



Decision and Reasons for Decision

Application Number: 210945

Applicant: JCZ

Respondent: Department of Health

Decision Date: 21 December 2009

Catchwords: **FREEDOM OF INFORMATION – section 44(1) of the *Freedom of Information Act 1992 (Qld)* – matter affecting personal affairs – whether information concerns the personal affairs of a person other than the applicant – whether disclosure would, on balance, be in the public interest – shared personal affairs – whether information is inextricably interwoven – information in a patient’s medical records**

FREEDOM OF INFORMATION – section 46 of the *Freedom of Information Act 1992* – matter communicated in confidence – whether disclosure of the matter in issue would found an action for breach of confidence – information provided by a third party for assisting in a patient’s medical care and treatment

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REASONS FOR DECISION

Summary

1. For the reasons set out below, I am satisfied that the matter in issue is exempt from disclosure under section 44(1) and section 46(1)(a) of the *Freedom of information Act 1992* (Qld) (**FOI Act**).

Background

2. On 21 April 2009 (**FOI Application**), the applicant applied for access to documents relating to his medical treatment from the Department of Health (known as Queensland Health) (**QH**).
3. By letter dated 9 June 2009 (**Original Decision**), QH advised the applicant that searches had been conducted at the Princess Alexandra Hospital Health Service District and a number of relevant documents had been located. QH decided to:
 - grant full access to 169 documents
 - grant partial access to 10 documents
 - refuse access to 2 documents.
4. By letter dated 15 July 2009, the applicant applied for internal review of the Original Decision.
5. By letter dated 12 August 2009 (**Internal Review Decision**), QH affirmed the Original Decision.
6. By letter dated 8 September 2009, the applicant applied to the Office of the Information Commissioner for external review of the Internal Review Decision.

Decision under review

7. The decision under review is the Internal Review Decision referred to at paragraph 5 above.

Steps taken in the external review process

8. By email on 10 September 2009, this Office requested that QH provide a number of initiating documents relevant to the external review.
9. By letter dated 16 September 2009, QH provided the requested information to this Office.
10. By letter dated 23 September 2009, this Office advised the applicant that his external review application had been accepted and the Internal Review Decision would be reviewed.
11. By letter dated 23 September 2009, this Office:
 - advised QH that the applicant's external review application had been accepted and the Internal Review Decision would be reviewed
 - requested that QH provide a copy of the matter claimed to be exempt.

12. On 7 October 2009, a staff member of this Office contacted QH to clarify its reasons for claiming the matter in issue was exempt from disclosure under section 46(1)(a) of the FOI Act.
13. On 19 October 2009, a staff member of this Office contacted QH to request further information relevant to the review.
14. By letter dated 20 October 2009, QH provided the requested information.
15. By email on 10 November 2009, QH provided further information relevant to the review.
16. On 10 November 2009, a staff member of this Office contacted the applicant to convey the preliminary view that the matter in issue was exempt from disclosure under the FOI Act. The applicant did not accept the preliminary view that was provided.
17. By letter to the applicant dated 16 November 2009, I confirmed the preliminary view that the matter in issue was exempt from disclosure under sections 44(1) and 46(1)(a) of the FOI Act. The applicant was invited to provide submissions in support of his case if he did not accept the preliminary view by 2 December 2009.
18. By letter dated 26 November 2009, the applicant provided submissions in support of his case but also indicated that he did not understand the reasons for my preliminary view and required an indefinite extension of time to provide further submissions.
19. By letter to the applicant dated 2 December 2009, I clarified the reasons for the preliminary view and allowed the applicant until 17 December 2009 to respond to the preliminary view.
20. By letter dated 12 December 2009, the applicant indicated that he understood the preliminary view, did not accept that the matter in issue was exempt from disclosure under the FOI Act and provided submissions in support of his case.
21. In making this decision, I have taken into account the following:
 - the FOI Application
 - the Original Decision and Internal Review Decision
 - the applicant's internal review application dated 15 July 2009 and external review application dated 8 September 2009
 - information provided to this Office by QH on 16 September 2009, 7 October 2009, 20 October 2009 and 10 November 2009
 - the applicant's submissions to this Office dated 26 November 2009 and 12 December 2009
 - relevant provisions of the FOI Act¹
 - the matter in issue
 - previous decisions of this Office as referred to in this decision.

¹ The FOI Act was repealed by the *Right to Information Act 2009 (RTI Act)* which commenced on 1 July 2009. However, because the FOI Application was made under the FOI Act and has not yet been finalised, for the purposes of this review, I am required to consider the application of the FOI Act (and not the RTI Act) to the matter in issue.

Matter in issue

22. The matter in issue in this review (**Matter in Issue**) can be described as the 12 documents which form part of the applicant's medical record from the Princess Alexandra Hospital.
23. QH has:
 - refused the applicant access to 2 of those documents in their entirety under section 46(1)(a) of the FOI Act
 - granted the applicant partial access to 10 of those documents by deleting some information under section 44(1) and 46(1)(a) of the FOI Act.
24. Therefore it is relevant for me to consider whether QH has correctly applied sections 44(1) and 46(1)(a) of the FOI Act to the Matter in Issue.

The applicant's submissions

25. I have carefully considered the information provided by the applicant in his internal review application dated 15 July 2009, external review application dated 8 September 2009 and submissions provided to this Office dated 26 November 2009 and 12 December 2009.
26. Some of the applicant's submissions relate to issues which this Office has no jurisdiction to consider or investigate on external review. By letters dated 16 November 2009 and 2 December 2009, I advised the applicant that the Information Commissioner's jurisdiction in this case was limited to determining whether QH's decision to refuse access to the Matter in Issue under the FOI Act was correct.
27. While I acknowledge the applicant's concerns about his treatment and the accuracy of information provided to his doctors, I confirm that this Office has no jurisdiction to investigate or assess these issues.
28. I have summarised the applicant's submissions which are relevant to this external review in the following manner:
 - The applicant was hospitalised at the Princess Alexandra Hospital for a period of seven weeks, part of which was involuntary.
 - The applicant requests information explaining the reasons for the involuntary stay and what caused the doctors to take the action they did in relation to him. The applicant suspects that certain family members provided false information to the hospital and his doctors which led to the involuntary stay.
 - The applicant is of the view that decisions regarding his release from hospital were made as a direct result of the Matter in Issue and considers that the Matter in Issue should be made available to him so that he can gauge its accuracy.
 - The applicant asserts that he has a right to defend himself against the incriminating evidence and/or stories which were provided as he was *'tried, found guilty, and imprisoned, by a judge and jury and [doesn't] even have the recourse to establish why all this happened the way it did in the first place'*.

- The applicant considers his involuntary hospitalisation was unwarranted and that he has suffered a great injustice as a result of these events. He wants that injustice to be acknowledged and/or punished.

Section 44(1) of the FOI Act

29. I will now consider the application of section 44(1) of the FOI Act to the Matter in Issue.

Internal Review Decision

30. In the Internal Review Decision, QH provided the following reasons for its decision that the relevant Matter in Issue is exempt from disclosure under section 44(1) of the FOI Act:

The information contained in the PA Hospital records in issue relates to personal information concerning other persons. This includes details of name, address, telephone number and occupational status. The information clearly falls within the Information Commissioner's definition of 'personal affairs', above. The information is clearly not defamatory, as it contains no information of relevance to the applicant.

The law

31. Section 44 of the FOI Act relevantly provides:

44 Matter affecting personal affairs

- (1) *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*
- (2) *Matter is not exempt under subsection (1) merely because it relates to information concerning the personal affairs of the person by whom, or on whose behalf, an application for access to a document containing the matter is being made.*

32. Section 44(1) therefore requires me to consider the following questions in relation to the Matter in Issue:

- Firstly, does the matter in issue concern the personal affairs of person/s (other than the applicant)? (**Personal Affairs Question**) If so, a public interest consideration favouring non-disclosure of the matter in issue is established.
- Secondly, are there public interest considerations favouring disclosure of the matter in issue which outweigh all public interest considerations favouring non-disclosure of the matter in issue? (**Public Interest Question**)

Personal Affairs Question

33. In *Stewart and Department of Transport (Stewart)*² the Information Commissioner discussed in detail the meaning of the phrase 'personal affairs of a person' (and relevant variations) as it appears in the FOI Act. In particular, he said that information concerns the 'personal affairs of a person' if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase 'personal affairs', that phrase has a well accepted core meaning which includes:

² (1993) 1 QAR 227. See in particular paragraphs 79 – 114.

- family and marital relationships
 - health or ill-health
 - relationships and emotional ties with other people
 - domestic responsibilities or financial obligations.
34. Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, to be determined according to the proper characterisation of the information in question.
35. The Information Commissioner also noted in *Stewart* that:
- for information to be exempt under section 44(1) of the FOI Act, it must be information which identifies an individual or is such that it can readily be associated with a particular individual³
 - information, such as a person's name, must be characterised according to the context in which it appears.⁴
36. Section 44(2) of the FOI Act provides that information will not be exempt from disclosure under section 44(1) of the FOI Act purely because it relates to information concerning the personal affairs of the applicant.

Shared personal affairs

37. In some cases, information can concern the personal affairs of more than one person. Where this is the case, section 32 of the FOI Act sometimes permits the severance or deletion of information about the other person from the document so that the remainder of the document can be released to the applicant.
38. Where information concerns the personal affairs of the applicant which cannot be separated from information concerning the personal affairs of another person, then the information is properly characterised as 'shared personal affairs' and is *prima facie* exempt from disclosure under section 44(1) of the FOI Act.
39. In *B and Brisbane North Regional Health Authority (B and BNRHA)*⁵ the Information Commissioner said:⁶

Where, however, the segment of matter in issue is comprised of information concerning the personal affairs of the applicant which is inextricably interwoven with information concerning the personal affairs of another person, then:

- (a) *severance in accordance with s.32 is not practicable;*
- (b) *the s.44(2) exception does not apply; and*
- (c) *the matter in issue is prima facie exempt from disclosure to the applicant according to the terms of s.44(1), subject to the application of the countervailing public interest test contained within s.44(1).*

Public Interest Question

40. The 'public interest' refers to considerations affecting the good order and functioning of community and governmental affairs, for the well-being of citizens. In general, a public

³ At paragraph 81.

⁴ At paragraph 90. See also paragraphs 21 – 23 of *Pearce and Queensland Rural Adjustment Authority; Various Landowners (Third Party)* (1999) 5 QAR 242.

⁵ (1994) 1 QAR 279.

⁶ At paragraph 176.

interest consideration is one which is common to all members of the community, or a substantial segment of them, and for their benefit. The public interest is usually treated as distinct from matters of purely private or personal interest. However, some recognised public interest considerations may apply for the benefit of individuals in a particular case.

41. In *Fox and Department of Police*,⁷ the Information Commissioner indicated that:

Because of the way that section 44(1) of the FOI Act is worded and structured, the mere finding that information concerns the personal affairs of a person other than the applicant for access must always tip the scales against disclosure of that information (to an extent that will vary from case to case according to the relative weight of the privacy interests attaching to the particular information in issue in the particular circumstances of any given case), and must decisively tip the scales if there are no public interest considerations which tell in favour of disclosure of the information in issue. It therefore becomes necessary to examine whether there are public interest considerations favouring disclosure, and if so, whether they outweigh all public interest considerations favouring non-disclosure.

Findings on the application of section 44(1) of the FOI Act

Personal Affairs Question

42. As the Matter in Issue appears in the context of the applicant's medical records, I understand that the applicant may consider that all of the information in the records is about him or his treatment. However I have carefully considered the Matter in Issue and am satisfied that:

- a) some of the information solely concerns the personal affairs of others and does not concern the applicant's personal affairs in any way, and includes, for example, the contact details for other individuals and other information about private aspects of their lives
- b) while some of the information does concern the applicant's personal affairs, this information also concerns the personal affairs of others, including information about family relationships and emotional ties
- c) the information referred to at b), is inextricably interwoven and is properly characterised as shared personal affairs information.

43. For the reasons set out above, I find that the relevant Matter in Issue is personal affairs information which is *prima facie* exempt from disclosure under section 44(1) of the FOI Act, subject to the public interest balancing test.

Public Interest Question

44. When matter is *prima facie* exempt from disclosure under section 44(1) of the FOI Act, it is exempt '*unless its disclosure would, on balance, be in the public interest*'. Accordingly, I must:

- consider any public interest considerations favouring disclosure of the Matter in Issue

⁷ (2001) 6 QAR 1 at paragraph 19.

- determine whether these public interest considerations outweigh the public interest in the protection of personal privacy and any other public interest considerations favouring non-disclosure of the Matter in Issue.

Public interest considerations favouring disclosure

45. An applicant's reasons for seeking access to documents under the FOI Act are not usually relevant, however, they may assist in identifying public interest considerations favouring disclosure of the Matter in Issue.
46. Based on the applicant's submissions which are summarised above, I have identified the following public interest considerations favouring disclosure of the Matter in Issue:
- a) the public interest in patients being able to gain access to information concerning their medical treatment
 - b) the public interest in members of the community being given ways to ensure the accuracy of personal affairs information held by government
 - c) the public interest in the accountability of government.
47. I will now discuss each of these public interest considerations.

The public interest in patients being able to gain access to information concerning their medical treatment

48. I accept that there is a public interest in patients being able to gain access to information concerning their medical treatment, although this is not an unqualified public interest.⁸
49. I also acknowledge that a patient may be particularly concerned about their involuntary hospitalisation and treatment and may wish to gain understanding about the surrounding circumstances.
50. However, as I have explained at paragraph 42 above, some of the Matter in Issue does not concern the applicant's personal affairs in any way and is information which concerns the private aspects of other individuals' lives. I do not consider that this public interest consideration is relevant to information which does not concern the applicant's personal affairs or information about his medical treatment. This information will not assist the applicant to gain an understanding of the reasons for his treatment.

The public interest in members of the community being given ways to ensure the accuracy of personal affairs information held by government

51. I also accept that there is a general public interest in members of the community being given ways to ensure the accuracy of personal affairs information held by government.
52. This public interest is recognised at section 4(2)(c) of the FOI Act which provides *'that, in a free and democratic society ... members of the community should have access to*

⁸ *B and BNRHA* at paragraph 182 and *P and Brisbane South Regional Health Authority* (1994) 2 QAR 159 at paragraph 48. For example, section 44(3) of the FOI Act expressly recognises that there may be instances where disclosure to an applicant of information of a medical or psychiatric nature concerning the applicant would be prejudicial to the applicant's physical or mental wellbeing (although that has not been suggested in this case).

information held by government in relation to their personal affairs...'. This public interest consideration only applies, however, where the matter in issue relates to the personal affairs of the applicant. As set out above, the Matter in Issue in this review concerns shared personal affairs and the personal affairs of other individuals.

The public interest in the accountability of government

53. The public interest in the accountability of government will normally carry substantial weight in an appropriate case. However, I note that QH has already released a large amount of information to the applicant about his treatment and the reasons for such treatment. Accordingly, in the circumstances, I do not consider that disclosure of the Matter in Issue would enhance the accountability of government in a significant way and would not further this public interest consideration.

Public interest considerations favouring non disclosure

54. I consider that there are principally two public interest considerations favouring non-disclosure of the Matter in Issue. These are:
- the inherent public interest in protecting personal privacy if the matter in issue concerns the personal affairs of a person other than the applicant
 - the public interest in safeguarding the flow of information to agencies which will allow agencies to properly discharge their functions.

The inherent public interest in protecting personal privacy of other people

55. As indicated above, there is an inherent public interest in protecting personal privacy if the matter in issue concerns the personal affairs of a person other than the applicant and appropriate weight must be allocated to that interest, having regard to the character and significance of the particular matter in issue. In this review, I consider that this public interest consideration is strong given that the Matter in Issue concerns the personal affairs of other people (which do not concern the applicant's personal affairs in any way) and shared personal affairs information.

The public interest in safeguarding the flow of information to agencies

56. I also consider that there is a public interest in safeguarding the flow of information to agencies which will allow agencies to properly discharge their functions. In this case, I consider it important to protect the free flow of information to QH which may assist in a person's care and treatment and that this public interest consideration should be given significant weight.
57. On balance and for the reasons set out above, I find that the public interest considerations favouring disclosure of the Matter in Issue do not outweigh the public interest considerations favouring non disclosure. Accordingly, I am satisfied that the relevant Matter in Issue is exempt from disclosure under section 44(1) of the FOI Act.

Section 46(1)(a) of the FOI Act

58. I will now consider the application of section 46(1)(a) of the FOI Act to the remainder of the Matter in Issue.

Internal Review Decision

59. In the Internal Review Decision, QH provided the following reasons for its decision that the relevant Matter in Issue is exempt from disclosure under section 46(1)(a) of the FOI Act:

A third party has been consulted with regards to information they have provided, and affirmed the original decision-makers decision that the information was provided in confidence. I would consider release of this information to the applicant to be a breach of confidence ...

The law

60. Section 46(1)(a) of the FOI Act provides:

46 Matter communicated in confidence

(1) Matter is exempt if—

(a) its disclosure would found an action for breach of confidence;

...

61. The Information Commissioner set out the correct approach to the interpretation and application of section 46(1) of the FOI Act in the decision of *B and BNRHA*:⁹

- an action for breach of confidence may be based on either a contractual or equitable obligation of confidence
- the test for exemption under section 46(1)(a) of the FOI Act is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence claimed to bind the agency not to disclose the information in issue.

62. In the Original Decision, QH explained that:

There is no suggestion of a contractual obligation of confidence between the third party and the Health Service District concerning the communication of information recorded on the exempted documents. The test for exemption under section 46(1)(a), has therefore been evaluated in terms of the requirements of an action in equity for breach of confidence.

63. In *B and BNRHA*, the Information Commissioner identified five requirements, all of which must be established, to obtain protection in equity of allegedly confidential information as follows:

- a) It must be possible to specifically identify the information, in order to establish that it is secret, rather than generally available information.¹⁰
- b) The information in issue must have ‘the necessary quality of confidence’; ie, the information must not be trivial or useless information, and it must have a degree of secrecy sufficient for it to be the subject of an obligation of conscience.¹¹

⁹ At paragraphs 43 – 44.

¹⁰ At paragraphs 60 – 63.

- c) The information must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it.¹²
- d) Disclosure to the applicant for access would constitute an unauthorised use of the confidential information.¹³
- e) Disclosure would be likely to cause detriment to the confider of the confidential information.¹⁴

64. I will now consider each of these requirements in relation to the Matter in Issue.

Findings on the application of section 46(1)(a) of the FOI Act

Requirement a) – specifically identified information

65. To satisfy this requirement, it must be possible to identify with specificity, and not merely in global terms, that which is said to be the information in question. I have reviewed the Matter in Issue and am satisfied that:

- the relevant information is specifically identified in the Matter in Issue
- requirement a) is established.

Requirement b) – necessary quality of confidence

66. The Information Commissioner has previously identified the following matters as being relevant in determining whether information contains the necessary quality of confidence:¹⁵

- the basic requirement is inaccessibility
- it is not necessary to demonstrate absolute secrecy or inaccessibility
- secrecy may attach to a way in which publicly available information has been utilised
- the question of confidentiality is to be determined by reference to the substance of the information for which protection is sought, not by reference to an express marking of 'confidential' on a document
- confidentiality may be lost with the passage of time
- the confider's own attitude and conduct toward preserving the secrecy of allegedly confidential information may be relevant to whether it should properly be characterised as confidential information.

67. I have carefully considered the relevant Matter in Issue and am satisfied that:

- the relevant Matter in Issue is not commonly known or trivial and accordingly has the necessary quality of confidence
- requirement b) is established.

¹¹ At paragraphs 64 – 75.

¹² At paragraphs 76 – 102.

¹³ At paragraphs 103 – 106.

¹⁴ At paragraphs 107 – 118.

¹⁵ *B and BNRHA* at paragraph 71.

Requirement c) – information communicated in confidence

68. With respect to the third requirement, I must evaluate all the relevant circumstances concerning the communication of the information for indications as to whether conscionable conduct on the part of QH does, or does not require that the relevant Matter in Issue be treated in confidence. The Information Commissioner has previously indicated that the relevant circumstances to consider include, but are not limited to:¹⁶
- the nature of the relationship between the parties
 - the nature and sensitivity of the information
 - the purpose(s) for which the information was communicated
 - the nature and extent of any detriment to the interests of the information-supplier that would follow from an unauthorised disclosure of the information
 - the circumstances relating to the information's communication.
69. I also note QH's submission that as a health care provider, it treats information of this nature as confidential.
70. On the information available to me, I am satisfied that the relevant Matter in Issue:
- is highly sensitive information which was communicated solely for the purpose of assisting in the applicant's care and treatment at the Princess Alexander Hospital
 - was communicated on the condition that it would be kept confidential and would not be communicated to another person for any other purpose.
71. For these reasons, I am satisfied that:
- the relevant Matter in Issue was communicated in confidence
 - requirement c) is satisfied.

Requirement d) – unauthorised use

72. Based on the information provided by QH, I am satisfied that the third party who supplied information to QH strongly objects to its disclosure and accordingly, that requirement d) is satisfied.

Requirement e) – detriment

73. In *B and BNRHA*, the Information Commissioner stated that it was not necessary to establish that a threatened disclosure of confidential information would cause detriment in a financial sense, but that detriment could also include embarrassment, a loss of privacy, fear, or an indirect detriment, for example, that disclosure of the information may injure some relation or friend.¹⁷
74. I am satisfied that the supplier of the information would suffer detriment of one or more of the kinds mentioned above if the relevant Matter in Issue was revealed to anyone other than the person to whom it was supplied and that requirement e) is satisfied.

¹⁶ *B and BNRHA* at paragraphs 82 and 84.

¹⁷ At paragraph 111.

DECISION

75. For the reasons set out above, I am satisfied that the Matter in Issue is exempt from disclosure under sections 44(1) and 46(1)(a) of the FOI Act.
76. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

Assistant Commissioner Henry

Date: 21 December 2009