schedule 3 section 10(1)(i) of the RTI Act.

- Is the agency entitled to refuse to deal with the access application? and
- Is the agency entitled to neither confirm nor deny the existence of the Requested Report?

Is the agency entitled to refuse to deal with the access application?

9. No, for the reasons that follow.
10. An agency can refuse to deal with an access application under section 40 of the RTI Act only if:
 - the application is expressed to relate to all documents, or to all documents of a particular class, that contain information of a stated kind or relate to a stated subject matter; and
 - it appears to the agency that all of the documents to which the application relates are comprised of exempt information.
11. In this case, the access application is for a single document, that is, an investigation report. As the application is not for all documents or a class of documents, I am satisfied that section 40 of the RTI Act does not apply and the agency was not entitled to refuse to deal with the access application. Nothing turns on this finding as the agency has, in effect, dealt with the access application by issuing a notice under section 55 of the RTI Act.

Is the agency entitled to neither confirm nor deny the existence of the Requested Report?

12. Yes, for the reasons that follow.
13. Section 55 of the RTI Act allows an agency to neither confirm nor deny the existence of a requested document if, assuming its existence, the document would contain prescribed information. Prescribed information includes personal information, disclosure of which would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.⁴
14. This provision is only intended for exceptional situations where:
 - revealing that the agency has or does not have documents in response to an application, due to the specific nature of the wording of the application, would reveal information to which an agency would normally refuse access on the grounds that it would be exempt or contrary to the public interest; or
 - there are legitimate grounds for refusing access to a document but explaining those grounds would reveal the information the agency is trying to protect or cause the harm the agency is trying to prevent.

If the Requested Report exists, would it contain personal information?

15. Yes, for the reasons that follow.
16. Personal information is information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material

⁴ Schedule 6 of the RTI Act.

form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.⁵

17. The access application is for “*report investigating [a particular person] conducted for the Psychologists Board of Queensland*”. Assuming its existence, the Requested Report would clearly identify the particular person to whom the access application relates. On this basis, I am satisfied that an individual could be identified from the requested information and that the information sought would be about that individual.
18. The applicant submits that:
 - information about a person’s work performance is not personal information for the purpose of the RTI Act and this accords with the ordinary, commonsense understanding of the expression⁶
 - the individual is employed at a public health facility offering mental health services to the public and is paid from public funds; and
 - the work conduct of this individual is not personal information.
19. I agree that if the Requested Report exists, it would relate to the person’s conduct in the context of their employment.
20. If an agency is considering disclosing information, routine personal work information and other personal information may be treated differently because the potential harm from disclosing routine personal work information is, in most circumstances, minimal or nonexistent. This is due to a number of factors including that:
 - public service officers are employed in the business of government which delivers services to the public and the public is generally entitled to know the identity of the service deliverers, advice givers and decision makers; and
 - a reasonable public service officer would expect that information that is solely their routine personal work information would be made available to the public.
21. Generally information of the type requested in this matter would not be considered routine personal work information. In any event, the relevant consideration here is only whether the type of information being considered would be personal information. That information relates to a person’s employment does not mean it is not their personal information. The definition of personal information is very broad and captures a substantial amount of information about the individual.
22. The applicant submits that, to the extent the Requested Report contains the personal information of other individuals, their identifying information could be deleted and the remaining information disclosed. This is not a relevant consideration. If an agency is entitled to neither confirm nor deny the existence of a requested document, issues about disclosure do not arise. The approach advocated by the applicant is inconsistent with the purpose of section 55 of the RTI Act.

⁵ Schedule 6 of the RTI Act and section 12 of the *Information Privacy Act 2009* (Qld).

⁶ Referring to *Re Subramanian and Refugee Review Tribunal* (1997) 44 ALD 435 (**Subramanian**), a decision of the Administrative Appeals Tribunal. I note that in relation to this point, the reasoning in *Subramanian* has not been followed. Other decisions have adopted a far broader interpretation of the relevant provision: *Lalogianni v Australian National University* [2003] FMCA 9 at [23] and [26]; *Re Pfizer Pty Ltd v Department of Health, Housing and Community Services* (1993) 30 ALD 647 at [78]; *Kristoffersen v Department of Employment, Workplace Relations and Small Business* [2002] FCA 55 at [25]; *Gilligan and Australian Securities and Investments Commission* [2011] AATA 104 at [70] and *Wong and Minister for Immigration and Citizenship* [2008] AATA 347 at [75].

If the Requested Report exists, would disclosing the personal information, on balance, be contrary to the public interest?

23. Yes, for the reasons that follow.

What is the public interest?

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.

How is the balance of the public interest determined?

25. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest. It also explains the steps that a decision-maker must take in deciding the public interest. To decide this issue I must:⁷

- 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 Requested Report, if it exists, on balance, would be contrary to the public interest.

Where does the balance of the public interest lie in this matter?

26. I am satisfied that if the Requested Report exists, disclosing the personal information would on balance, be contrary to the public interest for the reasons that follow.

27. I have examined the irrelevant factors in schedule 4 of the RTI Act and do not consider that any irrelevant factors arise in this case.

28. A number of factors must be considered in balancing the public interest in this case. I discuss these factors and their relative weight below.

Personal information and privacy

29. The RTI Act recognises that:

- disclosure of information could reasonably be expected to cause a public interest harm if disclosure would disclose personal information of a person, whether living or dead;⁸ and
- a factor favouring nondisclosure will arise if disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy.⁹

30. Given my finding that the Requested Report, if it exists, would contain personal information, I am satisfied that disclosure of that personal information could reasonably

⁷ Section 49(3) of the RTI Act.

⁸ Schedule 4, part 4, item 6 of the RTI Act.

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

be expected to cause a public interest harm. I am also satisfied that such disclosure could reasonably be expected to prejudice the practitioner's right to privacy.

31. The applicant submits that some serious allegations about the practitioner have been publicly reported. Where information is in the public domain, this generally reduces the relevant privacy interest. However, the contention regarding allegations, in the absence of the agency confirming the existence of the Requested Report or disciplinary action being recorded in the relevant discipline register, carries no weight in reducing the privacy interest.
32. Further, disclosing the Requested Report, if it exists, would also disclose the personal information of other individuals, primarily any complainants, patients and witnesses, and its disclosure could reasonably be expected to prejudice the protection of these individuals' right to privacy. Investigations undertaken in relation to the agency's regulatory functions and associated reporting would likely include personal information which is considered sensitive, such as information about individuals' health, reactions to events and views on matters in contention.
33. For these reasons, I am satisfied that these factors are relevant and are afforded significant weight in the circumstances.

Accountability and facilitating public scrutiny of the agency

34. The applicant submits that disclosure of the Requested Report, if it exists, would:
 - be informative of the policies, guidelines and codes of conduct, including their practical application, administered by the agency in its dealings with mental health professionals and complaints about their conduct
 - contribute to informed public debate about the adequacy of the regulation of health professionals who treat vulnerable patients; and
 - assist public understanding of the practical operation and effectiveness of the agency in relation to the discharge of its functions and responsibilities.
35. I accept in a general sense that there are public interest factors favouring the disclosure of information about the way in which an investigation is conducted, including the evidence relied upon and the conclusions reached. These factors are consistent with ensuring the accountability of agencies expending public funds, monitoring the performance of practitioners and ensuring that decisions are fair and based on sound reasoning.¹⁰ In my view the agency is accountable for the expenditure of public funds in initiating investigations and for its process and outcomes. I also accept that disclosure of certain information about an investigation may further the agency's accountability in this regard. For these reasons, I consider disclosure of the Requested Report, if its exists, could reasonably be expected to:
 - promote open discussion of public affairs and enhance the Government's accountability¹¹
 - inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community;¹² and
 - reveal the reason for a government decision and any background or contextual information that informed the decision.¹³

¹⁰ *Pope and Queensland Health* (1994) 1 QAR 616 at paragraph 96.

¹¹ Schedule 4, part 2, item 1 of the RTI Act.

¹² Schedule 4, part 2, item 3 of the RTI Act.

¹³ Schedule 4, part 2, item 11 of the RTI Act.

36. I accept that each of these factors are relevant and should be afforded significant weight.

Prejudice the flow of information to the agency

37. The applicant submits that:

- Practitioners are obliged to provide information to the agency and can be punished for not supplying such information fully and frankly. In the context of responding to a complaint, it is difficult to see why a practitioner should not be expected to respond fully or frankly or why their response should be kept confidential.
- If the practitioner admits to wrongdoing, that information should ordinarily become publicly available and this is the proper consequence of engaging in wrongdoing. If the practitioner has done nothing wrong, the practitioner should not be concerned about the information becoming public.
- If practitioners, complainants and others feel confident that information they provide to the agency will not be subject to public scrutiny, they may provide false information. The possibility of public scrutiny encourages people to be truthful and honest.

38. The agency submits that:

- It must be able to respond to complaints about health practitioners for the protection of the public. While there are mandatory requirements for registered health practitioners to report certain information to the agency about the health or conduct of another practitioner, the system otherwise relies on the free flow of information and voluntary notifications.
- People will hesitate to report concerns about practitioners in a frank and open manner which would cause the information to either not be provided at all or to be conveyed in neutral, non-committal terms so as to seriously detract from its usefulness. Disclosure of confidential information provided to the agency would erode confidence and place the system in jeopardy.

39. A public interest factor favouring nondisclosure arises in circumstances where disclosure could reasonably be expected to prejudice the flow of information to the police or another law enforcement or regulatory agency.¹⁴

40. As noted above¹⁵ the access application was made to the Psychologists Board of Queensland which was replaced by the Psychologists Board of Australia and AHPRA on 1 July 2010. The Requested Report, if it exists, would have been created by the Psychologists Board of Queensland. I am satisfied that both the Psychologists Board of Australia and AHPRA are regulatory agencies for the purpose of this factor and receive complaints about practitioners.

41. I do not accept the applicant's submissions. Investigations undertaken by regulatory agencies of this type often deal with sensitive issues. The outcomes can have serious

¹⁴ Schedule 4, part 3, item 13 of the RTI Act.

¹⁵ At footnote 1.

repercussions for practitioners, both in terms of their professional reputation and livelihood. At the same time, such regulatory agencies are required to discharge important public functions to '*protect the public and set standards and policies that all registered health practitioners must meet*'.¹⁶

42. I consider that the efficient and effective use of the agency's resources is facilitated by it receiving information from various sources including complainants, patients and even the subject of the complaint with as much cooperation as possible and voluntarily. The routine disclosure of information provided by individuals assisting investigations of this nature would, in my view, discourage people from providing information to the agency or cooperating with future investigations. For these reasons I am satisfied that this factor should be afforded very significant weight.

Reveal health risks or measures relating to public health and safety

43. The applicant submits that the Requested Report, if it exists, is relevant to matters of public health and safety and its disclosure could reasonably be expected to contribute to a proper understanding of the extent to which the practitioner's conduct has and/or continues to raise any potential health risk.

44. The agency submits that:

- certain information about its investigations is required to be recorded in the National Register and/or made publicly available; and
- if a decision had been made to take disciplinary action against the practitioner on the basis that there was a risk to public health, the record of the disciplinary hearing would be available on its website.

45. There is no record of any disciplinary action or hearings in relation to the named practitioner on the agency's website. In my view, the expectation that disclosure of the Requested Report, if it exists, could reveal health risks or measures relating to public health and safety is not reasonably based and therefore this factor does not apply.

Balancing the factors

46. I consider that in this matter the public interest in accountability and facilitating public scrutiny of the agency is significant, as is the public interest in protecting personal information and privacy. However, for the reasons discussed at paragraphs 40 to 42 above, I consider that the public interest in ensuring that the flow of information to regulatory agencies is not impeded is determinative. Therefore, having balanced the factors favouring disclosure and nondisclosure, I am satisfied that if the Requested Report exists, it would contain personal information, disclosure of which would, on balance, be contrary to the public interest.

Conclusion

47. For the reasons set out above, I find that:

- the Requested Report, if it exists, would contain prescribed information, that is, personal information the disclosure of which would, on balance, be contrary to the public interest; and
- the agency was therefore entitled to neither confirm nor deny the existence of the Requested Report.

¹⁶ AHPRA website <http://www.ahpra.gov.au/About-AHPRA/Who-We-Are.aspx>.

DECISION

48. I affirm the decision under review by finding that the agency is entitled to neither confirm nor deny the existence of the Requested Report under section 55 of the RTI Act.
49. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Suzette Jefferies
Assistant Information Commissioner

Date: 3 January 2012

APPENDIX**Significant procedural steps**

Date	Event
15 April 2010	The agency received the access application.
7 May 2010	The agency decided to refuse to deal with the application under section 40 of the RTI Act and relied on section 55 of the RTI Act to neither confirm nor deny the existence of the Report.
4 June 2010	The applicant applied to the agency for internal review of the decision.
30 June 2010	The agency affirmed the initial decision on internal review.
19 July 2010	The applicant applied to OIC for external review.
29 July 2010	OIC informed the agency and the applicant that the external review application had been accepted for review and asked the agency to provide a submission in relation to section 55 of the RTI Act.
3 August 2010	The agency requested an extension until 26 August 2010 to provide the requested submissions. OIC granted the requested extension.
30 August 2010	The agency requested a further extension until 10 September 2010 to provide the requested submissions.
31 August 2010	OIC granted the further extension.
10 September 2010	The agency provided submissions in relation to section 55 of the RTI Act.
30 September 2010	OIC forwarded the applicant a copy of the agency's submissions.
9 November 2010	OIC conveyed a preliminary view to the applicant that the agency was entitled to rely on section 55 of the RTI Act to neither confirm nor deny the existence of the Report.
26 November 2010	The applicant advised OIC that it did not accept the preliminary view and provided submissions in support of its case.