



Decision and Reasons for Decision

Application Number: 310676
Applicant: 7CLV4M
Respondent: Department of Communities
Decision Date: 21 December 2011

Catchwords: **ADMINISTRATIVE LAW – RIGHT TO INFORMATION – QUEENSLAND – REFUSAL OF ACCESS – EXEMPT INFORMATION – DISCLOSURE PROHIBITED BY ACT**
 applicant sought access to the name of a person listed as her birth father in adoption records – putative father information – whether access can be refused under section 47(3)(a) of the *Right to Information Act 2009 (Qld)* – whether disclosure of information is prohibited by Schedule 3 section 12(1) of the *Right to Information Act 2009 (Qld)* and section 314 of the *Adoption Act 2009 (Qld)*

Contents

REASONS FOR DECISION	2
Summary	2
Reviewable decision	2
Evidence considered	2
Information in Issue	2
Issue for determination	2
Relevant law	2
Findings	3
Is the Department entitled to refuse access to the Information in Issue?	3
Is the Information in Issue exempt information?	5
Does the exception in Schedule 3 section 12(2) apply?	5
Is the Information in Issue protected information?	5
Was the Information in Issue received by a relevant person performing functions under or relating to the administration of the Adoption Act?	6
Do any exceptions listed in section 314 of the Adoption Act apply?	6
Disclosure of the Information in Issue is required or permitted under another law	6
Consent to disclosure of the Information in Issue by the relevant person	7
Disclosure of non-identifying information by the chief executive officer	7
Conclusion.....	7
DECISION	8
APPENDIX	9
Significant procedural steps.....	9

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Communities (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to information about her mother's pregnancy and her adoption.
2. The Department refused the applicant access to the name of the person the birth mother identified as the birth father in the applicant's adoption records (**Information in Issue**) on the basis that its disclosure would, on balance, be contrary to the public interest.¹
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision to refuse her access to the Information in Issue.
4. I affirm the Department's decision to refuse access to the Information in Issue but on the basis that the Information in Issue comprises exempt information as its disclosure is prohibited by the *Adoption Act 2009* (Qld) (**Adoption Act**).
5. Significant procedural steps relating to the application are set out in the appendix to this decision.

Reviewable decision

6. The decision under review is the Department's internal review decision dated 23 May 2011.

Evidence considered

7. The 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

8. The Information in Issue is the information identified at paragraph 2 above.

Issue for determination

9. The issue to be determined in this review is whether the Department is entitled to refuse access to the Information in Issue.

Relevant law

10. One of the main objects of the Adoption Act is to provide for access to information about parties to adoptions in Queensland in a way that:²
 - promotes the wellbeing and best interests of adopted persons throughout their lives
 - supports efficient and accountable practice in the delivery of adoption services; and

¹ Sections 47(3)(b) and 49 of the RTI Act.

² Section 5 of the Adoption Act.

- complies with Australia's obligations under the Hague convention.
11. To further this object the Adoption Act provides a scheme for allowing individuals to access certain adoption information, subject to certain limitations.³ Section 314 of the Adoption Act is one of these limitations and deals with confidentiality of information obtained by persons involved in the administration of the Adoption Act.
 12. For disclosure of information to be prohibited by section 314 of the Adoption Act, the information must:
 - a) be protected information as defined in section 314 of the Adoption Act (that is, information about a person's personal affairs or personal history)
 - b) have been received by a listed person performing functions under or relating to the administration of the Adoption Act; and
 - c) not be subject to an exception listed in section 314 of the Adoption Act.
 13. Under the RTI Act, a person has a right to be given access to documents of an agency⁴ and the RTI Act generally overrides the provisions of other Acts prohibiting disclosure of information.⁵ However, the right to access documents of an agency under the RTI Act is subject to certain limitations and, relevantly, access may be refused if the information comprises exempt information.⁶
 14. Schedule 3 of the RTI Act sets out information which Parliament has decided is exempt information.⁷ Schedule 3 section 12 of the RTI Act provides that information is exempt if its disclosure is prohibited by a number of listed provisions, including section 314 of the Adoption Act.⁸ In effect, if section 314 of the Adoption Act prohibits disclosure of the specific information sought under the RTI Act, this is an exception to the general rule that the RTI Act overrides other legislation prohibiting disclosure of information.

Findings

Is the Department entitled to refuse access to the Information in Issue?

15. Yes, for the reasons that follow.
16. The Adoption Act establishes the right for adopted people to access information about birth parents regardless of when the adoption took place. The Department has given the applicant access to her adoption record except for the name of the person her birth mother has identified as the birth father. In this external review the applicant has provided cogent and well-argued submissions. Part of those submissions explain why she wants the Information in Issue and the effect not knowing the identity of the named person has had on her life. It is understandable that the applicant has a very strong desire to know this information and that not knowing this has affected her profoundly in different ways. Unfortunately, the relevant factors which I am able to take into account in this review do not include the applicant's reasons for requesting the Information in Issue and the effect not knowing this information has had on her.

³ Part 11 of the Adoption Act.

⁴ Section 23 of the RTI Act.

⁵ Section 6 of the RTI Act.

⁶ Section 47 and 48 of the RTI Act.

⁷ Section 48(2) of the RTI Act.

⁸ Schedule 3 section 12(2) of the RTI Act provides that subsection (1) does not apply if the Information in Issue is personal information for the applicant.

17. The applicant also provided detailed submissions on public interest factors which she contends favour disclosure of the Information in Issue. The Department has refused the applicant access to the Information in Issue on the basis that its disclosure would, on balance, be contrary to the public interest. I accept that the Department has correctly balanced the relevant public interest factors and that it was entitled to refuse access to the Information in Issue. The Department's decision is consistent with previous decisions of the Information Commissioner under the now repealed *Freedom of Information Act 1992* (Qld).
18. I consider though that the appropriate basis for refusing access is that the Information in Issue is exempt information (for the reasons outlined below), rather than on the basis that disclosure is contrary to the public interest.⁹ This approach is consistent with the scheme of the RTI Act.
19. The touchstone of the right to access government information in Queensland is the public interest. This is expressly stated in the preamble to the RTI Act:

It is also Parliament's intention to provide a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to provide the information. This Act reflects Parliament's opinion about making information available and the public interest.

20. Parliament has determined that disclosing particular types of information would be contrary to the public interest. The RTI Act provides that this information is exempt information. Although an agency or Minister has discretion to disclose information, disclosure of which would otherwise be exempt or contrary to the public interest (subject to consultation obligations), when considering non-disclosure, the appropriate first step is to consider whether the information comprises exempt information. Only if it does not, is it appropriate and necessary to complete the steps set out in section 49 of the RTI Act to decide whether disclosing particular information is contrary to the public interest. Therefore in reaching a decision in this matter I have not taken into account the public interest factors put forward by the applicant because the question that must be addressed first is whether the Information in Issue is exempt information. As I am satisfied that it is exempt information, it is unnecessary for me to apply the public interest test.
21. The applicant also submits that I '*should exercise the discretion to release the Information in Issue even if there is some basis to refuse access to it*'. I do not have discretion to direct that access be given to exempt information.¹⁰ Therefore, if the Information in Issue meets the legal requirements for exempt information, I must affirm the Department's decision to refuse access.
22. The applicant also submits that she is the subject of overt discrimination by the decision to refuse access to the Information in Issue and would not be subject to such discrimination in other States in Australia where the identity of a birth father (including those who have donated sperm) can be provided.
23. I acknowledge that rights afforded to individuals who have been adopted may not be uniform across all Australian jurisdictions. This issue is not unique to adoption and is a consequence of our federated system of government. In making this decision, I am required to apply the relevant law in Queensland. Any rights afforded under other State schemes are not a relevant consideration and I cannot take them into account.

⁹ Section 47(3)(b) of the RTI Act.

¹⁰ Section 105(2) of the RTI Act.

Whilst I can understand that this may seem discriminatory to the applicant, it is a matter of applying the relevant law and is not discriminatory in the relevant legal sense. In any event, I note that the Adoption Act applies despite the *Anti-Discrimination Act 1991* (Qld).¹¹

Is the Information in Issue exempt information?

24. Yes.

Does the exception in Schedule 3 section 12(2) apply?

25. No. Schedule 3 section 12 of the RTI Act does not apply if the Information in Issue is personal information for the applicant. This exception only applies if the information in Issue comprises the applicant's personal information only.¹² That is not the case here because although the Information in Issue is the applicant's personal information, it is also the personal information of the named person, as it comprises their name appearing within an adoption record.

26. The applicant contends that as '*Parliament did not use "about", or "in relation to" but the simple word "for. The name of a birth father is indeed information for me*'. I do not accept this submission. The exception ensures that the provision does not preclude an applicant from accessing their personal information. This is consistent with the object of the RTI Act. The broad interpretation advocated by the applicant renders the exception meaningless as virtually any application would come within the exception, thus negating the effect of the exemption provision.

Is the Information in Issue protected information?

27. Yes. Protected information is information about the person's personal history or the person's affairs.¹³

28. The applicant submits that:

- a person's personal history and a person's affairs can be distinguished from a person's given name
- Parliament has confirmed that by the examples in section 314(6) of the Adoption Act; and
- the interpretation of a person's given name being protected information does not accord with what Parliament enacted.

29. Personal history is criminal history, domestic violence history and traffic history.¹⁴ Clearly the Information in Issue is not personal history information.

30. The term 'person's affairs' is not defined in the Adoption Act. The relevant dictionary definitions for 'affair/s' are 'matters of interest or concern' and 'a private or personal concern'.¹⁵ I do not accept the applicant's submissions on this point. A person being

¹¹ Section 8 of the Adoption Act.

¹² Personal information is defined in section 12 of the *Information Privacy Act 2009* (Qld) 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.

¹³ Section 314(10) of the Adoption Act.

¹⁴ Schedule 3 of the Adoption Act.

¹⁵ *Macquarie Dictionary Online* (Fourth Edition) www.macquariedictionary.com.au.

named by the birth mother as the father of a child is a matter of interest and a private concern of the person named. Therefore, I am satisfied that, in this context, the person's name is protected information as defined in section 314(10) of the Adoption Act.

Was the Information in Issue received by a relevant person performing functions under or relating to the administration of the Adoption Act?

31. Yes. A public service employee is a person to whom section 314 applies.¹⁶ The Information in Issue is contained in a Departmental file and was recorded by a Departmental employee in the course of performing functions under the Adoption Act. Therefore this requirement is satisfied.

Do any exceptions listed in section 314 of the Adoption Act apply?

32. No. To comprise exempt information the Information in Issue must not be subject to one of the exceptions listed in section 314 of the Adoption Act. The applicant submits that a number of these exceptions apply. I am satisfied that these exceptions do not apply to the Information in Issue for the reasons set out below.

Disclosure of the Information in Issue is required or permitted under another law

33. Information obtained under the Adoption Act may be used or disclosed if the use or disclosure is otherwise required or permitted under another law.¹⁷ The applicant submits that disclosure of the Information in Issue is permitted under the RTI Act and the *Family Law Act 1975* (Cth) (**Family Law Act**). Specifically that the:

- Family Law Act enables a child to ascertain paternity with necessary orders of courts if required and appropriate orders for DNA testing; and
- interpretation of the RTI Act by the decision maker is inconsistent with Commonwealth legislation.

34. I have already explained at paragraph 13 above that unless the information is personal information of the applicant, if disclosure is prohibited under a provision of an Act mentioned in Schedule 3 section 12, Parliament has determined that such disclosure would, on balance, be contrary to the public interest and access may be refused.¹⁸ Given my finding that the Information in Issue comprises exempt information under Schedule 3 section 12 of the RTI Act, I am unable to direct the Department to disclose the Information in Issue to the applicant. For these reasons, I find that the RTI Act does not permit nor require the disclosure of the Information in Issue.

35. I have also considered the relevant provisions of the Family Law Act particularly Part VII, Division 12, Subdivisions D and E which relate to presumptions of parentage and parentage evidence in legal proceedings concerning children. The presumptions of parentage which are set out in the Family Law Act apply where there is evidence of marriage, cohabitation, registration of birth, findings of court or acknowledgment by the person named as the birth father. I have no evidence that any of these presumptions apply to the Information in Issue. Nor is there evidence that there are any relevant legal proceedings in relation to the applicant under the Family Law Act. I am satisfied that a decision to refuse access to the Information in Issue under the RTI Act in this case is not inconsistent with Commonwealth legislation.

¹⁶ Section 314 of the Adoption Act.

¹⁷ Section 314(3) of the Adoption Act.

¹⁸ Section 6 (note 2) and section 48(2) of the RTI Act.

Consent to disclosure of the Information in Issue by the relevant person

36. To the extent information is about a person (the relevant person), it may be disclosed to the relevant person or to someone else with the relevant person's consent.¹⁹
37. The applicant submits that *'This is permissive legislation. It permits disclosure to the person named with consent. It is not prohibitive legislation indicating that if a relevant person does not consent, the information cannot be provided. If Parliament had intended such a result it would have been made clear in these words.'* I understand the applicant means that the absence of consent by the relevant person does not mean that the person has objected.
38. Part 11 of the Adoption Act sets out detailed consultation procedures which OIC staff are not authorised to use.²⁰ I am not aware of any consent to release the Information in Issue. I am satisfied that this exception does not apply to the Information in Issue in the circumstances of this review.

Disclosure of non-identifying information by the chief executive officer

39. To the extent the chief executive is satisfied it would not be an unreasonable breach of privacy, the chief executive may disclose:²¹
- non-identifying information about an adopted person, adoptive parent or other relative of an adopted person to a birth parent of the adopted person; or
 - non-identifying information about a birth parent of an adopted person or relative of the birth parent to the adopted person or an adoptive parent of the adopted person.
40. The applicant submits that:
- it is not an unreasonable breach of privacy to disclose the name of a birth parent of an adopted person to that adopted person; and
 - the test of reasonableness is supported by the fact that the decision maker disclosed the name of her birth mother but refused access to the name of her birth father as revealed by the birth mother.
41. Section 314(6) of the Adoption Act applies to the chief executive in relation to disclosure of non-identifying information. I cannot use this provision to disclose information under the RTI Act and, in any event, the Information in Issue in this review is information which would identify the relevant individual. For these reasons, I am satisfied that this exception does not apply.

Conclusion

42. For the reasons set out above, I find that:
- the Information in Issue satisfies the requirements set out at paragraph 12 above and its disclosure is prohibited by section 314 of the Adoption Act

¹⁹ Section 314(4) of the Adoption Act.

²⁰ Section 258 of the Adoption Act states that *'the chief executive must take steps to contact the person and ask if the person wishes to give the consent.'*

²¹ Section 314(6) of the Adoption Act.

- the exception in Schedule 3 section 12(2) of the RTI Act does not apply to the Information in Issue; and
- the Information in Issue comprises exempt information in accordance with Schedule 3 section 12 of the RTI Act.

DECISION

43. For the reasons set out above, I affirm the Department's decision to refuse access to the Information in Issue, though for different reasons, that is, that the Information in Issue comprises exempt information in accordance with Schedule 3 section 12 of the RTI Act.
44. 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: 21 December 2011

APPENDIX

Significant procedural steps

Date	Event
3 December 2010	The Department received the access application.
28 March 2011	The Department refused access to the Information in Issue under section 47(3)(b) of the RTI Act (initial decision).
26 April 2011	The applicant applied to the Department for internal review of the initial decision.
23 May 2011	The Department affirmed the initial decision (internal review decision).
21 June 2011	OIC received the application for external review of the internal review decision.
22 June 2011	OIC asked the Department to provide documents relevant to the review.
24 June 2011	OIC received relevant documents from the Department.
29 June 2011	OIC notified the applicant and the Department that the external review application had been accepted and asked the Department to provide OIC with a copy of the relevant documents.
4 July 2011	OIC received relevant documents from the Department.
8 August 2011	The applicant requested that OIC staff meet with her in person to convey the preliminary view.
23 August 2011	OIC staff met with the applicant and conveyed the preliminary view that disclosure of the Information in Issue would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act. The applicant did not accept the preliminary view and provided submissions in support of her case. OIC agreed to confirm the preliminary view in writing.
25 October 2011	The applicant advised that she did not wish to make further submissions and requested that OIC issue a decision.
28 November 2011	OIC conveyed to the applicant and the Department a preliminary view that the Information in Issue comprised exempt information under Schedule 3 section 12 of the RTI Act. OIC invited both parties to provide submissions.
29 November 2011	The applicant requested an extension of time to provide submissions in support of her case.
30 November 2011	OIC granted the applicant the requested extension of time.
2 December 2011	The applicant advised OIC she did not accept the preliminary view and provided submissions.