OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 96019
Application S 203/93

Participants:

"ROSK"
Applicant

BRISBANE NORTH REGIONAL HEALTH AUTHORITY
Respondent

OTHERS
Third Parties

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - matter in issue comprising information used to support the issue of a warrant in respect of the applicant under s.25 of the *Mental Health Act 1974* Qld - warrant not executed - whether disclosure of the matter in issue could reasonably be expected to prejudice a system or procedure for the protection of persons - application of s.42(1)(h) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.42(1), s.42(1)(b), s.42(1)(h), s.42(2), s.46(1)(a), s.46(1)(b), s.52
Mental Health Act 1974 Qld s.6(c), s.15(6) s.18(3), s.21(2), s.21(3), s.21(4), s.21(5), s.21(6A), s.25, s.25(1), s.25(3), s.25(3)(a), s.25(3A), s.25(3A)(a), s.25(3A)(b), s.27, s.27(2), s.57, s.58

Murphy and Queensland Treasury & Ors, Re (Information Commissioner Qld, Decision No. 95023, 19 September 1995, unreported)

DECISION

I decide to vary the decision under review by finding that the matter remaining in issue (which is identified in paragraph 8 of my accompanying reasons for decision) is exempt matter under s.42(1)(h) of the *Freedom of Information Act 1992* Qld.

Date of decision: 18 November 1996

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F N ALBIETZ

INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse the applicant access to certain matter which is contained in an Information (and statements attached to it) used to support a warrant issued in respect of the applicant under s.25 of the *Mental Health Act 1974* Qld.

2. By letter dated 14 July 1993, the applicant applied to the Brisbane North Regional Health Authority (the Authority) for access under the *Freedom of Information Act 1992* Qld (the FOI Act) to:

   > *... a document which contains certain allegations to obtain a warrant to have me assessed under the Mental Health Act which I believe was done as a vexatious act using false and misleading statements.*

3. In her application for access, the applicant stated that when two medical practitioners, accompanied by the police, arrived at her home with the warrant, she was assessed, and the medical practitioners found that the applicant "*had no mental problems*" (to quote the applicant) and the warrant was therefore not executed.

4. In a decision made on 8 September 1993, Mr Bill Evans, FOI Co-ordinator for the Authority, identified seven folios as falling within the terms of the applicant's FOI access application, being the Information (i.e., the prescribed form, form 14, under s.25 of the *Mental Health Act*) relied upon to support the warrant, together with four signed statements attached to the Information. Mr Evans decided to grant the applicant access to parts only of the two folios comprising the Information, and an annotation made by one of the medical practitioners who

attended at the applicant's premises for the purposes of the warrant. Mr Evans decided that the remaining matter on the seven folios was exempt matter under s.42(1)(b) of the FOI Act.

5. By letter dated 4 October 1993, the applicant sought internal review of Mr Evans' decision, in accordance with s.52 of the FOI Act. The internal review was undertaken by the Acting Regional Director of the Authority, Mr A G Lederle, who made his decision on 12 October 1993. Mr Lederle decided to vary Mr Evans' initial decision by giving access to the heading of the prescribed form, and the signature block of the justice of the peace before whom the Information was sworn, but decided that the balance of the seven folios was exempt matter under s.42(1)(b) and s.46(1)(b) of the FOI Act.

6. By letter dated 6 November 1993, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Lederle's decision.

External review process

7. The documents claimed to be exempt were obtained and examined. The informant who swore the Information relied upon to support the warrant, and the three other persons who provided signed statements attached to the Information, were consulted by staff of my office. One of those persons consented to her name, and part of her signed statement, being disclosed to the applicant. Another person consented to her name being disclosed to the applicant, where that name appeared on the top of one of the signed statements attached to the Information. The Authority consented to the disclosure of that matter to the applicant, and I authorised disclosure accordingly. Apart from these concessions, the informant, and the other persons who provided signed statements, objected to the disclosure to the applicant of any of the matter remaining in issue.

8. The matter remaining in issue comprises:

- Document 1: a document headed "TO: Medical practitioner and Designated authorised person", from which the identity of the individual who swore the Information on 9 July 1993 has been deleted, together with other information concerning the identity of the persons who provided signed statements.
- Document 2: the Information which was sworn on 9 July 1993, from which has been deleted matter (including the grounds for suspicion that the applicant was mentally ill) that would enable the identity of the person who swore the Information to be ascertained.
- Document 3: an annexure (marked "A") to the Information, being the continuation of the explanation, by the person who swore the Information, of the grounds for that person's suspicion that the applicant was mentally ill.
- Document 4: the signed statement dated 9 July 1993 of the person who consented to her identity, and part of her signed statement, being released to the applicant. The matter which remains in issue consists of:

    * the address at the top of the statement
    * the name in the third line of the statement
    * the last two words of the sixth line, the seventh and eighth lines, and the first three words of the ninth line
    * the last two words of the twelfth line of the statement, and the thirteenth to eighteenth lines (inclusive).

- Document 5: a signed statement by the person who swore the Information on 9 July 1993.

- Document 6: the signed statement, dated 8 July 1993, of the person who consented to disclosure of her name only where it appears at the top of her signed statement. The rest of the statement remains in issue.
- Document 7: a signed statement of another person dated 9 July 1993.

9. I obtained evidence, in the form of statutory declarations, from two of the sources of information, and from a Senior Sergeant Sanders of the Queensland Police Service, who was involved in the issuing and processing of the warrant. Copies of that evidence were provided to the applicant, after deletion of references to matter claimed to be exempt.

10. I also conveyed to the applicant my preliminary views that the matter in issue was exempt under s.42(1)(h), s.46(1)(a) and s.46(1)(b) of the FOI Act. I extended to the applicant the opportunity, in the event that she did not accept my preliminary views, to lodge evidence and submissions in support of her case in this external review. On several occasions, the applicant indicated that she would provide evidence and/or submissions in support of her case in this external review, and sought extensions of time for that purpose, but despite several reminders, she has not done so.

11. On 12 September 1996, I wrote to the applicant forwarding copies of guidelines from Queensland Police Service Operational Procedures Manuals as to the practice of the Queensland Police Service in relation to administration of mental health warrants. In that letter, I extended to her a final opportunity to lodge evidence and submissions in support of her case, and suggested that she might wish to address the significance of the guidelines issued by the Queensland Police Service. No response has been received to that letter. The applicant has been given more than adequate opportunities to lodge material in support of her case, and it is appropriate that I now proceed to give my formal decision finalising this review.

Application of s.42(1)(h) of the FOI Act

12. Although the Authority relied on the application of s.42(1)(b) and s.46(1)(b) of the FOI Act, I have found it necessary to consider only the application of s.42(1)(h) to the matter remaining in issue. Section 42(1)(h) provides:

> ***42.(1)*** *Matter is exempt matter if its disclosure could reasonably be expected to—*
>
> ...
>
> *(h) prejudice a system or procedure for the protection of persons, property or environment;*

13. In my opinion, s.25 of the *Mental Health Act 1974* Qld, and related provisions of that Act, have established a carefully balanced system or procedure for the protection of persons. So far as relevant for present purposes, s.25 of the *Mental Health Act* provides:

> ***25.(1)*** *If it appears to a justice, on information by any person on oath, in the prescribed form, that there is reasonable cause to suspect that a person is mentally ill and that <u>in the interests of that person or for the protection of other persons it is necessary to do so</u>, the justice may issue a warrant in the prescribed form and as hereinafter provided.*

(1A) *A justice who issues a warrant as provided in subsection (1) shall forthwith forward a copy of the warrant and a copy of the sworn information relied on to the clerk of the court in the Magistrates Courts district in which the patient then is or, where in respect of any such district there is more than 1 such clerk, to 1 of those clerks.*

(2) *A warrant issued under this section shall authorise and require the police officer to whom it is directed or any other police officer to remove or cause to be removed, within the period of 14 days after the date of the warrant but as soon as practicable, <u>the person in respect of whom the warrant is issued to a place of safety</u>.*

(3) *In the execution of a warrant issued under this section the police officer by whom it is to be executed—*

> *(a)* *shall be accompanied by a medical practitioner and a designated authorised person; and*
>
> *(b)* *shall be provided by the clerk of the court by whom the sworn information relied on to support the warrant is held with a copy of the information contained in a sealed envelope; and*
>
> *(c)* *shall make the copy information referred to in paragraph (b) available upon request to the medical practitioner and the designated authorised person accompanying the police officer for their inspection; and*
>
> *(d)* *shall deliver the copy information referred to in paragraph (b) to the hospital administrator or person in charge of <u>the place of safety to which he has removed the person in respect of whom the warrant was issued</u>.*

(3A) *If the medical practitioner or the designated authorised person accompanying the police officer inform that officer in writing—*

> *(a)* *that, in his or her opinion, the person in respect of whom the warrant is issued is not mentally ill; or*
>
> *(b)* *that, in his or her opinion, it is not necessary that the person in respect of whom the warrant is issued should be removed to a place of safety, <u>in that person's own interests or for the protection of others</u>;*

that police officer shall not execute the warrant but shall as soon as practicable thereafter make a report as to the issue of the warrant and as to the reasons for its not having been executed and shall cause the report to be forwarded to the Director, who shall notify the justice who issued the warrant and the clerk of the court to whom a copy of the warrant was forwarded pursuant to subsection (1).

...
(my underlining).

14. I also note the terms of s.6(c) of the *Mental Health Act* which provides:

> ***6.*** *This Act shall be construed and applied—*
>
> ...
>
> *(c) so that in the case of any patient the compulsory powers relating to detention conferred by this Act are exercised for the purposes only of the patient's own welfare or the protection of others; ... .*

15. In my view, it is clear that the legislature considered it necessary to establish a system or procedure whereby members of the community who hold a genuine belief that a person is mentally ill, and a danger to himself/herself or to others, can initiate action to protect that person or others from the apprehended danger. This clearly answers the description "a system or procedure for the protection of persons", within the terms of s.42(1)(h) of the FOI Act.

16. Being a system or procedure capable of resulting in the temporary deprivation of the liberty of a citizen, it has been carefully constructed with a number of safeguards, checks and balances against improper use. Chief among these is that a person cannot be removed to a place of safety merely on the sworn information lodged with a justice of the peace in accordance with s.25(1) of the *Mental Health Act*. First, the justice of the peace must have reasonable cause to suspect the matters particularised in s.25(1), before a warrant is issued under s.25(1). Secondly, if a warrant is issued, the warrant will not be executed if, in the independent opinion of the medical practitioner or the designated authorised person who must (in accordance with s.25(3)(a) of the *Mental Health Act*) accompany a police officer authorised to execute a warrant, the person the subject of the warrant is not mentally ill, or it is not considered necessary to remove the subject of the warrant to a place of safety in that person's own interests or for the protection of others: see s.25(3A) of the *Mental Health Act*.

17. A further safeguard is provided by sections 57 and 58 of the *Mental Health Act* which prescribe penalties for forging documents, or intentionally facilitating the use of forged documents, or wilfully making a false statement in any document, in connection with the purposes of the *Mental Health Act*.

18. Section 27 of the *Mental Health Act* provides that a person removed to a place of safety (preferably a hospital - see s.27(2) of the *Mental Health Act*) is to be detained there for a period not exceeding three days, to allow the person to be assessed by a medical practitioner with a view to making an application for regulated admission of that person to a hospital, under Division 2 of Part 3 of the *Mental Health Act*. Such an application for admission is required to be supported by a written recommendation of a medical practitioner (s.18(3) of the *Mental Health Act*).

19. A person admitted to a hospital in pursuance of an application for admission under Division 2 of Part 3 of the *Mental Health Act* may be detained there for a period of three days, and shall not be detained after that period of time unless a second recommendation is made by a medical practitioner, other than the medical practitioner who supported the application for admission under s.18(3) (see s.21(1) of the *Mental Health Act*).

20. The second recommendation is sufficient to authorise detention of the person concerned for up to 21 days, and after that time, a person may only be detained subject to the process of renewal dealt with in s.21(3) of the *Mental Health Act*. Division 2 of Part 3 of the *Mental Health Act* provides for a system of "longer term" detention of persons who are mentally ill, and a danger to themselves or others. Each period of detention must be authorised by a medical practitioner. Any detention for more than 21 days must be authorised by a psychiatrist (see the combined effect of s.21(2)-s.21(5) of the *Mental Health Act*). Renewal of the detention of patients for more than 21 days is subject to the automatic review of the Patient Review Tribunal, and an application for the patient's discharge may be made to the Tribunal after the patient's detention has been renewed beyond an initial period of 21 days (see s.21(6A) of the *Mental Health Act*). Section 15(6) of the *Mental Health Act* provides that the Patient Review Tribunal may order the discharge of a patient from detention, if it is satisfied that the patient is not suffering from mental illness of a nature or to a degree that warrants the patient's detention in a hospital and does not need to be detained in the interests of the patient's own welfare or with a view to the protection of other persons.

21. This carefully prescribed system or procedure clearly contemplates that the information relied on to support the issue of a warrant is to be treated as confidential, and viewed only by those with a need to see it. Section 25(3) prescribes that a copy of the information relied on to support a warrant shall be provided by the clerk of the relevant court, to the executing police officer, in a sealed envelope, and is to be made available for inspection, on request, only by the medical practitioner and the designated authorised person who accompany the police officer. If the subject of the warrant is conveyed to a place of safety, the copy of the information must be delivered to the hospital administrator or person in charge of the place of safety. It appears to have been intended that the information be available, if required, to assist the medical practitioner and the designated authorised person with their initial assessment of whether the subject of a warrant should be removed to a place of safety, and, if so removed, that the information be available, if required, to assist medical practitioners with their ongoing assessment and care of the person removed to a place of safety. In my view, the medical practitioners would be implicitly authorised to selectively disclose parts of the information, to the extent that that was considered necessary for the effective assessment, treatment or care of the person removed to a place of safety, but I have no doubt that medical practitioners would take care to treat the information in confidence, and in particular to avoid disclosure of the source(s) of the information, so far as possible. Otherwise, the statutory scheme contemplates, in my opinion, that the information relied on to support the warrant should be treated in confidence as against the world at large, and, subject to practical considerations which may attend each individual case (e.g., whether the identity of the informant, or the information supplied, has by some means already been made known to the subject of the warrant, or the informant consents to its disclosure), should be treated in confidence as against the subject of the warrant.

22. Any consideration of whether procedural fairness might override confidentiality so as to require disclosure, to the subject of a warrant, of information used to support the issue of the warrant, must take account of the safeguards built into the statutory scheme. Once a warrant has been issued under s.25(1) of the FOI Act, the fate of the subject of the warrant depends on assessments made by health care professionals, who may or may not have regard to, or rely on, the information which supported the issue of the warrant. If it should ever be the case that information which supported the issue of a warrant remains one of the crucial factors relied upon by a health care professional to support an assessment that the subject of the warrant should remain in a place of safety for an extended period, the question of whether (and to what extent) procedural fairness requires disclosure to the subject of the warrant, of the information

which supported the issue of the warrant, would be a matter appropriate for the judgment of a Patient Review Tribunal, which could tailor its review procedures accordingly.

23. If (as occurred in the case of the applicant) a warrant is not executed because the medical practitioner, or the designated authorised person, makes an assessment in the terms of s.25(3A)(a) or (b) of the *Mental Health Act*, the intention of the statutory scheme appears to be that the information used to support the issue of the warrant should remain confidential from the subject of the warrant. In my opinion, there are sound reasons why this should be the case. Some are referred to in the statutory declaration of Senior Sergeant Sanders of the Queensland Police Service:

> *... it was my normal procedure to treat statements that were provided in support of a warrant issued under the provisions of the* [Mental Health Act] *as "confidential". In this regard, I mean that the identity of the person who provided the statement would not be disclosed to the person who was the subject of the warrant. However, at times the substance of the allegations made in respect of the subject of the warrant will be put to that person but not in any way so that the identity of the individual who provided a statement could be ascertained. It is my view that it is necessary to maintain the confidentiality of the identity of persons who provide information in support of warrants issued under the* [Mental Health Act] *so as to protect those individuals who supply information in that regard. It is my view that these people come forward to help someone who is considered to be mentally ill and the confidentiality of their identities as persons involved in the issue of the warrant should be preserved.*

24. In my opinion, it is essential for the efficacy of this system or procedure for the protection of persons, that members of the community should not be unduly inhibited from using the scheme if they honestly believe that a person may be mentally ill and a danger to himself/herself or to others. An informant under s.25(1) of the *Mental Health Act* may have an honest belief that turns out (in the opinion of the health professionals who assess the subject of a mental health warrant) to be a mistaken belief. That is why elaborate safeguards, checks and balances have been built into the statutory scheme. The interests of the community are best served, in my opinion, by having a system or procedure which encourages disclosures which may prevent mentally ill persons harming themselves or others, even if warrants under s.25 of the *Mental Health Act* are sometimes issued on the basis of mistaken (though honestly held) apprehensions about the subject of the warrant. (I note in this regard that s.57 and s.58 of the *Mental Health Act* are intended to punish, and thereby inhibit, wilful misuse of the statutory scheme).

25. I consider it important for the efficacy of this system or procedure for the protection of persons, that those who supply information which supports the issue of a warrant under s.25(1) of the *Mental Health Act* should (in the absence of their consent to disclosure) be entitled to expect (consistently with indications given in the terms of the statutory scheme itself) that the information would not be disclosed to the subject of the warrant (except in the circumstances referred to in paragraph 21 above, or where the circumstances of a particular case are such that, in practical terms, disclosure of the identity of the informant, or some of the information supplied by the informant, is unavoidable). If information used to support a warrant under s.25(1) of the *Mental Health Act* were routinely open to disclosure, under the FOI Act, to the subject of the warrant, I consider it reasonable to expect that many members of the community would be inhibited from using this system or procedure for the protection of persons, in cases where it should appropriately be used, or else would feel constrained to give information in such guarded terms that it would be of little or no assistance to a justice of the peace, or a

health care professional, attempting to make the difficult assessment of whether action should be taken in respect of a person to protect that person, or others, from harm.

26. The correct approach to the application of the phrase "could reasonably be expected to" in s.42(1) of the FOI Act was explained in *Re Murphy and Queensland Treasury & Ors* (Information Commissioner Qld, Decision No. 95023, 19 September 1995, unreported) at paragraph 44. The test embodied in that phrase calls for the decision-maker to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural expectations) and expectations which are reasonably based, i.e., expectations for the occurrence of which real and substantial grounds exist.

27. Applying that test, I am satisfied, for the reasons given in paragraphs 21-25 above, that disclosure of the matter remaining in issue could reasonably be expected to prejudice a system or procedure for the protection of persons, and hence that it is exempt matter under s.42(1)(h) of the FOI Act. I also find that none of the matter remaining in issue falls within the terms of s.42(2) of the FOI Act.

Conclusion

28. I note that concessions have resulted in disclosure to the applicant of some of the matter that was initially in issue, and that I have not found it necessary to consider the grounds of exemption relied upon in the decision under review. It is appropriate, therefore, that I decide to vary the decision under review by finding that the matter remaining in issue (as identified in paragraph 8 above) is exempt matter under s.42(1)(h) of the FOI Act.

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F N ALBIETZ
INFORMATION COMMISSIONER