



Decision and Reasons for Decision

Application Number: 210590

Applicant: Dr P Pentecost

Respondent: Department of Health

Decision Date: 8 June 2010

Catchwords: ADMINISTRATIVE LAW - FREEDOM OF INFORMATION – QUEENSLAND – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER AFFECTING PERSONAL AFFAIRS - whether information comprises the personal affairs of other persons under section 44(1) of the *Freedom of Information Act 1992* (Qld)

ADMINISTRATIVE LAW - FREEDOM OF INFORMATION – QUEENSLAND – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER CONCERNING CERTAIN OPERATIONS OF AGENCIES - whether disclosure of information could have a substantial adverse effect on the management or assessment by an agency of the agency's personnel under section 40(c) of the *Freedom of Information Act 1992* (Qld)

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REASONS FOR DECISION

Summary

1. Having considered the parties' submissions and evidence, relevant legislation, case law and decisions, I am satisfied that:
 - the Category A matter qualifies for exemption under section 44(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) on the basis that the information comprises the personal affairs of other persons
 - in respect of the Category B matter:
 - only the Type 2 and 3 information comprised within the Information concerning persons C, D, E and F qualifies for exemption under section 40(c) of the FOI Act on the basis that its disclosure could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel
 - the remainder of the Category B matter does not qualify for exemption under section 40(c) of the FOI Act.

Background

2. By letter dated 8 April 2008, the applicant wrote to the Department of Health (**Department**) for access under the FOI Act to any documents which contained information regarding concerns that had been raised about him prior to Dr Elizabeth Barrett's review on 24-25 May 2007 (**FOI Application**).
3. By letters dated 13 May 2008 and 9 July 2008, the applicant requested a response from the Department in relation to the FOI Application.
4. As the Department did not make a decision within the time period allowed under the FOI Act, its Principal Officer was taken to have made a decision on or about 10 June 2008 refusing the applicant access to the documents sought in the FOI Application (**Refusal of Access Decision**).¹
5. By letter dated 18 August 2008, the applicant informed this Office that he had not received a response from the Department to the FOI Application and that he wanted the matter investigated. This letter was taken to be the applicant's External Review Application (**External Review Application**).
6. By letter dated 22 August 2008, a member of this Office informed the applicant that as a consequence of the External Review Application, this Office was making preliminary enquiries with the Department.
7. By letter dated 5 September 2008, Acting Information Commissioner Kinross requested that the Department advise this Office whether it:
 - was prepared to release any documents to the applicant

¹ See section 27(5) of the FOI Act.

- sought to claim that any of the documents responsive to the FOI Application were exempt under the FOI Act, including the details of the exemption provisions relied upon.
8. By email dated 11 September 2008, the relevant district of the Department confirmed receipt of the above letter and requested an extension of time in which to provide a response to this Office.
 9. By email dated 12 September 2008, Acting Information Commissioner Kinross requested that the Department give priority to its response by ensuring its receipt by this Office by 10 October 2008.
 10. By letter dated 24 September 2008, Acting Information Commissioner Kinross informed the applicant that the External Review Application had been accepted by this Office.

Decision under review

11. The decision under review is the Refusal of Access Decision (referred to at paragraph 4 above).

Steps taken in the external review process

12. By letter dated 10 October 2008, the relevant district of the Department provided this Office with a copy of the documents it considered were responsive to the FOI Application.
13. In a telephone conversation with a staff member of this Office on 14 October 2008, the relevant district of the Department was asked to provide submissions in support of its exemption claims. The relevant district of the Department indicated that its submission would be sent to this Office as soon as possible.
14. As the Department's submission had not been received by this Office by 23 October 2008, a staff member of this Office contacted the relevant district of the Department. The responsible officer's voice mail service indicated that they would not be in the office until 28 October 2008.
15. On 27 October 2008, a staff member of this Office contacted the Department and requested that it follow up the relevant district of the Department for its submission.
16. In a telephone conversation on 3 November 2008, the Department requested an extension of time in which to provide its submission.
17. On 3 November 2008, the Department was granted an extension of time within which to provide its submission. The Department was given until 17 November 2008.
18. As the Department's submission was not received by this Office on or before 17 November 2008, on 18 November 2008, a staff member of this Office attempted to contact the relevant district of the Department by telephone. The call was not answered and the staff member left a message requesting a call back on the responsible officer's voice mail. The call was not returned.
19. In a meeting with the Department on 1 December 2008 (in relation to another review), the Department stated that it would follow up the requested submission from the relevant district of the Department.

20. In a telephone conversation on 5 December 2008, the relevant district of the Department confirmed that it had sent the requested submission to the Department's central office for final approval.
21. In a telephone conversation on 5 December 2008, the Department's central office confirmed receipt of the submission and stated that it would be hand delivered to this Office later that day.
22. By hand delivered letter on 5 December 2008, the Department's submissions in support of its claims for exemption under the FOI Act were received by this Office.
23. By letter dated 15 December 2008, I informed the applicant of the correspondence received at paragraph 22 above.
24. In a telephone conversation with a staff member of this Office on 3 March 2009, the applicant raised concerns about the searches conducted by the Department and clarified the documents being sought in the FOI Application.
25. In view of the matters raised in the conversation above, by letter dated 17 March 2009 I requested that the Department provide me (by 24 March 2009) with the details of all searches for documents it had conducted in relation to the FOI Application.
26. By facsimile received on 23 March 2009, relevant district of the Department requested an extension of time within which to respond to the above letter.
27. By email dated 24 March 2009, the relevant district of the Department was granted an extension of time until 31 March 2009 in which to provide this Office with the Department's response.
28. In a telephone call received on 30 March 2009, the relevant district of the Department requested a further extension of time in which to respond to my letter at paragraph 25 above. I informed the responsible officer of the Department that whilst I was dissatisfied with receiving a further request for an extension of time, I agreed to grant an extension of time until 3 April 2009.
29. As the Department's response to my letter had not been received by 6 April 2009, a staff member of this Office contacted the relevant district of the Department. The responsible officer was not able to take this call and the staff member left a message requesting that the call be returned.
30. In a telephone conversation on 6 April 2009, the relevant district of the Department indicated that the Department's response would be received by this Office.
31. In an email dated 7 April 2009, the relevant district of the Department stated that it had sought assistance with the Department's central office in preparing its response and as a consequence requested a further extension of time.
32. On 8 April 2009, a staff member of this Office spoke to the relevant district of the Department and requested that any further documents which it had located be provided to this Office by 9 April 2009 and that the Department's response in relation to its exemption claims be provided to this Office by 17 April 2009.
33. As the requested documents were not received by this Office by 15 April 2009, a staff member of this Office contacted the Department and was informed that despite leaving

numerous voice messages with the relevant district of the Department it was still in the process of organising the relevant documents.

34. On 21 April 2009, a staff member of this Office contacted the Department and requested that it follow up with the relevant district of the Department.
35. By letter dated 28 April 2009, the Department provided this Office with:
 - information about its searches for documents responding to the FOI Application; and
 - copies of further documents it had located as a consequence of additional searches it had conducted.
36. By letter dated 23 June 2009, I advised the applicant of my preliminary view that:
 - some of the documents located by the Department fell outside the scope of the FOI Application or contained irrelevant matter which could be deleted under section 27(3) of the FOI Act
 - the remainder of the folios qualified for partial or full exemption under sections 44(1) and/or section 40(c) of the FOI Act.
37. By letter dated 23 June 2009, I advised the Department of my preliminary view in respect of folios 69-72.
38. By letter dated 29 June 2009, the applicant indicated that he wished to contest my preliminary view.
39. By email dated 30 July 2009 the Department stated that in view of the fact that the applicant had already been provided with access to folios 69 - 72 by Workcover Qld, it no longer wished to claim any exemption over those folios.
40. By email dated 13 August 2009, I requested that the Department respond to the outstanding matters raised in my preliminary view to the Department dated 23 June 2009 in relation to any attachments to folios 69-72.
41. By email dated 7 September 2009, the Department responded in part to my email at paragraph 40 above by indicating what documents were attached to folios 69-72. The Department indicated that it needed to conduct further discussions with the relevant district of the Department prior to confirming the exemption status of the documents.
42. By email dated 9 September 2009, the Department indicated the status of the documents discussed at paragraph 41 above.
43. On three occasions on 8 February 2010 and two occasions on 23 February 2010 I attempted to contact the Department to clarify whether the attachments to folios 69-72 had also been released to the applicant by Workcover Qld and confirm the Department's claim for exemption in respect of those documents. On each occasion I was unable to speak to the responsible officer and so left a message to have my telephone call returned, however none of my calls were returned.
44. In a telephone conversation with Workcover Qld on 23 February 2010, I ascertained that folios 47-50 and 64-66 had been released to the applicant by Workcover Qld as part of its disclosure process.

45. In a telephone conversation with the Department on 23 February 2010, I requested that the Department clarify its exemption claims in respect of folios 47-50 and 64-66. The Department stated that prior to advising this Office of the Department's view; it would need to confer with the relevant district of the Department.
46. By letter dated 23 February 2010 to the Department, I set out my queries as discussed in the above telephone conversation and my preliminary view in respect of the matter in issue. I requested that the Department provide me with its response by 1 March 2010.
47. By email dated 2 March 2010, the Department stated it needed to discuss the issues raised in my letter with the relevant district of the Department prior to providing this Office with its response.
48. By email dated 5 March 2010, the Department stated that it had spoken with the relevant district of the Department and would contact me on 9 March 2010.
49. I attempted to contact the Department on 27 April 2010 to ascertain its response to my letter dated 23 February 2010. I was not able to speak to the responsible officer and so, left a message requesting that my call be returned. My call was not returned.
50. A staff member of this Office contacted the Department on 24 May 2010 and 25 May 2010 to again seek its response to my letter of 23 February 2010 and to advise of the next step in the review. Despite being assured that the Department would respond promptly to the call, no response was received within the timeframes indicated by the Department.
51. On 3 June 2010, the Department contacted this Office and left a message requesting that a staff member of this Office return the call.
52. On 7 June 2010, a staff member of this Office contacted the Department and left a message stating that this Office was returning its call and could be contacted again if necessary.
53. On 8 June 2010, the Department contacted this Office and was informed that a decision in this review would be issued today.
54. In making my decision in this matter, I have taken the following into consideration:
 - the FOI Application, correspondence sent by the applicant to the Department and the External Review Application
 - the Refusal of Access Decision
 - file notes of telephone conversations between staff members of this Office and the applicant during the course of this review
 - file notes of telephone conversations between staff members of this Office and the Department during the course of this review
 - written correspondence received from the applicant during the course of this review
 - written correspondence received from the Department during the course of this review
 - relevant sections of the FOI Act

- reference material available on the Department's website
- previous decisions of the Information Commissioner of Queensland and decisions and case law from other Australian jurisdictions as identified in this decision.

Scope of the FOI Application

55. In the FOI Application, the applicant specifically requested information regarding concerns that were raised by other people about him. He stated that these concerns were raised with senior members of staff prior to a review of the Douglas Shire Multi Purpose Health Service (**DSMPHS**) on 24-25 May 2007 by Dr Elizabeth Barrett (**Review**).
56. By letter to the applicant, dated 23 June 2009, I confirmed that as a consequence of his discussion with a staff member of this Office, it was apparent that his FOI Application only required access to:
- concerns/allegations which were raised with Ms Sue Anastasios about him
 - communications between Dr Sue Anastasios and Dr Michael Humphrey relating to him.
57. By letter dated 29 June 2009 the applicant referred to the above and clarified that he was primarily seeking access to documents containing concerns/allegations relating to him which were raised **by** Dr Sue Anastasios in communications with Dr Michael Humphrey. Notwithstanding the fact that this statement seems to suggest a further narrowing of the scope of the FOI Application, the applicant also indicated in that letter that he wished to contest my preliminary view on the basis that both the Category A and B matter should be released.
58. In view of this, I have proceeded on the basis that the applicant still wishes to access the Category A and B matter considered in my preliminary view despite the fact that neither category contains a document which details concerns/allegations relating to the applicant which were raised by Dr Sue Anastasios in communications with Dr Michael Humphrey.
59. It is also worth noting that in a telephone conversation with a staff member of this Office, the applicant indicated that he was not satisfied with the searches conducted by the Department in response to the FOI Application and stated he believed a more substantive report written by Dr Barrett should exist. Although I obtained submissions from the Department and Dr Barrett on this issue, the applicant clarified in his letter of 29 June 2009 that these were matters which he had raised in the context of a separate and later FOI application to the Department and one which is currently the subject of a separate external review. Accordingly, I have not dealt with those issues further in this decision.

Matter in issue

60. Through negotiation with the Department during the course of this review, and as a consequence of clarification provided by the applicant, the number of folios over which exemption was claimed was reduced. As a consequence, the matter in issue in this

review comprises those folios which the Department maintains qualify for partial or full exemption under the FOI Act (**matter in issue**).²

61. The following table sets out the folios that are the matter in issue for the purpose of this decision; the exemption claim of the Department; and whether exemption is claimed over part or all of the folio. The table is separated into two parts. The first part contains the folios located by the Department after its initial searches. The second part contains the folios located by the Department after further searches in the course of the review.

Part One - Initial Searches		
Folio #	The Department's Exemption Claim	The extent of the Department's Exemption Claim over the document
25	Section 44(1)	Partially exempt
42	Section 44(1)	Partially exempt
47, 50	Sections 40(c) and 44(1)	Fully exempt
48-49	Section 40(c)	Fully exempt
64	Sections 40(c) and 44(1)	Partially exempt
65 – 66	Sections 40(c) and 44(1)	Partially exempt
68	Sections 40(c)	Partially exempt
Part Two – Further Searches		
23	Section 40(c)	Fully exempt
25	Section 40(c)	Fully exempt
29	Section 40(c)	Fully exempt

Categories of matter in issue

62. I have categorised the matter in issue into two categories, Category A matter and Category B matter.
63. The **Category A matter** is comprised of the matter in issue over which section 44(1) of the FOI Act has been claimed. This matter is:
- a complainant's signature³ and residential address⁴
 - a personal mobile phone number;⁵ and
 - a person's date of birth.⁶

² This excludes any documents or parts of documents which I have previously informed the applicant are duplicate copies of documents previously located or released to the applicant; fall outside the scope of the FOI Application; or contain irrelevant matter which may be deleted under section 27(3) of the FOI Act on the basis that the information relates to matters not canvassed in the FOI Application.

³ As it appears on folios 42 and 50 of Part One.

⁴ As it appears on folios 42, 47, 50 and 65 of Part One.

⁵ As it appears on folios 25 and 65 of Part One.

⁶ As it appears on folio 65 of Part One.

64. The **Category B matter** is comprised of the matter in issue over which section 40(c) of the FOI Act has been claimed. This matter is comprised of complaints or issues of an industrial nature raised by staff.

Issues in the review

65. The issue in this review is whether sections 40(c) and 44(1) of the FOI Act apply to exempt information contained in the matter in issue.

Applicable legislation

66. The *Right to Information Act 2009 (RTI Act)* commenced on 1 July 2009.⁷ Section 194 of the RTI Act repeals the FOI Act. However, section 199 of the RTI Act provides in relation to applications made under the repealed FOI Act:

199 Applications under Freedom of Information Act 1992

- (1) *The repealed Freedom of Information Act 1992 continues to apply in relation to an application under that Act that has not been finalised before the commencement of this section as if this Act had not been enacted.*
- (2) *For subsection (1), an application has not been finalised until -*
- (a) *a decision on the application is made; and*
 - (b) *either -*
 - (i) *the time for exercising any review rights or appeal rights in relation to the decision has ended without any rights being exercised; or*
 - (ii) *any review or appeal in relation to the decision has ended.*
67. Accordingly, because the FOI Application the subject of this review was made under the repealed FOI Act and has not yet been finalised. Therefore, for the purposes of making a decision in this review, I am required to consider the application of the FOI Act (and not the RTI Act) to the matter in issue.

Relevant law

68. Pursuant to 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, under which an agency can refuse access to exempt matter or an exempt document.
69. As set out in the table above, the Department has claimed that certain documents or parts of documents to which the applicant has sought access are exempt on the basis of sections 40(c) and 44(1) of the FOI Act. My findings with respect to the application of those provisions to the matter in issue are set out below.

Section 44(1) of the FOI Act

70. The Department contends that the Category A Matter is exempt from disclosure under section 44(1) of the FOI Act.

⁷ With the exception of sections 118 and 122 of the RTI Act.

71. I note that 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.*

72. The test for whether matter qualifies for exemption under section 44(1) of the FOI Act is in two parts, as follows:

- (i) would disclosure of the matter in issue disclose information that is properly characterised as information concerning the personal affairs of a person?
- (ii) if (i) is answered affirmatively, a public interest consideration favouring non-disclosure is established and the matter in issue will be *prima facie* exempt. However, if the public interest considerations favouring disclosure outweigh all identifiable public interest considerations favouring non-disclosure, a finding that disclosure of the matter in issue would, on balance, be in the public interest, is warranted.

73. In *Stewart and Department of Transport*⁸ the Information Commissioner discussed the meaning of the phrase '*personal affairs of a person*' as it appears in the FOI Act.⁹ In particular, the Information Commissioner said that:

- information concerns a person's personal affairs if it concerns the private aspects of a person's life
- there is a substantial grey area within the ambit of the phrase '*personal affairs*', but that phrase has a well-accepted core meaning which includes matter relating to:
 - family and marital relationships
 - health or ill health
 - relationships and emotional ties with other people
 - domestic responsibilities or financial obligations.

74. Whether or not information contained in a document comprises information concerning an individual's personal affairs is a question of fact, to be determined according to the proper characterisation of the information in question.

Findings of fact

75. I have reviewed the Category A matter and make the following findings of fact.

76. In *Stewart*¹⁰ and *Pearce and Qld Rural Adjustment Authority; Various Landholders (Third Parties)*¹¹ the Information Commissioner accepted that a person's private address, residential/personal phone number and signature comprise the personal affairs of a person for the purposes of section 44(1) of the FOI Act. Accordingly, those parts of the Category A matter that are a complainant's signature and address and a

⁸ (1993) 1 QAR 227 (*Stewart*).

⁹ See paragraphs 79-114 of *Stewart*.

¹⁰ At paragraph 80.

¹¹ (1999) 5 QAR 242 (*Pearce*).

personal mobile phone number can be properly characterised as personal affairs information and are *prima facie* exempt.

77. As to that part of the Category A matter which comprises a person's date of birth, the Information Commissioner has previously determined that such information can properly be characterised as personal affairs information under section 44(1) of the FOI Act, which is *prima facie* exempt.¹²
78. In view of my reasoning above, I am satisfied that all the Category A matter is *prima facie* exempt under section 44(1) of the FOI Act, subject to the public interest balancing test.

Public interest balancing test

79. In relation to the Category A matter, which is *prima facie* exempt from disclosure under section 44(1) of the FOI Act, it is necessary to weigh up relevant public interest considerations.
80. On account 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.
81. The extent to which 'the scales will tip' varies from case to case depending on:
- the weight of relevant privacy interests (which favour non-disclosure) attaching to the information
 - the particular circumstances of the case.
82. The scales must decisively tip against disclosure if there are no public interest considerations which favour release of the matter in issue.
83. Accordingly, it is necessary to examine whether there are public interest considerations favouring disclosure, and if there are, whether they outweigh all public interest considerations favouring non-disclosure.
84. After careful consideration of this issue, I consider that the following public interest considerations favouring disclosure may be relevant in the circumstances:
- openness and transparency in government decision making
 - increased public understanding of government processes.
85. The applicant submits that significant weight should be attached to the above public interest considerations for the following reasons:
- there is a lack of openness and transparency surrounding the DSMPHS review
 - it is in the public interest to disclose matter which may have lead to a government (QH) decision to undertake this review.

¹² *OKP and Department of Communities* (Unreported, Queensland Information Commissioner, 9 July 2009) at paragraph 48.

86. Although I acknowledge the applicant's concerns about the DSMPHS review I am of the view that disclosure of the Category A matter will not further the above public interest considerations in this case because:
- whilst some of the Category A matter has previously been released to the applicant by Workcover Qld, although diminished, the privacy interests attaching to this information have not been extinguished
 - the Category A matter does not demonstrate the actions taken by the Department, nor does it shed light on the decision making process in the circumstances of this case.
87. Accordingly, the two public interests identified above should be afforded little weight in the circumstances.
88. I am satisfied that:
- on balance, the public interest considerations favouring disclosure do not outweigh the public interest consideration favouring non-disclosure of this information.
 - the Category A matter is exempt from disclosure under section 44(1) of the FOI Act.

Section 40(c) of the FOI Act

89. The Department claims the Category B matter qualifies for exemption under section 40(c) of the FOI Act.
90. I have reviewed this matter in detail and note it comprises:
- complaints made or concerns expressed by other staff members about the applicant; or
 - references to the complaints made or concerns expressed.
91. For greater clarity in this decision, I have further categorised the Category B matter as follows:
- Information concerning person A – fully released to the applicant by Workcover Qld (folios 47-50 of Part One)
 - Information concerning person B – fully released to the applicant by Workcover Qld (folios 64-66 of Part One)
 - Information concerning person C (folio 23 of Part Two)
 - Information concerning person D (folios 25 and 29 of Part Two)
 - Information concerning persons E and F (folio 68 of Part One).
92. Although the Department has relied on this exemption provision either in part or full, during the course of this review it became apparent that some of the Category B matter¹³ had been released to the applicant in full by Workcover Qld. Although the Department was given the opportunity to reconsider its position in light of this information, it did not respond on this issue.

¹³ Namely, folios 47-50 and 64-66 of Part One.

93. Section 40(c) of the FOI Act provides:

40 Matter concerning certain operations of agencies

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

...

(c) have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; or;

...

unless its disclosure would, on balance, be in the public interest.

94. The Information Commissioner has previously discussed the operation of section 40(c) of the FOI Act¹⁴ and for that provision to apply here, the following criteria must be established:

- that an adverse effect on the management or assessment by the Department of its personnel could reasonably be expected to follow on from disclosure of the relevant documents; and
- that the adverse effect/s, either individually or in aggregate, constitute a substantial adverse effect on the management or assessment by the Department of its personnel.

95. If the above requirements are satisfied, I must then consider whether the disclosure of the documents in issue would nevertheless, on balance, be in the public interest.

96. The interpretation of the phrase 'could reasonably be expected to' was dealt with in *Attorney-General v Cockcroft*,¹⁵ in the context of the section 43(1)(c)(ii) (business affairs) exemption contained in the Commonwealth FOI Act, where Bowen CJ and Beaumont J said:

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

97. The Justices' interpretation of the phrase 'could reasonably be expected to' and the proposed line of inquiry, while made in the context of the business affairs exemption contained in Commonwealth legislation is relevant in the context of the exemption contained in section 40(c) of the FOI Act.

98. Whether the adverse effect claimed amounts to a substantial adverse effect on the management or assessment by an agency of its personnel will depend on the meaning

¹⁴ *Pemberton and The University of Queensland* (1994) 2 QAR 293, *Murphy and Queensland Treasury* (1995) 2 QAR 774, *Shaw and The University of Queensland* (1995) 3 QAR 107 and *McCann and Queensland Police Service* (1997) 4 QAR 30.

¹⁵ (1986) 64 ALR 97 (**Cockcroft**).

attributed to those terms. The adjective "substantial" in the phrase "substantial adverse effect" means grave, weighty, significant or having a serious effect.¹⁶ A further issue to consider is the likely flow on effect that staff involved in the review may then encounter.

99. The Information Commissioner has previously noted¹⁷ that management of staff performance, including taking action if there are concerns about the performance or behaviour of a member of staff is an aspect of the management by an agency of its personnel.

Could adverse effect reasonably be expected to follow from disclosure?

100. The Department claim that disclosure of the Category B matter could reasonably be expected to have a substantial adverse effect on the management of its personnel because:

- it is critical that staff have confidence in processes which facilitate the management and assessment of staff and operations – this is particularly significant in small community health facilities such as the DSMPHS
- the Department is reliant on information such as that contained within the Category B matter to ensure the continued effectiveness of its management and evaluation processes
- release of the information would cause a significant erosion of trust between employer and staff (particularly where it is of a personal and/or private nature)
- if disclosed, it has the potential to jeopardise the current operation of the workplace by negatively affecting staff management, workplace relationships and the delivery of high quality health care.

101. In response to the above submissions, the applicant submits the following:

- a) *I am unaware of any QH policy advising its personnel that complaints made about colleagues will not be disclosed. I request QH provide evidence to show that nondisclosure of such complaints is QH policy*
- b) *I request QH provide evidence demonstrating that QH policy for "the management and assessment of staff and operations" differs according to the size and location of the facility*
- c) *I request clarification from QH about its complaints handling processes.*

Findings of fact

102. The question I must ask is: *Is it reasonable to expect that disclosure of the Category B matter will have a substantial adverse effect on the management or assessment by the Department of its personnel?*

103. In relation to Information concerning persons A and B, I do not consider that disclosure of these documents would have a substantial adverse effect on the management or assessment by the Department of its personnel because:

¹⁶ *Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 at paragraphs 148-150.

¹⁷ In *WLS and Queensland Rail* (Unreported, Queensland Information Commissioner, 31 October 2002) at paragraph 28.

- the applicant has previously obtained a copy of this information (albeit from Workcover Qld)
- there is no evidence before me to suggest that any substantial adverse effect to the Department's management or assessment of its personnel has occurred since this information was disclosed to him
- the fact that there was no substantial adverse effect from the previous disclosure of the information concerning persons A and B is evidence that a substantial adverse effect could not reasonably be expected to follow on from its subsequent release under the FOI Act.

104. In relation to the Information concerning person C, I have further categorised the information comprised within the relevant documents as follows:

- Information which discusses interactions between person C and the applicant (Type 1 information)
- Information which identifies person C as an individual who had concerns about the applicant (Type 2 information).

105. Similarly, in relation to the Information concerning person D, the relevant documents comprise:

- Information which discusses interactions between person D and the applicant (Type 1 information)
- Information which identifies person D as an individual who had concerns about the applicant (Type 2 information)
- Information about person D's performance management (Type 3 information).

106. The Information concerning persons E and F is the names of those two individuals who have been put forward by a complainant as being persons who were in a position to be able to substantiate the incidents complained about in that document. On the basis that persons E and F are supportive of the complainant's version of events (which are adverse to the applicant) and therefore may be regarded as also having concerns about the applicant, I consider this information may be regarded as Type 2 information.

107. I am of the view that disclosure of the Type 1 information would not have a substantial adverse effect on the management or assessment by the Department of its personnel because:

- it is practicable in the circumstances to release this information to the applicant without needing to identify person C or D
- the information is similar in substance to the information which has previously been released to the applicant by Workcover Qld, which as previously discussed, did not lead to any adverse effect on the Department's management or assessment of its personnel
- I do not consider, in view of my statement above and the reasons given at paragraph 103 above that release of this information could reasonably be expected to have an adverse effect on the management or assessment by the Department of its personnel.

108. However, in respect of the Type 2 and 3 information, I consider that the answer to the question at paragraph 102 above is yes because:

- due to the nature of the work undertaken in health care settings, there is an expectation that employees work closely with their colleagues for the benefit of persons in their care – this is particularly apparent in small communities where remoteness and staff numbers requires the existence of a close working relationship between colleagues
- persons who lodge complaints about colleagues in such settings may have valid concerns about being the subject of any reprisal should the information they provided be disclosed
- if it became known amongst staff of the Department that such information was treated insensitively by the Department and/or released this may have a deterrent effect on other employees providing the Department with similar information necessary to monitor and manage the performance of its staff in the future
- as the Department is ultimately responsible for the provision of health care to the greater public, if it is unaware of problems subsisting within its regional health facilities it cannot take appropriate action to prevent such issues having a negative impact on the provision of health care to the community.

109. Accordingly, I consider that release of the Type 2 and 3 information could reasonably be expected to have a substantial adverse effect on the management or assessment by the Department of its personnel by:

- breaching the trust involved between those individuals and the Department
- inhibiting members of staff from raising concerns about the performance of colleagues with senior management of the Department in the future
- preventing the Department from being able to openly discuss performance management issues with members of its staff.

Public interest balancing test

110. As I am of the view that the requirements of section 40(c) of the FOI Act are met in respect of the Type 2 and 3 information, I must now consider whether there are public interest considerations favouring disclosure of that information which, on balance, outweigh the public interest in protecting the Department from any substantial adverse effect on its management or assessment of its personnel.

111. During the course of this review the applicant indicated a view that the Department has not provided him with the opportunity to respond to any of the allegations made against him.

112. In view of the applicant's submission above, the following public interest considerations favouring disclosure may be relevant:

- the public interest in enhancing the accountability of the Department for the way it carries out its personnel management functions
- the public interest in a person having access to matter on the file of an agency that may be regarded as adverse to him/her.

113. I will discuss these below in the context of the Type 2 and 3 information.

Accountability of government

114. Facilitating the accountability of government is a public interest consideration recognised by section 4 of the FOI Act. Enabling accountability of government also promotes informed public participation in the processes of government, recognised as one of the FOI Act's major objectives.
115. The question in this case is whether disclosure of the relevant information would allow members of the public a better understanding of action taken by the Department and enable them to better scrutinise and assess the Department's performance.¹⁸
116. Accordingly, I must consider whether disclosure of the Type 2 and 3 information would materially enhance this public interest consideration to an extent that warrants it being accorded significant weight in favour of disclosure.
117. The applicant submits that the Category B matter in its entirety has significant public interest because he believes the documents influenced the personnel management functions of the Department senior management which lead to the DSMPHS review.
118. Although I acknowledge the significant public interest in enhancing the accountability of government agencies in respect of the performance of their functions, I am satisfied that disclosure of the Type 2 and 3 information would not materially enhance this public interest consideration because the information does not indicate action taken by the Department in response to any concerns/complaints made. On this basis, this public interest consideration is of little or no weight in the circumstances.

Adverse allegations

119. In respect of the issue of adverse allegations, the Information Commissioner has previously recognised a public interest in an individual, who is the subject of an investigation by a government agency, being provided with an effective opportunity to know the substance of the adverse allegations made against him/her, so that he/she may appropriately respond, if necessary.¹⁹
120. During the course of the review, the applicant raised a concern about not being provided an opportunity to respond to adverse allegations, a right provided for all parties to a grievance.²⁰
121. I acknowledge the principles of natural justice require the following:²¹

A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise...The person whose interests are likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance....Nevertheless in the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible,

¹⁸ *Burke and Department of Families, Youth and Community Care* (1997) 4 QAR 205

¹⁹ *C and Department of Tourism, Small Business and Industry* (Unreported, Information Commissioner Qld, 23 June 1998); *McEnery and Medical Board of Queensland* (1994) 1 QAR 349.

²⁰ See Integrated Resource Manual – 3.5 Grievance Resolution & EB6 Grievance Settling; and Industrial Disputes, http://www.health.qld.gov.au/hrpolicies/irm/section_3/irm3_5.pdf, 3.1.2 Workplace Harassment, http://www.health.qld.gov.au/hrpolicies/irm/section_3/irm3_1_2.pdf, and 8.3 Unsatisfactory Performance, http://www.health.qld.gov.au/hrpolicies/learn_dev/g_11.pdf

²¹ As stated by Brennan J in *Kioa v West* (1995) 159 CLR 550 at pages 628-629.

relevant and significant to the decision to be made. It is not sufficient for the repository of the power to endeavour to shut information of that kind out of his mind and to reach a decision without reference to it. Information of that kind creates a real risk of prejudice, albeit subconscious, and it is unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with the information. He will be neither consoled nor assured to be told that the prejudicial information was left out of account.

122. I also note that:

...the content of the requirements of procedural fairness may vary according to the particular circumstances of the case, including the nature and general functions of the entity required to observe them and the relationship between that entity and the person to whom procedural fairness must be accorded.²²

123. In consideration of the fact that the majority of the Category B matter²³ will now be released to the applicant as a consequence of this decision it is my view that:

- this public interest has been satisfied on the basis that each of the complaints (or the substance of the complaint/concerns made) will be released to the applicant²⁴
- the Type 2 and 3 information does not comprise adverse allegations against the applicant and therefore its disclosure would not further the public interest.

Summary - public interest considerations

124. Having regard to the considerations described above, I am satisfied that in relation to the Type 2 and 3 information:

- the public interest considerations favouring disclosure are insufficient to outweigh the significant public interest in avoiding a substantial adverse effect on the management or assessment by the Department of its personnel
- this information qualifies for exemption under section 40(c) of the FOI Act.

DECISION

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

- the Category A matter qualifies for exemption under section 44(1) of the FOI Act
- in respect of the Category B matter:
 - only the Type 2 and 3 information comprised within the Information concerning persons C, D, E and F qualifies for exemption under section 40(c) of the FOI Act on the basis that its disclosure could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel

²² *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at page 90.

²³ This includes the Information concerning persons A and B as well as the Type 1 information comprised within the Information concerning persons C and D.

²⁴ With the exception of any Category A matter comprised within the documents which I have previously determined in this decision qualifies for exemption under section 44(1) of the FOI Act.

- the remainder of the Category B matter does not qualify for exemption under section 40(c) of the FOI Act.

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

V Corby
Assistant Commissioner

Date: 8 June 2010