



Decision and Reasons for Decision

Application Number: 310437 and 310445

Applicant: N55WLN

Respondent: Department of Health

Decision Date: 30 April 2012

Catchwords: ADMINISTRATIVE LAW – INFORMATION PRIVACY ACT – QUEENSLAND – REFUSAL OF ACCESS – an agency may refuse access to a document of an agency in the same way and to the same extent the agency could refuse access to the document under section 47 of the *Right to Information Act 2009* (Qld) were the document to be the subject of an access application under that Act – section 67(1) of the *Information Privacy Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION ACT – QUEENSLAND – REFUSAL OF ACCESS – HEALTHCARE INFORMATION – applicant sought access to reports prepared by a psychiatrist about her – whether the reports comprise the applicant’s relevant healthcare information – whether disclosure of the reports might be prejudicial to the physical or mental health or wellbeing of the applicant – whether contrary to the applicant’s best interests under section 51 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION ACT – QUEENSLAND – REFUSAL OF ACCESS – EXEMPT INFORMATION – application for letter of advice from Crown Law to agency and summaries of the instructions provided and advice received contained within other documents – whether information would be privileged from production in a legal proceeding on the ground of legal professional privilege – whether legal professional privilege has been waived – sections 47(3)(a), 48 and schedule 3, section 7 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION ACT – QUEENSLAND – REFUSAL OF ACCESS – CONTRARY TO THE PUBLIC INTEREST – application for information about staffing issues and management options arising from the applicant’s employment; information provided by other staff in relation to their emotions, team morale and incidents involving the applicant and other staff information – 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)

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REASONS FOR DECISION

Summary

1. The applicant, a former Queensland Health (QH)¹ employee, sought access to a range of information under the *Information Privacy Act 2009* (Qld) (**IP Act**) about her employment and an assessment by a psychiatrist. QH located and disclosed a number of relevant documents to the applicant and refused access to:
 - correspondence from the psychiatrist to QH including reports about the applicant and extracts of these reports set out in other documents (**Category A information**)
 - a letter of advice from Crown Law to QH; QH summaries of the instructions provided to Crown Law and the advice received contained within other documents (**Category B information**); and
 - information relating to staffing issues and management options arising from the applicant's employment with QH; information provided by other staff in relation to their emotions, team morale and incidents involving the applicant and other staff information² (**Category C information**).
2. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of QH's decisions to refuse access to the relevant information.
3. Having considered the Category A information and the information provided by the applicant about the current state of her health and inability to understand information conveyed to her, I am satisfied that there is a real and tangible possibility that disclosing the Category A information might prejudice the applicant's physical or mental health or wellbeing. I find that QH was entitled to refuse access to the Category A information under section 47(3)(d) of the *Right to Information Act 2009* (Qld) (**RTI Act**).
4. I am satisfied that the Category B information comprises confidential communications between a legal adviser and client made for the dominant purpose of providing legal advice and is subject to legal professional privilege. Although some of the Category B information was disclosed to the Queensland Ombudsman and a psychiatrist, I am satisfied that the disclosure was for a specific, limited purpose and legal professional privilege has not been waived in the circumstances. I find that QH was entitled to refuse access to the Category B information under section 47(3)(a) of the RTI Act.
5. I am satisfied that disclosure of the Category C information would, on balance, be contrary to the public interest. The factors that tip the balancing of the public interest in this case are the public interest in protecting other individuals' personal information and the public interest in avoiding prejudice to QH's management function. I find that QH was entitled to refuse access to the Category C information under section 47(3)(b) of the RTI Act.
6. The decisions under review are varied.³

Background

7. Significant procedural steps relating to the application and external review application are set out in the appendix to this decision.

¹ Also known as the Department of Health.

² Including information about leave entitlements of other staff and the signature of a QH employee.

³ The relevant background is set out at footnote 33 below and in the appendix.

Reviewable decisions

8. The decisions under review are QH's decisions dated 13 October 2010 to refuse access to the Category A, B and C information in these reviews.

Evidence considered

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

Might disclosing the Category A information be prejudicial to the applicant's physical or mental health or wellbeing?

10. Yes.

Relevant law

11. Under the IP Act, an individual has a right to be given access to documents of an agency to the extent those documents contain the individual's personal information. However, this right is subject to other provisions of the IP Act and RTI Act including the grounds on which an agency may refuse access to documents.⁴ An agency may refuse access to a document under the RTI Act if:⁵

- the decision to refuse access is made by an appropriately qualified healthcare professional appointed by the agency
- the information comprises the applicant's relevant healthcare information; and
- disclosing the information might be prejudicial to the physical or mental health or wellbeing of the applicant.

Findings

12. The Category A information comprises correspondence from the psychiatrist to QH including reports about the applicant and extracts of these reports set out in an email and an internal file note.

Was the healthcare decision made by an appropriately qualified healthcare professional appointed by QH's principal officer?

13. Yes.
14. A *healthcare professional* is a person who carries on, and is entitled to carry on, an occupation involving the provision of care for a person's physical or mental health or wellbeing, including, for example:⁶
- a doctor, including a psychiatrist
 - a psychologist
 - a social worker; or
 - a registered nurse.

⁴ Section 67(1) of the IP Act allows an agency to refuse access to documents on the grounds set out in section 47 of the RTI Act.

⁵ Section 50(5)(b) of the IP Act and sections 47(3)(d) and 51 of the RTI Act.

⁶ Schedule 5 of the IP Act.

15. *Appropriately qualified* means having the qualifications and experience appropriate to assess relevant healthcare information in a document.⁷

16. The healthcare decision was made by Dr J Gilhotra, Principal Advisor in Psychiatry. Dr J Gilhotra was appointed by the Director-General of QH to make the decision. I am satisfied that Dr Gilhotra was appropriately appointed and qualified to make the decision.

Does the Category A information comprise the applicant's relevant healthcare information?

17. Yes.

18. *Relevant healthcare information* is healthcare information given by a healthcare professional.⁸ I am satisfied that the Category A information comprises the applicant's relevant healthcare information as it is about the applicant's physical or mental health or wellbeing and was given to QH by a psychiatrist.

Might disclosing the Category A information prejudice the applicant's physical or mental health or wellbeing?

19. Yes.

20. The prejudice contemplated in this context is whether there is a real and tangible possibility, as distinct from a fanciful, remote or far-fetched possibility, of prejudice to the physical or mental health or wellbeing of the applicant.⁹

21. During the external review, the applicant told OIC that she did not consider disclosing the Category A information might be prejudicial to her physical or mental health or wellbeing and OIC invited the applicant to provide submissions supporting her case. The applicant¹⁰ requested several extensions of time to provide submissions and explained that:

- she experienced a very traumatic event in the workplace and suffered severe shock, severe trauma and overwhelming fear and has "*not made a reasonable or full recovery as [she is] still suffering from post-traumatic stress disorder, disability impairment of memory loss, low concentration levels and inability to fully comprehend and understand everything that is being said or written.*" ... "*Only with the support of family, [is she] able to write this letter. (i.e. help with typing)*"
- she is injured and feels that OIC "*hasn't taken [her] restrictions as a result of [her] injury into serious consideration*"
- although she received legal advice on the issues in this review, she didn't understand the advice or the legislation
- she has been the subject of discrimination by QH and the psychiatrist who assessed her

⁷ Schedule 5 of the IP Act.

⁸ Schedule 5 of the IP Act.

⁹ This meaning of the term "might be prejudicial" was adopted by the Commonwealth Administrative Appeals Tribunal for the purposes of a similar provision in the *Freedom of Information Act 1982* (Cth) in *Re K and Director-General of Social Security* (1984) 6 ALD 354 at 356-7 and endorsed by the Information Commissioner in *S and Medical Board of Queensland* (Unreported, Queensland Information Commissioner, 12 October 1994) when considering section 44(3) of the repealed *Freedom of Information Act 1992* (**FOI Act**). Section 51(2) of the RTI Act is the equivalent provision to section 44(3) of the repealed FOI Act. As this section also contains the phrase "might be prejudicial", this interpretation is still relevant.

¹⁰ And/or her support person and carer.

- she found the psychiatrist who authored the reports to be “*extremely bias, prejudice, very insulting and offensive and hurtful*” and believes she needs to know “*what [the psychiatrist] based his conclusion and recommendations [on] which got [her] unfairly suspended, and unfairly terminated, what he asked in the very short timeframe and the very few relevant questions asked at the time of the medical assessment. He failed to provide an appropriate medical assessment on [her] and he acted in a very unprofessional manner towards [her].*”
 - she believes “*there is nothing that is in [the reports] that can do anymore harm to [her] that has not already been done to [her]*” and feels the psychiatrist “*is hiding behind legislation and that he should be held accountable for the devastation and destruction that [the reports have] caused*”; and
 - she does not have a mental illness and does not need to see a psychiatrist.
22. Having considered the Category A information¹¹ and the information provided by the applicant about the current state of her health and inability to understand information conveyed to her,¹² I am satisfied that there is a real and tangible possibility that disclosure of the Category A information might prejudice the applicant’s physical or mental health or wellbeing.
23. For the reasons set out above, I find that QH was entitled to refuse access to the Category A information under section 67(1) of the IP Act and sections 47(3)(d) and 51 of the RTI Act.

Is the Category B information subject to legal professional privilege?

24. Yes.

Relevant law

25. An agency may refuse access to a document under the RTI Act to the extent it comprises exempt information.¹³ Information is exempt information if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.¹⁴ Information is subject to legal professional privilege if it comprises a confidential communication between a legal adviser and client made for the dominant purpose of obtaining or providing legal advice. If legal professional privilege has been waived, the information will not be exempt from disclosure on the basis of legal professional privilege.¹⁵

Findings

26. The Category B information comprises:
- a letter of advice from Crown Law to QH
 - a summary of the Crown Law advice set out in internal QH briefing notes and correspondence from QH to the Queensland Ombudsman and a psychiatrist who assessed the applicant; and

¹¹ Section 120 of the IP Act prevents me from disclosing in these reasons for decision the content of the Category A information which I have taken into account in making my findings.

¹² As set out above.

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

¹⁴ Schedule 3, section 7 of the RTI Act.

¹⁵ Legal professional privilege may be waived intentionally, by disclosure of the privileged communications to persons outside the relationship of privilege (express waiver) or through implication of law in circumstances where the conduct is inconsistent with maintaining the privilege (implied waiver).

- a summary of the instructions QH provided to Crown Law set out in internal QH briefing notes and an internal file note.
27. I have considered the letter of advice from Crown Law to QH and am satisfied that it comprises a confidential communication between a legal adviser and client made for the dominant purpose of providing legal advice and is subject to legal professional privilege. As the summaries identified at paragraph 26 above replicate the substance of the legal advice sought and received, I am satisfied that this information is also subject to legal professional privilege.
 28. Information is not subject to legal professional privilege if privilege is waived. In the circumstances of this review, the issue of implied waiver arises in respect of the summaries and particularly in relation to whether QH's communication of the summaries internally, to the Queensland Ombudsman and to the psychiatrist constitutes an implied waiver of legal professional privilege.
 29. Disclosure of a privileged communication, for a limited purpose in a specific context, does not necessarily amount to a general waiver of legal professional privilege.¹⁶ Merely communicating privileged legal advice internally within a corporation or agency will not of itself deprive the agency or corporation of the benefit of that privilege.¹⁷ Accordingly, I am satisfied that QH's internal communication of the summaries does not constitute waiver of legal professional privilege.
 30. With respect to the information provided to the Queensland Ombudsman and the psychiatrist, the question for determination is whether QH's actions in disclosing the information are inconsistent with the confidence that legal professional privilege is designed to protect. I am satisfied that QH's actions in this case do not constitute waiver of legal professional privilege. The Queensland Ombudsman has wide powers to require a person to give information and documents relevant to its investigations.¹⁸ In providing information in response to the Queensland Ombudsman's preliminary investigation, QH was not entitled to refuse to provide the information on the basis that it was subject to legal professional privilege.¹⁹ In providing the information to the psychiatrist, QH was providing information relevant to the advice QH had engaged the psychiatrist to provide. In both circumstances, there is no indication that the information has not been treated confidentially by the recipients.
 31. Based on the above, I am satisfied that the information was disclosed to the Queensland Ombudsman and psychiatrist for a specific, limited purpose and the circumstances do not reveal an inconsistency on the part of QH with the confidence that legal professional privilege is designed to protect.
 32. For the reasons set out above, I am satisfied that QH was entitled to refuse access to the Category B information on the basis that it is subject to legal professional privilege.²⁰

¹⁶ See *Mann v Carnell* (1999) 201 CLR 49 at [29].

¹⁷ *Bulk Materials (Coal Handling) Services Pty Ltd v Coal & Allied Operations Pty Ltd* (1988) 13 NSWLR 689 at 691, 696; *Thiess Contractors Pty Ltd v Terokell Pty Ltd* [1993] 2 Qd R 341; *South Australia v Peat Marwick Mitchell* (1995) 65 SASR 72 at 75-77; *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275 at 279-280; and *Southern Cross Airlines Holdings Ltd (in liq.) v Arthur Andersen & Co.* (1998) 84 FCR 472 at 480.

¹⁸ Part 4 of the *Ombudsman Act 2001 (Qld)* (**Ombudsman Act**).

¹⁹ Section 45 of the *Ombudsman Act*.

²⁰ Section 67(1) of the *IP Act* and sections 47(3)(a), 48 and schedule 3, section 7 of the *RTI Act*.

Would disclosing the Category C information, on balance, be contrary to the public interest?

33. Yes.

Relevant law

34. An agency may refuse access to a document to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest.²¹ The term *public interest* is not defined in the RTI Act, instead the RTI Act recognises that many factors can be relevant to determining where the public interest lies.²² The RTI Act also explains the steps that a decision-maker must take in deciding the public interest. To determine the balance of the public interest a decision-maker must:²³

- identify any irrelevant factors and disregard them
- identify any relevant public interest factors favouring disclosure and nondisclosure
- balance the relevant factors favouring disclosure and nondisclosure; and
- decide whether disclosure of the relevant information would, on balance, be contrary to the public interest.

Findings

35. The Category C information is contained within the following documents:

- two letters from QH to the psychiatrist seeking specific medical advice about the applicant
- internal correspondence and case notes; and
- a leave adjustment form.

36. Within these documents, the Category C information can be described as:

- information relating to staffing issues and management options arising from the applicant's employment with QH
- information provided by other staff in relation to their emotions, team morale and incidents involving the applicant; and
- other staff information.²⁴

37. No irrelevant factors arise in the circumstances.²⁵ I consider the relevant factors below.

Personal information and privacy

38. I am satisfied that disclosing some of the Category C information could reasonably be expected to disclose the applicant's personal information²⁶ including information about her health and references to events involving her in the workplace. This is a public

²¹ Section 47(3)(b) and 49 of the RTI Act.

²² A non-exhaustive list of public interest factors are set out in schedule 4 of the RTI Act.

²³ Section 49(3) of the RTI Act.

²⁴ Including information about leave entitlements for other staff and the signature of a QH employee.

²⁵ In determining this I have had regard to the factors listed in schedule 4 part 1 of the RTI Act.

²⁶ Section 12 of the IP Act 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.*

interest factor favouring disclosure.²⁷ I am satisfied that significant weight should be attributed to this factor, however it must also be weighed against any other relevant factors.

39. Some of the Category C information is also the personal information of others. The RTI Act provides that it is reasonable to expect that disclosing an individual's personal information to another person will cause a public interest harm.²⁸ It is then relevant to consider the extent of that harm. The relevant parts of the Category C information identify a number of individuals and provide sensitive information about them, including their emotional reactions in a workplace context. Given the sensitive nature of this information, I am satisfied that the extent of the public interest harm that could be anticipated from disclosure is quite significant.
40. I am satisfied that disclosing parts of the Category C information could reasonably be expected to prejudice the protection of an individual's right to privacy.²⁹ Although arising in an employment context, the personal information of these individuals (as it appears in parts of the Category C information) reflects concerns of a private nature. Given the nature of the relevant Category C information, I consider there is a strong privacy interest in protecting the personal information of individuals other than the applicant for access and I attribute substantial weight to this public interest factor.

Enhancing the Government's accountability and revealing reasons for a decision

41. It is also relevant to consider whether disclosing the Category C information could reasonably be expected to enhance the Government's accountability and may reveal reasons for decisions made about the applicant's employment.³⁰ As noted above, some of the Category C information relates to staffing and management issues arising from the applicant's employment with QH. I note that a significant amount of the information contained in these documents has already been released to the applicant, however disclosing some of the Category C information could reasonably be expected to reveal more detail about the reasons for decisions made about the applicant's employment. I attribute moderate weight to these factors but note that they must be weighted against other relevant factors.

Prejudice the management function of an agency

42. I am satisfied that disclosing the Category C information could reasonably be expected to prejudice the processes that QH uses to manage its employees.³¹ The information identifies issues relating to the management of the applicant's employment. It is significant to note in this case that the information is about others in the workplace and is quite personal and sensitive. In my view, disclosing this information could reasonably be expected to have a detrimental effect on QH's management function as staff and management may, in the future, be reluctant to so candidly engage in these management processes. This in turn would prejudice QH's ability to obtain information regarding sensitive employee issues, which is necessary for effectively managing such issues in the workplace. For these reasons, I attributed significant weight to this public interest factor.

²⁷ Schedule 4, part 2, item 7 of the RTI Act.

²⁸ Schedule 4, part 4, section 6 of the RTI Act.

²⁹ Schedule 4, part 3, item 3 of the RTI Act.

³⁰ Schedule 4, part 2, item 1 and schedule 4, part 2, item 11 of the RTI Act.

³¹ Schedule 4, part 3, item 19 of the RTI Act. In *Daw and Queensland Rail* (Unreported, Queensland Information Commissioner, 24 November 2010) at paragraphs 16 and 17, the RTI Commissioner interpreted the meaning of *prejudice* in this context as having a detrimental effect on the agency's management function or placing the agency at a disadvantage in relation to its management function.

Balancing competing public interest factors

43. In summary, I recognise the significant public interest in disclosing the applicant's personal information to the applicant. I also accept that there is a public interest in ensuring accountability for the government decisions in managing its employees. I note though that much of the information in the documents in which the Category C information appears has been released to the applicant. The information to which access has been refused comprises a small proportion of the information and, whilst this information is about the applicant, it is predominantly about other QH staff. Given the nature of this information, as discussed above, I attribute substantial weight to the public interest in protecting these individuals' personal information and find the privacy interest in protecting their personal information is significant. Having carefully considered each of the public interest factors and their relative weight, I am satisfied that the privacy considerations, together with the public interest in avoiding prejudice to QH's management function, in this instance, outweigh the public interest factors favouring disclosure.
44. For these reasons, I am satisfied that QH was entitled to refuse access to the Category C information on the basis that its disclosure would, on balance, be contrary to the public interest.³²

DECISION

45. I vary³³ the decisions under review by finding that QH was entitled to refuse access to:
- the Category A information on the basis that it comprises the applicant's relevant healthcare information the disclosure of which may be prejudicial to the applicant's physical or mental health or wellbeing
 - the Category B information on the basis that it comprises exempt information; and
 - the Category C information on the basis that its disclosure would, on balance, be contrary to the public interest.
46. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

Suzette Jefferies
Assistant Information Commissioner

Date: 30 April 2012

³² Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

³³ QH initially decided to refuse access to information under section 47(3)(d) of the RTI Act. During the external review, OIC conveyed a preliminary view to QH that it was not entitled to refuse access to some of this information under section 47(3)(d) of the RTI Act because the information did not comprise the applicant's healthcare information. QH accepted the preliminary view on this issue and instead submitted that disclosure of this information would, on balance, be contrary to the public interest.

APPENDIX**Significant procedural steps**

Date	Event
25 August 2010	QH received the access application.
13 October 2010	QH issued its decisions under the IP Act on the access application.
2 November 2010	OIC received the applicant's external review application. OIC asked QH for a copy of relevant procedural documents.
5 November 2010	OIC received the requested documents from QH.
16 November 2010	OIC notified the applicant and QH that the external review application had been accepted and asked QH to provide a copy of the information in issue and other relevant procedural documents.
30 November 2010	OIC received the requested documents from QH.
3 December 2010	The applicant's support person asked OIC to meet with the applicant.
7 December 2010	OIC staff met with the applicant and the applicant's support person. OIC staff explained the effect of QH's decisions and the application of the relevant legislation.
26 March 2011	The applicant notified OIC that she was no longer a QH employee.
21 June 2011	OIC asked QH if it would agree to release additional information to the applicant.
13 October 2011	QH agreed to disclose additional information to the applicant. OIC conveyed a preliminary view to QH in relation to some of the information QH claimed was healthcare information.
11 November 2011 14 November 2011	QH agreed to disclose additional information to the applicant. QH notified OIC that it accepted the preliminary view in relation to some of the information it claimed was healthcare information but submitted that its disclosure would, on balance, be contrary to the public interest.
16 November 2011	OIC asked QH to provide submissions in relation to certain information by 22 November 2011.
22 November 2011	OIC received QH's submissions.
13 December 2011	OIC conveyed a preliminary view to the applicant in relation to the Category A, B and C information and invited her to provide submissions supporting her case by 9 January 2012.
3 January 2012	The applicant advised OIC that she did not accept the preliminary view and requested an extension of time to provide submissions supporting her case.
4 January 2012	OIC agreed to extend the time for the applicant to provide submissions until 23 January 2012.
23 January 2012	OIC received the applicant's submissions. The applicant also notified OIC that she had not been able to receive legal advice on the preliminary view and was not able to understand it due to the current state of her health.
24 January 2012	OIC agreed to a further extension of time until 22 February 2012 for the applicant to provide final submissions.

Date	Event
10 February 2012	The Aboriginal & Torres Strait Islander Women's Legal & Advocacy Service (ATSIWLAS) notified OIC it was representing the applicant in the external review and requested a copy of all documents relevant to the review and a further extension of time until 5 March 2012.
13 February 2012	OIC agreed to extend the time for the applicant to provide submissions until 24 February 2012.
14 February 2012	OIC provided ATSIWLAS with a copy of the relevant documents.
23 February 2012	The applicant's support person advised OIC that ATSIWLAS was no longer representing the applicant.
24 February 2012	OIC received submissions from the applicant. The applicant again told OIC that she had not received sufficient legal advice and did not understand the preliminary view due to the current state of her health.
29 February 2012	OIC provided the applicant with a copy of the relevant legislation and a summary of the preliminary view.
11 April 2012	OIC conveyed a preliminary view to QH in relation to some additional information and invited QH to provide submissions supporting its case by 18 April 2012 if it did not accept the preliminary view.
20 April 2012	QH accepted the preliminary view and agreed to release the additional information to the applicant.
23 April 2012	OIC asked QH to release the additional information to the applicant.