

Office of the Information Commissioner (Qld)

Decision and Reasons for Decision

Application Number: 310329
Applicant: G8KPL2
Respondent: Department of Health
Decision Date: 31 January 2011

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - applicant seeks access to report of investigation into allegations made by the applicant about hospital staff conduct - agency notified Crime and Misconduct Commission (CMC) of suspected official misconduct - CMC referred matter back to the agency for investigation - whether information obtained, used or prepared for an investigation by a prescribed crime body or another agency in the performance of the prescribed functions of the prescribed crime body - whether information is exempt under schedule 3, section 10(4) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - where applicant's complaint initiated an investigation into suspected official misconduct - whether information in the investigation report is "about" the applicant - whether information is not exempt on basis of schedule 3, section 10(6) of the *Right to Information Act 2009* (Qld)

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REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Health¹ (**Department**) for access to an investigation report (**Report**) prepared by the Department's Ethical Standards Unit (**ESU**) into allegations of misconduct the applicant had made against hospital staff.
2. The Department refused access to the Report under section 47(3)(a) of the *Right to Information Act 2009* (Qld) (**RTI Act**) on the basis that the information:
 - was obtained, used or prepared for an investigation by a prescribed crime body², or another agency, in the performance of the prescribed functions of the prescribed crime body; and
 - is exempt information under section 48 and schedule 3, section 10(4) of the RTI Act.
3. The applicant considers that, as the complainant, s/he has the right to know if an open, honest and transparent investigation was conducted and that an appropriate and reasonable outcome was achieved in relation to the complaint. The applicant submits that the only way of establishing this is by obtaining access to the Report.
4. The applicant also raises concerns that the Department's correspondence advising s/he of the outcome of the investigation, contained errors and was critical of the applicant.³ These matters fall outside the external review jurisdiction of the Information Commissioner under the RTI Act and therefore, they are not dealt with in this decision.⁴
5. For the reasons set out below, the Department's decision refusing access to the Report under section 47(3)(a) of the RTI Act is affirmed.

Background

6. By letter dated 1 June 2010, the applicant applied to the Department seeking access under the RTI Act to the Report (**Access Application**).
7. On 3 August 2010⁵, the Department decided to refuse access to all pages of the Report under section 47(3)(a) of the RTI Act on the basis that the information is exempt information under section 48 and schedule 3, section 10(4) of the RTI Act (**Decision**).
8. On 12 August 2010, the Office of the Information Commissioner (**OIC**) received an application from the applicant seeking external review of the Decision (**External Review Application**).

Steps taken on external review

9. The significant procedural steps taken during the external review are set out in the Appendix.

Reviewable decision

10. The decision under external review is the Decision of the Department refusing access to the Report.

Information in issue

11. The information in issue in this external review is the Report prepared by the Department's ESU in relation to the investigation of the applicant's complaint.⁶

Issues in this review

12. The primary issue to be determined in this review is whether access to the entire Report can be refused under section 47(3)(a) of the RTI Act on the basis that the Report comprises exempt information under schedule 3, section 10(4) of the RTI Act (**CMC exemption**).
13. The circumstances of this case also raise the issue of whether the exemption in schedule 3, section 10(4) of the RTI Act is excluded due to the operation of schedule 3, section 10(6) of the RTI Act.

Evidence considered

14. In reaching this decision, I have considered the following:
 - Access Application
 - Decision
 - External Review Application
 - Report
 - submissions made to OIC by the applicant during the external review
 - file notes of telephone conversations held between OIC staff and the applicant, Crime and Misconduct Commission (**CMC**) and Department during the external review
 - correspondence exchanged between the Department and the CMC in relation to commencement and outcome of the ESU investigation into the applicant's complaint
 - decision of the Information Commissioner in *McKay and Department of Justice and Attorney General*⁷
 - relevant provisions of the RTI Act, *Crime and Misconduct Act 2001* (Qld) (**CM Act**) and the repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**); and
 - Explanatory Memoranda and Second Reading speech pertaining to the *Freedom of Information and Other Legislation Amendment Bill 2005* (Qld).

Relevant law

15. Access must be given to a document unless disclosure would, on balance, be contrary to the public interest.⁸ Schedule 3 of the RTI Act sets out information which Parliament considers is exempt information on the basis that disclosure would, on balance, be contrary to the public interest.⁹

CMC exemption

16. Schedule 3, section 10 of the RTI Act operates to exempt certain law enforcement and public safety information from disclosure. In this review, the following parts of that section that relate to CMC investigation information are relevant:

10 Law enforcement or public safety information

...
 (4) Also, information is exempt information if it consists of information obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in the performance of the prescribed functions of the prescribed crime body.

...
 (6) However, information is not exempt information under subsection (4) or (5) in relation to a particular applicant if—

- (a) it consists of information about the applicant; and
 (b) the investigation has been finalised.

...
 (9) In this section—

...
misconduct functions see the Crime and Misconduct Act 2001, section 33.

prescribed crime body means—

- (a) the Crime and Misconduct Commission; or
 (b) the former Criminal Justice Commission; or
 (c) the former Queensland Crime Commission.

prescribed functions means—

- (a) in relation to the Crime and Misconduct Commission—the crime function, the intelligence functions and the misconduct functions; and

...

CMC's misconduct function

17. The CMC's misconduct function includes ensuring that a complaint about misconduct is dealt with in an appropriate way.¹⁰ The CMC must perform its misconduct function having regard to the principles of cooperation, capacity building, devolution and the public interest.¹¹ Specifically, the principle of devolution provides that '*action to prevent and deal with misconduct in a unit of public administration should generally happen with the unit*'.¹²
18. The CMC can perform its misconduct function in several ways, including by doing one or more of the following:
- assessing information about misconduct
 - referring complaints to a public official to be dealt with by the public official; and/or
 - performing its monitoring role for police misconduct or official misconduct.¹³
19. The CM Act defines 'misconduct' to include 'official misconduct or police misconduct'.¹⁴
20. The term 'official misconduct' is defined in the CM Act¹⁵ as follows:

... conduct that could, if proved, be—

- (a) a criminal offence; or
 (b) a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or was the holder of an appointment.

21. If it is suspected that a complaint involves or may involve official misconduct under the CM Act, the public official must notify the CMC.¹⁶ The Department must deal with a complaint about official misconduct (if the CMC refers the complaint back to it), in the way it considers most appropriate, subject to the CMC's monitoring role.¹⁷

Findings

CMC exemption

22. For the CMC exemption to apply in this case, the following requirements must be satisfied:

- the Report was obtained, used or prepared for an investigation
- the investigation was conducted by a prescribed crime body or other agency; and
- the investigation was in the performance of the prescribed functions of the prescribed crime body.

23. Having reviewed the relevant evidence in this case, I find that:

- A grievance was lodged with the Department by the applicant. The complaint contained allegations that if proven, may have constituted official misconduct by staff of the Department.
- The Department notified the prescribed crime body, in this case the CMC, of the complaint.
- The CMC assessed the allegations and considered that if proven, they may amount to official misconduct¹⁸ and referred the matter back to the Department to deal with, subject to the CMC's monitoring role with the requirement that the CMC be advised of the outcome.
- The Department's ESU investigated the allegations against a number of staff and prepared the Report.
- The Department subsequently notified the CMC of the outcome of its investigation.
- On completion of the investigation, the Department wrote to the applicant to advise that his/her allegations had been assessed as suspected official misconduct and were the subject of an investigation by the Department's ESU.

24. Based on findings of fact set out in paragraph 23, I am satisfied that all requirements of the CMC exemption, as set out in paragraph 22, are met in this case.

The exception in schedule 3, section 10(6) of the RTI Act

25. Information will not be exempt under the CMC exemption where:

- the information is about the applicant; and
- the investigation has been finalised.¹⁹

26. The correspondence provided to the applicant by the Department regarding the outcome of the investigation confirms that the investigation has been finalised. During the course of the external review, the CMC confirmed to OIC that the investigation is complete.

27. Therefore, for the exception to apply in this case, information in the Report must be *about* the applicant.
28. The word 'about' is not defined in the RTI Act or the *Acts Interpretation Act 1954* (Qld). The Macquarie Dictionary²⁰ defines 'about' as '*of; concerning; in regard to ... connected with*'.
29. The CMC exemption²¹ and its exception identified above²² are equivalent to provisions in the repealed FOI Act.²³ In the Explanatory Memorandum to the Bill²⁴ which inserted the CMC exemption and its exception²⁵ into the FOI Act, the purpose of these sections was described as follows:

... a new exemption which exempts information obtained, used or prepared for investigations by the Crime and Misconduct Commission (CMC) or another agency. The exemption is only to apply where the investigation is in performance of the CMC's crime function and misconduct functions ...

This exemption is to apply to the information obtained, used or prepared in the course of the investigation and the consideration of, and reporting of the investigation.

*This exemption does not apply if a person seeks information about themselves, including personal, professional, business and work-related information. However, a person can only receive such information once the investigation has been finalised. **For example, and subject to the other exemptions in the FOI Act, a person could receive information about allegations made against them, information given about them in the course of an interview and conclusions made about them in a report.***

[emphasis added]

30. The debate following the Second Reading speech²⁶ in respect of the Bill which introduced the CMC exemption and its exception makes it clear that Parliament intended that access to the investigation reports would be available only to the person being investigated. That is, mainly public officials (investigated under the CMC's misconduct function) and criminals (investigated under the CMC's crime function), i.e. people who are the subject of the investigation.
31. The CMC's misconduct functions include ensuring that a complaint about misconduct is dealt with in an appropriate way.²⁷ As discussed above, the CMC can perform this misconduct function by referring a complaint about misconduct to a public official²⁸ who has a responsibility to deal with the complaint.
32. Investigations such as that carried out by the Department's ESU in relation to the applicant's complaint are concerned with establishing whether official misconduct has occurred under the CM Act. While it can be said that the Report came into existence as the result of the applicant's actions (making the complaint), that does not in and of itself make the Report *about* the applicant.²⁹ The Report is about the hospital staff members whom the applicant's allegations concerned.
33. Accordingly, I find that while the investigation has been finalised, the information contained in the Report is not information *about* the applicant and therefore, the exception in to the CMC exemption in schedule 3, section 10(6) of the RTI Act does not apply in this case.

Conclusion

34. On the basis of the matters set out above, I am satisfied that:

- There is sufficient evidence to establish that the CMC performed its misconduct function in relation to the notification by the Department of possible official misconduct, by referring the matter to the Department to be dealt with subject to the CMC's monitoring role.
- The Report was obtained, used or prepared by the Department's ESU, in the performance of the CMC's misconduct function subject to the CMC's monitoring role with the requirement that the CMC be advised of the outcome.
- The Report comprises exempt information under schedule 3, section 10(4) of the RTI Act and is not subject to the exception in schedule 3, section 10(6) of the RTI Act.

DECISION

35. I affirm the decision of the Department to refuse access to the Report under section 47(3)(a) of the RTI Act on the basis that the Report comprises exempt information under section 48 and schedule 3, section 10(4) of the RTI Act.
36. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

Clare Smith
Right to Information Commissioner

Date: 31 January 2011

Appendix

Significant procedural steps

Date	Event
20 August 2010	OIC informed the applicant and Department, in writing, that the External Review Application had been accepted by OIC.
6 September 2010	The Department provided OIC with a copy of the Report.
16 September 2010	CMC verbally confirmed to OIC that the investigation relating to this matter had been finalised.
16 September 2010	An OIC staff member telephoned the applicant to convey a preliminary view that the Report comprises exempt information under schedule 3, section 10(4) of the RTI Act (Preliminary View).
21 September 2010	A letter was forwarded to the applicant conveying reasons for, and confirming, the Preliminary View. The applicant was asked to notify OIC by 5 October 2010 whether s/he accepted the Preliminary View and to provide final submissions by that date if s/he contested the preliminary view.
22 September 2010 - 7 October 2010	OIC corresponded with the applicant in relation to the content of the Preliminary View. OIC granted the applicant an extension of time to provide submissions in response to the Preliminary View by 7 October 2010.
7 October 2010	The applicant lodged submissions with OIC contesting the Preliminary View.
10 December 2010	OIC asked the Department to provide OIC with copies of correspondence exchanged between the Department and the CMC in relation to the commencement and outcome of the ESU investigation.
13 December 2010	The Department provided OIC with copies of its relevant correspondence with the CMC in relation to the investigation.

¹ Also known as Queensland Health.

² In this case, the Crime and Misconduct Commission (**CMC**).

³ The Department's correspondence summarised the investigation's findings on substantiated allegations and confirmed that '*appropriate administrative action*' had been taken in relation to the substantiated allegations.

⁴ However, I note that section 44(5)(b) of the *Crime and Misconduct Act 2001* (Qld) (**CM Act**) sets out the circumstances in which a public official must give a complainant a response as to action taken in relation to a complaint.

⁵ The Department sought the applicant's consent, on two occasions, to a longer processing period under section 35 of the RTI Act. The applicant did not refuse either request and therefore, the Department proceeded to issue its decision prior to the extended date of 6 August 2010.

⁶ The Report comprises the written investigation report and various appendices (422 pages).

⁷ Unreported, Queensland Information Commissioner, 25 May 2010 (**McKay**).

⁸ Section 44(1) and 48(1) of the RTI Act.

⁹ See also, section 48 of the RTI Act.

¹⁰ Section 46(2)(b) of CM Act.

¹¹ Section 33(b) and section 34 of CM Act.

¹² Section 34(c) of CM Act.

¹³ Section 35 of CM Act.

¹⁴ See the Dictionary in Schedule 2 of the CM Act.

¹⁵ Section 15 of CM Act.

¹⁶ Section 38 of CM Act.

¹⁷ Section 44(2) of the CM Act.

¹⁸ Under the CM Act.

¹⁹ Schedule 3 section 10(6) of the RTI Act.

²⁰ Macquarie Dictionary Online www.macquariedictionary.com.au.

²¹ Schedule 3 section 10(4) of the RTI Act

²² Schedule 3 section 10(6) of the RTI Act.

²³ Sections 42(3A) and 42(3B) of the FOI Act. Inserted by the *Freedom of Information and Other Legislation Amendment Act 2005* (Qld) which commenced on 31 May 2005.

²⁴ *Freedom of Information and Other Legislation Amendment Bill 2005* (Qld).

²⁵ Schedule 3 sections 10(4) and 10(6) of the RTI Act. Sections 42(3A) and 42(3B) of the FOI Act.

²⁶ Which occurred on 11 and 25 May 2005. See in particular page 1634 of Hansard for this period.

²⁷ Section 33 of the *CM Act*.

²⁸ Section 35(1)(b) of the *CM Act*.

²⁹ See *McKay* at paragraphs 80 and 81.