



Decision and Reasons for Decision

Application Number: 310149

Applicant: Moon

Respondent: Department of Health

Decision Date: 12 August 2010

Catchwords: **RIGHT TO INFORMATION ACT – Grounds on which access may be refused – document is nonexistent or unlocatable - section 47(3)(e) of the *Right to Information Act 2009* (Qld)**

RIGHT TO INFORMATION ACT – Onus – section 87 of the *Right to Information Act 2009* (Qld)

RIGHT TO INFORMATION ACT – Effect of sections 6 and 44(1) of the *Right to Information Act 2009* (Qld) on confidentiality provisions contained within the *Health Services Act 1991* (Qld)

RIGHT TO INFORMATION ACT – Early resolution encouraged – section 90 of the *Right to Information Act 2009* (Qld)

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REASONS FOR DECISION

Summary

1. Having considered the parties' submissions and relevant legislation, I find that:
 - the *Right to Information Act 2009* (Qld) (**RTI Act**) requires agencies to give access to a document unless access would, on balance be contrary to the public interest.
 - the Department of Health (**Department**) has not raised any public interest argument against the disclosure of the information in issue
 - in the circumstances, the Department is required by the RTI Act to give access to the information in issue and could have done so as early resolution of this external review.

Background

2. By application dated 16 January 2010, the applicant applied to the Department for access to information concerning the time her great aunt (now deceased) spent at the Eventide Aged Care Facility in Sandgate prior to her death in 1980 (**RTI Application**).
3. In its letter dated 25 February 2010, the Department refused access under section 47(3)(e) of the RTI Act, on the basis that the information requested did not exist.
4. By email received by this Office on 17 March 2010, the applicant applied for an external review of the Department's decision (**External Review Application**).

Steps taken in the external review process

5. By email dated 19 March 2010, the Office of the Information Commissioner (**the Office**) conducted enquiries with the Department in respect of the External Review Application.
6. In an email dated 25 March 2010, the Department indicated it was conducting further searches at Queensland State Archives for documents responsive to the RTI Application.
7. By letter dated 31 March 2010, the Office informed the applicant and the Department that the External Review Application had been accepted for review.
8. By letter dated 30 April 2010, the Department confirmed that as a consequence of its searches at Queensland State Archives, it had located a two page document responsive to the RTI Application.

Information in issue

9. The information in issue comprises the two page document located by the Department subsequent to its decision dated 25 February 2010.

Issues in the review

10. The applicant applied to the Department for information concerning her great aunt's residence at Eventide Aged Care Facility, Sandgate. Although the applicant's great aunt passed away in 1980, the applicant has confirmed that as her great aunt had no children, she is a direct descendant through her grandfather (her great aunt's brother), who has also passed away.
11. In the decision under review, the Department decided to refuse the applicant access to any documents responsive to the RTI Application under section 47(3)(e) of the RTI Act on the basis that the documents "...do not exist within The Prince Charles Hospital Health Service District."
12. The Department's reliance on section 47(3)(e) of the RTI Act as a grounds for refusal is no longer appropriate because it has, subsequent to the decision under review, located the information in issue.¹ The Department now submits that even though it has no objection to the release of the information, it is unable to provide the applicant with access. This decision will consequently consider whether:
 - the Department should give access to the applicant; and
 - the Department could have agreed to the early resolution of this external review by agreeing to release the information in issue to the applicant.

Findings

Should the Department give access to the applicant?

13. The short answer is 'yes'.
14. Under section 44(1) of the RTI Act if an access application is made, an agency should give access unless giving access would, on balance, be contrary to the public interest.
15. On external review the onus is on agencies to establish that access would, on balance be contrary to the public interest. Section 87 of the RTI Act provides:

87 Onus

(1) On an external review, the agency or Minister who made the decision under review has the onus of establishing that the decision was justified or that the information commissioner should give a decision adverse to the applicant.

16. On the discovery of documents responsive to this application, the Department's decision that documents did not exist had to be set aside. As it stands, the information in issue is open to the public unless it can be shown that access would be contrary to the public interest. The Department has the onus of establishing that the Information Commissioner should give a decision adverse to the applicant.
17. In respect of the information in issue, the Department has stated² that based on the age and content of the information in issue, it does not wish to make any submissions

¹ I note, as an aside, that no objections to the release of the information in issue were made by any third party during the course of this review.

² In its letter to this Office dated 30 April 2010.

contending that the information in issue comprises exempt information or that its disclosure would be contrary to the public interest.

18. Accordingly, the Department is required by the RTI Act to give access to the applicant and I am unable to give a decision adverse to the applicant.

Could the Department have negotiated an early resolution to this or any other external review?

19. The short answer to this question is 'yes'.
20. The Office has a statutory function to give guidance on the interpretation and administration of the RTI Act and to give information and help to agencies, applicants and third parties at any stage of an access application.
21. The Department submitted it was prevented from providing the applicant with access to the information in issue on an "informal basis", because under section 62A of the *Health Services Act 1991* (Qld), employees are subject to a strict duty of confidentiality in respect of any information which identifies an individual was the recipient of a public sector health service:

I am advised that because Queensland Health's decision-making power in relation to Ms Moon's access application is exhausted, and such jurisdiction now rests with your office, we cannot simply consent to the release of the document to Ms Moon (in the context of your office's mandatory duty to explore the possibility of informal resolution), as such informal release does not come within any of the statutory exceptions to the s 62A [HS Act] duty of confidentiality.

22. Section 62A of the *Health Services Act 1991* (Qld) states:

A designated person or former designated person must not disclose to another person, whether directly or indirectly, any information (confidential information) acquired because of being a designated person if a person who is receiving or has received a public sector health service could be identified from the confidential information.

23. The Department, referencing the Offices' statutory duty to explore the possibility of early resolution, is of the view that as 'informal release' does not come within any of the statutory exceptions to section 62A of the *Health Services Act 1991* (Qld), it cannot consent to releasing the information in issue to the applicant. Further, it has indicated a belief that its decision-making power in relation to the RTI Application is exhausted on the basis that such jurisdiction now rests with this Office.
24. Section 6 of the RTI Act makes it clear that the RTI Act overrides the confidentiality provisions of the *Health Services Act 1991* (Qld):

6 Relationship with other Acts prohibiting disclosure of information

This Act overrides the provisions of other Acts prohibiting the disclosure of information (however described).

25. The policy objective behind section 6 is to provide a deliberate override of secrecy provisions in other legislation such as section 62A of the *Health Services Act 1991* (Qld) to ensure that the RTI Act can operate unhindered by them. The Parliament considered those secrecy provisions that should not be overridden by the RTI Act and provision is made for them in Schedule 3, section 3 of the RTI Act. The confidentiality provisions in the *Health Services Act 1991* (Qld) do not appear in the Schedule.

26. The effect of section 6 is that the Department can participate in the early resolution processes of the Office provided for in the RTI Act and it can agree to release information that might otherwise be subject to section 62A of the *Health Services Act 1991* (Qld) in that process.
27. In any case section 62B of the *Health Services Act 1991* (Qld) is the relevant statutory exception to section 62A applying to early resolution under the RTI Act. Section 62B provides:

Section 62A(1) does not apply to the disclosure of confidential information by a designated person if the disclosure is required or permitted by an Act or another law.
28. Disclosure of the document considered in this matter is permitted by the RTI Act in circumstances where an access application was made to the agency, a decision made by the agency and an application for external review made. As pointed out earlier, section 44(1) of the Act requires access to be given to documents where on balance this would not be contrary to the public interest.
29. Section 90 of the RTI Act requires me to identify opportunities and processes for early resolution of the external review application and promote settlement of a review. To facilitate this, section 90(3) of the RTI Act enables an external review to be suspended at any time so that the participants in the external review may be allowed to negotiate a settlement.
30. Section 90(3) of the RTI Act therefore permits the Department to negotiate a settlement of external review matters, the practical effect of which is that the Department reconsiders its original decision. If the Department was not permitted to take part in an early resolution process and negotiate a settlement by section 62A of the *Health Services Act 1991* (Qld), section 90 of the RTI Act would be redundant.

DECISION

31. I set aside the decision under review by finding that:
 - the Department, not having identified any contrary public interest argument, should give access to the information in issue,
 - the Department could and should have given the applicant access to the information in issue as soon as it formed the view that it had no public interest arguments against access. It was within the Department's power and ability to negotiate an early settlement of this external review without the requirement of a formal decision and without offending its statutory duty of confidentiality.

Julie Kinross
Information Commissioner

Date: 12 August 2010