



Decision and Reasons for Decision

Application Number: 210148

Applicant: Ms J Beauchamp

Respondent: Department of the Premier and Cabinet

Decision Date: 10 October 2007

Catchwords: **FREEDOM OF INFORMATION – (Section 46(1) of the *Freedom of Information Act 1992 (Qld)* – matter communicated in confidence – whether information would found an action for breach of confidence – whether information communicated in confidence)**

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Reasons for Decision

Background

1. Ms J Beauchamp (**Applicant**) seeks review of the Department of the Premier and Cabinet's (**Department**) decision to refuse her access to 15 documents. These documents were submitted to the Queensland Health Systems Review (**Review Team**) in response to its request for submissions in relation to systemic issues within Queensland Health.
2. In a letter dated 30 August 2006, the Applicant applied to the Department for access to:
 1. *'..any submissions from Dental Associations, Medical Associations, and any Government Oral health Units and any Health Promotion units (any Australian State or Federal body or any private body) that relate to Oral health'*
 2. *'..documentation of the credentials of Mr. Peter Forster that were supplied to the Qld Govt on or prior to his appointment to the Review'*
 3. *'..documentation held by the Qld government of any links between Mr Forster (for example, paid or unpaid consultancy work) with any Australian Medical or Dental association or private health body prior to his appointment to the review'.*
3. By letter dated 14 November 2006, Ms Conway, Manager, Administrative Law Services of the Department, determined that:
 - there were 15 documents responsive to the first point of the Applicant's application to which the Applicant was denied access on the basis that the matter was communicated in confidence under section 46(1)(a) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) and therefore exempt from release
 - the Department did not have any documents relevant to the remaining points of the Applicant's application and as such, access was refused under section 28A of the FOI Act on the basis that the documents were either nonexistent or unable to be located.
4. By letter dated 15 November 2006, the Applicant sought internal review of Ms Conway's decision to deny her access to the 15 documents.
5. By letter dated 12 December 2006 Mr Keogh, the Department's A/Director, Constitutional and Administrative Law Services, affirmed Ms Conway's decision.
6. By letter dated 23 January 2007, the Applicant applied to this Office under Part 5 of the FOI Act for an external review of Mr Keogh's decision.

Steps taken in the external review process

7. Copies of the documents in issue were obtained and examined.
8. In making my decision in this matter, I have taken the following material into account:
 - the Applicant's letters dated 10 January 2007, 19 January 2007 (and attachments), 14 March 2007 (and attachment) and 24 September 2007; telephone conversations with officers of this Office on 29 January 2007, 22 February 2007 and 8 May 2007; and
 - the Department's emails dated 31 January 2007, 7 February 2007 and 6 March 2007; telephone conversations with officers of this Office on 31 January 2007, 7

February 2007, 8 February 2007, 21 February 2007, 6 March 2007, 8 March 2007, 26 April 2007 and 12 July 2007.

9. On 12 September 2007, I provided a preliminary view to the Applicant explaining that:
 - the Matter in Issue comprises matter communicated in confidence which is exempt from disclosure under either section 46(1)(a) or section 46(1)(b) of the FOI Act
 - in the event the Applicant did not accept the preliminary view, I invited her to provide any further submissions in support of her case for disclosure.
10. By letter received 25 September 2007, the Applicant provided this Office with further submissions for consideration in this external review and by inference indicated that she did not accept the preliminary view (**Further Submissions**).

Matter in issue

11. The Department identified 15 responsive documents, 2 of which were duplicates, leaving 13 relevant documents. After carefully considering these documents, I formed a preliminary view that the documents could be categorised in the following manner:
 1. 9 submissions lodged by individuals in a private capacity
 2. 3 submissions lodged by organisations
 3. 1 submission lodged by a group of individuals.
12. As 9 of the submissions identified by the Department were authored by individuals in a private capacity (thereby falling outside the scope of the Applicant's FOI request), I formed the preliminary view that only submissions falling into categories 2 and 3 comprised the matter in issue in this review.
13. In her Further Submissions, the Applicant advised that she:
 - wishes to limit her FOI request to only those submissions which consider oral health in association with water fluoridation
 - requires clarification as to whether the submission lodged by the group of individuals was made by an organisation.
14. As a consequence of the Applicant's request to limit her FOI application in the manner set out above, the matter remaining in issue comprises only 3 submissions, 2 of which were authored by organisations, the third being the submission authored by a group of individuals rather than an organisation (**Matter in Issue**).

Findings

15. The only matter remaining for determination in this review is whether the Matter in Issue qualifies for exemption under section 46(1) of the FOI Act.
16. Prior to examining section 46(1) of the FOI Act, it is necessary to determine whether the relevant documents are of a kind contemplated by section 46(2) of the FOI Act and to which section 46(1) of the FOI Act has no application.

Section 46(2) of the FOI Act

17. Section 46(2) of the FOI Act provides that:

46 Matter communicated in confidence

- ...
- (2) Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless it consists of information communicated by a person or body other than—
- (a) a person in the capacity of—
- (i) a Minister; or
 - (ii) a member of the staff of, or a consultant to, a Minister; or
 - (iii) an officer of an agency; or
- (b) the State or an agency.

18. As set out in this Office's FOI Concept: "Deliberative Process" (available at www.oic.qld.gov.au) a deliberative process:

- refers to the pre-decisional thinking processes of an agency
- tends to occur toward the end stage of a larger process *after information has been obtained from different sources.*

19. In this respect the Applicant submits in her Further Submissions that:

- "*great weight would have been placed on submissions from expert government personnel in the Public State System*" and that "*the gathered 'submission information' is likely pre-digested deliberations.*"
- due to the low number of submissions received, it is very likely that the actual deliberation would have been done by the Review Team.

20. On the information available to me, I am satisfied that:

- the Matter in Issue comprises the information gathered by the Review Team (by way of a voluntary call for submissions) prior to the relevant deliberative or pre-decisional thinking processes which the Review Team then undertook and which resulted in the formulation of the relevant terms of reference
- the application of section 46(1) is not excluded by section 46(2) of the FOI Act.

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

21. 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; ...*

22. The test for exemption under section 46(1)(a) of the FOI Act is considered by reference to a hypothetical legal action in which an identified plaintiff has standing to enforce an obligation of confidence in respect of the documents in issue (see *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (**Re "B"**) at paragraph 44. I am satisfied that the authors of the Matter in Issue have standing to bring an action for breach of confidence.

Contractual obligation of confidence

23. An obligation of confidence may arise, either expressly or impliedly, between the parties to a contract (see *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 (**Esso**)).

24. On the information available to me, I am satisfied that no express contractual obligation of confidence arises here. Therefore, the test for exemption under section 46(1)(a) must be evaluated in terms whether an equitable obligation of confidence arises.

Equitable obligation of confidence

25. To succeed in an equitable action for breach of confidential information, a plaintiff must establish that (see *Corrs Pavey v Collector of Customs* (1987) 74 ALR 428 (a decision concerning the Commonwealth equivalent to section 46(1)(a) of the FOI Act), at 437 per Gummow J):
- a) the information can be specifically identified
 - b) the information has the necessary quality of confidence
 - c) the information was communicated in confidence
 - d) there is actual or threatened misuse of the information

Requirement (a) – specific identification of the information

26. With respect to the first requirement, I am satisfied that the Matter in Issue can be specifically identified as that over which the Department claims an obligation of confidence.

Requirement (b) – necessary quality of confidence

27. With respect to the second requirement, the Information Commissioner explained that the following points are relevant to whether information contains the necessary quality of confidence for it to be the subject of a confidence in paragraph 71 of *Re “B”*:
- 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
 - 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.
28. In her FOI request and Further Submissions, the Applicant confirms that she does not seek information from, or about, private individuals. Rather, she seeks only submissions from recognised bodies, associations or government Departments with any identifying details removed.
29. In respect of the Matter in Issue, I note that while it refers to issues generally known to the public, those issues are dealt with in a highly detailed way including information about specific workplaces and individuals, the detail of which in my view, is not information in the public domain and which the Applicant confirms, in her Further Submissions, is not sought.

30. I also note that:

- while it is the usual practice of one of relevant organisations to make its submissions to government publicly available, it has not done so with this submission, which in my view indicates the high level of secrecy or confidentiality which the organisation attaches to its submission
- the connection of a person's identity with the imparting of information can itself be secret information capable of protection from disclosure: see *G v Day* (1982) 1 NSWLR 24; *Re "B"* at paragraph 137; *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at paragraphs 108-110; *Re McCann and Queensland Police Service* (1997) 4 QAR 30, at paragraph 28 (***Re McCann***).

31. After carefully considering all of the information available to me, I am satisfied that the Matter in Issue has the necessary quality of confidence or secrecy to satisfy the second requirement for exemption under section 46(1)(a) of the FOI Act.

Requirement (c) – were the submissions communicated in confidence

32. With respect to the third requirement, I must evaluate all the relevant circumstances including but not limited to:

- the nature of the relationship between the parties
- the nature and sensitivity of the information
- the circumstances relating to its communication, such as those referred to by a Full Court of the Federal Court of Australia in *Re Smith Kline and French Laboratories (Aust) Limited and Ors ats Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at paragraph 46 (see *Re "B"* at paragraph 82).

33. With respect to the request for submissions, I note that although the relevant print advertisement seeking submissions does not refer to confidentiality, it directs readers to the Review Team's website for further information for those interested in making a submission. The Review Team's website sets out the terms of reference for the review and invites submissions. Relevantly, it provides:

Individual submissions to the Review Team will be treated on a confidential basis. Individuals will not be identified in the Review's report on Queensland Health's systems.

The Review Team will respect the confidentiality of individuals; however, your submission should include some information about your relationship to Queensland Health's systems eg. Nurse employed by Queensland Health,...

34. Whilst the print advertisement made no undertaking as to confidentiality, it clearly refers readers to the relevant website which assures interested parties that their submissions will be received and treated on a confidential basis.

35. The Department submits that:

- the Matter in Issue contained information which is inherently confidential
- the information is secret and was never proposed to be made publicly available
- the print advertisement calling for submissions clearly stated that submissions to the Review Team would be treated on a confidential basis
- the authors of the submissions provided the information on the express understanding that the submissions would be treated confidentially and were accepted by the Review Team on that basis

- Mr Forster (**Consultant**) advised during third party consultation that there was a mutual expectation that all submissions would be treated confidentially
 - disclosure of the Matter in Issue would constitute an unauthorised use of the confidential information.
36. The Consultant submits that:
- the expectations of all involved were that the review would be objective, impartial and conducted independently of government Departments
 - *"I authorised advertisements inviting people to provide submissions to the review relevant to the terms of reference on the basis that these would be used only for the purpose of the review and would remain confidential"*
 - at the conclusion of review, material was returned to the Department *"for safekeeping in the context of the original confidentially provision given to those making submissions"*
 - *"[the Matter in Issue] remains confidential information collected only for the purposes of the review, and now entrusted to the Department for safekeeping..."*
37. On the information available to me, I am satisfied that the Consultant's submissions (in respect of his understanding of the confidentiality of the submissions and his recollection of how the Review Team treated the submissions) are consistent with both:
- the Department's submissions regarding confidentiality; and
 - the assurance given by the Review Team to interested parties via the relevant website.
38. The Applicant, in her Further Submissions, asks whether any of the authors of submissions requested in writing any further assurance of confidentiality in respect of their submissions. I am not aware of any written requests for an additional assurance of confidentiality. However, I am not satisfied that this impacts upon the question of whether the Matter in Issue was communicated in confidence.
39. In this respect, the Information Commissioner in *Re "B"* (at paragraph 91) noted that a marking of 'confidential' on a document (and by analogy a further express request that a submission be subject to an obligation of confidentiality) may merely indicate that the author of the document wished it to reach its intended recipient without being read by an intermediary (see *Wolsley and Department of Immigration* (1985) 7 ALD 270 at paragraph 12) rather than evidencing the existence of an actual obligation of confidence.
40. In her Further Submissions, the Applicant states that the assurance of confidentiality given by the Review Team on their website only applied to submissions from 'individuals' and not those made by organisations, associations or government agencies. After careful consideration of this submission, the submissions of the Department and Consultant (who were directly involved with the process) and the relevant statement on the website, I am satisfied that the correct interpretation of the word 'individual' in the statement *"Individual submissions to the Review Team will be treated on a confidential basis"* is that "Each submission to the Review Team will be treated on a confidential basis".
41. After carefully considering all of the information available to me, I am satisfied that the third element is satisfied as the Matter in Issue was:
- voluntarily communicated in confidence by third parties to the Review Team

- received by the Review Team on the basis of a mutual understanding of confidence (as set out on the relevant website and communicated by the Consultant and the Review Team to the authors).

Requirement (d) – would disclosure constitute an unauthorised use

42. On the information available to me as set out above, I am satisfied that:

- disclosure of the matter remaining in issue would constitute an unauthorised use of the information contained in it given that it was communicated in confidence
- this fourth element is satisfied.

Detriment

43. The Applicant asserts in her Further Submissions that “*Apparently the FOI Act is being made up as we proceed with an extra element of ‘detriment now being included in the consideration.’*” This is incorrect. I confirm that there is presently some judicial uncertainty as to whether this additional element is also required to be satisfied to establish an equitable obligation of confidence¹.

44. In any event, I am satisfied that public release of the Matter in Issue (which I have found to be subject to an equitable obligation of confidence) amounts to a detriment sufficient to satisfy the fifth element, if required.

45. As the elements of section 46(1)(a) of the FOI Act have been fulfilled, I am satisfied that the Matter in Issue is prima facie exempt from disclosure on the basis that its disclosure would found an action for breach of an equitable obligation of confidence.

Possible defences

46. In considering section 46(1)(a) of the FOI Act, it is appropriate to take into account any equitable defences that might be available to an action for breach of confidence (see *Re “B”*).

47. There are 2 relevant defences. One relates to information deemed “third party information” (that is, information provided by a third party to government), the other to information deemed “government information” (that is, information about government prepared by government).

Third party information

48. The defence relevant to third party information is only available where there is some evidence of illegal activity, breach of the law (including fraud) or serious misbehaviour.

49. On the information available to me, I am satisfied that:

¹ In *Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39 at 50–52 (Fairfax)*, Mason J, (citing *Coco v A N Clark (Engineers) Ltd [1969] RPC 41 (Coco)* as authority) broadly stated that to succeed in an action for breach of confidence a plaintiff must establish detriment. However, in *Coco*, Sir Robert Megarry J expressly questioned whether a plaintiff would be required to demonstrate detriment in all cases. In *NP Generations Pty Ltd v Fenely (2001) 80 SASR 151*, a decision of a Full Court of the Supreme Court of South Australia, Debelle J noted the anomaly between the decisions in *Fairfax* and *Coco* and observed that the decision in *Fairfax* may have to be reviewed (see also *National Roads and Motorists’ Association Ltd v Geeson (2001) 40 ACSR 1 (at 58)*).

- the 2 submissions lodged by organisations (which form part of the Matter in Issue) can be described as third party information
- the defence is not able to be established in the present circumstances as there is no evidence of any relevant illegal activity, breach of the law or serious misbehaviour.

50. Accordingly, I am of the view that the third party submissions (that is the 2 submissions lodged by organisations which form part of the Matter in Issue) are exempt from disclosure under section 46(1)(a) of the FOI Act as no defence is available to an action for breach of confidence in relation to them.

51. It is unnecessary for me to consider the issue of whether a defence is available in respect of the submission lodged by a group of individuals rather than an organisation (which also forms part of the Matter in Issue), given my findings in relation to the application of section 46(1)(b) of the FOI Act to that submission as set out below.

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

52. Section 46(1)(b) of the FOI Act provides:

46 Matter communicated in confidence

(1) *Matter is exempt if—*

...

(b) *it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*

53. As stated in *Re "B"* (at paragraphs 146-147) matter will be exempt under section 46(1)(b) of the FOI Act if:

- a) it consists of information of a confidential nature;
- b) it was communicated in confidence;
- c) its disclosure could reasonably be expected to prejudice the future supply of such information; and
- d) the weight of the public interest considerations favouring non-disclosure equals or outweighs that of the public interest considerations favouring disclosure.

Requirements (a) and (b)

54. As set out above, it is my view that:

- the submission lodged by a group of individuals (which forms part of the Matter in Issue) comprises detailed information about specific issues not in the public domain and which were communicated to the Department in confidence
- there was a common understanding between the authors of the submission, the Consultant and the Department as to the relevant obligation of confidentiality attaching to the information imparted
- requirements (a) and (b) are satisfied.

Requirement (c)

55. This requirement requires consideration of whether disclosure of the Matter in Issue could reasonably be expected to prejudice the future supply of information to the Department.
56. The meaning of the phrase "could reasonably be expected to" was examined at paragraphs 154-160 in *Re "B"* as requiring the decision-maker applying section 46(1)(b) of the FOI Act to discriminate between:
- unreasonable expectations and reasonable expectations
 - what is merely possible and expectations which are reasonably based, that is, expectations for the occurrence of which real and substantial grounds exist.
57. In my view, the current circumstances are analogous to situations where persons voluntarily submit information to assist investigations. For example, in *Re McCann*; (1997) 4 QAR 30, the Information Commissioner stated (at paragraph 73) that:
- the co-operation by members of the community with investigators, through the supply of relevant information, is essential to successful enforcement of the law
 - there is little doubt that members of the community who choose to co-operate may suffer inconvenience, imposition on their time and anxiety at possible harassment or retributive action if their identity or the information provided was disclosed to the public
 - disclosure could prejudice the future supply of such information from a substantial number of sources on the basis of reluctance to participate or co-operate in future investigations.
58. I note that in the present case, a call was made for voluntary submissions in order to:
- understand the concerns of community members/employees/organisations on a range of issues
 - determine the relevant terms of reference.
59. On the information available to me, it is my view that:
- disclosure of the submission lodged by a group of individuals (rather than an organisation) could reasonably be expected to lessen the quantity, quality and depth of information received in future as people may fear identification or reprimand
 - this will be particularly relevant to input from government employees, who in my view would be less likely to be forthcoming or descriptive about their concerns, particularly in relation to their own specific workplace, if an obligation of confidence did not attach to their submissions
 - disclosure by the Department of information which was imparted on an understanding (and with a specific assurance) that it would remain confidential, could reasonably be expected to discourage the future supply of such information.
 - requirement (c) is satisfied.

Requirement (d) - the weight of the public interest considerations favouring non-disclosure equals or outweighs that of the public interest considerations favouring disclosure

60. I have carefully considered the Applicant's submissions in respect of public interest considerations favouring disclosure of the Matter in Issue, including but not limited to:
- issues related to fluoridation of the water supply and changes to government water policy affect every member of the community
 - validation, accountability and transparency of government require disclosure of submissions dealing with these issues.
61. Against these considerations favouring disclosure, I must balance considerations favouring non-disclosure of the submission lodged by the group of individuals including that:
- disclosure of the submission could reasonably be expected to lessen the quantity, quality and depth of information received in future as people may fear identification or reprimand
 - disclosure by the Department of information which was imparted on an understanding (and with a specific assurance) that it would remain confidential, could reasonably be expected to discourage the future supply of such information
 - the public interest in maintaining the secrecy of confidential information provided to government.
62. After carefully considering each of the considerations set out above, I am satisfied that:
- the weight of the public interest considerations favouring non-disclosure outweighs that of the public interest considerations favouring disclosure
 - requirement (d) is satisfied.
63. On this basis I am satisfied that the submission lodged by a group of individuals qualifies for exemption from disclosure under section 46(1)(b) of the FOI Act.

Conclusion

64. I am satisfied that the Matter in Issue is exempt from disclosure under section 46(1) of the FOI Act. More specifically that:
- the 2 submissions lodged by organisations are exempt from disclosure under section 46(1)(a) of the FOI Act as their disclosure would found an action for breach of an equitable obligation of confidence
 - the submission lodged by a group of individuals is exempt from disclosure under section 46(1)(b) of the FOI Act as it consists of information of a confidential nature that was communicated in confidence to the Department and the disclosure of which:
 - could reasonably be expected to prejudice the future supply of such information
 - on balance, is not in the public interest.

Decision

65. I vary the decision under review (being the decision made by Mr Keogh on 12 December 2006 on behalf of the Department) by deciding that the Matter in Issue is exempt from disclosure under section 46(1) of the FOI Act.
66. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

F Henry
Assistant Commissioner

Date: 10 October 2007