



Decision and Reasons for Decision

Application Number: 210867

Applicant: Mr F Carter

Respondent: Department of Community Safety

Decision Date: 27 August 2009

Catchwords: ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – APPLICATION OF ACT TO OFFENDERS OR AGENTS – Section 11E of the *Freedom of Information Act 1992 (Qld)* – applicant seeks access to psychological report – whether the applicant is an offender – whether the report is a risk assessment document – whether the report received or brought into existence by the agency - whether applicant not entitled to access the report under section 11E of the *Freedom of Information Act 1992 (Qld)*

Contents

REASONS FOR DECISION	2
Summary	2
Background.....	2
Decision under review	3
Steps taken in the external review process	3
Matter in issue	4
Findings	4
Relevant Law.....	4
Section 11E of the FOI Act.....	4
Submissions of the participants	6
Department's submissions.....	6
Applicant's submissions.....	6
Findings of fact and application of the law	7
Is the applicant an 'offender'?	7
Is the Report a 'risk assessment document'?	7
Was the Report received or brought into existence by the department in which the <i>Corrective Services Act 2006</i> is administered?	8
Summary	8
DECISION	9

REASONS FOR DECISION

Summary

1. The applicant is an offender as defined in section 11E of the *Freedom of Information Act 1992* (Qld) (**FOI Act**).
2. The applicant seeks access to a risk assessment document as defined in section 11E of the FOI Act.
3. The risk assessment document was brought into existence by the department in which the *Correctives Services Act 2006* is administered.
4. Accordingly, I am satisfied that the applicant is not entitled to obtain access to the balance of the risk assessment document due to the operation of section 11E of the FOI Act.

Background

5. By application dated 19 December 2008 (**FOI Application**), the applicant applied to the then named Department of Corrective Services, now Department of Community Safety (**Department**), for a copy of a psychological report prepared by Ms Tonya Plumb on 14 March 1994.
6. By letter dated 27 December 2008, the applicant provided additional information to assist the Department in relation to the FOI Application.
7. By letter dated 8 May 2009 (**Original Decision**), Ms Dimitra Barr, FOI Administration Officer, Legal Services Unit, advised the applicant that:
 - a 15 page psychological report written by Ms Plumb (**Report**) had been identified as relevant to the FOI Application
 - he was not entitled to obtain access to the Report under section 11E of the FOI Act.
8. By application dated 18 May 2009, the applicant applied for internal review (**Internal Review Application**) of the Original Decision.
9. By letter dated 26 May 2009 (**Internal Review Decision**), Ms Susan Barker, Manager, FOI and Privacy, advised the applicant of her decision to uphold the Original Decision.
10. By application dated 30 May 2009, the applicant applied to the Office of the Information Commissioner (**Office**) for external review of the Internal Review Decision (**External Review Application**) providing submissions in support of his application.
11. The FOI Act was repealed by the *Right to Information Act 2009* (**RTI Act**)¹ which commenced on 1 July 2009.² However, because the FOI Application was made under the FOI Act and has not yet been finalised, for the purposes of this decision, I am required to consider the application of the FOI Act (and not the RTI Act) to the matter in issue.³

¹ Section 194 of the RTI Act.

² With the exception of sections 118 and 122 of the RTI Act.

³ Section 199 of the RTI Act.

Decision under review

12. The decision under review is the Internal Review Decision.

Steps taken in the external review process

13. In response to preliminary inquiries made by the Office, under cover of a letter dated 12 June 2009, the Department provided copies of a number of documents relevant to the external review, including the Report.
14. By letters dated 18 June 2009, I informed the parties that the External Review Application had been accepted for review.
15. A copy of the Report was reviewed.
16. During a telephone conversation with Ms Barker of the Department on 19 June 2009, a staff member of this Office discussed issues relating to the review and raised with the Department the possibility of parts of the Report being released to the applicant.
17. By letter dated 30 June 2009, Ms Barker wrote to the Office indicating that:
- although portions of the document comprise purely factual matter, as opposed to opinion on or assessment of risk, the Department remained of the view that the whole of the Report was a 'risk assessment document' within the meaning of section 11E of the FOI Act
 - given that parts of the Report were however, known to the applicant, the Department was prepared to disclose certain matter to him
 - the Department maintained that the applicant was not entitled to access the balance of the Report under section 11E of the FOI Act.
18. By letter dated 14 July 2009, I wrote to the applicant to:
- inform him that although the Department still maintained that he was not entitled to access the Report, it was prepared to agree to release a significant proportion of the Report to him
 - provide the applicant with a preliminary view regarding the application of section 11E to the balance of the Report.
19. By letter dated 23 July 2009, the applicant indicated that he was not prepared to accept partial access to the Report in resolution of the external review and raised issues relating to the manner in which the Report was initiated.
20. During a telephone conversation with a staff member of this Office on 30 July 2009, Ms Barker confirmed that the Report was brought into existence by the Department.
21. By letter dated 30 July 2009, the Department confirmed that parts of the Report had been released to the applicant.
22. In reaching a decision in this external review, I have given consideration to:
- the FOI Application and Original Decision
 - the Internal Review Application and Internal Review Decision
 - the External Review Application
 - the matter in issue

- file notes of telephone conversations with the Department on 19 June 2009, 30 June 2009 and 26 August 2009
- correspondence from the Department dated 30 June 2009 and 30 July 2009
- correspondence from the applicant dated 23 July 2009
- relevant provisions of the following as mentioned in this decision:
 - the FOI Act
 - the *Corrective Services Act 2006* (Qld)
 - the *Criminal Code*.

Matter in issue

23. The Department maintains that the Report in its entirety is a risk assessment document and the applicant is not entitled to obtain access to it under section 11E of the FOI Act.
24. However, as explained at paragraphs 16, 17 and 21 above, during the course of the review the Department agreed to release parts of the Report to the applicant. The released portion of the Report is therefore no longer in issue in this review.
25. The following parts of the Report, which comprise the balance of the Report, form the matter in issue in this review:
 - parts of pages 5, 7, 9, 12, 13, and 15; and
 - all of pages 10, 11 and 14.

Findings

26. Section 21 of the FOI Act confers on persons a legally enforceable right to be given access under the FOI Act to documents of an agency and official documents of a Minister. This right of access is subject to other provisions of the FOI Act. In particular, the right of access is subject to Part 1 Division 4 of the FOI Act, which sets out provisions relating to the operation and application of the FOI Act. This includes section 11E of the FOI Act.

Relevant Law

Section 11E of the FOI Act

27. Section 11E of the FOI Act provides:

11E Application of Act to offenders or agents

- (1) *An offender, or an offender's agent, is not entitled to obtain access to a risk assessment document received, or brought into existence, by –*

- (a) *the department in which the Corrective Services Act 2006 is administered; or*

- (b) *a parole board as defined under that Act.*

- (2) *In this section –*

offender means an offender as defined under the *Corrective Services Act 2006* -

- (a) *who is serving a term of imprisonment for a prescribed offence, or serving a period of imprisonment that includes a term of imprisonment*

for a prescribed offence, whether the person was sentenced to the term or period of imprisonment before or after the commencement of this section; or

- (b) *who is a detained prisoner (sexual offender), or a supervised dangerous prisoner (sexual offender), as defined under the Corrective Services Act 2006.*

Note –

Under the Corrective Services Act 2006, schedule 4, offender means –

- (a) *a prisoner; or*
- (b) *a person who is subject to –*
- (i) *a community based order; or*
- (ii) *a conditional release order.*

period of imprisonment *see the Penalties and Sentences Act 1992, section 4.*

prescribed offence *means –*

- (a) *an offence against a provision mentioned in the Penalties and Sentences Act 1992, schedule; or*

Note –

See the Penalties and Sentences Act 1992, section 208(2).

- (b) *an offence against the Criminal Code, section 302; or*
- (c) *an offence against the Criminal Code, section 359E.*

risk assessment document *means a document, or that part of a document, that assesses or is used for the assessment of –*

- (a) *the risk an offender may pose to the community; or*
- (b) *a risk to the security or good order of a corrective services facility as defined under the Corrective Services Act 2006.*

Example for paragraph (a) –

a document prepared to help the chief executive make a decision under the Corrective Services Act 2006, section 12(2), 66 or 98.

term of imprisonment *see the Penalties and Sentences Act 1992, section 4.*

28. To determine whether section 11E has application in this external review, I am required to consider whether:

- the applicant is an offender within the meaning of section 11E of the FOI Act
- the matter in issue is a risk assessment document within the meaning of section 11E of the FOI Act
- the matter in issue was 'received' or 'brought into existence by' the department in which the *Corrective Services Act 2006* is administered.

Submissions of the participants

Department's submissions

29. In the Internal Review Decision, the Department said:

You are presently held at the Lotus Glen Correctional Centre and are therefore an 'offender' as defined in Schedule 4 of the Corrective Services Act 2006 ... which includes a prisoner and persons subject to community based and conditional release orders.

You are serving sentences for two murders, an offence against s.302 of the Criminal Code, so that you fall within the definition of 'offender' in s.11E(2) of the FOI Act.

D Barr refused you access to a psychological report prepared by Ms Plumb in March 1994 for a Sentence Management Review. Without entering into a discussion of the content of that document, it is evident from that content that the Report's primary purpose is to examine the risks you might pose at that time to the security and good order of the correctional centre in which you were accommodated (Sir David Longland), including the risk to other persons within the centre and to the community.

30. In the course, of this external review, the Department has also made the following submissions:

- the entirety of the Report constitutes a risk assessment document for the purposes of section 11E of the FOI Act
- although the Department is prepared to disclose parts of the Report to the applicant (content that is known to him), the Department maintains that the applicant is not entitled to obtain access to the remainder of the Report because he is an 'offender' within the definition in section 11E of the FOI Act and the balance of the document comprises risk assessment material
- the Report was received, or brought into existence, by the Department.

Applicant's submissions

31. The applicant's submissions in this external review primarily relate to the circumstances in which the Report was created.

32. In the External Review Application the applicant says:

On page 7 of Ms Plumb's report, she states the following:

"Mr Carter's solicitors have written to SDLCC requesting on his behalf "that you make arrangements for him to be psychologically assessed in regard to his attitude as to the socially correct use of knives and sharp objects and as to whether or not he would be a danger to any person " (T.Fischer 14/5/93).

The above statement in my view is unequivocal. It was my solicitor who sought and initiated the report, not the Department of Corrective Services.

33. In his letter dated 23 July 2009, the applicant said:

I am not prepared to accept partial access to the report.

As previously stated the report was initiated by a request from my solicitors, perusal of my files will verify this claim.

Therefore section 11E is not applicable in my case.

34. In short, the applicant submits that the Report does not meet the requirements of section 11E of the FOI Act because the Report was not received, or brought into existence, by the Department.

Findings of fact and application of the law

Is the applicant an 'offender'?

35. To be an offender for the purposes of section 11E of the FOI Act, the applicant must be an offender as defined in the *Corrective Services Act 2006*, and meet the requirements of either (a) or (b) in the definition of offender in section 11E(2) of the FOI Act.
36. Under the *Corrective Services Act 2006*, an offender means a prisoner, or a person who is subject to a community based order or conditional release order.⁴
37. A prisoner is defined in the *Corrective Services Act 2006* to mean (amongst other things) a person who is in the chief executive's custody.⁵ Relevantly, a person is taken to be in the chief executive's custody when admitted to a corrective services facility for detention.⁶
38. The applicant is currently detained in a corrective services facility, serving a period of imprisonment for numerous offences, including terms of imprisonment for offences against section 302 of the *Criminal Code* (Definition of *murder*).
39. An offence against section 302 of the *Criminal Code* is a *prescribed offence* for the purpose of the definition in section 11E(2) of the FOI Act.
40. Accordingly, I find that:
- the applicant is an *offender* as defined in the *Corrective Services Act 2006* because the applicant is a *prisoner*
 - the applicant is serving a term of imprisonment for a *prescribed offence*
 - the applicant is an *offender* within the meaning of section 11E of the FOI Act.

Is the Report a 'risk assessment document'?

41. A risk assessment document means a document, or that part of a document, that assesses or is used for the assessment of:
- the risk an offender may pose to the community; or
 - a risk to the security or good order of a corrective services facility as defined under the *Corrective Services Act 2006*.
42. Under the *Corrective Services Act 2006*, a corrective services facility is defined to mean a prison, a community corrections centre, or a work camp.⁷
43. Under section 87 of the FOI Act, I am precluded from including in these reasons for decision any matter that is claimed to be exempt matter. However, I have read and considered the contents of the Report and I am satisfied that the purpose of the Report

⁴ *Correctives Services Act 2006*, Schedule 4.

⁵ *Corrective Services Act 2006*, Schedule 4.

⁶ See section 7(2) of the *Corrective Services Act 2006*.

⁷ *Corrective Services Act 2006*, Schedule 4.

was to examine the risks that the applicant might pose to the security and good order of the correctional services facility, being a prison, in which the applicant was accommodated at that time.

44. Accordingly, I find that the parts of the Report in issue in this review:

- assess a risk to the security or good order of a corrective services facility
- constitute a risk assessment document for the purposes of section 11E of the FOI Act.

Was the Report received or brought into existence by the department in which the Corrective Services Act 2006 is administered?

45. Prior to changes to the administrative arrangements of the Queensland Government in March 2009, the Minister for Police, Corrective Services and Sport had principal ministerial responsibility for Adult Corrective Services⁸. Falling within this responsibility was the *Corrective Services Act 2006*, administered by the administrative unit known as the Department of Corrective Services.

46. Since 26 March 2009, the Minister for Police, Corrective Services and Emergency Services has principal ministerial responsibility for Adult Corrective Services⁹. The *Corrective Services Act 2006* is now administered by the administrative unit known as the Department of Community Safety.

47. I am satisfied that while the name of the 'administrative unit' may have changed since March 2009, the Report was received or brought into existence by the department in which the *Corrective Services Act 2006* is administered.

48. The applicant submits that the Report was initiated by his solicitors and not the Department.

49. I acknowledge that the applicant's solicitors may have asked for a risk assessment to be conducted. However, I am satisfied that the Report was brought into existence by the Department. This is because:

- the Department has checked its personnel records and confirmed to the Office that at the time the Report was prepared, Ms Plumb was an employee of the Department
- it is evident from the Report itself that the Report was created by Ms Plumb in respect of a sentence management review.

50. I am therefore satisfied that the Report was brought into existence by the Department in which the *Corrective Services Act 2006* is administered.

Summary

51. I find that the applicant is not entitled to obtain access to the parts of the Report in issue in this review because for the purposes of section 11E of the FOI Act:

- the applicant is an offender
- the parts of the Report in issue in this review constitute a risk assessment document

⁸ Excluding offender health services.

⁹ Excluding offender health services.

- the Report was brought into existence by the department in which the *Corrective Services Act 2006* is administered.

DECISION

52. I affirm the decision under review by finding that the applicant is not entitled to obtain access to the parts of the Report in issue in this review under section 11E of the *Freedom of Information Act 1992* (Qld).
53. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

Suzette Jefferies
Acting Assistant Commissioner

Date: 27 August 2009