



## Decision and Reasons for Decision

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**Application Number:** 310006

**Applicant:** Moriarty

**Respondent:** Department of Health

**Decision Date:** 15 September 2010

**Catchwords:** RIGHT TO INFORMATION ACT – Grounds on which access may be refused - section 47 of the *Right to Information Act 2009* (Qld) – whether disclosure of the information would, on balance, be contrary to the public interest under section 49 of the *Right to Information Act 2009* (Qld) - whether document comprises exempt information under section 48 of the *Right to Information Act 2009* (Qld)

RIGHT TO INFORMATION ACT – EXEMPT INFORMATION – INFORMATION DISCLOSURE OF WHICH WOULD BE CONTEMPT OF COURT OR PARLIAMENT – whether disclosure of information would infringe the privileges of Parliament under schedule 3, section 6(c)(i) of the *Right to Information Act 2009* (Qld)

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## REASONS FOR DECISION

### Summary

1. The Applicant applied (on behalf of her client) to the Department Health<sup>1</sup> (QH) for access to documents drafted by and concerning Mr B Pepplinkhouse.
2. In reviewing QH's decision to refuse access to 21 pages, the Information Commissioner affirmed QH's decision finding that QH was entitled to rely on sections 47(3)(a) and 47(3)(b) of the *Right to Information Act 2009* (Qld) (RTI Act) to refuse the applicant access to the information in issue.

### Background

3. Significant procedural steps are set out in the Appendix.

### Decision under review

4. In a telephone conversation with QH on 18 December 2009, the Office confirmed that QH's decision of 27 November 2009 deals with all documents found to be responsive to the Access Application.
5. Accordingly, the decision under review is QH's decision of 27 November 2009 in which it refused access to 21 pages in accordance with sections 47(3)(a) and 47(3)(b) of the RTI Act.

### Evidence relied upon

6. In making my decision in this matter, I have taken the following into consideration:
  - the Access Application, decision under review and application for external review
  - file notes of telephone conversations with the applicant during the course of this review
  - written correspondence received from the applicant during the course of this review
  - written correspondence received from QH during the course of this review
  - QH's Human Resources Policy E10
  - the Discipline Guidelines published by the Queensland Public Service Commissioner
  - the information in issue
  - relevant sections of the RTI Act and *Information Privacy Act 2009* (Qld) (IP Act)
  - previous decisions of the Information Commissioner of Queensland and decisions and case law from other Australian jurisdictions or courts as identified in this decision.

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<sup>1</sup> Commonly known as Queensland Health.

## Information in issue

7. The information in issue comprises those 21 pages to which the applicant was refused access including:
- information claimed to be exempt information under section 48 of the RTI Act on the basis that its disclosure would infringe the privileges of parliament under schedule 3, section 6(c)(i) of the RTI Act (**Category A information**)
  - information, the disclosure of which would, on balance be contrary to the public interest under section 49 of the RTI Act (**Category B information**).

## Findings

### **Section 48 of the RTI Act**

8. QH claims that the Category A information comprises exempt information under section 48 of the RTI Act on the basis that its disclosure would infringe the privileges of parliament under schedule 3, section 6(c)(i) of the RTI Act.

### **Schedule 3, section 6(c)(i) of the RTI Act**

9. Schedule 3, section 6(c)(i) of the RTI Act states:

#### **6 Information disclosure of which would be contempt of court or Parliament**

*Information is exempt information if its public disclosure would, apart from this Act and any immunity of the Crown -*

- ...  
(c) *infringe the privileges of -*
- i. Parliament; or*
- ...

10. The concept of 'Parliamentary privilege' is based on the notion that '*a member of Parliament should be able to speak in Parliament with impunity and without any fear of the consequences*'.<sup>2</sup> Section 8 of the *Parliament of Queensland Act 2001* (Qld) assigns the privilege to "proceedings in the assembly," a term defined under section 9 as follows:

#### **9 Meaning of 'proceedings in the Assembly'**

- (1) *'Proceedings in the Assembly' include all words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the Assembly or a committee.*
- ...

### ***Was the Category A information prepared for the purpose of, or incidental to, transacting business in the Assembly?***

11. QH submits that the answer to this question is 'yes' for the following reasons:

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<sup>2</sup> *Sankey v Whitlam* (1978) 142 CLR, per Gibbs ACJ.

- the information was created specifically for use by the Minister for Health in relation to potential parliamentary questions regarding a matter falling within the Health portfolio.
  - in order to effectively discharge their functions in Parliament, a Minister must be fully conversant with issues before the Parliament. Ministers rely upon the provision of specialist advice to enable them to participate effectively in the business of Parliament.
  - the information in question is directly related to the discharge in Parliament of the Minister's obligations and thus comprises material prepared "*for the purposes of or incidental to, transacting business of the Assembly*"
12. I have examined the Category A information in detail and am satisfied that it was prepared by QH to assist the Minister for Health in answering possible parliamentary questions relating to his portfolio and as a consequence:
- was prepared for the purposes of transacting business of the Assembly
  - attracts Parliamentary privilege
  - comprises exempt information under schedule 3, section 6(c)(i) the RTI Act.

### **The applicant's submissions**

13. During the course of this review the applicant indicated a belief that public ventilation and publicity about Mr Peplinkhouse's case had reduced any privacy interest in the Category A information.
14. To support her view the applicant provided the Office with information concerning Mr Peplinkhouses' conviction, subsequent engagement with QH and disciplinary matters as discussed in:
- a) Parliamentary Hansard of 22 February 2005, in which the Minister for Health responds to a Question Without Notice (**Hansard**)
  - b) press articles dated 23 January 2005 and 22 February 2005 (**Articles**).
15. Although the applicant has raised privacy interests attaching to the Category A information, this is not a matter which I can take into account in considering the application of schedule 3, section 6(c)(i) of the RTI Act.
16. If the information in question satisfies schedule 3, section 6(c)(i) of the RTI Act, it will be exempt information. This provision does not require or allow consideration of public interest issues such as privacy concerns.<sup>3</sup>

### **Section 49 of the RTI Act**

17. QH has refused access to the Category B information under section 47(3)(b) of the RTI Act on the basis that its disclosure would be contrary to the public interest under section 49 of the RTI Act.
18. Section 49 of the RTI Act sets out the steps which must be taken when deciding whether disclosure of information would, on balance, be contrary to the public interest and must be read in conjunction with the public interest factors listed in schedule 4 of the RTI Act.

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<sup>3</sup> I have however considered the applicant's submission in relation to the Category B information.

19. To decide whether disclosure of the Category B information would, on balance, be contrary to the public interest, I must:<sup>4</sup>
- identify any irrelevant factors that apply in relation to the information and disregard them
  - identify public interest factors favouring disclosure and nondisclosure that apply in relation to the information
  - balance the relevant factors favouring disclosure and nondisclosure
  - decide whether disclosure of the information, on balance, would be contrary to the public interest.

### **Irrelevant Factors**

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

### **Factors in favour of disclosure**

21. QH must be accountable to patients using the public health system and Queensland taxpayers. From time to time, that may involve answering questions about the qualifications of health care providers and the experience of managers employed by QH. This is particularly important in the area of Mental Health, where patients are arguably most vulnerable. On that basis, I accept that disclosure of the Category B information may:

- promote open discussion of public affairs and enhance the government's accountability<sup>5</sup>
- contribute to positive and informed debate on important issues or matters of serious interest<sup>6</sup>
- reveal the reason for a government decision and any background or contextual information that informed the decision.<sup>7</sup>

22. The applicant submits that details of disciplinary action taken by QH against Mr Peplinkhouse will support her client's application for re-instatement as a Senior Speech Pathologist. On the basis of this information and in the interest of ensuring consistency in disciplinary recommendations, I am satisfied that some (if only slight) weight should be given to the fact that disclosure of the Category B information may:

- advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies<sup>8</sup>
- contribute to the administration of justice for a person.<sup>9</sup>

### **Factors in favour of non-disclosure**

23. The Category B information contains information about Mr Peplinkhouses' employment and related matters and is therefore 'personal information' as that term is

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<sup>4</sup> Section 49 of the RTI Act; pursuant to section 47(3)(b) of the RTI Act.

<sup>5</sup> Schedule 4, Part 2, section 1 of the RTI Act.

<sup>6</sup> Schedule 4, Part 2, section 2 of the RTI Act.

<sup>7</sup> Schedule 4, Part 2, section 11 of the RTI Act.

<sup>8</sup> Schedule 4, Part 2, section 10 of the RTI Act.

<sup>9</sup> Schedule 4, Part 2, section 17 of the RTI Act.

defined in section 12 of the IP Act.<sup>10</sup> In view of this, I consider that its disclosure to someone other than Mr Pepplinkhouse could reasonably be expected to:

- prejudice the protection of an individual's right to privacy<sup>11</sup>
- disclose personal information thereby causing a public interest harm.<sup>12</sup>

24. Furthermore, I have observed that at least one of the allegations made against Mr Pepplinkhouse was determined by QH to be unsubstantiated. On that basis, I am of the view that disclosure of this information could also reasonably be expected to:

- prejudice the fair treatment of an individual and the information is, in part, about unsubstantiated allegations of misconduct.<sup>13</sup>

25. It is also prudent to consider the effect on QH's operations if information obtained in the course of confidential disciplinary proceedings was to be disclosed to a person other than Mr Pepplinkhouse. In this context I note QH's current Human Resources Policy E10 states:

*The employee is notified in writing of the Director-General (or delegate) decision. All aspects of the disciplinary process are recorded in a confidential discipline file and not placed on the employee's personnel file.*

26. The above policy conforms with the Discipline Guidelines published by the Queensland Public Service Commissioner which state:

*The matters surrounding the disciplinary process are confidential (subject to the statutory obligation to provide information under s44(5) of the Crime and Misconduct Act 2001) All parties should be required to comply with confidentiality requirements.*

27. Furthermore, in consultations with QH, Mr Pepplinkhouse has indicated that he objects to the disclosure of the Category B information on the basis that he was of the view that the information would remain confidential.

28. Accordingly, I am satisfied in the present circumstances that disclosure of the Category B information may:

- prejudice the management functions of QH, or the conduct of industrial relations by QH<sup>14</sup>
- have a substantial adverse effect on the management or assessment by an agency of the agency's staff; or have a substantial adverse effect on the conduct of industrial relations by an agency<sup>15</sup>
- prejudice an agency's ability to obtain confidential information<sup>16</sup>
- prejudice the future supply of confidential information.<sup>17</sup>

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<sup>10</sup> "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."

<sup>11</sup> Schedule 4, Part 3, section 3 of the RTI Act.

<sup>12</sup> Schedule 4, Part 4, section 6 of the RTI Act.

<sup>13</sup> Schedule 4, Part 3, section 6 of the RTI Act.

<sup>14</sup> Schedule 4, Part 3, section 19 of the RTI Act.

<sup>15</sup> Schedule 4, Part 4, section 3 of the RTI Act.

<sup>16</sup> Schedule 4, Part 3, section 16 of the RTI Act.

<sup>17</sup> Schedule 4, Part 4, section 8 of the RTI Act.

### **Balancing the public interest**

29. Although the applicant has indicated that the Category B information will assist her to further her client's application for re-instatement, I have no information before me which identifies how information concerning Mr Pepplinkhouse (which dates back to 2005) would assist her client's case.
30. In addition whilst I acknowledge there may be some public interest in the Category B information, I note Mr Pepplinkhouses' case was concluded in early 2005, and was the subject of some public discussion and media scrutiny at that time. Accordingly, I do not consider that disclosure of the Category B matter is likely to further the accountability factors previously discussed in this decision given the time period which has elapsed since Mr Pepplinkhouses' case was completed.
31. Although I acknowledge that the information publicly available about this matter has led to a slight diminution in the privacy interests attaching to the Category B information, this does not mean that such privacy interests have been completely extinguished, particularly in view of the fact that:
- one of the allegations discussed within the information remains unsubstantiated
  - there is no public reporting about the action taken by QH in respect of Mr Pepplinkhouses' breach on the basis that such information is considered confidential in accordance with QH's Human Resources Policy.
32. In balancing the public interest factors favouring disclosure and non-disclosure, I am satisfied that disclosure of the Category B information would, on balance, be contrary to the public interest under section 49 of the RTI Act.

### **DECISION**

33. I affirm the decision under review by finding that QH was entitled to refuse access to:
- the Category A information under section 47(3)(a) of the RTI Act on the basis that it comprises exempt information under sections 48 and schedule 3, section 6(c)(i) of the RTI Act
  - the Category B information under section 47(3)(b) of the RTI Act because disclosure of this information would, on balance, be contrary to the public interest under section 49 of the RTI Act.

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Julie Kinross  
**Information Commissioner**

**Date: 15 September 2010**

## Appendix

### ***Significant procedural steps***

1. By application dated 1 October 2009, the applicant applied to QH for access to **(Access Application)**:
  - a copy of the document drafted by B. Peplinkhouse in which he stated that 15% of psychiatric beds were closed because they were not needed.
  - a copy of the documents provided to John Scott claiming that 'show cause' disciplinary proceedings against Bill Peplinkhouse had been initiated and a copy of all documents prepared by Mr Scott or others advising Minister Nuttall that 'show cause' proceedings had been initiated against Bill Peplinkhouse.

Incl. emails, briefing notes, press releases, etc.
2. On 9 November 2009, QH indicated that 14 pages were located in response to the Access Application and decided to:
  - grant you access to 9 pages in full; and
  - refuse you access to 5 pages under section 47(3)(a) of the RTI Act.
3. On 27 November 2009, QH conducted further searches at its corporate offices and issued a supplementary decision which:
  - identified that it had located 26 pages
  - granted access to 5 pages in full
  - refused access to 6 pages under section 47(3)(a) of the RTI Act; and
  - refused access to 15 pages under section 47(3)(b) of the RTI Act.
4. By fax received by the Office of the Information Commissioner (**the Office**) on 7 December 2009, the applicant applied for an external review of QH's decisions in respect of those pages to which access was refused.
5. The Office received oral submissions from the applicant via a telephone conversation on 31 August 2010.
6. By letter dated 14 September 2010 the Office provided the applicant with a preliminary view in respect of QH's claim for exemption over the information in issue. In the event that the applicant did not accept the preliminary view, she was invited to provide further information or evidence in support of her case.
7. By email received by the Office on 15 September 2010, the applicant indicated she did not accept the reasoning outlined in the preliminary view and requested that the review be formalised. The applicant did not provide any further information in support of her case or to dispute the preliminary view.