



Decision and Reasons for Decision

Application Number: 310604

Applicant: Setschnjak

Respondent: Department of Justice and Attorney-General

Decision Date: 25 May 2012

Catchwords: **ADMINISTRATIVE LAW – RIGHT TO INFORMATION – QUEENSLAND – REFUSAL OF ACCESS – CONTRARY TO PUBLIC INTEREST – applicant sought access to the substance of a complaint made about him to the Office of Fair Trading – complainant objects to disclosure – whether disclosure of information would, on balance, be contrary to the public interest - section 47(3)(b) and 49 of the *Right to Information Act 2009 (Qld)***

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REASONS FOR DECISION

Summary

1. The applicant applied under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to a complaint made to the Office of Fair Trading (**OFT**) about him and/or his wife, as well as any complaints made about another individual. The agency¹ refused access to the information on the basis that it comprised exempt information and its disclosure would, on balance, be contrary to the public interest.² In applying to the Office of the Information Commissioner (**OIC**) for external review, the applicant limited his request to the substance of a complaint made to the OFT about the applicant and/or his wife (**information in issue**).³
2. The applicant and the complainant are currently involved in litigation arising from a business dispute. The complainant objects to disclosure of the information in issue. The applicant submits that the complainant has forfeited his right to privacy as the substance of the complaint has been disclosed in the course of litigation.
3. Even if it were established that some aspects of the complaint to the OFT are alleged in the current court proceedings, I am not satisfied that the information in issue has been disclosed to the applicant nor that the privacy interest attaching to the information in issue has been significantly reduced in the way the applicant contends. It is also relevant to note that the OFT did not investigate the complaint nor take any action against the applicant. Therefore, it was not necessary for the OFT to convey the substance of the complaint to the applicant as it would ordinarily be expected to do when investigating a complaint.
4. In the circumstances of this review I consider there is a significant public interest in the applicant accessing his personal information. Balanced against this, however, is the public interest in protecting the privacy of the complainant as well as the strong public interest in protecting the free flow of information to the OFT from members of the public. I consider these public interest factors favouring nondisclosure tip the balance of the public interest in favour of not disclosing the information in issue.
5. As noted above, the agency decided the information in issue comprised exempt information in accordance with schedule 3, section 10(1)(b) of the RTI Act. For the reasons set out below, I vary the decision under review by finding that access to the information in issue can be refused but on the basis that its disclosure would, on balance, be contrary to the public interest.

Background

6. Significant procedural steps relating to the external review are set out in the appendix.

¹ At the time the access application was made, the OFT was part of the Department of Employment, Economic Development and Innovation (**DEEDI**). In February 2011, the OFT became part of the Department of Justice and Attorney-General (**DJAG**) as a result of machinery of government changes. DJAG delegated its decision-making power to DEEDI in this matter and the decision under review was made by DEEDI on behalf of DJAG.

² The agency decided to grant full access to four pages, partial access to two pages (subject to the deletion of personal information) and refused access to 63 pages on the basis that they comprised exempt information in accordance with schedule 3, section 10(1)(b) of the RTI Act.

³ These are the pages which the agency decided comprised exempt information.

Reviewable decision

7. The decision under review is the agency's decision dated 28 March 2011 to refuse access to the information in issue.

Evidence considered

8. Evidence, submissions, legislation and other material I have considered in reaching my decision are disclosed in these reasons (including footnotes and appendix).

Information in issue

9. As noted at paragraph 1 above, the information in issue in this review comprises the substance of a complaint made to the OFT about the applicant and his wife. The information in issue is contained within various documents including a complaint form with attachments, file notes and a printout from the OFT electronic complaint database.

Issue in the review

10. The applicant was refused access to the information in issue on the ground that the information was exempt, as the agency considered disclosure could reasonably be expected to enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained.⁴ This exemption cannot apply where the identity of an information provider is known to the applicant.
11. In this case, the exemption provision cannot apply because the applicant knows a complaint was made to the OFT about him and knows the identity of the complainant. Specifically, the complainant provided the applicant with an affidavit in the course of litigation in which the complainant acknowledges he made a complaint to the OFT about the applicant. The applicant provided extracts of the affidavit to OIC as evidence to support this. Notwithstanding that the information does not comprise exempt information, it is relevant for me to consider whether disclosing the information in issue would nonetheless, on balance, be contrary to the public interest.

Relevant law

12. Under the RTI Act, an individual has a right to be given access to documents of an agency.⁵ However, this right is subject to other provisions of the RTI Act including the grounds on which an agency may refuse access to documents.⁶ Relevantly, access may be refused where disclosure would, on balance, be contrary to the public interest.⁷
13. The term 'public interest' refers to considerations affecting the good order and functioning of the community and government affairs, for the wellbeing of citizens generally. This means that, ordinarily, a public interest consideration is one which is common to all members of, or a substantial segment of, the community as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.
14. The RTI Act identifies many factors that may be relevant to deciding the balance of public interest. It also explains the steps that a decision-maker must take in deciding

⁴ Schedule 3, section 10(1)(b) of the RTI Act.

⁵ Section 23 of the RTI Act.

⁶ As set out in section 47 of the RTI Act.

⁷ Sections 47(3)(b) and 49 of the RTI Act.

the public interest. To decide whether disclosing the information in issue would be contrary to the public interest, I must:⁸

- identify any irrelevant factors and disregard them
- identify relevant public interest factors favouring disclosure and nondisclosure
- balance the relevant factors favouring disclosure and nondisclosure; and
- decide whether disclosure of the information, on balance, would be contrary to the public interest.

Findings

15. For the reasons set out below, I am satisfied that disclosing the information in issue would, on balance, be contrary to the public interest.
16. I have examined the irrelevant factors in schedule 4 of the RTI Act and do not consider that any apply here, nor do I consider any other irrelevant factors arise in this matter. I discuss the relevant factors and their relative weight below.

Personal information and privacy

17. If disclosing information could reasonably be expected to disclose the personal information of the individual applying for that information, a public interest factor favouring disclosure arises.⁹ To the extent the information in issue is about the applicant, this factor is relevant and should be afforded weight.
18. However, the information an individual provides to a regulatory agency when making a complaint is also their personal information and I am satisfied that the information in issue also comprises the complainant's personal information. The nature of the information in issue is such that it is not possible to separate the applicant's personal information from the personal information of the complainant. In other words, the relevant information cannot be disclosed to the applicant without disclosing personal information of the complainant.
19. The RTI Act provides that it is reasonable to expect that disclosing an individual's personal information to another individual will cause a public interest harm.¹⁰ On this basis it is reasonable to expect that disclosing the information in issue to the applicant will cause a public interest harm. It is therefore relevant to consider the extent of that harm. In this instance the harm is reflected in the intrusion into the complainant's privacy. If disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy, a public interest factor favouring nondisclosure will arise and it will also be relevant to consider the weight of this factor.¹¹
20. The applicant submits that:

⁸ Section 49(3) of the RTI Act.

⁹ Schedule 4, part 2, item 7 of the RTI Act. Section 12 of the *Information Privacy Act 2009* (Qld) defines 'personal information' as *information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*

¹⁰ Schedule 4, part 4, section 6 of the RTI Act.

¹¹ Schedule 4, part 3, item 3 of the RTI Act.

- he knows the complainant's identity and personal details and the complainant informed him both personally and in written court documents that the complaint was made
 - details of the complaint have been disclosed in submissions the complainant has provided to the court during the litigation and these submissions are freely available;¹² and
 - as a result of this disclosure the complainant has forfeited his right to privacy.
21. Where information is already known to an applicant, this potentially reduces (though does not negate) the privacy interest attaching to the information. The complaint appears to have arisen in the context of a complex business dispute between the applicant and the complainant which has now resulted in litigation. I have considered the extracts of the affidavit provided by the applicant. Even if it were established that some aspects of the complaint to the OFT are alleged in the current court proceedings, I am not satisfied that the information in issue has been disclosed to the applicant nor that the privacy interest attaching to the information in issue has been significantly reduced in the way the applicant contends.
22. The complainant has not consented to the information in issue being disclosed and submits that the information was provided to the OFT in confidence. I consider the complainant provided the information to the OFT for the specific and limited purpose of the OFT conducting an investigation. In the absence of any investigation or further action by the OFT, it is reasonable to expect that the information in issue would remain confidential. However, if the OFT, on receiving the complaint, considered taking action against the applicant then the substance of the complaint would likely have been put to the applicant for a response and to meet the requirements of procedural fairness or for relevant proceedings. In this case, as the OFT did not take any action, it was unnecessary for this to occur.
23. I am satisfied that disclosing the information in issue could reasonably be expected to prejudice the complainant's privacy. Given that some aspects of the complaint to the OFT may also be alleged in the current court proceedings and therefore may be known to the applicant, I consider the extent of the intrusion, and the anticipated harm, may be reduced to some degree. However, I am not satisfied that the information in issue has been disclosed to the applicant nor that the privacy interest attaching to the information in issue has been significantly reduced in the way the applicant contends.

Prejudice the flow of information

24. If disclosing the information could reasonably be expected to prejudice the flow of information to a regulatory agency, a public interest factor favouring nondisclosure arises.¹³ It is generally recognised that there is a strong public interest in protecting the free flow of information to regulatory agencies. This is because agencies such as the OFT often rely on information from the public to be alerted to and to pursue breaches of the law or regulatory schemes. Routinely disclosing complaint information provided by members of the public would tend to discourage individuals from coming forward with such information. This in turn would significantly prejudice the OFT's ability to effectively discharge its functions. This is a significant factor weighing against disclosure.

¹² The applicant has provided evidence to support this submission, in the form of extracts of the affidavits filed in court proceedings.

¹³ Schedule 4, part 3, item 13 of the RTI Act.

Contribute to / impede the administration of justice

25. If disclosing information could reasonably be expected to contribute to the administration of justice generally or to the administration of justice for a person, including procedural fairness, it is relevant to consider this factor favouring disclosure.¹⁴ Conversely, a factor favouring nondisclosure will arise where disclosing the information in issue could reasonably be expected to impede the administration of justice generally or the administration of justice for a person, including procedural fairness.¹⁵
26. As the OFT did not take any action in relation to the complaint, I am satisfied that disclosing the information in issue could not reasonably be expected to contribute to the administration of justice for the applicant. I am satisfied that this public interest factor is not relevant in the circumstances of this case.
27. During the external review, OIC consulted the complainant in relation to disclosing the information in issue. The complainant objected to disclosing the information in issue to the applicant and contends that "*release of any documents pertaining to this case could be potentially prejudicial*". The complainant did not provide reasons for his view on this issue and I am not satisfied that disclosing the information in issue could reasonably be expected to impede the administration of justice in the circumstances.

Enhance the accountability of government

28. The applicant submits that if he made a complaint about a particular business, he would have no objection to disclosing this to the public "*as it would be in the public interest to be informed of mal practice or scams which could affect them*". It is unclear how this submission relates to the information in issue in this review. The information in issue is a complaint about the applicant. As no action was taken in relation to the complaint, there are no findings made by the OFT which may further this public interest in the way the applicant contends. In any event, the applicant does not seek access to information about how the OFT handled the complaint. I do not consider that disclosing the information in issue could reasonably be expected to promote open discussion of public affairs or enhance the government's accountability.¹⁶ I am satisfied that this is not a relevant factor in the circumstances.

Balancing relevant public interest factors

29. In the circumstances of this review I consider there is a significant public interest in the applicant accessing his personal information. Balanced against this, however, is the public interest in protecting the privacy of the complainant as well as the strong public interest in protecting the free flow of information to the OFT from members of the public. It is relevant that the OFT did not take any action in response to the complaint and therefore it was not necessary for the OFT to disclose the substance of the complaint to the applicant. In the circumstances, I do not consider that disclosing the information in issue could reasonably be expected to contribute to the accountability of government or the administration of justice. I find that the public interest factors favouring nondisclosure tip the balance of the public interest in favour of nondisclosure of the information in issue.
30. I am therefore satisfied that disclosing the information in issue would, on balance, be contrary to the public interest.

¹⁴ Schedule 4, part 2, items 16 and 17 of the RTI Act.

¹⁵ Schedule 4, part 3, items 8 and 9 of the RTI Act.

¹⁶ Schedule 4, part 2, item 1 of the RTI Act.

DECISION

31. As noted above, the agency decided the information in issue comprised exempt information in accordance with schedule 3, section 10(1)(b) of the RTI Act. For the reasons set out above, I vary the decision under review by finding that access to the information in issue can be refused but on the basis that its disclosure would, on balance, be contrary to the public interest.
32. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Suzette Jefferies
Assistant Information Commissioner

Date: 25 May 2012

APPENDIX**Significant procedural steps**

Date	Event
2 November 2010	DEEDI received the access application.
18 February 2011	DEEDI consulted with the third party (the complainant) about disclosure of the relevant information.
24 February 2011	The third party notified DEEDI that he objected to disclosure of the relevant information and provided submissions supporting his case.
28 March 2011	DEEDI (on behalf of DJAG) issued a decision under the RTI Act.
13 April 2011	OIC received the applicant's external review application.
14 April 2011	OIC notified DEEDI that the external review application had been received and asked DEEDI to provide relevant procedural documents.
20 April 2011	OIC received the relevant procedural documents.
21 April 2011	OIC advised the applicant and DEEDI that the external review application had been accepted. OIC asked DEEDI to provide a copy of the information in issue and any further submissions by 13 May 2011.
18 May 2011	OIC received the requested information from DEEDI.
19 May 2011	OIC asked DEEDI for further information.
24 May 2011	OIC received further information from DEEDI.
3 August 2011	The applicant provided extracts of an affidavit.
12 August 2011	The applicant provided extracts of an affidavit.
7 November 2011	OIC consulted the third party (the complainant) about disclosure of the information in issue.
10 November 2011	The third party objected to disclosure of the information in issue.
14 November 2011	OIC invited the third party to participate in the external review and to provide submissions supporting his case by 28 November 2011.
16 November 2011	The third party objected to disclosure of the information in issue and provided submissions supporting his case.
13 January 2012	OIC conveyed a preliminary view to the applicant and invited him to provide submissions supporting his case by 30 January 2012.
30 January 2012	The applicant requested and was granted an extension until 6 February 2012 to provide submissions supporting his case.
6 February 2012	OIC received the applicant's submissions in support of his case.