



Decision and Reasons for Decision

Application Number: 310590

Applicant: TSO08G

Respondent: Department of Health

Decision Date: 13 December 2011

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - EXEMPT INFORMATION - BREACH OF CONFIDENCE - applicant requested access to report of investigation into his complaint about medical treatment - agency refused access to information which had been provided by other individual/s to the applicant's treating doctors - whether disclosure of the information would found an action for breach of confidence - whether information is exempt under schedule 3, section 8 of the *Right to Information Act 2009* (Qld) - whether access may be refused under section 67 of the *Information Privacy Act 2009* (Qld)

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REASONS FOR DECISION

Summary

1. In 2005, the applicant was hospitalised for a period of time, part of which was involuntary. The applicant subsequently complained to the Department of Health (**Department**)¹ about his treatment. In 2009, the Department conducted an investigation into the applicant's complaint.
2. The applicant applied under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to a copy of the investigation report regarding his complaint. The Department decided² to grant the applicant full access to 141 pages and partial access to 10 pages, and to refuse access to two pages.³ The grounds for the Department's refusal of access decision were as follows:
 - (i) disclosure of the information would, on balance, be contrary to the public interest, primarily for reasons of personal privacy;⁴ and
 - (ii) the information was exempt on the basis that disclosure would found an action for breach of confidence.⁵
3. The Department's refusal of access decision was affirmed on internal review.⁶ The applicant then applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's internal review decision. During the external review, the applicant confirmed that he did not wish to pursue access to the personal information of other people. Accordingly, the only information which is the subject of this decision is the information subject to the breach of confidence claim.
4. The applicant submits that he has a right to know what other people have said about him to the Department. He has emphasised to OIC that he believes incorrect and false information was provided to the Department about him. He also submits that disclosure will help him to further understand the treatment he received.
5. The Department submits that the information was provided by individual/s in circumstances importing an obligation of confidence and is of a nature which is treated as confidential by health care providers. The Department considers that disclosure would cause significant concern to the individual/s who provided the information and would constitute an unauthorised use of the confidential information.
6. Having reviewed the relevant evidence in this review, I am satisfied that disclosure of the information remaining in issue would found an action for breach of confidence⁷ and that therefore, access to the information may be refused on the basis that it is exempt.⁸

Background

7. Significant procedural steps relating to the application and external review are set out in the Appendix.

¹ Also known as Queensland Health.

² Decision dated 6 January 2011.

³ The investigation report comprised 153 pages in total.

⁴ Under section 49 and schedule 4 of the *Right to Information Act 2009* (Qld) (**RTI Act**).

⁵ Under section 48 and schedule 3, section 8 of the RTI Act.

⁶ Decision dated 7 March 2011.

⁷ See schedule 3, section 8 of the RTI Act.

⁸ Under section 67 of the IP Act and section 47(3)(a) and 48 of the RTI Act. Section 67 of the IP Act provides that access may be refused on the same grounds as set out in section 47 of the RTI Act.

Reviewable decision

8. The decision under review is the Department's internal review decision dated 7 March 2011.

Information in issue

9. The Information in Issue in this review appears in parts of five pages⁹ and two whole pages¹⁰ of progress notes relating to the applicant's hospital treatment.

Evidence considered

10. Evidence, submissions, legislation and other material I have considered in reaching my decision is as disclosed in these reasons (including the appendix and all footnotes).

Relevant law

11. Under the IP Act, a person has a right to be given access to documents of an agency to the extent they contain the applicant's personal information.¹¹ This right is subject to other provisions of the IP Act including grounds on which access may be refused.¹² Where information is considered to be exempt, access to it may be refused.¹³

Breach of confidence

12. Information will be exempt if its disclosure would found an action for breach of confidence.¹⁴ The words of the section refer to an action based in equity for breach of an equitable obligation of confidence.¹⁵
13. The following 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; and
 - d) disclosure to the applicant for access must constitute an unauthorised use of the confidential information.¹⁶

⁹ Pages 136, 144-146 and 149.

¹⁰ Pages 150-151.

¹¹ Section 40 of the IP Act.

¹² Section 67 of the IP Act.

¹³ Section 47(3)(a) and section 48 of the RTI Act. Schedule 3 of the RTI Act sets out the categories of exempt information.

¹⁴ Schedule 3, section 8 of the RTI Act.

¹⁵ In cases concerning disclosure of information that is claimed to be confidential, the facts may give rise to both an action for breach of contract and in equity, for breach of confidence. At general law, these are separate and distinct causes of action. An action for breach of confidence will only be established where particular requirements (discussed at paragraphs 13-15 of these reasons) are present. However, where a contractual term requiring confidentiality exists, disclosure (or threatened disclosure) of information may, in itself, only found an action for breach of contract. See *Callejo and Department of Immigration and Citizenship* [2010] AATA 244 (**Callejo**) at paragraphs 163-166.

¹⁶ 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.

14. An additional requirement of detriment to the plaintiff as a result of disclosure has also been found to exist.¹⁷ In view of the authorities on this point¹⁸, I consider that detriment is a necessary fifth requirement of the breach of confidence exemption, and that it can be easily established by a non-government plaintiff.¹⁹ The detriment suffered by the plaintiff 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.²⁰
15. The issue of whether defences to a breach of confidence action should be considered in applying the exemption is also subject to different views. Recently, in *Callejo* the Administrative Appeals Tribunal of Australia decided it was not necessary to consider defences on the basis that the section²¹ only requires that disclosure would “found” an action for breach of confidence.²² While the Information Commissioner has previously considered defences to be relevant in applying the breach of confidence exemption²³, the Information Commissioner has acknowledged that if defences cannot be considered, evidence of an iniquity may still be relevant in determining whether information has the necessary quality of confidence.²⁴
16. Having considered the relevant authorities, I am satisfied that the availability of defences is not a separate requirement when applying the breach of confidence exemption in schedule 3, section 8 of the RTI Act. In the particular circumstances of this case, I have assessed whether evidence of an iniquity is present in the context of requirement (b), that is, whether the Information in Issue has the necessary quality of confidence.

Findings

17. I am satisfied that disclosure of the Information in Issue would found an action for breach of an equitable obligation of confidence. Reasons relevant to each requirement are set out below.

(a) specifically identifiable information

18. It must be possible to identify with specificity, and not merely in general terms, the information in question.²⁵
19. The Information in Issue is contained within seven pages of progress notes recording communications between individual/s and health professionals. I am satisfied that all instances of communication are specifically identifiable from the Information in Issue and that this requirement is therefore satisfied.

¹⁷ *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 per Mason J at 51.

¹⁸ This requirement has been questioned by two State appellate court decisions *NP Generations Pty Ltd v Fenely* (2001) 80 SASR 151, per Debelle J at 580 and *National Roads and Motorists Association Ltd v Geeson* (2001) 40 ACSR 1. However, the judgment of Mason J in *Commonwealth of Australia v John Fairfax & Sons Ltd* is that of a single judge of the High Court and is therefore binding on the Information Commissioner. See also *B and BNRHA* at paragraph 109.

¹⁹ *B and BNRHA* at paragraph 111.

²⁰ Dean, R., (1990) *The Law of Trade Secrets*, Law Book Company, pp. 177-8.

²¹ The equivalent breach of confidence exemption in section 45 of the *Freedom of Information Act 1982* (Cth).

²² *Callejo* at paragraph 180.

²³ *B and BNRHA* at paragraphs 119-134.

²⁴ *B and BNRHA* at paragraphs 121-131. The Information Commissioner referred to the reasoning of Gummow J in *Corrs Pavey* where his Honour stated that:

“...information will lack the necessary attribute of confidence if the subject matter is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed.”

²⁵ *B and BNRHA* at paragraphs 60-63.

(b) necessary quality of confidence

20. 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.²⁶ As medical records are not publicly available, I am satisfied the Information in Issue is not generally known. I also do not consider that information provided by individual/s to health care professionals during a patient's medical treatment could be considered trivial or useless.
21. For the Information in Issue to have the necessary quality of confidence, it must not comprise evidence of an iniquity (eg. a crime, civil wrong or serious misdeed of public importance).²⁷ The applicant contends that the Information in Issue will assist him in proving that medical professionals engaged in misconduct in administering incorrect medication to him during his treatment. Having carefully examined the Information in Issue, I am satisfied that it does not disclose evidence of an iniquity.
22. On the basis of the above, I am satisfied that the Information in Issue has the necessary quality of confidence.

(c) circumstances of communication

23. 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 indicated²⁸ that the relevant circumstances to consider 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.
24. The Department submits that people have an expectation that information they provide to health care professionals will be treated with confidence. Additionally, the Department has provided OIC with details about the particular circumstances of this matter, including the Department's conversation/s with the relevant individual/s regarding the understanding that the information would be treated confidentially.
25. On the information available to me, I am satisfied that the Information in Issue:
 - is highly sensitive information which was communicated solely for the purpose of aiding in the applicant's care and treatment; and
 - was communicated on the understanding that it would be kept confidential and would not be communicated to another person, including the applicant, for any other purpose.
26. On the basis of the above, I am satisfied that the Information in Issue was communicated to the Department in circumstances which give rise to an equitable obligation of confidence.

²⁶ *B and BNRHA* at paragraph 43; *Callejo* at paragraph 139.

²⁷ *Corrs Pavey* at paragraph 456.

²⁸ *B and BNRHA* at paragraph 84.

(d) unauthorised use

27. The Department has submitted that the relevant individual/s have strongly objected to the disclosure of the Information in Issue. On this basis, I am satisfied that disclosure would be an unauthorised use of the information.

(e) detriment

28. The Department submits that release of the Information in Issue in this matter would cause significant concern to the individual/s who provided such information. In the circumstances of this case, I accept that disclosure of the Information in Issue would cause detriment to the individual/s concerned.

Conclusion

29. On the basis of the above, I find that the requirements to found an action for breach of an equitable obligation of confidence are established, and that therefore, the Information in Issue is exempt under schedule 3, section 8 of the RTI Act.

DECISION

30. I affirm the decision under review and find that access to the Information in Issue can be refused under section 67(1) of the IP Act and section 47(3)(a) of the RTI Act on the basis that it is exempt information under schedule 3, section 8 of the RTI Act.
31. 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: 13 December 2011

APPENDIX**Significant procedural steps**

Date	Step taken
26 September 2010	The Department received the access application from the applicant
6 January 2011	The Department issued a decision to the applicant
4 February 2011	The applicant applied to the Department for internal review
7 March 2011	The Department issued the internal review decision to the applicant
1 April 2011	The applicant applied to OIC for external review
15 April 2011	OIC accepted the application for external review and requested copies of the documents to which full and partial access had been refused from the Department
21 April 2011	The Department provided OIC with copies of documents relevant to the review, including the Information in Issue
5 July 2011	OIC received written submissions from the applicant
5 July 2011 and 15 July 2011	OIC contacted the Department to obtain further information in relation to its decision, the Information in Issue and discussion/s with relevant third party/s
11 August 2011	OIC conveyed a written preliminary view to the applicant affirming the Department's internal review decision
15 August 2011	The applicant contacted OIC by telephone to discuss the preliminary view
23 August 2011	The applicant provided OIC with written submissions in response to the preliminary view. The applicant confirmed that he did not wish to pursue access the personal information of other people but contested that information was subject to the breach of confidence exemption
23 August 2011	OIC emailed the Department to seek its consent to providing the applicant with a more detailed description of the Information in Issue (ie. confirming the type of information which it did not contain)
25 August to 9 September 2011	OIC received further written submissions from the applicant (eight letters)
8 September 2011	OIC wrote to the applicant confirming that OIC would consider his submissions and information provided by the Department in reaching its decision
1 September 2011	The Department provided OIC with a description of the Information in Issue which it consented to OIC using in further correspondence with the applicant
6 October 2011	OIC wrote to the applicant including the additional description of the Information in Issue, as approved by the Department, and confirming the preliminary view
13 October 2011	OIC spoke with the applicant by telephone. He confirmed that he would be providing further submissions to OIC in writing in support of his case
18 October 2011 to 24 October 2011	The applicant provided OIC with further submissions in support of his application (four letters)
25 October 2011	OIC wrote to the applicant confirming receipt of his further submissions
7 November 2011 and 21 November 2011	OIC received further written submissions from the applicant
1 December 2011	OIC wrote to the applicant confirming receipt of his further submissions