



Decision and Reasons for Decision

Application Number: 310392

Applicant: Geary

Respondent: Australian Health Practitioner Regulation Agency

Decision Date: 12 September 2011

Catchwords: **INFORMATION PRIVACY ACT – REFUSAL OF ACCESS – applicant sought access to information related to concerns about the applicant’s conduct and a copy of relevant CCTV footage – whether disclosure of information would, on balance, be contrary to public interest – section 67(1) of the *Information Privacy Act 2009 (Qld)* and sections 47(3)(b) and 49 of the *Right to Information Act 2009 (Qld)***

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REASONS FOR DECISION

Summary

1. The applicant applied to the Queensland Nurses' Council (**QNC**) for information "*which raises concerns about ...*" the applicant's health and conduct.
2. QNC released all documents on the applicant's professional standards file to the applicant except for a two page file note and a copy of relevant CCTV footage.¹
3. On behalf of the applicant, the Queensland Nurses' Union (**QNU**) applied to the Australian Health Practitioner Regulation Agency (**AHPRA**)² for internal review of QNC's decision.
4. On internal review, AHPRA upheld QNC's decision³ refusing access to the file note and CCTV footage on the basis that their disclosure would, on balance, be contrary to the public interest.
5. QNU applied for external review of AHPRA's internal review decision.
6. During the course of this external review, AHPRA agreed⁴ to release some routine personal work information contained in the file note⁵ to the applicant. However, AHPRA maintains that disclosure of the remaining information in the file note and the CCTV footage would, on balance, be contrary to public interest.
7. Accordingly, the information under consideration in this external review (**Information in Issue**) comprises:
 - the remaining information⁶ in the file note which is limited to:
 - information relating to the identity of the notifier
 - personal opinions held by the author of the file note regarding collateral issues (including staffing); and
 - relevant CCTV footage.
8. After carefully considering all of the relevant information before me, I am satisfied that:
 - the file note is not the relevant 'complaint' and contains no information about the actual incident involving the applicant
 - disclosure of the Information in Issue:
 - would disclose personal information of third parties (which is not routine personal work information) and could reasonably be expected to cause a public interest harm
 - could reasonably be expected to prejudice the protection of those third parties' rights to privacy; and
 - is, on balance, contrary to public interest under sections 47(3)(b) and 49 of the RTI Act.

¹ Dated 30 June 2010.

² QNC (being a state health registration board) merged with the Australian Health Practitioner Regulation Agency (**AHPRA**) on 1 July 2010 following the commencement of the *Health Practitioner Regulation National Law 2009* (Cth) which came into effect on that date.

³ Internal review decision dated 12 August 2010.

⁴ Following consultation with Queensland Health (**QH**).

⁵ Routine personal work information is information that is solely and wholly related to the routine day to day work duties and responsibilities of a public service officer. While the routine personal work information of public service officers is personal information, on balance, the infringement of a public service officer's right to privacy would, generally, be minimal or non-existent, as would any public interest harm caused by its disclosure. See OIC's guideline, *Routine personal work information of public servants*.

⁶ Which I note contains no details of the incident involving the applicant which led to the relevant notification.

Reviewable decision

9. The decision under review is AHPRA's internal review decision dated 12 August 2010.

Background

10. Significant procedural steps are set out in the appendix to this decision.

Evidence considered

11. In making this decision, I have taken the following into account:

- the applicant's applications to QNC, AHPRA and the Office of the Information Commissioner (**OIC**)
- QNC's initial decision and AHPRA's internal review decision
- the submissions made by QNU on the applicant's behalf to OIC
- file notes of telephone conversations between OIC staff and QNU staff
- file notes of telephone conversations between OIC staff and AHPRA staff
- the Information in Issue; and
- relevant provisions of the *Right to Information Act 2009* (Qld) (**RTI Act**) and the *Information Privacy Act 2009* (Qld) (**IP Act**).

Issue for determination

12. The issue for determination in this review is whether AHPRA is entitled to refuse access to the Information in Issue on the basis that its disclosure would, on balance, be contrary to public interest under section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

Applicant's submissions

13. QNU makes extensive submissions in support of its member's case⁷ including that:

- in relation to the remaining information in the file note:
 - it must have been in the reasonable contemplation of Queensland Health (**QH**) that the file note would need to be provided to the applicant pursuant to the rules of natural justice
 - the Nursing and Midwifery Board of Australia recently determined to refer the applicant's matter to the Queensland Civil and Administrative Tribunal
 - the documents sought are key to the applicant's disciplinary matter and disclosure is in the public interest so that the applicant is in a position to know the evidence which may be put against him
 - all of the information contained in the file note would be "*deliberative process information*", and thus should not be considered exempt information or information favouring nondisclosure
 - how can any "*personal opinions, beliefs or comments*" contained in a file note prepared in relation to an employment matter place it outside what would otherwise be regarded as work information, rather than personal information
 - how can information conveyed by a staff member or members to their supervisors regarding an incident that they witnessed properly be considered information of a confidential nature that was communicated in confidence
 - it is unlikely that the file note was disclosed to QNC on a confidential basis - any possible claim to confidentiality was lost at the point the information was given to QNC

⁷ In their request for internal review dated 19 July 2010, request for external review dated 9 September 2010 and submissions dated 2 August 2011.

- In relation to the relevant CCTV footage:
 - it is disputed that many of the individuals, if any, are truly identifiable from the footage, given the poor quality of the footage
 - it is anticipated that the CCTV footage will be a key piece of evidence in disciplinary proceedings against the applicant
 - counsel and/or external solicitors will be engaged to represent the applicant in disciplinary proceedings and they will need to view the footage
 - it is not reasonable to expect a barrister to attend QH offices simply for the purpose of viewing this footage, and
 - the applicant is entitled to know the case which may be put against him, and obtain full and informed advice from his legal representatives in relation to this matter.

QNC/AHPRA submissions

14. As set out in their decisions, QNC and AHPRA relevantly state that:

- portions of the file note would reveal the identity of the person who made the initial notification
- QH contends that the notifier is a confidential source of information, in relation to the enforcement or administration of the law (namely, the provisions of the *Nursing Act 1992* (Qld) regarding the investigation of complaints against registrants)
- the factors relevant to the flow of information to AHPRA (as the organisation replacing the QNC) should be afforded considerable weight, given that the success of AHPRA's notification program relies on the receipt of this kind of information
- as AHPRA's ability to respond to such complaints exists for the protection of the public, AHPRA does not wish to place this system in jeopardy
- the file note also contains the personal views of the author regarding how the matter was managed
- the CCTV footage records the personal information of not only the applicant but also a number of other identifiable individuals, including staff and patients
- as neither QNC nor QH has the technical equipment necessary to obscure (pixelate) the identities of those other persons, release would result in the disclosure of personal information of all persons captured on the tape, including individuals who were at the relevant time patients receiving mental health treatment
- once released, the QNC would not be able to place any conditions on the future disclosure/use of the information, resulting in a breach of the privacy of the patients concerned, and
- natural justice has been afforded to the applicant by the communication of relevant information and the decision to give the applicant access to all of the other documents in his professional standards file.

Relevant law

15. Section 67(1) of the IP Act provides that access to a document may be refused on the same basis upon which access to a document could be refused under section 47 of the RTI Act.
16. Relevantly, sections 47(3)(b) and 49 of the RTI Act provide a ground for refusal of access where disclosure of information would, on balance, be contrary to public interest.

17. The term 'public interest' is not defined in the RTI Act. Instead the RTI Act recognises that many factors can be relevant to the concept of the public interest. The public interest refers to considerations affecting the good order and functioning of the community and governmental affairs for the well-being of citizens. The notion of the public interest is usually treated as separate from matters of purely private or personal interest. Usually, a public interest consideration is one that is available to all members or a substantial segment of the community should they choose to access it. Although, in some circumstances public interest considerations can apply for the benefit of particular individuals.
18. In determining whether disclosure of the Information in Issue would, on balance, be contrary to public interest, I must:⁸
- identify and disregard irrelevant factors
 - identify factors favouring disclosure of the information in the public interest
 - identify factors favouring non-disclosure of the information in the public interest
 - balance the relevant factors favouring disclosure and non-disclosure; and
 - decide whether disclosure of the information would, on balance, be contrary to public interest.

Irrelevant factors

19. QNU identifies the following factor as irrelevant to deciding the public interest - disclosure of the information could reasonably be expected to cause embarrassment to the Government or cause a loss of confidence in the Government.⁹
20. I agree that this factor is irrelevant and should be disregarded in accordance with section 49(3)(d) of the RTI Act.

Factors favouring disclosure

21. On the basis of the information before me, I am satisfied that the factors favouring disclosure of the Information in Issue include that disclosure could reasonably be expected to:
- promote open discussion of public affairs and enhance the Government's accountability¹⁰
 - advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies;¹¹ and
 - contribute to the administration of justice (both generally and for a person), including procedural fairness.¹²

Factors favouring nondisclosure

22. On the basis of the information before me, I am satisfied that the factors favouring nondisclosure of the Information in Issue include that disclosure:
- could reasonably be expected to prejudice an individual's right to privacy¹³
 - may cause a public interest harm as it would disclose an individual's personal information;¹⁴ and

⁸ Section 49 of the RTI Act. This section must be read in conjunction with the public interest factors listed in schedule 4 of the RTI Act.

⁹ Schedule 4, Part 1, Factor 1 of the RTI Act.

¹⁰ Schedule 4, Part 2, Factor 1 of the RTI Act.

¹¹ Schedule 4, Part 2, Factor 10 of the RTI Act.

¹² Schedule 4, Part 2, Factor 16 and 17 of the RTI Act.

¹³ Schedule 4, Part 3, Factor 3 of the RTI Act.

¹⁴ Schedule 4, Part 4, section 6(1) of the RTI Act.

- could reasonably be expected to prejudice an agency's ability to obtain confidential information.¹⁵

Balancing the public interest

23. I note that personal information is '*information or an opinion... whether true or not ... about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion*'.¹⁶

CCTV footage

24. With respect to the relevant CCTV footage, I note:

- QNC's statement that neither QNC nor QH have the technology to enable pixilation of the third parties' images to prevent disclosure of the third parties' personal information,¹⁷ and
- that the applicant and two QNU officials have already viewed the CCTV footage¹⁸ and have been advised that the CCTV footage may be viewed again.

25. After carefully considering the CCTV footage and all of the relevant information before me, I am satisfied that:

- the footage contains the personal information of third parties including patients receiving mental health treatment
- the images are sufficiently clear for the persons recorded to be identified
- the applicant and his representatives have viewed the footage and are able to view the footage again at QH's offices if they wish to do so, and
- while there is a clear public interest in the accountability of agencies and in individuals being afforded procedural fairness, on balance, the factors favouring nondisclosure of the CCTV footage (including the protection of an individual's right to privacy, particularly where some of those individuals are patients receiving mental health treatment) significantly outweigh the factors favouring disclosure in the circumstances of this review.

Remaining information in file note

26. After carefully considering the remaining information in the file note and all of the relevant information before me, I am satisfied that:

- the file note is not the relevant 'complaint' and contains no information about the actual incident involving the applicant
- the remaining information in the file note:
 - comprises information relating to the identity of the notifier and personal opinions held by the author of the file note regarding collateral issues (including staffing)
 - comprises the personal information of third parties
 - does not comprise the routine personal work information of a public servant,¹⁹ and
 - is not adverse to the applicant.

¹⁵ Schedule 4, Part 3, Factor 16 of the RTI Act.

¹⁶ See section 12 of the *Information Privacy Act 2009* (Qld).

¹⁷ Page 2 of QNC's decision dated 30 June 2010.

¹⁸ As advised by QNU in their submission dated 2 August 2011.

¹⁹ As set out in this Office's guideline, non-routine personal work information includes complaints made by or about a public service officer and opinions about another public service officer including about how well an officer performs their duties.

Procedural fairness and administration of justice

27. QNU submits that procedural fairness requires the file note to be provided to the applicant so that he knows the evidence which may be put to him, particularly now that the matter has been referred to QCAT.
28. Given my findings that the file note is not the relevant 'complaint', that the remaining information in the file note contains no information about the relevant incident, is not adverse to the applicant and where the applicant has been provided with all other documents on his professional standards file, I am satisfied that little or no weight should be afforded to these submissions in support of factors favouring disclosure including the administration of justice and procedural fairness.

Deliberative process information and routine work information

29. QNU also submits that the information in the file note would be "*deliberative process information*" and questions how any "*personal opinions, beliefs or comments*" contained in a file note prepared in relation to an employment matter place it outside what would otherwise be regarded as work information.
30. Given my findings that the remaining information in the file note comprises the personal information of third parties (being information relating to the identity of the notifier and personal opinions held by the author of the file note regarding collateral issues including staffing), I am satisfied that:
- this information is properly characterised as the non-routine personal work information of the file note's author as it comprises an individual's personal views regarding collateral issues including staffing²⁰
 - this information does not comprise deliberative process matter,²¹
 - little or no weight should be afforded to these submissions in support of factors favouring disclosure.

Confidentiality

31. QNU further submits that:
- information conveyed by a staff member or members to their supervisors regarding an incident that they witnessed cannot properly be considered information of a confidential nature that was communicated in confidence, and
 - it is unlikely that the file note was disclosed to QNC on a confidential basis, therefore, any possible claim to confidentiality was lost at the point the information was given to QNC.
32. Given my finding that the remaining information in the file note does not concern "*information conveyed by a staff member ... to their supervisor... regarding an incident that they witnessed*" and the relevant confidentiality provisions of the *Nursing Act 1992* (Qld) and the *Health Practitioner Regulation National Law Act 2009* (Qld),²² I am satisfied that little or no weight should be afforded to these submissions in support of factors favouring disclosure.

²⁰ See the OIC's Guideline "*Routine personal work information of public servants*" which explains that the type of information which is not considered to be routine includes complaints made by or about a public service officer and an officer's opinions about other public service officers.

²¹ As it does not comprise a relevant opinion, advice, recommendation, consultation or deliberation that has taken place, been obtained, prepared or recorded in the course of, or for the purposes of, the deliberative processes of government.

²² See for example section 216 of the *Health Practitioner Regulation National Law Act 2009* (Qld) "Duty of confidentiality" and section 139 of the *Nursing Act 1992* (Qld) "Confidentiality of documents and information".

33. In summary, after carefully considering the remaining information in the file note, QNU's submissions and all of the relevant information before me, I am satisfied that:
- while acknowledging the importance of agency accountability generally and the applicant being provided with sufficient information to enable him to properly respond to allegations made against him, little weight should be afforded to the public interest factors favouring disclosure, given that:
 - the applicant has been provided with all other information on his professional standards file
 - the remaining information in the file note contains no information about the actual incident and is not adverse to the applicant
 - significant weight should be afforded to the factors favouring nondisclosure, as disclosure could reasonably be expected to:
 - cause a public interest harm as it would disclose third parties' personal information (including information regarding the identity of the notifier and the author's personal opinions about collateral issues which do not comprise routine personal work information and do not relate to the applicant's relevant conduct)
 - prejudice the third parties' rights to privacy, and
 - on balance, the factors favouring nondisclosure of the remaining information in the file note outweigh the factors favouring disclosure in the circumstances of this review.
34. In summary and based on the matters set out above, I am satisfied that disclosure of the Information in Issue is, on balance, contrary to public interest.

DECISION

35. I vary the decision under review by finding that AHPRA:
- a) was not entitled to refuse access to the routine personal work information contained in the file note; and
 - b) is entitled to refuse access to the Information in Issue under section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act on the basis that disclosure would, on balance, be contrary to public interest.
36. I have made this decision as a delegate of the Information Commissioner, under section 139 of the *Information Privacy Act 2009* (Qld).

Jenny Mead
Right to Information Commissioner

Date: 12 September 2011

APPENDIX**Significant procedural steps**

Date	Event
26 May 2010	The applicant lodges an application with the Queensland Nursing Council (QNC) seeking information under the <i>Information Privacy Act 2009 (IP Act)</i> .
30 June 2010	QNC issues its initial decision.
1 July 2010	QNC merges with the Australian Health Practitioner Regulation Agency (AHPRA).
19 July 2010	Queensland Nurses' Union (QNU), on behalf of the applicant, applies to AHPRA for internal review of QNC's decision.
12 August 2010	AHPRA issues its internal review decision.
9 September 2010	QNU applies to the Office of the Information Commissioner (OIC) for external review of AHPRA's internal review decision and provides copies of relevant documents.
6 October 2010	OIC accepts the external review application. OIC requests AHPRA provide copies of the documents to which access was refused.
11 October 2010	AHPRA provides OIC with copies of the relevant information.
23 June 2011	OIC: <ul style="list-style-type: none"> • conveys a written preliminary view to AHPRA; and • consults with Queensland Health (QH), advising of the preliminary view to AHPRA and asking whether QH wishes to become a participant in the external review.
7 July 2011	AHPRA accepts OIC's preliminary view, agreeing to release further information to the applicant. QH confirms that it has no objection to the preliminary view conveyed to AHPRA and, on that basis, does not wish to apply to participate in the external review.
13 July 2011	OIC conveys a preliminary view to QNU and asks AHPRA to release additional information to the applicant.
26 July 2011	AHPRA releases the additional information to the applicant/QNU.
2 August 2011	QNU provides a submission to OIC.