



## Decision and Reasons for Decision

---

**Application Number:** 210810

**Applicant:** QPF

**Respondent:** Department of Health

**Decision Date:** 29 June 2009

**Catchwords:** ADMINISTRATIVE LAW - FREEDOM OF INFORMATION – QUEENSLAND – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER RELATING TO LAW ENFORCEMENT OR PUBLIC SAFETY - whether disclosure of an application for a Justices Examination Order could reasonably be expected to prejudice a system or procedure for the protection of persons under section 42(1)(h) of the *Freedom of Information Act 1992* (Qld)

## Contents

REASONS FOR DECISION .....	2
Summary .....	2
Background.....	2
Decision under review .....	2
Steps taken in the external review process .....	2
Matter in issue .....	3
Findings .....	3
Relevant law.....	3
Section 42(1)(h) of the FOI Act .....	3
a) Does an identifiable system or procedure exist? .....	4
b) Is the procedure for the protection of persons, property or environment? .....	4
c) Could disclosure of the JEO Application be reasonably expected to prejudice that system or procedure? .....	5
The applicant's submissions .....	6
Summary .....	8
DECISION .....	8

## REASONS FOR DECISION

### Summary

1. Having considered the parties' submissions and evidence, relevant legislation, case law and decisions, I am satisfied that access to the JEO Application should be refused under section 42(1)(h) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) on the basis that its disclosure would prejudice a system or procedure for the protection of persons.

### Background

2. By application dated 15 October 2008 (**FOI Application**), the applicant wrote to the Department of Health, also known as Queensland Health (**QH**) and requested access to a copy of the Justices' Examination Order (**JEO**) and related application (**JEO Application**).
3. On 15 December 2008, QH decided to (**Original Decision**):
  - grant the applicant full access to the JEO
  - deny the applicant access to the JEO Application under section 42(1)(h) of the FOI Act.
4. By letter dated 9 January 2009, the applicant sought internal review of the Original Decision (**Internal Review Application**).
5. QH did not make an Internal Review Decision and as a consequence is taken to have affirmed the Original Decision on or about 6 February 2009 (**Deemed Affirmation Decision**).<sup>1</sup>
6. By email dated 18 March 2009, the applicant applied to this Office for an external review of the above decision (**External Review Application**).

### Decision under review

7. The decision under review is the Deemed Affirmation Decision (referred to at paragraph 5 above).

### Steps taken in the external review process

8. By letters dated 23 March 2009, Acting Assistant Commissioner Jefferies advised the parties in this review that the External Review Application had been accepted.
9. By letter dated 26 May 2009 I informed the applicant of my preliminary view.
10. In an email dated 2 June 2009, the applicant indicated that she would be making submissions in response to the preliminary view.
11. By letter dated 1 June 2009 (received by this Office on 17 June 2009), the applicant indicated she did not agree with the preliminary view.

---

<sup>1</sup> See section 52(6) of the FOI Act

12. By email dated 18 June 2009, the applicant requested that an additional two paragraphs be added to her submission at paragraph 11 above.
13. In making my decision in this matter, I have taken the following into consideration:
  - the Internal Review Application and External Review Application
  - the Original Decision and Deemed Affirmation Decision
  - file notes of telephone conversations between staff members of this Office and the applicant
  - written correspondence received from the applicant during the course of this review
  - relevant sections of the FOI Act, the Mental Health Bill 2000 (Qld) and the *Mental Health Act 2000* (Qld)
  - reference material available on QH's website
  - previous decisions of the Information Commissioner of Queensland and decisions and case law from other Australian jurisdictions as identified in this decision.

### **Matter in issue**

14. The matter in issue in this review comprises the JEO Application which QH claims qualifies for exemption under section 42(1)(h) of the FOI Act.

### **Findings**

#### ***Relevant law***

#### **Section 42(1)(h) of the FOI Act**

15. Section 42(1)(h) of the FOI Act provides:

#### **42 Matters relating to law enforcement or public safety**

- *Matter is exempt matter if its disclosure could reasonably be expected to –*
  - h) prejudice a system or procedure for the protection of persons, property or environment; ...*

16. QH submits that disclosure of the JEO Application could reasonably be expected to result in other potential informants being less likely to provide relevant information, thereby prejudicing the system or procedure for the protection of persons which is established by the provisions of the *Mental Health Act 2000* (**MHA 2000**).
17. The Information Commissioner has previously discussed the operation of section 42(1)(h) of the FOI Act and stated that for the provision to apply, the following criteria must be satisfied:<sup>2</sup>
  - a) there exists an identifiable system or procedure
  - b) it is a system or procedure for the protection of persons, property or environment

---

<sup>2</sup> *Ferrier and Queensland Police Service* (1996) 3 QAR 350 (**Ferrier**) at paragraphs 27-36.

- c) disclosure of the information in issue could reasonably be expected to prejudice that system or procedure.

**a) Does an identifiable system or procedure exist?**

18. Having regard to reference material available on QH's website, I note the objective of a JEO is to allow a person in the community to request a non-urgent (and involuntary) mental health assessment for a person who they believe may be experiencing mental health problems.<sup>3</sup>
19. The procedure is set out under Chapter 2, Part 3, Division 2 of the *MHA 2000* as follows:
- a person may apply to a Magistrate or Justice of the Peace for a JEO for another person<sup>4</sup>
  - the Magistrate or Justice of the Peace may issue a JEO if he/she reasonably believes that the relevant person has a mental illness and should be examined<sup>5</sup>
  - once a JEO has been issued and sent to an authorised mental health service, a doctor or authorised mental health practitioner may conduct the examination<sup>6</sup>
  - the doctor or authorised mental health practitioner may make a recommendation for assessment requiring an involuntary assessment of that person at an authorised mental health service<sup>7</sup>
  - if the doctor or authorised mental health practitioner does not make a recommendation for assessment they must explain their reasons for their decision.<sup>8</sup>
20. Having regard to the above, I am satisfied that Chapter 2, Part 3, Division 2 of the *MHA 2000* establishes 'a system or procedure' for the purpose of section 42(1)(h) of the FOI Act.

**b) Is the procedure for the protection of persons, property or environment?**

21. Prior to the enactment of the *MHA 2000*, the Information Commissioner considered in *ROSK and Brisbane North Regional Health Authority; Others (Third Parties)*<sup>9</sup> whether provisions contained within its predecessor, the *Mental Health Act 1974* (Qld) (***MHA 1974***) established a procedure or system for the protection of persons, property or environment under section 42(1)(h) of the FOI Act.
22. The relevant provisions of the *MHA 1974* enabled a warrant to be issued for the removal (by police and a medical officer) of a person (suspected as being mentally ill and a danger) to a place of safety.
23. In *ROSK*, the Information Commissioner found that a system or procedure was established:

<sup>3</sup> See QH factsheet entitled 'Information about Justice Examination Orders' available on QH's website: [www.health.qld.gov.au/mha2000/documents/jeo\\_brochure.pdf](http://www.health.qld.gov.au/mha2000/documents/jeo_brochure.pdf).

<sup>4</sup> Section 25 of the *MHA 2000*.

<sup>5</sup> Section 28 of the *MHA 2000*.

<sup>6</sup> Sections 29 and 30 of the *MHA 2000*.

<sup>7</sup> Section 30 of the *MHA 2000*.

<sup>8</sup> Section 32 of the *MHA 2000*.

<sup>9</sup> (1996) 3 QAR 393 (***ROSK***).

- whereby members of the community who held a genuine belief that a person was mentally ill, and a danger to himself/herself or to others, could initiate action to protect that person or others from the apprehended danger
- which answered the description of 'a system or procedure for the protection of persons' within the meaning of section 42(1)(h) of the FOI Act.

24. In *TQN and Royal Brisbane Hospital Health Service District*,<sup>10</sup> it was confirmed that the *MHA 2000*:

- replaces the *MHA 1974*
- establishes a procedure (enabling application for and issuance of a JEO) which is similar to the system set up by the *MHA 1974* for the protection of persons.

25. In relation to treatment which may occur as a consequence of a JEO, the explanatory note to the Mental Health Bill 2000 (Qld) states:<sup>11</sup>

*The scheme for involuntary treatment is necessary to **protect the health and safety of persons with a mental illness and to ensure the safety of the community**. A significant feature of some mental illnesses is the person's inability to recognise the presence of illness and the need for treatment. Without treatment, the person is likely to remain unwell for an extended period to the detriment of their own quality of life, health and safety and in a small number of cases, the safety of others.*

**[my emphasis]**

26. In view of the discussion above, I am satisfied that the procedures set out in Chapter 2, Part 3, Division 2 of the *MHA 2000* establish 'a system or procedure for the protection of persons' described in section 42(1)(h) of the FOI Act.

**c) Could disclosure of the JEO Application be reasonably expected to prejudice that system or procedure?**

27. Requirement (c) asks whether disclosing the documents in issue (the JEO Application) could reasonably be expected to prejudice the system or procedure.

28. In *Attorney-General v Cockcroft*,<sup>12</sup> which dealt with the interpretation of the phrase 'could reasonably be expected to prejudice the future supply of information' in the context of the section 43(1)(c)(ii) (business affairs) exemption contained in the Commonwealth FOI Act, Bowen CJ and Beaumont J said:<sup>13</sup>

*In our opinion, in the present context, the words "could reasonably be expected to prejudice the future supply of information" were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act ... To construe s.43(1)(c)(ii) as depending in its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability is, in our view, to place an unwarranted gloss upon the relatively plain words of the Act. It*

<sup>10</sup> (Unreported, Queensland Information Commissioner, 31 October 2002).

<sup>11</sup> Explanatory Note, Mental Health Bill 2000 (Qld) at page 14.

<sup>12</sup> (1986) 64 ALR 97(**Cockcroft**).

<sup>13</sup> *Cockcroft*, at 106.

*is preferable to confine the inquiry to whether the expectation claimed was reasonably based ...*

29. The Justices interpretation of the phrase 'could reasonably be expected to' and the proposed line of inquiry, while made in the context of the business affairs exemption contained in Commonwealth legislation is relevant in the context of the exemption contained in section 42(1)(h) of the FOI Act.
30. Accordingly, to determine whether the JEO Application is exempt from disclosure under section 42(1)(h) of the FOI Act, I must examine whether it is reasonable as distinct from something that is irrational, absurd or ridiculous to expect that disclosing the JEO Application will '*prejudice the system or procedure*' established by Chapter 2, Part 3, Division 2 of the *MHA 2000*.

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

31. In the Internal Review Application, External Review Application and during the course of the external review the applicant made various submissions concerning the JEO Application and why it should be released to her.
32. By letter dated 1 June 2009 the applicant clarified why she considers section 42(1)(h) of the FOI Act does not apply to exempt the JEO Application. I have summarised these submissions below:
  - a) the applicant believes the JEO was made vindictively and for an improper motive. She considers that in such cases the JEO documentation should be released as it would deter members of the community from wasting the resources of Mental Health Staff and the Queensland Police Service and/or using the JEO process for improper means
  - b) the applicant states that the principles established in *ROSK*, *Ferrier* and *Cockcroft* do not apply in this case because the *MHA 2000* was administered incorrectly
  - c) the applicant considers that section 42 of the FOI Act should only apply in instances where the person clearly has a mental illness or is likely to take destructive action against the person (the applicant refers to *VHL and the Department of Health*)<sup>14</sup>
  - d) the applicant requires the JEO Application in order to amend any false or misleading information contained within the document so that her treatment for an unrelated medical condition is not compromised
  - e) the applicant believes that if the JEO Application were disclosed it would deter the person whom she believes is responsible for the JEO from making further misleading and false applications
  - f) the applicant believes that 99% of JEO applications are made vindictively or for an ulterior purpose.
33. The applicant's submissions at a), c), d) and e) above are in the nature of 'public interest' submissions, in that they identify reasons why it is in the public interest that the

---

<sup>14</sup> (Unreported, Queensland Information Commissioner, 20 February 2009). That decision considered the application of sections 42(1)(h) and 42(1)(ca) of the FOI Act to JEO documents. As section 42(1)(ca) of the FOI Act has not been claimed in this case, any commentary on the application of that provision in the stated decision has no relevance to this external review.

JEO Application should be disclosed. However, there is no public interest test incorporated into section 42(1)(h) of the FOI Act unless one of the exceptions referred to in section 42(2) of the FOI Act applies.

34. Section 42(2) of the FOI Act lists various types of documents/matter which may be excluded from section 42(1) of the FOI Act (subject to the public interest balancing test). They include:
  - matter revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law
  - matter containing a general outline of the structure of a program adopted by an agency for dealing with a contravention or possible contravention of the law
  - a report on the degree of success achieved in a program adopted by an agency for dealing with a contravention or possible contravention of the law
  - a report prepared in the course of a routine law enforcement inspection by an agency whose functions include that of enforcing the law (other than the criminal law or the law relating to misconduct under the *Crime and Misconduct Act 2001* (Qld))
  - a report on a law enforcement investigation that has already been disclosed to the person or body the subject of the investigation.
35. Having examined the JEO Application, I am satisfied that it is not any of the types of documents listed in section 42(2) of the FOI Act. There is nothing in the circumstances of this case, nor any material before me, that would indicate that section 42(2) of the FOI Act applies. Accordingly, I am unable to take into account the applicant's public interest submissions in determining whether or not the JEO Application is exempt under section 42(1)(h) of the FOI Act.
36. In respect of the applicant's submissions at b) above:
  - in determining the application of section 42(1)(h) of the FOI Act I am not required to:
    - investigate or consider whether the system or procedure established under the *MHA 2000* is flawed
    - determine whether the applicant suffered from a mental illness at the time of the JEO
  - if I find that a system or procedure exists for the purposes of section 42(1)(h) of the FOI Act, the system or procedure will exist regardless of whether it was or was not administered incorrectly in the circumstances.
37. Whilst the applicant has conveyed disappointment with the current system enabling the issuance of JEO's and the safeguard offered under section 522 of the *MHA 2000*, those issues relate to matters of policy and law reform, both of which are beyond the role and functions of this Office.<sup>15</sup> This Office is only empowered to apply the FOI Act in accordance with Parliament's intent.
38. In relation to JEO documents, I am of the view that members of the community will be reluctant to utilise the JEO process if they were aware that the information they or other persons provided in support of a JEO were to be disclosed. Accordingly, I am satisfied

---

<sup>15</sup> See section 101C of the FOI Act which provides that the functions of the Information Commissioner are to investigate and review decisions of agencies and Ministers of the kinds listed in that section.

that disclosure of the JEO Application would prejudice the system or procedure for the protection of persons established under the *MHA 2000* because:

- the system or procedure is dependent on applications being made by concerned members of the public because many persons in need of mental health treatment have little or no insight into their illness
  - a significant number of JEO's result in the treatment of the individual concerned, in particular I note that for the period 2006 to 2007, 216 of 787 JEO's resulted in an involuntary treatment order.<sup>16</sup> These figures conflict with the applicant's submission at f) in paragraph 32 above
  - if people become less inclined to institute the JEO process despite well-founded concerns, this may result in persons in need of assessment and treatment being left untreated in the community thereby creating the potential for those persons to deteriorate and possibly harm themselves or others.
39. Although I acknowledge that systems or procedures which are reliant on information from the public may be susceptible to abuse, this should not detract from the overall benefits which such a system or procedure provides to the community and the particular individuals who it aims to assist.

### **Summary**

40. Applying the principles established in *ROSK*, *Ferrier* and *Cockcroft*, I consider that disclosure of the JEO Application could reasonably be expected to result in members of the community being less likely to use the JEO process, thereby prejudicing the system or procedure for the protection of persons which is established by the provisions of the *MHA 2000*.
41. Accordingly, for the reasons discussed above, I am satisfied that the JEO Application qualifies for exemption from disclosure under section 42(1)(h) of the FOI Act.

### **DECISION**

42. I affirm the decision under review by finding that the JEO Application is exempt from disclosure under section 42(1)(h) of the FOI Act.
43. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

---

**V Corby**  
**Assistant Commissioner**

**Date: 29 June 2009**

---

<sup>16</sup> see The Director of Mental Health, *Annual Report 2006-2007* at page 237.