



## Decision and Reasons for Decision

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Application Numbers:	310696, 310877
Applicant:	Collins
Respondent:	Health Quality and Complaints Commission
Decision Date:	6 November 2012
Catchwords:	<p><b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - applicant sought access to documents relating to an investigation of a complaint made to the Health Quality and Complaints Commission in relation to the applicant's mother's death at a public hospital - access refused to the signature of an independent clinician, a qualified medical practitioner, who was involved in early assessment of the complaint - independent clinician did not investigate complaint - independent clinician strongly objected to disclosure of their signature- whether disclosure would found an action for breach of confidence- sections 47(3)(a) and 48 of the <i>Right to Information Act 2009 (Qld)</i> on the ground set out in schedule 3, section 8 of the <i>Right to Information Act 2009 (Qld)</i></b></p> <p><b>ADMINISTRATIVE LAW – RIGHT TO INFORMATION – APPLICATION FOR ACCESS TO INFORMATION – REFUSAL OF ACCESS – NON-EXISTENT DOCUMENTS – applicant submits additional relevant documents should exist within the agency – whether there are reasonable grounds for agency to be satisfied that documents do not exist – whether access to documents can be refused – section 47(3)(e) of the <i>Right to Information Act 2009 (Qld)</i> – section 52(1)(a) of the <i>Right to Information Act 2009 (Qld)</i></b></p>

### REASONS FOR DECISION

#### Summary

1. The applicant's mother passed away in a Queensland public hospital. The applicant's sibling then made a complaint to the Health Quality and Complaints Commission (**HQCC**) relating to the hospital treatment of her mother (**complaint**).
2. HQCC commenced an assessment of the complaint and determined that the matter did not require a formal investigation. In deciding not to investigate the complaint, the HQCC relied on the opinions of an independent clinician who considered that the treatment provided was reasonable.

3. After the HQCC assessment process had been finalised, the applicant applied to HQCC under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to all documents held by the HQCC in relation to his mother and the complaint (the **first access application**).<sup>1</sup>
4. HQCC granted the applicant full access to all documents except for part of one page which contained the signature of the independent clinician (**clinician's signature**), a qualified medical practitioner, who provided HQCC with a medical opinion in the assessment of the complaint (**independent clinician**).<sup>2</sup>
5. HQCC refused access to the clinician's signature under section 47(3)(b) of the RTI Act on the basis that disclosure would, on balance, be contrary to the public interest.
6. The applicant then made a second access application to HQCC for information which would identify the independent clinician, documents about the clinician's qualifications, as well as documents used to assess the clinician's independence (the **second access application**).<sup>3</sup> HQCC decided to release 18 pages in full and one in part, and refuse access to 11 pages on the basis that disclosure, would, on balance, be contrary to the public interest. HQCC also found that some documents did not exist.
7. The applicant applied to the OIC for external review of both decisions.<sup>4</sup> I have decided to deal with both applications in these reasons.
8. During the course of the external reviews, the information under consideration was narrowed to:
  - information identifying the clinician, namely:
    - A signature in the first application<sup>5</sup>
    - A resume in the second application,<sup>6</sup> and
  - *'any instructions/guidance/advice given to experts about the preparation of expert opinions (instruction documents)* in the second application.
9. It is decided that, in the circumstances of this review, HQCC's decisions are set aside and HQCC:
  - is entitled to refuse access to the identifying information of the independent clinician on the grounds that disclosure would found an equitable action for breach of confidence; and
  - is entitled to refuse access to instruction documents on the grounds that they are non-existent.

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<sup>1</sup> External review no. 310696

<sup>2</sup> The clinician's name was not recorded on any of the documents.

<sup>3</sup> External review number 310877.

<sup>4</sup> On 1 June 2011 for the first access application and on 29 August 2011 for the second access application.

<sup>5</sup> Following enquiries from the applicant as to whether the signature is legible, HQCC submitted that the clinician's identity can be reasonably identified by inputting the signature into the Australian Health Practitioner Regulation Agency's register of medical practitioners in Queensland. I accept this submission and consider that the signature does identify the clinician.

<sup>6</sup> The applicant has questioned if the resume identifies the clinician. HQCC submitted, in their decision dated 16 November 2011, *'The clinician's resume would disclose the identity of the clinician given the various positions the clinician has held in professional associations, colleges and university. Having knowledge of these positions and the date these positions were held, a simple internet search would reveal the identity of the clinician.'* I accept this submission and consider that the resume does identify the clinician.

## Reviewable decisions

10. The decisions under review are HQCC's decision on the first access application dated 10 June 2011 and HQCC's internal review decision on the second access application dated 16 November 2011.

## Evidence considered

11. Evidence, submissions, legislation and other material I have considered in reaching this decision is disclosed in these reasons (including footnotes and Appendix).

## Information in issue

12. The Information in Issue in this review is described at paragraph 8.

## Issues in this review

13. HQCC decided not to release the identifying information of the independent clinician on the grounds that disclosure would, on balance, be contrary to the public interest.
14. After careful consideration of the relevant information, the relevant law, HQCC's decision and the applicant's submissions,<sup>7</sup> I am satisfied that it is more appropriate to consider the application of schedule 3, section 8 of the RTI Act. Accordingly, this decision does not consider whether disclosure of the information in issue would, on balance, be contrary to the public interest.<sup>8</sup>
15. The issues for consideration in this review are therefore:
  - whether HQCC is entitled to refuse access to the instruction documents on the grounds that they are non-existent; and
  - whether disclosure of the identifying information of the independent clinician would found an action in equity for breach of confidence.

## Refusal of access to non-existent documents

### Relevant law

16. The RTI Act provides that access to a document may be refused if the document is non-existent.<sup>9</sup> A document is non-existent if there are reasonable grounds for the agency or Minister dealing with the access application to be satisfied that the document does not exist.<sup>10</sup>
17. The RTI Act is silent on how an agency or Minister can be satisfied that a document does not exist. In *PDE and the University of Queensland*<sup>11</sup> (*PDE*), the Information Commissioner explained that, to be satisfied that a document does not exist, an

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<sup>7</sup> The applicant made a number of submissions on the public interest factors favouring disclosure of the identifying information of the clinician. As I have decided that the identifying information of the clinician is exempt from disclosure, I have not considered the applicant's submissions on the public interest in this decision.

<sup>8</sup> As to the correctness of this approach, see *BL v Office of the Information Commissioner, Department of Communities* [2012] QCATA 149 at 15.

<sup>9</sup> Sections 47(3)(e) and 52 of the RTI Act.

<sup>10</sup> Section 52(1)(a) of the RTI Act.

<sup>11</sup> (Unreported, Queensland Information Commissioner, 9 February 2009). Although *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld), the requirements of that section are replicated in section 52 of the RTI Act.

agency must rely on its particular knowledge and experience, having regard to various key factors including:

- the administrative arrangements of government
  - the agency structure
  - the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
  - the agency's practices and procedures (including but not exclusive to its information management approach); and
  - other factors reasonably inferred from information supplied by the applicant including:
    - the nature and age of the requested document/s; and
    - the nature of the government activity the request relates to.
18. When these factors are properly considered and the decision maker is satisfied on reasonable grounds that the document does not exist, then it is unnecessary for searches to be conducted.
19. Alternatively, the decision maker may rely on searches to justify a decision that the document sought does not exist. If an agency relies on searches, all reasonable steps must be taken to locate the requested document. In determining whether all reasonable steps have been taken, regard should be had to the factors listed in *PDE*.

***Is HQCC entitled to refuse access to the instruction documents on the basis that they are non-existent?***

20. In his second access application, the applicant applied to HQCC for:

*...any instructions/guidance/advice/training given to experts about the preparation of expert opinions – Including any general ones and ones specific to the opinion mentioned above.*

21. In its decision, HQCC refused access to the documents on the grounds that they were non-existent. This decision was affirmed on internal review.
22. HQCC's internal review decision sets out clinicians are employed on contracts to assess complaints and provide advice. All advice provided must fall within the clinician's experience and/or professional registration and clinicians are required to advise HQCC if a matter falls outside their experience, training or professional registration. They also stated that clinicians must advise of any conflicts of interest.<sup>12</sup>
23. HQCC submitted clinicians are employed under an employment agreement and there is no additional information or training provided. Following enquiries on external review, a HQCC staff member made enquiries with relevant staff within HQCC and conducted additional searches. HQCC confirmed in writing<sup>13</sup> that:

*There are no documents which exist throughout HQCC with this information (the instruction documents) requested by Mr Collins.*

24. HQCC is a relatively small organisation. I am satisfied that enquiries made by the staff member would identify documents if they existed.

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<sup>12</sup> In the internal review decision dated 16 November 2011.

<sup>13</sup> In an email dated 28 August 2012.

25. Given HQCC's submission on internal review, their subsequent searches and the relatively small size of the organisation, I am satisfied that HQCC does not hold instruction documents and these documents do not exist.

### ***Breach of confidence***

#### **Relevant law**

26. Sections 47(3)(a) and 48 of the RTI Act provide that access may be refused to a document to the extent that it comprises exempt information. Schedule 3 sets out the type of information the disclosure of which the Parliament has considered would, on balance, be contrary to the public interest and is therefore exempt.
27. Information will be exempt if its disclosure would found an action for breach of confidence in equity.
28. The following elements must be established to give rise to an equitable obligation of confidence:
- a) information must be capable of being specifically identifiable as information that is secret, rather than generally available
  - b) information must have the necessary quality of confidence
  - c) circumstances of the communication must create an equitable obligation of confidence
  - d) disclosure to the applicant for access must constitute an unauthorised use of the confidential information; and
  - e) disclosure must cause detriment to the plaintiff.<sup>14</sup>
29. In this case, I am satisfied that HQCC is bound with an equitable obligation of confidence not to disclose the identifying information of the clinician. I explain my reasons below.

#### ***(a) specifically identified information***

30. It must be possible to identify with specificity, and not merely in general terms, the information in question.<sup>15</sup>
31. The information in question is the signature of the independent clinician and the clinician's resume. I am therefore satisfied that the information is specifically identifiable and that this requirement is met.

#### ***(b) necessary quality of confidence***

32. An equitable obligation of confidence will only protect information with the necessary quality of confidence—it will not extend to information that is generally known, useless or trivial.<sup>16</sup>

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<sup>14</sup> The Queensland Information Commissioner identified these requirements in *B and Brisbane North Regional Health Authority* [1994] QICmr 1 (***B and BNRHA***) in applying the equivalent exemption under the repealed *Freedom of Information Act 1992* (Qld). See also *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) and Another* (1987) 14 FCR 434 (***Corrs Pavey***) at 437 per Gummow J. The recent decision of *TS008G and Queensland Health* (Unreported, Queensland Information Commissioner, 13 December 2011) confirmed the requirement of detriment in RTI cases.

<sup>15</sup> *B and BNRHA* at paragraphs 60-63.

<sup>16</sup> *B and BNRHA* at paragraph 43; *Callejo* at paragraph 139.

33. The applicant submits that the staff members at HQCC would know the identity of the clinician.
34. The law on this issue makes it clear that it is necessary for the information to have a 'degree of secrecy sufficient for it to be subject to an obligation of conscience'.<sup>17</sup> It is not necessary to demonstrate absolute secrecy or inaccessibly. The fact that staff members at HQCC may know the identity of the clinician does not take away from the quality of confidence over the information in issue.
35. In this case, the identifying information of the clinician (the resume and the signature), despite being known to some members of HQCC, is not generally known, nor is it trivial or useless. I am therefore satisfied that this requirement is satisfied.

**(c) circumstances of communication**

36. All the relevant circumstances in which information was received must be considered to determine whether the party who received the information is bound with an obligation of confidence. The Information Commissioner has previously indicated<sup>18</sup> that the relevant circumstances will include, but are not limited to:
  - nature of the relationship between the parties
  - nature and sensitivity of the information
  - purpose/s for which the information was communicated
  - nature and extent of any detriment to the interests of the information-supplier that would follow from an unauthorised disclosure of the information; and
  - circumstances relating to the communication.
37. I must consider whether HQCC (as the party who received the information) is bound with an obligation of confidence to the clinician to maintain confidentiality over the information in issue (information which would identify the clinician).
38. HQCC has provided a copy of the independent clinician's employment agreement. This agreement contains a confidentiality clause which states that:

*HQCC will use its best endeavours to keep confidential any information that could directly or indirectly reveal your identity.*
39. While the test I am applying is an equitable one, the above contractual clause is strong evidence of an understanding between the parties that information identifying the clinician would be kept confidential.
40. In submissions in the first external review, HQCC referred to the understanding of confidence between HQCC and the clinician set up by the confidentiality clause in the agreement.
41. HQCC consulted with the clinician, who objected to disclosure of their identifying information. This provides additional evidence of the clinician's understanding that HQCC would maintain confidentiality over their identifying information.

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<sup>17</sup> *B and BNRHA*.

<sup>18</sup> *B and BNRHA* at paragraph 84.

42. On the basis of the matters set out above, I am satisfied that the identifying information of the clinician was communicated to HQCC in circumstances giving rise to an equitable obligation of confidence. I am therefore satisfied that this requirement is met.

**(d) unauthorised use**

43. Disclosure to the applicant for access must constitute an unauthorised use of the confidential information.
44. Both HQCC and the clinician object to disclosure of the clinician's identifying information. I am therefore satisfied this requirement is satisfied.

**(e) detriment**

45. Detriment suffered by a non-government plaintiff such as the clinician, need not be of a financial nature and may include embarrassment, loss of privacy, or fear, or an indirect detriment, for example, disclosure of the confidential information may injure some relation or friend.<sup>19</sup>
46. HQCC has submitted that disclosure of the information would be of significant concern to the clinician, in particular that there is a concern that disclosure may adversely affect the clinician's career because of the risk of professional ostracism.
47. The applicant submits that the evidence for professional ostracism must be strong, 'so it is almost a certainty.'<sup>20</sup>
48. For a non-government plaintiff, it is not necessary for there to be strong evidence. The Information Commissioner in B and BNRNA quoted *Attorney-General v Guardian Newspapers*:

*I would think it a sufficient detriment to the confider that information given in confidence is to be disclosed to persons to whom he would prefer not to know of it, even though disclosure would not be harmful to him in any positive way.*

49. I accept HQCC's submission that disclosure would be of significant concern to the clinician and I consider that this is sufficient to satisfy this requirement.

**Breach of confidence—conclusion**

50. On the basis of the matters set out above, I find that the requirements to found an action for breach of an equitable obligation of confidence are established, and that therefore, the identifying information of the clinician is exempt under schedule 3, section 8 of the RTI Act.

**DECISION**

51. HQCC's decisions are varied and HQCC:
- is entitled to refuse access to the identifying information of the independent clinician on the grounds that disclosure would found an equitable action for

<sup>19</sup> Dean, R., (1990) *The Law of Trade Secrets*, Law Book Company, pp. 177-8.

<sup>20</sup> This submission is linked to the applicant's previous submissions in the first external review relating to whether disclosure of the identifying information of the clinician would, on balance, be contrary to the public interest. As this is not considered in this decision, not all of the applicant's submission is relevant.

breach of confidence under schedule 3, section 8 and section 47(3)(a) of the RTI Act; and

- is entitled to refuse access to the instruction documents on the grounds that they are non-existent under sections 47(3)(e) and 52(1)(a) of the RTI Act.

52. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

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**Clare Smith**  
**Right to Information Commissioner**

**Date: 6 November 2012**



**APPENDIX****Significant procedural steps****Application 1: 310696**

Date	Event
6 June 2011	HQCC received the applicant's access application under the RTI Act.
10 June 2011	HQCC issued its decision refusing access to the Clinician's Signature.
7 July 2011	The application applied to OIC for an external review of HQCC's decision.
20 July 2011	OIC received the document from HQCC to which the applicant was refused part access
26 July 2011	OIC conveyed an oral preliminary view to the applicant affirming HQCC's decision not to release the information
3 August 2011	The applicant corresponded with OIC by email to advise that he did not accept the preliminary view.
3 August 2011	OIC requested HQCC to consult with the clinician.
4 August 2011	HQCC advised OIC that the clinician objects to disclosure of their signature.
15 September 2011	OIC wrote to HQCC explaining further submissions were required to show disclosure of Clinician's Signature would, on balance, be contrary to the public interest.
6 September, 8 November and 15 November 2011	OIC received further submissions from the applicant
28 September 2011	OIC received further submissions from HQCC.
15 November 2011	OIC met with HQCC staff – RTI officer, General Counsel and Clinical Integrity Officer. During this meeting HQCC provided substantial submissions to OIC.
7 December 2011	OIC conveyed an oral preliminary view to the applicant that disclosure would, on balance, be contrary to the public interest. The applicant did not accept.
20 February 2012	OIC conveyed a written preliminary view to the applicant setting out that disclosure would, on balance, be contrary to the public interest
24 February, 28 February and 5 March 2012	OIC received submissions from the applicant contesting OIC's preliminary view.
31 August 2012	OIC conveyed a preliminary view to the applicant both of his external reviews.
14 September 2012	The applicant responded to the preliminary view. He did not accept that disclosure of the identifying information of the clinician was exempt.

**Application 2: 310877**

Date	Event
2 September 2011	HQCC received the applicant's access application under the RTI Act
27 September 2011	HQCC issued its decision refusing access to the resume of the Clinician
24 October 2011	The applicant sought internal review of HQCC's decision

16 November 2011	HQCC issued its internal review decision affirming the access decision
15 December 2011	The applicant applied to OIC for an external review of HQCC's internal review decision
10 January 2012	OIC received the documents from HQCC to which the applicant was refused access
14 February 2012	OIC received further documents relevant to the review from HQCC
28 August 2012	OIC wrote to HQCC requesting further submissions concerning refusal of access and sufficiency of search
31 August 2012	OIC conveyed a preliminary view to the applicant both of his external reviews.
14 September 2012	The applicant responded to the preliminary view. He did not accept that disclosure of the identifying information of the clinician was exempt or that the instruction documents were non-existent.