



Decision and Reasons for Decision

Application Number: 210534

Applicant: GVK

Respondent: Department of Health

Decision Date: 24 December 2008

Catchwords: **FREEDOM OF INFORMATION – Section 42(1)(h) of the *Freedom of Information Act 1992* (Qld) – existence of an identifiable system or procedure – procedure for the protection of persons – whether disclosure of a Justices Examination Order issued under the *Mental Health Act 2000* (Qld) could reasonably be expected to prejudice that system or procedure**

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REASONS FOR DECISION

Summary

1. On the information available to me, I am satisfied that the JEO Application is exempt from disclosure under section 42(1)(h) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**).

Background

2. By application dated 24 January 2008, the applicant wrote to the Department of Health (**Department**) and requested access to the following (**FOI Application**):

All information relating to my premature discharge from hospital. Please see details on complaints I lodged 7/7/07 and 9/7/07, 13/7/07, 19/7/07.

and, as stated in his request to the Department of Justice and Attorney-General:¹

Having explored all legal avenues of enquiry suggested to me up to this point without success, I am now advised to turn to you for the release of the said JEO for my perusal and use...

3. On 15 April 2008, the Department decided to (**Original Decision**):
 - grant the applicant full access to 63 folios
 - grant the applicant partial access to 4 folios
 - deny the applicant access to 2 folios.
4. By application dated 30 April 2008, the applicant applied for internal review of the Original Decision to refuse him access to the Justices Examination Order application which comprised the 2 folios² to which he was denied access (**Internal Review Application**).
5. On 23 May 2008, Ms P Lane, District Manager at the Department decided to affirm the Original Decision (**Internal Review Decision**).
6. By email dated 16 June 2008, the applicant applied to this Office for external review of the Internal Review Decision (**External Review Application**).

Decision under review

7. The decision under review is the Internal Review Decision (referred to at paragraph 5 above).

Steps taken in the external review process

8. By letters dated 19 June 2008, I advised the applicant and the Department that the External Review Application had been accepted.

¹ Which was subsequently transferred to the Department.

² From the Applicant's IMHS file.

9. In a telephone conversation with a staff member of this Office on 29 August 2008, the applicant indicated that he did not want this Office to consult with the person who had made the Justices Examination Order application (**Third Party**).
10. In a telephone conversation with a staff member of this Office on 19 September 2008, the applicant stated that he was now agreeable to this Office consulting with the Third Party.
11. On 19 September 2008, a staff member of this Office consulted with the Third Party.
12. In telephone discussions on 30 September 2008 and 3 October 2008, a staff member of this Office communicated to the Department my preliminary view that folios 52 to 60 of the IMHS file are not irrelevant to the FOI Application and instead form part of the Justices Examination Order application.
13. In a telephone discussion on 3 October 2008 a staff member of this Office inquired with the Department as to whether it would be willing, with a view to resolving the external review informally, to provide a typed summary of any parts of the Justices Examination Order application that did not identify the Third Party. The Department indicated that it would not agree to do this for a number of reasons including the difficulty for the Department's staff of being able to identify aspects of the information that may identify the Third Party to the applicant. That is, the Department is concerned that information which may appear to Departmental staff to be non-identifying may, when considered with other information known by the applicant, identify the Third Party.
14. By letter dated 3 October 2008 to the Department, I sought confirmation of the Department's position in relation to the attachments and the exemptions claimed.
15. By letter dated 7 October 2008, I informed the applicant that it was my preliminary view that the:
 - attachments to the Justices Examination Order application form part of the application
 - Justices Examination Order application, including its attachments, qualify for exemption from disclosure under section 42(1)(h) of the FOI Act (**Preliminary View**).

I asked the applicant, if he did not accept the Preliminary View, to provide submissions to this Office by 22 October 2008.

16. By letter dated 8 October 2008, the Department indicated that it accepted my preliminary view that the attachments form part of the Justices Examination Order application and confirmed its position that the attachments qualify for exemption under section 42(1)(h) of the FOI Act.
17. By email dated 22 October 2008, and in response to matters raised by the applicant in his email of the same day, I extended the time for the applicant to respond to the Preliminary View to 5 November 2008.
18. By emails dated 22 October 2008 (2), 27 October 2008, 31 October 2008 and 5 November 2008 and 17 December 2008, the applicant provided submissions for consideration in this review.

19. In making my decision in this matter, I have taken the following into consideration:

- the applicant's FOI Application, Internal Review Application and External Review Application
- the Department's Original Decision and Internal Review Decision
- records of telephone conversations between the applicant and a staff member of this Office on 29 August 2008, 19 September 2008, 26 September 2008, 30 September 2008, 8 October 2008 and 15 October 2008 and 17 December 2008
- records of telephone conversations between the Department and a staff member of this Office on 16 September 2008, 30 September 2008 and 3 October 2008
- a record of a telephone conversation between the Third Party and a staff member of this Office on 19 September 2008
- the applicant's written submissions of 22 October 2008 (2), 27 October 2008, 31 October 2008, 5 November 2008 and 17 December 2008
- written correspondence from the Department dated 8 October 2008
- the JEO Application
- relevant sections of the FOI Act and *Mental health Act 2000* (Qld)
- explanatory notes to the *Mental Health Bill 2000* (Qld)
- previous decisions of the Information Commissioner of Queensland and decisions and case law from other Australian jurisdictions as identified in this decision
- factsheets published by the Department on its website
- parts of the report titled '*The Right to Information: Reviewing Queensland's Freedom of Information Act*' published by the independent FOI review panel in June 2008
- parts of the *Right to Information Bill 2008* (Qld).

Matter in issue

20. The matter in issue in this review comprises the JEO Application and its attachments³ (**JEO Application**).

Relevant legislation

21. Under 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.
22. As noted above, the Department has refused the applicant access to the JEO Application on the basis of section 42(1)(h) of the FOI Act. My findings with respect to the application of this provision to the matter in issue are set out below.

³ Comprising folios 52-60 of the Applicant's IMHS file.

Findings

Section 42(1)(h) of the FOI Act

23. Section 42(1)(h) of the FOI Act provides:

42 Matters relating to law enforcement or public safety

(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; ...

The Department's submissions

24. The Department submits that the JEO Application qualifies for exemption under section 42(1)(h) of the FOI Act because it comprises information:

- given for the limited purpose of assisting with the administration of the *Mental Health Act 2000* (Qld) (**MHA 2000**)
- received by the Department, on the mutual understanding that it would not be disclosed
- which, if disclosed could reasonably be expected to result in other potential informants being less likely to provide relevant information, thereby prejudicing the system or procedure for the protection of persons which is established by the provisions of the *MHA 2000*.

The applicant's submissions

25. The applicant's submissions are summarised at paragraphs 45 to 48 below.

Findings on material questions of fact

26. My findings on material questions of fact in this external review are as follows:

- the Third Party made the JEO Application
- A JEO Order was served on the applicant on 15 January 2008
- within a short time of conducting an examination the Chief Mental Health Officer said to the applicant that he was of sound mind and there had been a mistake
- the Assessment Report states that the applicant did not meet the criteria for further assessment under the MHA
- the Third Party objects to disclosure of the JEO Application
- the applicant suspects that he knows who made the JEO Application
- disclosing even seemingly minor details in the JEO Application may identify the Third Party.

Application of section 42(1)(h) of the FOI Act to the JEO Application

27. The Information Commissioner has previously discussed the operation of section 42(1)(h) of the FOI Act and stated that for the provision to apply, the following criteria must be satisfied:⁴

⁴ *Ferrier and Queensland Police Service* (1996) 3 QAR 350 at paragraphs 27-36.

- a) there must be an identifiable system or procedure
- b) the system or procedure must be for the protection of persons, property or environment
- c) disclosing the documents in issue could reasonably be expected to prejudice that system or procedure.

28. I consider each of these criteria in turn.

a) Does an identifiable system or procedure exist?

29. The JEO Application resulted in a JEO being issued against the applicant on 15 January 2008.

30. Having regard to reference material available on the Department's website, I note the objective of a JEO is to allow a person in the community to request a non-urgent (and involuntary) mental health assessment for a person who they believe may be experiencing mental health problems.⁵

31. The procedure is set out under Chapter 2, Part 3, Division 2 of the *MHA 2000* as follows:

- a person may apply to a Magistrate or Justice of the Peace for a JEO for another person⁶
- the Magistrate or Justice of the Peace may issue a JEO if he/she reasonably believes that the relevant person has a mental illness and should be examined⁷
- once a JEO has been issued and sent to an authorised mental health service, a doctor or authorised mental health practitioner may conduct the examination⁸
- the doctor or authorised mental health practitioner may make a *recommendation for assessment* requiring an involuntary assessment of that person at an authorised mental health service⁹
- if the doctor or authorised mental health practitioner does not make a *recommendation for assessment* they must explain their reasons for their decision.¹⁰

32. Having regard to the above, I am satisfied that the *MHA 2000* establishes 'a system or procedure' for the purpose of section 42(1)(h) of the FOI Act.

b) Is the procedure for the protection of persons, property or environment?

33. Prior to the enactment of the *MHA 2000*, the Information Commissioner considered in *ROSK and Brisbane North Regional Health Authority; Others (Third Parties) (Rosk)*¹¹ whether provisions contained within its predecessor, the *Mental Health Act 1974*

⁵ See the Department factsheet entitled 'Information about Justice Examination Orders' available on the Department's website: www.health.qld.gov.au/mha2000/documents/jeo_brochure.pdf.

⁶ Section 25 of the *MHA 2000*.

⁷ Section 28 of the *MHA 2000*.

⁸ Sections 29 and 30 of the *MHA 2000*.

⁹ Section 30 of the *MHA 2000*.

¹⁰ Section 32 of the *MHA 2000*.

¹¹ (1996) 3 QAR 393 (*ROSK*).

(Qld)(**MHA 1974**) established a procedure or system for the protection of persons, property or environment under section 42(1)(h) of the FOI Act.

34. The relevant provisions of the *MHA 1974* enabled a warrant to be issued for the removal (by police and a medical officer) of a person (suspected as being mentally ill and a danger) to a place of safety.
35. In *ROSK*, the Information Commissioner found that a system or procedure was established:
- whereby members of the community who held a genuine belief that a person was mentally ill, and a danger to himself/herself or to others, could initiate action to protect that person or others from the apprehended danger
 - which answered the description of 'a system or procedure for the protection of persons' within the meaning of section 42(1)(h) of the FOI Act.
36. In *TQN and Royal Brisbane Hospital Health Service District*,¹² it was confirmed that the *MHA 2000*:
- replaces the *MHA 1974*
 - establishes a procedure (enabling application for and issuance of a JEO) which is broadly similar to the system set up by the *MHA 1974* for the protection of persons.
37. In relation to treatment which may occur as a consequence of a JEO, the Explanatory Note to the Mental Health Bill 2000 (Qld) states:¹³

The scheme for involuntary treatment is necessary to protect the health and safety of persons with a mental illness and to ensure the safety of the community. A significant feature of some mental illnesses is the person's inability to recognise the presence of illness and the need for treatment. Without treatment, the person is likely to remain unwell for an extended period to the detriment of their own quality of life, health and safety and in a small number of cases, the safety of others.

38. In view of the discussion above, I am satisfied that the procedures set out in Chapter 2, Part 3, Division 2 of the *MHA 2000* establish 'a system or procedure for the protection of persons' for the purposes of section 42(1)(h) of the FOI Act.

c) Could disclosure of the JEO Application reasonably be expected to prejudice that system or procedure?

39. Requirement (c) asks whether disclosing the documents in issue could reasonably be expected to prejudice the system or procedure.
40. In *Attorney-General v Cockcroft*,¹⁴ which dealt with the interpretation of the phrase 'could reasonably be expected to prejudice the future supply of information' in the context of the section 43(1)(c)(ii) (business affairs) exemption contained in the Commonwealth FOI Act, Bowen CJ and Beaumont J said:¹⁵

¹² (Unreported, Queensland Information Commissioner, 31 October 2002).

¹³ Explanatory Note, Mental Health Bill 2000 (Qld) at page 14.

¹⁴ (1986) 64 ALR 97(**Cockcroft**). The interpretation of the phrase "could reasonably be expected to" in *Cockcroft* was recently approved in *Maksimovic and Attorney-General's Department* [2008] AATA 108.

¹⁵ *Cockcroft*, at 106.

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 ...

41. 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 42(1)(h) of the FOI Act.
42. Accordingly, to determine whether the JEO Application is exempt from disclosure under section 42(1)(h) of the FOI Act, I must examine whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous to expect that disclosing the JEO Application could 'prejudice the system or procedure' established by Chapter 2, Part 3, Division 2 of the MHA 2000.
43. In ROSK, the Information Commissioner stated¹⁶ that:

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, willful misuse of the statutory scheme).

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 [¹⁷], 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

¹⁶ At paragraphs 24 and 25.

¹⁷ At paragraph 21 the Information Commissioner notes:

'[i]n 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'.

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 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.

44. In my view, the statement above from ROSK, though described within the framework of the *MH Act 1974* is nonetheless relevant to a consideration of the application of section 42(1)(h) of the FOI Act in the context of the *MH Act 2000*.

The applicant's submissions

45. During the course of this review, the applicant has made both written and oral submissions to this Office. I have summarised those submissions as follows:
- Within five minutes of being assessed the Chief Mental Health Officer said to the applicant that he was of sound mind and there had been a mistake
 - The applicant is concerned that his examination under the *MHA 2000* was conducted without there being a proper basis for the allegations about him and he wants to know why it was served.
 - He considers that he has been unjustly made the subject of a JEO, evidenced by the fact that his mental health examination under that process did not lead to any further action.
 - He considers that the person/s who initiated the JEO was/were acting adversely to his interests and that the application was made for an improper purpose and with malicious intent.
 - The experience of being subject to the JEO and being named as a person with a mental illness has caused him significant distress, both during the process of being involuntarily detained, and subsequently, as he attempted to discover the basis of the application.
 - Unless he knows the content of the JEO Application, he is unable to address any of the issues raised in it
 - This Office is a body in a position to influence and it is incumbent on us to make the legislature and others aware of the dangers with JEOs.
 - The current legislation is inadequate and it leads to people being exploited.
46. In response to the Preliminary View, the applicant made additional submissions. These are summarised below:
- the date when the person/s made the JEO Application should be released to him as this is essential in determining whether the serving of the JEO was lawful¹⁸
 - the current system enabling the issuance of JEOs is faulty in that:
 - it favours corrupt informers with ulterior motives
 - the person/s making a JEO Application benefits from protection and anonymity provided by law whereas the person against whom the JEO is served is exposed to more risk
 - the reaction of a person who is served with a JEO may lead to that individual being regulated

¹⁸ I informed the Applicant that I could not provide him with the requested information because under section 87 of the FOI Act I am prohibited from disclosing, during the course of a review, or in reasons for decision, any information that is claimed to qualify for exemption. Notwithstanding this, the Applicant has made a number of further requests for this information.

- the applicant considers that the release of a JEO applicant's name would act as a deterrent for persons intending to make such applications for malicious purposes
- the applicant believes that the JEO applicant/s should be made accountable so that they may have their actions examined in a court of law
- this Office is in a privileged position of experience and expertise in these matters and should be advocating that the current system be changed
- as a consequence of coincidental happenings the applicant suspects that the JEO applicant/s had access to staff and resources from the Department and considers this possible collusion and misuse of systems and procedures warrants investigation
- the applicant is innocent of the charges against him but is maligned and intimidated by the accusations that someone has made and is still alarmed at what some persons capable of such an act and not allowed to be known to him might try on him
- as a matter of compassion, in light of his innocent circumstances, his accusers should be made known to him as well as the reasons for the application so the whys and wherefores of their actions can be examined.

47. The applicant also submits that:

..... In The Country of "A Fair Go" and Open Society, which of the, both logical, scenarios, is preferable - that which:

"could reasonably be expected to result in other potential informants being less likely to provide relevant information",

Or that which

"if honesty of being open, if needs be, serve as a deterrent, in questionable cases of assessment"?

Which is preferable?

In the former and presently accepted ruling, the bias is much too much inclined towards the person making the request for an assessment knowing they have this "cloak", this over-protection by Law, as I see it, if you like, while the "victim" as he/she can then become, is inevitably exposed more to risk and can have more at risk and to suffer, and unjustly, when the law, as it presently stands, is taken advantage of, yet he/she may not be in need of assessment at all, and may well have felt they have been defiled and degraded in society, or actually have been as a result, while all the time being innocent and have done nothing to deserve the serving of the JEO!

On the other hand, to press home my point, the person making the request for the assessment is insulated and secure from investigation, however malicious or ulterior his/her motives may be, it seems!

Specifically, this bias and weakness, it seems to me again, comes straight from a faulty "system or procedure for the protection of persons which is established by the provisions of the MHA 2000".

48. During the course of this review the applicant has also raised and requested that I address the following points in this decision:

- a) In Common Law, if another accuses me, for example of rape or of improper conduct against society at large or a similar anti-social act, is their identity, by Law, kept from me permanently on the grounds that it might deter others from accusing likewise in other cases? What is the difference between these examples as

reported (ie. cases of rape or of improper conduct or a similar anti-social act) and the example of someone accusing me of mental incompetency, as in my case?

- b) In relation to the applicant's submissions concerning (what he considers may be) the possible collusion between the JEO applicant/s and the Department, the applicant requests that this Office, specifically confirm or deny whether the person who made the JEO application was employed by or professionally associated with the Department at the time the JEO was served on him.

Analysis

49. I do not doubt that the experience of being issued with a JEO has been extremely concerning for the applicant and that the applicant's sense of injustice about this has been compounded by his being unable to access information that he believes will allow him to address his concerns.
50. The principal issue in this external review is whether disclosure of the JEO Application to the applicant could reasonably be expected to prejudice the system established by Chapter 2, Part 3, Division 2 of the *MHA 2000* which allows community members to request a non-urgent (and involuntary) mental health assessment for a person who they believe may be experiencing mental health problems.
51. The applicant's submissions:
- put forward public interest arguments in favour of disclosing the JEO Application
 - raise concerns about the effect of the relevant legislative provisions
 - request this Office's involvement in law reform
 - suggest investigation of the circumstances surrounding the issuing of the JEO.
52. Although the applicant raises issues which are clearly of genuine concern to him, they are not matters which I can take into account in reaching a decision in this matter as there is no public interest test incorporated into section 42(1)(h) of the FOI Act,¹⁹ and my role in this review is limited to making a determination as to whether the Department's decision was made in accordance with the requirements of the FOI Act.
53. In relation to the issues raised by the applicant at a) of paragraph 48 above, I note that, whilst the applicant seeks to draw an analogy between a person accused of a crime and a person issued with a JEO, in my view, the two are not in any way analogous. Leaving to one side the obvious dissimilarity between the criminal law and health systems, with one directed toward punishment and deterrence and the other toward

¹⁹ Please note that an examination of public interest considerations is only required if the documents in issue are documents/matter of a type listed in section 42(2) of the FOI Act. This includes:

- matter revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law
- matter containing a general outline of the structure of a program adopted by an agency for dealing with a contravention or possible contravention of the law
- a report on the degree of success achieved in a program adopted by an agency for dealing with a contravention or possible contravention of the law
- a report prepared in the course of a routine law enforcement inspection by an agency whose functions include that of enforcing the law (other than the criminal law or the law relating to misconduct under the *Crime and Misconduct Act 2001* (Qld))
- a report on a law enforcement investigation that has already been disclosed to the person or body the subject of the investigation.

As I do not consider that the JEO application is a document/matter of a type listed in section 42(2) of the FOI Act, public interest considerations are not relevant to the application of section 42(1)(h) of the FOI Act in this review.

healing, the issuing of a JEO is only one part of a multi-layered system for assessing whether an individual requires health care intervention and assistance. I make these remarks by way of observation only as they have no bearing on the issues being considered in this review.

54. In relation to the issues raised by the applicant at b) of paragraph 48 above, I have already explained my role in relation to this external review at paragraph 52 above.
55. In relation to the applicant's concerns about the system/procedure being used for a malicious purpose, possibly leading to unwarranted involuntary treatment, I note the *MHA 2000* aims to protect against the inappropriate application of the involuntary processes contained within it through the following safeguards:²⁰
- a person may apply to a Magistrate or Justice of the Peace for a JEO for another person only if they have observed the person within the previous 3 days
 - the Magistrate or Justice of the Peace may issue a JEO only if he/she reasonably believes that the relevant person has a mental illness and should be examined
 - when considering whether to issue a JEO, the Magistrate or Justice of the Peace can seek specialist health advice or other relevant information
 - once issued, the JEO is sent to an authorised mental health service, a doctor or authorised mental health practitioner
 - the person subject to the order is examined by a doctor or authorised mental health practitioner
 - following an examination, the doctor or authorised mental health practitioner may make a recommendation for assessment at an authorised mental health service
 - A patient subject to an involuntary treatment order must be examined by an authorised psychiatrist within 3 days if the order was made by a doctor who is not a psychiatrist
 - under section 522 of the *MHA 2000* strict penalties can be applied if, in making the JEO application, a JEO applicant knowingly relies on information that is false or misleading.²¹

Review of the FOI regime

56. In his submissions the applicant refers to the FOI Independent Review Panel (**Review Panel**) chaired by Dr David Solomon AM which recently undertook a comprehensive review of the FOI Act and issued the Right to Information Report (**RTI Report**).
57. In the RTI Report, the Review Panel discussed the circumstances surrounding the issue of JEOs and the refusal of access to the orders and corresponding applications

²⁰ Explanatory Note, Mental Health Bill 2000 (Qld) at page 6. See also ROSK at paragraph 24 where the Information Commissioner stated that in respect of the *MHA 1974* '...elaborate safeguards, checks and balances have been built into the statutory scheme.'

²¹ **522 False or misleading documents**

(1) *A person must not state anything in any document required or permitted to be made under this Act the person knows is false or misleading in a material particular.*

Maximum penalty—40 penalty units.

(2) *It is enough for a complaint against a person for an offence against subsection (1) to state the statement made was, without specifying which, 'false or misleading'.*

by the Department.²² Specifically, the Review Panel made the following recommendation in relation to this type of information:

Where an agency receives personal information from a third party in confidence, the agency in considering the public interest and an applicant's right of access, should provide the applicant with a summary of the information (unless information can not be "de-identified") and/or provide the information through an independent intermediary.²³

58. In his submissions, the applicant refers to the above recommendation as being "a statement of present recognition by the present state government" and stressed that it should apply to his case.
59. Whilst I acknowledge the applicant's request, I note that:
- the recommendation is not currently the practice required of agencies
 - the FOI Act has not been amended to take account of the recommendations made by the Review Panel in the RTI Report.²⁴
60. Accordingly, for the purpose of this review, I am bound to apply section 42(1)(h) of the FOI Act in its present form.

Summary

61. Having considered the matters discussed above, I am satisfied that:
- the JEO Application comprises the identity of the Third Party, their reasons for requesting the JEO and evidence supporting that application
 - in accordance with the principles established in *ROSK*,²⁵ disclosure of information supplied by persons who provide information in support of a JEO under the *MHA 2000* could reasonably be expected to result in other potential informants being less likely to provide relevant information, thereby prejudicing

²² See pages 54-58 of the RTI Report.

²³ See Recommendation 15 on Page 58 of the RTI Report.

²⁴ The draft RTI Bill has now been released for public consultation at <http://www.qld.gov.au/right-to-information/>. Section 42(1)(h) of the FOI Act has been retained in its entirety in this draft bill as Schedule 3, section 10(1)(i). In terms of providing a summary of information as noted in Recommendation 15 of the RTI report, section 72 of the draft RTI Bill provides the following:

72 Access to summary of personal information to third party

(1) This section applies if, under this Act—

(a) an agency or a Minister refuses an applicant access to a document that includes personal information of an individual; and

(b) the refusal is lawful.

(2) Despite the refusal of access, the agency or Minister must take all reasonable steps to give the applicant as much as possible of the personal information.

(3) Reasonable steps may include, for example, any of the following—

(a) giving the applicant a summary of the personal information;

(b) giving a person other than the applicant (an **intermediary**) a summary of the personal information on conditions of use or disclosure agreed between the agency or Minister and the intermediary, or between the agency or Minister, the intermediary and the applicant.

(4) However, if a summary of information under subsection (3) includes information given by a person (the **information giver**), other than the applicant, who gave the information on a confidential basis, the summary must not be given to the applicant or intermediary without consultation with, and the agreement of, the information giver.

(5) Subsection (4) applies whether or not the summary is capable of revealing the identity of the information giver.

[my underlining]

²⁵ At paragraph 43 above.

the system or procedure for the protection of persons which is established by the provisions of the *MHA 2000*

- in this matter, disclosing even seemingly minor details in the JEO Application may identify the Third Party
- it is reasonable, as distinct from something that is irrational, absurd or ridiculous to expect that disclosing the JEO Application could prejudice the system or procedure established under Chapter 2, Part 3, Division 2 of the *MHA 2000*
- the JEO Application qualifies for exemption from disclosure under section 42(1)(h) of the FOI Act.

DECISION

62. I set aside the decision under review and in substitution decide that the:

- attachments to the Justices Examination Order application are part of the application
- JEO Application in its entirety is exempt from disclosure under section 42(1)(h) of the FOI Act.

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

Acting Assistant Commissioner Jefferies

Date: 24 December 2008