

## "VO" and Queensland Health

(S 6/02, 17 June 2002, Assistant Information Commissioner Barker)

*(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)*

1.-2. These paragraphs deleted.

### **REASONS FOR DECISION**

#### **Background**

3. By letter dated 5 October 1999, the applicant sought access from Queensland Health, under the FOI Act, to a copy of his Drugs of Dependence Unit (DDU) file. The DDU is the division of Queensland Health which is responsible for the monitoring of persons who use dangerous drugs (as defined in the relevant State legislation).
4. Queensland Health's Acting Principal Policy Officer, Legal and Administrative Law Unit, Ms Susan Heal, informed the applicant (by letter dated 10 November 1999) of her decision that the matter in issue was exempt under s.42(1)(e) or s.43(1) of the FOI Act.
5. The applicant sought internal review of Ms Heal's decision by lodging an application form dated 6 August 2001. Although the internal review application was made some 20 months after the date by which, in accordance with the provisions of s.52(2)(c) of the FOI Act, it should have been lodged, Queensland Health accepted and dealt with the application. By letter dated 21 August 2001, Dr J Youngman, General Manager, Health Services, informed the applicant that he had decided to vary Ms Heal's decision by finding that s.43(1) of the FOI Act did not apply to the matter in issue, and that some segments of matter were not exempt from disclosure under s.42(1)(e) of the FOI Act. Dr Youngman affirmed Ms Heal's decision that the balance of the matter in issue was exempt from disclosure under s.42(1)(e) of the FOI Act.
6. Dr Youngman's decision was forwarded to the applicant, at the address provided on the applicant's FOI access application dated 5 October 1999. The applicant contacted Queensland Health in December 2001 to inquire about the progress of his application for internal review, and informed Queensland Health that he had moved to another address (which had been provided on his internal review application dated 6 August 2001). A copy of Dr Youngman's letter was forwarded to the applicant at his new address, under cover of a letter from Queensland Health dated 3 December 2001.
7. By way of a facsimile transmission dated 21 December 2001, the applicant sought review by the Information Commissioner, under Part 5 of the FOI Act, of Dr Youngman's decision dated 21 August 2001. That application was made within the prescribed time

limit, as the applicant did not receive notice of Dr Youngman's decision until after 3 December 2001.

### **External review process**

8. Copies of the documents containing the matter in issue were obtained and examined. The matter in issue in this review comprised the following:
  1. all of folios 25, 28, 33, 35, 39, 42, 43, 44, 45, 47, 58, 62, 65, 70, 83, 88, 93, 97, 98, 100, 105 and 106; and
  2. segments of matter in folios 11, 32, 36, 41, 87 and 102.
9. In a telephone conversation with a member of the staff of this office on 15 February 2002, Queensland Health was requested to provide more detailed reasoning with respect to its application of s.42(1)(e) of the FOI Act to the above matter. By letter dated 15 March 2002, Ms Bev Boel, Acting Senior Policy Officer, Legal and Administrative Law Unit, provided a response to that request. By a further letter, dated 16 April 2002, Ms Boel confirmed that Queensland Health no longer contended that segments of matter in issue on folios 32, 87 and 102 were exempt from disclosure, and that matter is no longer in issue in this review.
10. I informed the applicant, by letter dated 18 April 2002, of my preliminary view that the matter remaining in issue qualified for exemption from disclosure under s.42(1)(e) of the FOI Act. I invited the applicant to provide a written submission in reply and, by facsimile transmission dated 15 May 2002, the applicant provided a submission in support of his case for disclosure of the matter in issue. (A further copy of that submission was received from the applicant on 5 June 2002.)
11. In making my decision, I have taken into account the following material:
  1. the contents of the matter in issue;
  2. Ms Heal's initial decision, dated 10 November 1999;
  3. Dr Youngman's internal review decision, dated 21 August 2001;
  4. the applicant's external review application, dated 21 December 2001;
  5. Queensland Health's submission dated 15 March 2002; and
  6. the applicant's submission dated 15 May 2002.

### **Application of s.42(1)(e) of the FOI Act**

12. Section 42(1)(e) of the FOI Act provides:

*42.(1) Matter is exempt matter if its disclosure could reasonably be expected to—*

...

*(e) prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law); ...*

13. The Information Commissioner discussed the correct way to interpret and apply this exemption provision in his decision in *Re "T" and Queensland Health* (1994) 1 QAR 386. Section 42(1)(e) of the FOI Act gives an agency such as Queensland Health a legal entitlement to refuse access to information, if the agency has reasonable grounds for expecting that disclosure of the information could have one of the prejudicial consequences specified in that provision. To establish that s.42(1)(e) applies to matter in issue, it is necessary to show that:

1. there is a lawful method or procedure used by the agency;
2. the method or procedure is used for preventing, detecting, investigating or dealing with a contravention, or a possible contravention, of the law; and
3. the agency has a reasonable basis for expecting that disclosure of the matter in issue could prejudice (that is, reduce the effectiveness or usefulness of) that method or procedure.

I will deal with the three requirements separately.

**(i) Method or procedure used by Queensland Health**

14. In *Re "T"* at p.393, paragraphs 23-24, the Information Commissioner said:

*23. ... Each agency will have developed (and will probably continue to develop and refine) methods and procedures to assist in the performance of its particular law enforcement responsibilities. Some methods and procedures may depend for their effectiveness on secrecy being preserved as to their existence, or their nature, or the personnel who carry them out, or the results they produce in particular cases. It is not possible to list the types of methods or procedures which may qualify for protection under s.42(1)(e) of the FOI Act. Each case must be judged on its own merits.*

15. It is not possible to describe in these reasons for decision the methods or procedures which Queensland Health is seeking to protect. This office is prohibited (by s.76(2) and s.87(1) of the FOI Act) from disclosing to an applicant for access the matter in issue in a review.

16. An applicant for access is at an unavoidable disadvantage in not knowing the nature of the information in issue. However, this office (as the independent appeal tribunal under the FOI Act) is able to inspect the matter in issue to assess whether or not an agency has correctly applied the provisions of the FOI Act, and I have carefully examined the matter in issue in this review. I am satisfied that the matter in issue does describe methods or procedures used by the DDU to monitor persons using dangerous drugs. The DDU's

enforcement procedures include various methods for monitoring the use of drugs of dependence.

17. I find that disclosure of the matter in issue in this review would disclose methods or procedures used by the DDU, and hence that the first requirement for exemption under s.42(1)(e) of the FOI Act is satisfied.

**(ii) Law administered by Queensland Health**

18. Queensland Health has advised this Office that "*[t]he law which is relevant to the documents to which s.42(1)(e) has been applied is the Health Act 1937, and under section 152 of that Act, the Poisons Regulation 1973 [now the Health (Drugs & Poisons) Regulation 1996]. The Health (Drugs & Poisons) Regulation contains a number of provisions relating to the prescription, dispensing, sale, supply, manufacture and possession of drugs of dependence. Drugs of dependence are those listed in schedule 8 of the Standard for the Uniform Scheduling of Drugs and Poisons referred to in the Regulation. These drugs are dangerous drugs for the purpose of the Regulation*".
19. Queensland Health is responsible for administering the provisions of the *Health (Drugs and Poisons) Regulation* (to which I will refer as 'the Regulation'), and I am satisfied that the methods or procedures referred to in paragraph 16 above are used for preventing, detecting, investigating or dealing with contraventions, or possible contraventions, of this law. I therefore find that the second requirement for exemption under s.42(1)(e) of the FOI Act is satisfied.

**(iii) Reasonable expectation of prejudice**

20. Because of the statutory prohibitions on disclosure of matter in issue that I have referred to in paragraph 16 above, it is not possible to fully describe in these reasons for decision the type of prejudice which Queensland Health asserts could reasonably be expected if the matter remaining in issue in this review were to be disclosed. At p.393, paragraphs 23-24 of *Re "T"*, the Information Commissioner explained that:

23. .... *The question of whether or not the effectiveness of a method or procedure could reasonably be expected to be prejudiced by the disclosure of particular matter sought in an FOI access application, is the crucial judgment to be made in any case in which reliance of s.42(1)(e) is invoked.*

24. ... *ordinarily in a review under Part 5 of the FOI Act it will be incumbent on an agency to explain the precise nature of the prejudice to the effectiveness of a law enforcement method or procedure that it expects to be occasioned by disclosure, and to satisfy me that the expectation of prejudice is reasonably based. I will ordinarily not be able to refer in my reasons for decision to the precise nature of the prejudice, nor in many cases to the nature of the relevant methods or procedures (where that would subvert the reasons for claiming an exemption in the first place) but I will, in any event, need to be satisfied that the*

*agency has discharged its onus under s.81 of the FOI Act of establishing all requisite elements of the test for exemption under s.42(1)(e) of the FOI Act.*

21. Queensland Health contended, in its submission dated 15 March 2002, that the Regulation can be contravened in a number of ways, including *"forging and altering prescriptions (section N1), making false representations to obtain drugs of dependence (section N2) and failing to disclose to medical practitioners and dentists details of drugs obtained in the previous two months (section N3)"*.
22. Queensland Health uses various methods to stop persons from contravening the Regulation, and to detect persons who try to do so. Queensland Health argued in its submission dated 15 March 2002 that *"[i]f the methods are rendered ineffective by wide public knowledge, then it is reasonable to assume that easier access may be gained by such persons [that is, persons who are addicted to dangerous drugs] to dangerous drugs. This consequence, and the fact that such persons would not fear detection, could ultimately have a deleterious effect on the safety of the public"*.
23. In summary, Queensland Health contends that it is easier for someone who is addicted to dangerous drugs to avoid being detected if they know the methods used by the DDU to monitor their use. Queensland Health also relies on the submissions which it made to this office in *Re "T"*, quoted in the Information Commissioner's decision at p.399, paragraph 46, that:
  46. *It must be recognised that some of the DDU's clients are often quite ingenious in developing strategies to avoid detection in their pursuit of drugs of dependence. A number of individuals are also quite volatile and at times even dangerous. If the methodology were to become accessible to the public, drug dependent persons would be able to assess the efficacy of their own methods for obtaining dangerous drugs without being detected.*
24. There is no evidence before me that the applicant seeks to use the matter in issue in this review in the manner suggested by Queensland Health. However, the consequences of disclosure of information under the FOI Act must ordinarily be evaluated as if disclosure were to the world at large. The applicant could use information disclosed under the FOI Act for his own purposes, or disclose it to any other person, intentionally or unintentionally. It would not be possible for Queensland Health to control the further disclosure of that information, or the uses to which that information could be put (although if it is used in a way which is contrary to the law, the person who uses it in that way may be liable for its misuse).
25. From my examination of the matter in issue in this review, I consider that it would be useful to persons who wanted to obtain a dangerous drug, and/or to avoid detection of the fact that a dangerous drug had been obtained. I am satisfied that disclosure of the matter in issue could reasonably be expected to prejudice the ability of Queensland Health's DDU to prevent people from doing so, or to detect them if they tried to do so, and

accordingly I find that the third requirement for establishing exemption under s.42(1)(e) of the FOI Act is satisfied.

26. Since I am satisfied that all requirements for exemption under s.42(1)(e) are established, I find that the matter in issue is exempt matter under s.42(1)(e) of the FOI Act.

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### **DECISION**

27. I affirm the decision under review (being the decision made on behalf of Queensland Health on 21 August 2001 by Dr J G Youngman) that the matter in issue in folios 11, 25, 28, 33, 35, 36, 39, 41, 42, 43, 44, 45, 47, 58, 62, 65, 70, 83, 88, 93, 97, 98, 100, 105 and 106 qualifies from exemption from disclosure to the applicant under s.42(1)(e) of the FOI Act.