



## Decision and Reasons for Decision

---

**Application Number:** 210496

**Applicant:** DTI

**Respondent:** Department of Health

**Decision Date:** 24 April 2009

**Catchwords:** **FREEDOM OF INFORMATION – section 44(1) of the *Freedom of Information Act 1992 (Qld)* – personal affairs – public interest – section 42(1)(b) of the *Freedom of Information Act 1992 (Qld)* – confidential source – *Mental Health Act 2000 (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 .....	5
Findings .....	5
Section 44(1) of the FOI Act .....	6
Relevant Law.....	6
Submissions of participants .....	7
Findings of fact and application of section 44(1) of the FOI Act .....	9
Summary - application of section 44(1) of the FOI Act .....	14
Section 42(1)(b) of the FOI Act.....	15
Relevant Law.....	15
Submissions of participants .....	15
Findings of fact and application of section 42(1)(b) of the FOI Act.....	16
Summary - application of section 42(1)(b) of the FOI Act.....	18
DECISION .....	18

## REASONS FOR DECISION

### Summary

1. On the basis of the following reasons for decision, I am satisfied that the:
  - Category A Matter is exempt from disclosure under section 44(1) of the *Freedom of Information Act 1992 (FOI Act)*
  - Category B Matter is exempt from disclosure under section 42(1)(b) of the FOI Act.

### Background

2. By application dated 20 February 2008, the applicant applied to the Department of Health, known as Queensland Health (**Queensland Health**) for:

*... all the information on all documents in the possession of, or under the control of, the Mental Health Unit at Chermside and the Hospital at Chermside, where any of that information relates to my personal affairs.*

*Aspley Community Centre, Zillmere Road*

*...*

*The responsive documents should include all recordings of pages from my website [...] that have been copied by officers of the Mental Health Unit at Chermside and the Hospital at Chermside. This will include pages retained in the cache of the Mental Health Unit at Chermside and the Hospital at Chermside computers, or computers.*

3. Following further correspondence and discussions between the applicant and Queensland Health, the applicant's freedom of information (**FOI Application**) was amended to relate essentially to:
  - all the applicant's medical records held at Aspley Community Mental Health Service
  - the Prince Charles Hospital Mental Health records since the last release on 12 March 2007.
4. By letter dated 31 March 2008 (**Original Decision**), Ms Joy Reilly advised the applicant that:
  - she had located 584 documents which related to the applicant's FOI Application
  - she had decided that:
    - 59 pages contained matter which was exempt from disclosure under section 46(1)(b) of the FOI Act
    - 42 pages contained matter which was exempt from disclosure under section 44(1) of the FOI Act
    - 2 pages contained matter, part of which was exempt under section 44(1) of the FOI Act, and part of which was exempt under section 46(1)(b) of the FOI Act.

Copies of the 584 documents, with exempt matter deleted, were provided to the applicant with Ms Reilly's decision.

5. By letter dated 3 April 2008, the applicant applied for internal review of the Original Decision (**Internal Review Application**).
6. By letter dated 16 April 2008 (**Internal Review Decision**), Ms Mary Montgomery advised the applicant of her decision to affirm the Original Decision.
7. By letter received by the Office of the Information Commissioner (**Office**) on 29 April 2008, the applicant applied for an external review of the Internal Review Decision (**External Review Application**).

#### **Decision under review**

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

#### **Steps taken in the external review process**

9. Copies of the matter in issue were reviewed by the Office.
10. During a telephone conversation with the applicant on 1 July 2008, a staff member of the Office clarified procedural matters raised in an email received from the applicant dated 29 June 2008. During that conversation and a later telephone conversation on 3 July 2008, the applicant provided further information about the applicant's reasons for seeking access to the matter in issue.
11. On 7 July 2008, the Office received an email from the applicant raising various issues relating to the government and the administration of the health system in Queensland. In response, the Office wrote to the applicant to clarify the role of the Office in conducting external reviews.
12. A preliminary view was formed relating to the majority of the matter in issue. By letter dated 11 December 2008, I wrote to Queensland Health to:
  - obtain further information regarding the basis on which Queensland Health considered some of the matter in issue qualified for exemption from disclosure under the FOI Act
  - identify a small number of instances where my preliminary view varied from the decision under review
  - identify a small amount of matter which in my preliminary view, did not qualify for exemption under either section 44(1) or section 46(1)(b) of the FOI Act.
13. Queensland Health responded to my letter of 11 December 2008, providing confidential submissions by letter dated 21 January 2009.

I note that as those submissions (and the submissions referred to in paragraph 17) discussed matter claimed to qualify for exemption in detail, copies were not provided to the applicant. I am satisfied that the applicant has been given sufficient opportunity to provide submissions relating to the application of sections of the FOI Act to the matter in issue, during the course of this review.

14. During telephone conversations with Queensland Health on 13 February 2009 and 18 February 2009, a staff member of the Office clarified matters relating to exemption provisions claimed over some of the documents in issue in this review.

15. During a telephone conversation with a staff member of the Office on 20 February 2009, the applicant provided further submissions relating to this review.
16. By letter dated 13 March 2009, I provided a preliminary view to Queensland Health that some of the matter in issue in a small number of documents did not qualify for exemption from disclosure under the FOI Act.
17. By letter dated 27 March 2009, Queensland Health provided submissions in response to my letter of 13 March 2009.
18. By letter dated 3 April 2009, I provided a preliminary view to the applicant that:
  - the Category A Matter is exempt from disclosure under section 44(1) of the FOI Act
  - the Category B Matter is exempt from disclosure under section 42(1)(b) of the FOI Act.

In that letter, I also notified the applicant that as a result of discussions with the Office, Queensland Health had indicated that it no longer claimed parts of the matter in issue were exempt from disclosure under the FOI Act.

19. By letter dated 6 April 2009, I wrote to Queensland Health to confirm those parts of the matter in issue which Queensland Health no longer claimed were exempt from disclosure under the FOI Act, and to request that matter be released to the applicant.
20. During a telephone conversation with a staff member of the Office on 14 April 2009, the applicant indicated that he intended to prepare a summons to require the Office to produce documents in the Sandgate Magistrates Court in relation to proceedings on 28 April 2009. The applicant also provided verbal submissions to support his view that the matter in issue should be released to him, during that conversation and a later conversation on 17 April 2009.
21. By email dated 17 April 2009, the applicant provided written submissions in response to the preliminary view.
22. On 21 April 2009, the applicant delivered a summons requiring the Office to produce documents to the Sandgate Magistrates Court at 9am on 24 April 2009 (**Summons**).
23. Following discussions between a staff member of the Office and the Registrar of the Sandgate Magistrates Court, the Office provided a letter to the Court on 21 April 2009 (by email and post), setting out provisions of the FOI Act that related to:
  - the Office's obligations to ensure non-disclosure of exempt matter
  - section 99A of the FOI Act which provides that the Office can not be compelled to produce 'FOI documents' in third party proceedings.

A copy of that letter was also provided to the applicant on 21 April 2009 (by email and post).

24. 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

- email correspondence received from the applicant dated 29 June 2008 and 7 July 2008
- files notes of telephone conversations with the applicant on 1 July 2008, 3 July 2008, 20 February 2009, 14 April 2009 and 17 April 2009
- written submissions received from Queensland Health dated 21 January 2009 and 27 March 2009
- written submissions received from the applicant on 17 April 2009
- relevant information contained in the Summons
- the matter in issue
- the provisions of the FOI Act and *Mental Health Act 2000* as set out in this decision
- case law and previous decisions of the Office as referred to in this decision.

### Matter in issue

25. As a result of discussions with the Office during the course of this review, Queensland Health indicated that it no longer claimed parts of the matter in issue were exempt from disclosure under the FOI Act. Accordingly, that matter is no longer in issue in this review.
26. The matter remaining in issue in this review therefore consists of the following:

Record	Documents
Prince Charles Hospital medical record	<ul style="list-style-type: none"> <li>• part of document 31</li> </ul>
Aspley Community Mental Health Service medical record (volume 1)	<ul style="list-style-type: none"> <li>• parts of documents 7, 8, 9, 16, 19, 21, 24, 25, 41, 43, 44, 64, 69, 70, 77, 81, 113, 197 and 241</li> <li>• all of documents 10, 17, 26, 42, 106 - 109</li> </ul>
Aspley Community Mental Health Service medical record (volume 2)	<ul style="list-style-type: none"> <li>• part of documents 5, 6, 8, 10, 11, 13, 14, 16, 17, 23, 25, 26, 29, 30, 31, 38, 52, 53, 56, 58, 59, 63, 64, 75, 147, 149, 157, 168, 179, 182, 190, 196, 203, 241 and 243</li> <li>• all of documents 12, 18, 19, 127 – 133, 169 – 172, 184, 195, 197 - 201 and 204 – 217.</li> </ul>

27. The matter in issue consists of information contained in file notes, emails, and other documents created by, and/or communicated to, Queensland Health staff.

### Findings

28. Under section 21 of the FOI Act, a person has a legally enforceable right to be given access 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, section 28 of the FOI Act, which provides that an agency may refuse access to exempt matter or an exempt document, and the provisions of Part 3, Division 2 of the FOI Act, which set out those exemption provisions.
29. In the Internal Review Decision, Queensland Health refused access to the matter in issue under either section 44(1) or 46(1)(b) of the FOI Act. During the course of this review, Queensland Health provided submissions that some of the matter in issue was exempt under section 42(1)(b) of the FOI Act (and other provisions of the FOI Act).

30. As set out below, I am satisfied that the matter remaining in issue is exempt under either section 44(1) or 42(1)(b) of the FOI Act. Accordingly, it has not been necessary for me to consider the application of section 46(1)(b) (or other provisions) of the FOI Act to the matter in issue.
31. I also note that while I have confined my analysis to the operation of sections 44(1) and 42(1)(b) of the FOI Act to the Category A Matter and Category B Matter respectively, I consider that much of the matter in issue qualifies for exemption under both sections 44(1) and 42(1)(b) of the FOI Act.

## Section 44(1) of the FOI Act

### **Relevant Law**

32. Section 44(1) of the FOI Act 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.*

...

33. 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**

34. In *Stewart and Department of Transport (Stewart)*<sup>1</sup> 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:
- family and marital relationships
  - health or ill-health
  - relationships and emotional ties with other people
  - domestic responsibilities or financial obligations.

---

<sup>1</sup> (1993) 1 QAR 227. See in particular paragraphs 79 – 114.

35. 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.
36. 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 individual<sup>2</sup>
  - information, such as a person's name, must be characterised according to the context in which it appears.<sup>3</sup>

### **Public Interest Question**

37. 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 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.
38. In *Fox and Department of Police*,<sup>4</sup> 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.*

### **Submissions of participants**

#### **Queensland Health's submissions**

39. In summary, Queensland Health submits in relation to the application of section 44(1) of the FOI Act:<sup>5</sup>
- portions of the matter in issue relate to the personal affairs of others and information provided in confidence
  - persons to whom the entries relate have not provided authority for information to be released
  - while there may be some weight to the importance of the applicant being provided with the records, there is a much greater weight in the privacy of information relating to others

---

<sup>2</sup> At paragraph 81.

<sup>3</sup> At paragraph 90. See also paragraphs 21 – 23 of *Pearce and Queensland Rural Adjustment Authority; Various Landowners (Third Party)* (1999) 5 QAR 242.

<sup>4</sup> (2001) 6 QAR 1 at paragraph 19.

<sup>5</sup> In the Original Decision, Internal Review Decision and submissions provided in the course of the review.

- there are no identifiable public interest considerations favouring release of the personal affairs information of others which are sufficient to override the privacy interests of others.

### **Applicant's submissions**

40. I have considered the applicant's submissions in the External Review Application and correspondence to the Office, and those provided verbally during telephone conversations with a staff member of the Office.

41. In the applicant's External Review Application, the applicant stated:

*There have been comments made about me by others and these comments have been used to make a diagnosis. I have not been given the opportunity to dispute those comments. For procedural fairness I should be allowed to answer the accusations made by others against me. When others made those accusations they put them onto the record against me and therefore any privacy given to those accusations, that are being used to make a diagnosis, should have been lost by the very nature of those accusations etc.*

*Maligning and malice should not be protected under the FOI legislation. Accusations that malign and have malice in them should not be protected under FOI. There must be an opportunity for me to answer the accusations and malice.*

42. In an email to the Office on 29 June 2008, the applicant stated:

*... I am no longer on an ITO as I won at the Mental Health Review Tribunal and beat the Psychiatrists ...*

43. During a telephone conversation with a staff member of the Office on 1 July 2008, the applicant again reiterated that the Involuntary Treatment Order (ITO) had been revoked, and during a later conversation on 3 July 2008, indicated that he had received the reasons for decision from the Mental Health Review Tribunal. He said that those reasons for decision demonstrated that the psychiatrist who had placed him on the ITO had done so for an improper purpose.

44. During a telephone conversation with a staff member of the Office on 14 April 2009, the applicant also submitted that he required the matter in issue for harassment and defamation proceedings in the Sandgate Magistrates Court on 28 April 2009.

45. In his email dated 17 April 2009, the applicant submitted the following:

***I rely on the principles of Natural Justice, the right of a person to be able to contest the 'evidence' against them. Since the diagnosis was made on the 'collateral history' then being able to contest the diagnosis requires that I have access to that 'collateral history.'***

*Dr Richardson said under oath that the diagnosis that I had a delusional disorder was made on collateral history. When pressed he went further to admit that the diagnosis was made on what the Prince Charles Hospital Treating Team was told by others.*

*I know who provided the 'collateral history' ... so the argument that you will be keeping their identity from me goes nowhere.*

*Further more, I do not know the extent but do know the nature of that collateral history ...*



The applicant then went on to describe the nature of the claims he believed had been made, and to state his position in relation to these claims. He then stated:

*At no time was I or have I been allowed to contest the 'information' that was used to base my diagnosis on and that resulted in me being imprisoned for 38 days and drugged and caused great harm for another 9 months or more.*

*... It is essential that Government Administration cannot be conducted behind closed doors and must be accountable for their decisions. Because all this 'information' has been kept secret and cannot be contested I stand stigmatised as mentally ill with the possibility that a complaint (fabricated, invented, - it doesn't matter) that suggests that I threatened my sister would have me locked up again permanently.*

*When my mother dies I can expect a large number of accusations to be made to Mental Health, which on past history, will be believed, and I will again be imprisoned and tortured.*

*The treatment I received has many side effects some being permanent and it is also known to kill off brain cells.*

*You too would be in fear of Psychiatrists and the Mental Health System if you had suffered as they made me suffer. This matter must be cleared up, I must be given the 'collateral history' so I can contest it and answer the accusations made in it.*

46. With his email of 17 April 2009, the applicant also provided extracts (pages 64, 65 and 68) from a transcript of proceedings in the Mental Health Court in 2008, in which it appears the applicant appealed a decision of the Mental Health Review Tribunal. The applicant highlighted specific parts of these pages to support his position that Queensland Health staff based their diagnosis of him on information supplied by others.
47. In summary, the applicant submits that:
- information provided by others has been used to diagnose and treat the applicant
  - the information is malicious
  - Queensland Health made an incorrect diagnosis for an improper purpose on the basis of the information
  - because the information has not been provided to him, he has not had an opportunity to know the case against him, or respond to that information
  - in the interests of procedural fairness, the applicant should be allowed to respond to the information provided by others
  - the government must be accountable for its decisions
  - the applicant requires that information for court proceedings.

### ***Findings of fact and application of section 44(1) of the FOI Act***

#### **Personal Affairs Question**

48. I have examined the matter in issue in this review and I am satisfied that some of the matter in issue is information which concerns the personal affairs of persons other than the applicant. I have referred to that matter as Category A Matter.
49. In respect of the Category A Matter, I am also satisfied that:

- some of the matter concerns both the applicant's personal affairs, and the personal affairs of others and is properly to be characterised as concerning the 'shared personal affairs' of the applicant and others
- applying the principles in *B and Brisbane North Regional Health Authority*<sup>6</sup> to the Category A Matter, the matter in issue concerning the applicant's personal affairs is inextricably intertwined with information concerning the personal affairs of other persons, such that it is prima facie exempt under section 44(1) of the FOI Act, subject to the application of the public interest balancing test.

50. The Category A Matter is set out in the following table:

<b>Record</b>	<b>Documents</b>
Prince Charles Hospital medical record	<ul style="list-style-type: none"> <li>• part of document 31</li> </ul>
Aspley Community Mental Health Service medical record (volume 1)	<ul style="list-style-type: none"> <li>• part of documents 7, 19, 77, 81, 197 and 241</li> </ul>
Aspley Community Mental Health Service medical record (volume 2)	<ul style="list-style-type: none"> <li>• part of documents 10, 13, 14, 16, 17, 19, 23, 25, 26, 29, 30, 31, 38, 52, 53, 56, 58, 59, 63, 64, 75, 157, 168, 179, 182, 190, 196, 203, 241 and 243</li> <li>• all of documents 127 – 133, 169 – 172.</li> </ul>

### **Public Interest Question**

51. Because I am satisfied that the Category A Matter concerns the personal affairs of others, section 44(1) of the FOI Act requires that I must consider whether there are sufficient public interest considerations favouring disclosure of the Category A Matter to outweigh the public interest considerations favouring non-disclosure of the Category A Matter.

### ***Public interest arguments favouring disclosure***

52. I have interpreted the relevant parts of the applicant's submissions as falling into the following public interest considerations favouring disclosure of the matter in issue:

- given the information concerns the applicant to such a degree, this gives rise to a justifiable 'need to know'<sup>7</sup>
- disclosure of information about how government functions are conducted can enhance the accountability of agencies in the performance of their functions
- the right to pursue a legal remedy.

### **The applicant's 'justifiable need to know'**

53. I recognise that there is a public interest favouring disclosure in persons being able to access information relating to their medical treatment.<sup>8</sup>

<sup>6</sup> (1994) 1 QAR 279 at paragraph 176.

<sup>7</sup> See *Pemberton and The University of Queensland* (1994) 2 QAR 293, paragraphs 164 – 193.

54. I also recognise a public interest in a particular person having access to certain information because that information affects or concerns them to such a degree as to give rise to a justifiable 'need to know' which is more compelling than for other members of the public.
55. Additionally, I acknowledge the public interest in an individual having access to information concerning that individual's personal affairs. This is recognised in section 6 of the FOI Act, which provides:

**6 Matter relating to personal affairs of applicant**

*If an application for access to a document is made under this Act, the fact that the document contains matter relating to the personal affairs of the applicant is an element to be taken into account in deciding—*

- (a) *whether it is in the public interest to grant access to the applicant; and*  
(b) *the effect that the disclosure of the matter might have.*

56. Section 6 of the FOI Act therefore requires the decision-maker to give particular consideration to matter relating to the personal affairs of the applicant when considering the public interest.
57. In this review, disclosure of the Category A Matter to the applicant would, in some cases, disclose information concerning the applicant's personal affairs.<sup>9</sup> However, such disclosure would also necessarily disclose information concerning the personal affairs of others. Accordingly, the public interest in the applicant having access to matter constituting information concerning the applicant's personal affairs must be balanced against the public interest in the protection of personal privacy (which is discussed below).
58. I am satisfied that some weight can be given to this public interest consideration, however the weight is reduced because the matter in issue concerns the personal affairs of others, as well as the applicant.<sup>10</sup>

**Accountability of government**

59. The Information Commissioner has previously accepted that there is a legitimate public interest in the accountability of public hospitals for the provision of medical services in accordance with proper professional standards, and for timely and cost-effective service delivery.<sup>11</sup>
60. I also recognise that there is a public interest in members of the community being given ways of ensuring the accuracy of information held by government, and the public interest in enhancing the accountability of Queensland Health with respect to the treatment it provides to patients.

---

<sup>8</sup> Although this is qualified to an extent by section 44(3) of the FOI Act, which recognises that there may be instances where disclosure to the applicant of information of a health care nature concerning an applicant may be prejudicial to the applicant's physical or mental health or well-being.

<sup>9</sup> Which is a factor to be taken into account in considering the effect that disclosure of the matter might have (section 6(b) of the FOI Act).

<sup>10</sup> In drawing this conclusion I have followed the reasoning in previous decisions of this Office. In particular, see *KBN and Department of Families, Youth and Community Care* (1998) 4 QAR 422, at paragraph 58.

<sup>11</sup> *Summers and Department of Health; Hintz (Third Party)* (1997) 3 QAR 479 at paragraph 27.

61. In the present case, the following factors favour disclosing the matter in issue:
- some of the information in issue concerns the applicant's personal affairs
  - the applicant's interest in obtaining access to the information in issue is more compelling than for other members of the public
  - the applicant provided evidence that Queensland Health considered information provided by others in assessing and treating the applicant
  - Queensland Health is accountable for the treatment it provides to patients.
62. However, I note that:
- the *Mental Health Act 2000 (MHA)* contains:
    - provisions which require an ITO to be reviewed on a regular basis by the Mental Health Review Tribunal (**MHRT**)<sup>12</sup>
    - an avenue of appeal to the Mental Health Court from decisions of the MHRT<sup>13</sup>
  - the applicant has provided information that demonstrates that:
    - the ITO was subject to review in the MHRT and he received 'reasons for decision' from the MHRT
    - he pursued appeal avenues in the Mental Health Court.
63. While there is a general public interest in ensuring the accuracy of information held by government, and in enhancing the accountability of Queensland Health with respect to the treatment it provides to patients, I note that in this case, Queensland Health has already been subject to a process of accountability in relation to information obtained and relied upon by Queensland Health, and the treatment of the applicant, through the review and appeal processes available under the MHA.
64. In addition, I note that the MHA contains provisions intended to provide a safeguard to people who are subject to involuntary assessment and treatment under the MHA as a consequence of others having knowingly provided 'false or misleading' material about them.<sup>14</sup>
65. I also note that:
- a significant amount of information contained in the medical records has been released to the applicant through the freedom of information process
  - the public interest in the accountability of government has been substantially discharged through the release of that information
  - disclosing the particular information in issue would not significantly further Queensland Health discharging this public interest consideration.
66. Accordingly, in this case, the public interest consideration in the accountability of government can be given only a little weight.

### **Right to pursue a legal remedy**

67. In an appropriate case, there may be a public interest in a person who has suffered an actionable wrong being permitted to access information which would assist them to pursue a remedy which the law affords in those circumstances.

---

<sup>12</sup> See MHA, chapter 6.

<sup>13</sup> See MHA, chapter 8.

<sup>14</sup> See for instance, section 522 of the MHA relating to false and misleading documents.

68. The mere assertion by an applicant that information is required to enable pursuit of a legal remedy will not be sufficient to give rise to a public interest consideration that ought to be taken into account. As set out in *Willsford and Brisbane City Council (Willsford)*,<sup>15</sup> it should be sufficient to establish this public interest consideration, if an applicant can demonstrate that:
- loss or damage or some kind of wrong has been suffered, in respect of which a remedy is, or may be, available under the law
  - the applicant has a reasonable basis for seeking to pursue the remedy
  - disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available, or worth pursuing.
69. The existence of a public interest consideration of this kind represents one consideration to be taken into account in the weighing process along with any other relevant public interest considerations.
70. During a telephone conversation with a staff member of the Office on 14 April 2009, the applicant submitted that he requires the matter in issue in relation to harassment and defamation proceedings which are being brought against him in the Sandgate Magistrates Court. Later, on 21 April 2009, the Office received the Summons which related to a breach of an order made under the *Domestic and Family Violence Protection Act 1989*. The applicant is the defendant in those proceedings.
71. While it is evident from the Summons that the applicant is involved in legal proceedings:
- I have no evidence available to me to suggest that disclosure of the matter in issue would assist the applicant to pursue a defence or evaluate whether a remedy/defence is available in relation to this type of legal proceeding
  - I am not satisfied that the test in *Willsford* has otherwise been met.
72. Accordingly, in this case, no weight can be given to the public interest consideration in a right to pursue a legal remedy.

***Public interest arguments favouring non-disclosure***

73. In relation to the Category A Matter, 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 persons other than the applicant (**Privacy Interest**)
  - the public interest in safeguarding the flow of information to agencies (**Flow of Information**).

**Privacy Interest**

74. As indicated above, there is an inherent public interest in protecting personal privacy if the matter in issue concerns the personal affairs of person/s other than the applicant.

---

<sup>15</sup> (1996) 3 QAR 368 at paragraphs 16 – 18.

An appropriate weight must be allocated to that interest, having regard to the character and significance of the particular matter in issue.<sup>16</sup>

75. I am satisfied that there is a strong public interest in protecting information about the health and other personal affairs information of third parties from being disclosed. I note that previous decisions of the Information Commissioner have identified a strong privacy interest in a person's health information.<sup>17</sup>
76. Accordingly, I am satisfied that the weight to be given to the public interest in protecting the privacy of others, having regard to the nature of the Category A Matter, is relatively high.

### **Flow of information**

77. Disclosure of the Category A Matter could reasonably be expected to identify persons who have provided information to Queensland Health. Government agencies such as Queensland Health discharge important functions on behalf of the community and in discharging those functions, they frequently rely on information provided by members of the community. As was stated in *Kinder and Department of Housing*:<sup>18</sup>

*Those essential public interests include ensuring that government agencies do not suffer any unwarranted hindrance to their ability to perform their important functions for the benefit of the wider Queensland community, as a result of any unwarranted inhibition on the supply of information from citizens, on whose co-operation and assistance government agencies frequently depend.*

78. It is reasonable to conclude that persons may be reluctant to provide information of the type comprising the matter in issue and on which Queensland Health relies in discharging its functions in the future if they are aware that their identity will be disclosed to the subject of the information.
79. I am therefore satisfied that the weight to be given to this public interest consideration in relation to the Category A Matter is relatively high.

### **Summary - application of section 44(1) of the FOI Act**

80. I have weighed the public interest arguments in favour of disclosure against the public interest arguments favouring non-disclosure.
81. I acknowledge that there are public interest arguments which favour disclosure of the matter in issue, including that some of the Category A Matter relates to the applicant and the accountability of Queensland Health for the performance of its functions. I am satisfied however that those public interest considerations favouring disclosure are not sufficient to outweigh the public interest considerations which favour non-disclosure, including the relatively high weight of the privacy interest in protecting the personal affairs information of third parties, and the flow of that information to government.
82. I am therefore satisfied that:

---

<sup>16</sup> *Lower Burdekin Newspaper Company Pty Ltd and Burdekin Shire Council; Hansen, Covolo and Cross (Third Parties)* (2004) 6 QAR 328 at paragraph 23.

<sup>17</sup> See, for example, *Summers and Department of Health; Hintz (Third Party)* (1997) 3 QAR 479.

<sup>18</sup> (Unreported, 12 March 2002) at paragraph 31.

- the Category A Matter concerns the personal affairs of persons other than the applicant
- the public interest favours non-disclosure of the Category A Matter.

## Section 42(1)(b) of the FOI Act

### **Relevant Law**

83. Section 42(1)(b) of the FOI Act provides:

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

*Matter is exempt matter if its disclosure could reasonably be expected to –*

...

*(b) enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained; or*

...

84. The following requirements must be satisfied in order to establish that information is exempt under this provision:<sup>19</sup>

- a confidential source of information must exist
- the information the confidential source has supplied (or is intended to supply) must relate to the enforcement or administration of the law; and
- disclosure of the information in issue could reasonably be expected to –
  - enable the existence of a confidential source of information to be ascertained; or
  - enable the identity of the confidential source of information to be ascertained.

85. A confidential source of information, for the purposes of section 42(1)(b) of the FOI Act, is a person who supplies information on the understanding, express or implied, that his or her identity will remain confidential.<sup>20</sup> I also note that the identity of a confidential source of information may pass through a chain of persons without losing its confidential status, provided the persons who receive it are obliged to respect the understanding of confidentiality.<sup>21</sup>

86. The phrase 'could reasonably be expected to' in this context requires a consideration of whether the expectation that disclosure of the Category B Matter will either disclose the existence or identity of a confidential source of information, is reasonably based.<sup>22</sup>

### **Submissions of participants**

#### **Queensland Health's submissions**

87. In summary, Queensland Health submits<sup>23</sup> in relation to the application of section 42(1)(b) of the FOI Act:

---

<sup>19</sup> See *McEniery and Medical Board of Queensland* (1994) 1 QAR 349 (**McEniery**) at paragraph 16.

<sup>20</sup> See *McEniery* at paragraphs 20-21.

<sup>21</sup> *McEniery* at paragraph 34.

<sup>22</sup> See *Attorney-General v Cockcroft* (1986) 10 FCR 180.

<sup>23</sup> In its submissions provided to this Office dated 21 January 2009 and 27 March 2009.

- person/s who provided information to Queensland Health meet the definition of a 'confidential source of information in relation to the enforcement or administration of the law'
- the law being administered is the MHA (in particular, the provisions in chapter 4, part 1 regarding involuntary treatment orders).

### **Applicant's submissions**

88. In his email dated 17 April 2009, the applicant submitted:

*I know who provided the 'collateral history' ... so the argument that you will be keeping their identity from me goes nowhere.*

### **Findings of fact and application of section 42(1)(b) of the FOI Act**

89. I have considered the application of section 42(1)(b) of the FOI Act to the matter remaining in issue, referred to as the Category B Matter.

<b>Record</b>	<b>Documents</b>
Aspley Community Mental Health Service medical record (volume 1)	<ul style="list-style-type: none"> <li>• parts of documents 8, 9, 16, 21, 24, 25, 41, 43, 44, 64, 69, 70 and 113</li> <li>• all of documents 10, 17, 26, 42, 106 - 109</li> </ul>
Aspley Community Mental Health Service medical record (volume 2)	<ul style="list-style-type: none"> <li>• part of documents 5, 6, 8, 11, 13, 19, 147 and 149</li> <li>• all of documents 12, 18, 184, 195, 197 - 201 and 204 - 217.</li> </ul>

### **Confidential source**

90. Having examined the Category B Matter, I am satisfied that there is evidence from the Category B Matter that there was a common understanding that the source of information in each case would be kept confidential.

91. The relevant factors which demonstrate this understanding exists include:

- the nature of the information conveyed
- written evidence (in some cases) of an express assurance that information provided by a source would be kept confidential
- that it could reasonably have been understood in each case, by the source of information and the recipient, that appropriate action could be taken in respect of the information conveyed while still preserving the confidentiality of its source.<sup>24</sup>

92. Given the sensitive nature of the information conveyed and the circumstances in which it was provided, I am satisfied that it was reasonable for the source in each instance to expect that Queensland Health would keep their identity confidential.

93. Accordingly, I am satisfied that:

- a confidential source of information exists in each case

<sup>24</sup> A further discussion of factors which may be relevant can be found at paragraph 50 of *McEnery*.



- the first requirement for exemption under section 42(1)(b) of the FOI Act has been met.

### **Enforcement or administration of the law**

94. Queensland Health submits that the law being enforced/administered is the MHA (in particular, the provisions in chapter 4, part 1 regarding involuntary treatment orders).

95. I have considered Queensland Health's submissions and note the following:

- the purpose of the MHA is to provide for the involuntary assessment and treatment, and the protection of persons who have a mental illness while at the same time:
  - safeguarding their rights and freedoms; and
  - balancing their rights and freedoms with the rights and freedoms of other persons<sup>25</sup>
- the MHA provides for the detention, examination, admission, assessment and treatment of persons having, or believed to have, a mental illness<sup>26</sup>
- Chapter 4, Part 1 provides for the treatment of persons who have a mental illness
- the MHA is administered by Queensland Health.<sup>27</sup>

96. I am satisfied that:

- Queensland Health's ability to effectively administer the MHA relies heavily on information being provided by third parties
- the Category B Matter contains information relating to the administration of the MHA
- the second requirement for exemption under section 42(1)(b) of the FOI Act has been met because the information supplied relates to the administration of the MHA.

### **Existence or identity of confidential source of information**

97. This third element requires that disclosure of the information in issue could reasonably be expected to:

- enable the existence of a confidential source of information to be ascertained; or
- enable the identity of a confidential source of information to be ascertained.

98. I have considered the matter in issue and I am satisfied that disclosure of any of the Category B Matter could reasonably be expected to enable the applicant to ascertain the existence or identity of a confidential source of information in each case, either because the matter in issue:

- consists of the name of the source, or
- the information is of a nature that would enable the applicant to determine the identity of the source.

99. While I acknowledge that the applicant submits that he knows who provided the information consisting of the matter in issue, I note that it is not appropriate for me to

---

<sup>25</sup> MHA section 4.

<sup>26</sup> MHA section 5(a).

<sup>27</sup> See the Administrative Arrangements Order (No. 1) 2009.

either confirm or deny an applicant's suspicions or conclusions about either the source or substance of information provided, in the absence of any confirmation of identity from an information provider or official source. In reaching a decision in this matter, I can only consider whether the exemption applies to the specific information to which access has been refused.

100. Accordingly, I am satisfied that the third requirement for exemption under section 42(1)(b) of the FOI Act has been met.

***Summary - application of section 42(1)(b) of the FOI Act***

101. I am satisfied that disclosure of the Category B Matter could in each case, reasonably be expected to enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained.

**DECISION**

102. I vary the decision under review by finding that the:

- Category A Matter is exempt from disclosure under section 44(1) of the FOI Act
- Category B Matter is exempt from disclosure under section 42(1)(b) of the FOI Act.

103. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

---

**S Jefferies**  
**Acting Assistant Commissioner**

**Date: 24 April 2009**