



Decision and Reasons for Decision

Application Number: 210906

Applicant: Dr P Pentecost

Respondent: Department of Health

Decision Date: 30 November 2010

Catchwords: ADMINISTRATIVE LAW - FREEDOM OF INFORMATION – QUEENSLAND – REFUSAL OF ACCESS – DOCUMENT NONEXISTENT OR UNLOCATABLE - Section 28A of the *Freedom of Information Act 1992* (Qld) – whether documents exist – whether all reasonable steps taken to find responsive documents

ADMINISTRATIVE LAW - FREEDOM OF INFORMATION – QUEENSLAND – REFUSAL OF ACCESS – MATTER AFFECTING PERSONAL AFFAIRS - Section 44(1) of the *Freedom of Information Act 1992* (Qld) - whether disclosure of information would disclose information concerning the personal affairs of a person other than the applicant

ADMINISTRATIVE LAW - FREEDOM OF INFORMATION – QUEENSLAND – REFUSAL OF ACCESS – MATTER CONCERNING CERTAIN OPERATIONS OF AGENCIES - Section 40(c) of the *Freedom of Information Act 1992* (Qld) - whether disclosure of information could have a substantial adverse effect on the management or assessment by an agency of the agency's personnel

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Summary

1. The Applicant applied to the Department of Health¹ (**QH**) to access various documents relating to the Douglas Shire Multi-Purpose Health Service (**DSMPHS**) review.
2. Having considered the parties' submissions and evidence, relevant legislation, case law and decisions, I am satisfied that QH:
 - is entitled to rely on section 28A of the *Freedom of Information Act 1992* (Qld) (**FOI Act**) to refuse access to those documents sought in the FOI Application, but unable to be located because the documents were either never created or that all reasonable steps have been taken to find the documents, but they can not be found.
3. In relation to information located by QH in external review 210590 and which I have determined is relevant to this external review I am satisfied that:
 - the complaint letter and Q-COMP letter qualifies for partial exemption under section 44(1) of the FOI Act
 - the Category B information and some of the Category A information qualifies for exemption under section 40(c) of the FOI Act
 - the remainder of the information should be released to the applicant.

Background

4. Significant procedural steps are set out in the Appendix.

Reviewable decision

5. The decision under review is the Refusal of Access Decision (see paragraph 4 in the Appendix).

Evidence relied upon

6. In making my decision in this matter, I have taken the following into consideration:
 - the FOI Application, the Internal Review Application and the External Review Application
 - the Initial Decision and Refusal of Access Decision
 - a file note of a telephone conversation between a staff member of this Office and the applicant during the course of this review (in relation to external review 210590)
 - file notes of telephone conversations between staff members of this Office and QH during the course of this review and in external review 210590
 - notes taken and material received during a meeting with QH on 31 August 2010

¹ Commonly known as Queensland Health.

- file notes of telephone conversations between a staff member of this Office and Dr Barrett in external review 210590
- written correspondence received from Dr Barrett in external review 210590
- relevant sections of the FOI Act
- previous decisions of the Information Commissioner of Queensland and decisions and case law from other Australian jurisdictions as identified in this decision.

Documents sought by the Applicant

7. The FOI Application requests access to the following documents:

Part A - Documents containing information regarding the Douglas Shire Multi Purpose Health Service (DSMPHS) Review
<ol style="list-style-type: none"> (1) Information regarding the selection process used to appoint Dr Elizabeth Barrett to conduct the DSMPHS Review (Dr David Campbell (former Acting Executive Director of Medical Services, CHSD), Dr Wayne McDonald; Dr Michael Humphrey; Angela Beckett; Mr Steven Tresidder) (2) Information given to Dr Elizabeth Barrett in preparation for the review (Dr Michael Humphrey; Angela Beckett; Dr Simi Schdev) (3) Discussions between the District Executive and the manager of DSMPHS Mary Streatfield regarding the DSMPHS Review (4) Documents showing how Dr Elizabeth Barrett verified the information she obtained from her discussions/interviews with staff of DSMPHS (5) Copy of the DSMPHS Review report given to Angela Beckett (District Manager) and Dr Michael Humphrey (clinical CEO) by Dr Barrett (Not the Summary of Recommendations given to staff) (6) Copy of notes taken by Dr Elizabeth Barrett during my 90 minute discussion with her, and a copy of written submissions I gave her (7) Documents outlining what action was taken by Queensland Health in response to the recommendations made by Dr Elizabeth Barrett (8) Documents indicating remuneration received by Dr Elizabeth Barrett, and the recruitment agency, for providing this service to Queensland Health (9) Discussions between Dr Sue Anastasios, Dr Michael Humphrey and Angela Beckett regarding issues at DSMPHS. In particular-discussions regarding myself and Mary Streatfield (10) Discussions between Dr Sue Anastasios and other staff at DSMPHS regarding myself and also Mary Streatfield (RNs Lyn Harrold, Irene Hocking, Andrea Smith, Collette Baldwin, Sally Roberts, Sue Schultz and Wendy Kenna; Sharon Osborne) (11) Discussions about the concerns raised about me, and the various means of addressing these issues (Dr Sue Anastasios; Dr Michael Humphrey Angela Beckett; Mr Steven Tressider; myself)
Part B – Relates to correspondence sent to Mr Steven Tressider from Dr Michael Humphrey on 23/06/2007 (as previously released to the applicant)
<ol style="list-style-type: none"> (1) Information given to Dr Elizabeth Barrett supporting the statement that my “behaviour seen as seriously destabilizing and compromising team based care” (2) Documents in which some staff have described me as – “disordered, arrogant, condescending, rude, lazy, intimidating, undermining.” In

particular, the context in which these words were used, any supporting evidence, and details of staff (e.g. their role at DSMPHS; how many staff expressed these views)

- (3) The number of people who said they cannot work with me (including their role; attempts to discuss this matter with me prior to the DSMPHS Review)
- (4) Number of staff taking stress leave because of me; any stress claims related to the concerns raised about me; the outcome of any such stress claims (RN Irene Hocking)
- (5) Information Dr Elizabeth Barrett used to determine that "Paul demonstrates no insight into his behaviour and its impact on the hospital." (Also any documents indicating that this was brought to my attention by Queensland Health)
- (6) The evidence mentioned by Dr Elizabeth Barrett that I have "declined to resolve issues of concern through discussion and mediation."
- (7) The reply from Mr Steven Tresidder to Dr Michael Humphrey in relation to his correspondence dated 23/06/2007

The law

8. The *Right to Information Act* 2009 (**RTI Act**) commenced on 1 July 2009.² Section 194 of the RTI Act repeals the FOI Act. However, section 199 of the RTI Act provides in relation to applications made under the repealed FOI Act:

199 Applications under Freedom of Information Act 1992

- (1) *The repealed Freedom of Information Act 1992 continues to apply in relation to an application under that Act that has not been finalised before the commencement of this section as if this Act had not been enacted.*
- (2) *For subsection (1), an application has not been finalised until -*
 - (a) *a decision on the application is made; and*
 - (b) *either -*
 - (i) *the time for exercising any review rights or appeal rights in relation to the decision has ended without any rights being exercised; or*
 - (ii) *any review or appeal in relation to the decision has ended.*

9. Accordingly, because the FOI Application was made under the repealed FOI Act and has not yet been finalised, for the purposes of making a decision in this review, I am required to consider the application of the FOI Act (and not the RTI Act).

Documents located during external review 210590

10. Although QH initially indicated that it could not locate any documents responsive to the FOI Application, I note it had previously been able to locate 251 pages in response to an earlier application to QH by the applicant concerning similar issues.
11. Whilst examining the 251 pages³ in the context of external review 210590, it became apparent that whilst a large number fell outside the scope of the application in that review, a number of the documents were relevant to the terms of the FOI Application relating to this external review.

² With the exception of sections 118 and 122 of the RTI Act.

³ Some of which comprised duplicate copies.

12. I have tabulated these documents as follows:

Part One		
Page no's	Description	Exemption/exclusion claims made by QH
000023	Email: M Humphrey to A Beckett and S Tresidder 7:20:18am 24 September 2007	Fully exempt – section 40(c)
000059-000063	Letter: Q-Comp to Cairns District Health Service concerning claim of a QH employee who is not P Pentecost.	Partially exempt – section 40(c), 44(1) and 43(1)
Part Two		
Office of Dr S Anastasios		
10	Email: S Anastasios to W McDonald 11:15pm 8 April 2007.	Nil, except for information about another staff member which is outside the scope of the FOI Application
11-12	Email: W McDonald to S Anastasios 8:19am 10 April 2007.	Nil, except for information about another staff member which is outside the scope of the FOI Application
42-44	Emails: Between S Anastasios and A Beckett et al 14 and 15 May 2007.	Nil
56	Letter: QH employee to S Anastasios 13 September 2007	Nil on the basis that the employee is consulted ⁴ (QH previously claimed this document was partially exempt under section 40(c) and 44(1))
59, 61-62	Emails: between M Humphrey and S Anastasios various dates September 2007.	Fully exempt - 40(c)
60	Email: between M Humphrey and S Anastasios in relation to complaint received from QH employee.	Nil on the basis that the employee is consulted ⁵
Documents held by District chief Executive Office Cairns and Hinterland Health Service District		
3-4	Briefing note District Manager to Health Minister: Update on Facility Review of Douglas Shire Multi-Purpose Health Service, 31 July 2007. Unsigned	Nil
5-6	Briefing note District Manager to Health Minister: Update on Facility Review of Douglas Shire Multi-Purpose Health Service, 31 July 2007. Initialled in the "Cleared by: (DM/ED)" box.	Nil
22	Business plan/Action items, from Douglas Shire Multiple Purpose Health Service Review	Nil
23-24	Documents headed "Tasks & Expected Outcomes for Relief DON at DSMPHS 18 June to 6 July 2007"	Nil on the basis that the employee named at item 6 on page 24 is consulted ⁶

13. During the course of this review QH confirmed that although it wished to maintain the exemption claims noted above, it did not object to the release of the remaining

⁴ Due to the Office being unable to consult with the relevant QH employee I will consider the exemption status of this document in accordance with QH's earlier exemption claims under sections 44(1) and 40(c) of the FOI Act.

⁵ Due to the Office being unable to consult with the relevant QH employee and the fact that these emails relate to page 56 of Part Two, I will consider the exemption status of this document in accordance with QH's earlier exemption claim under section 40(c) of the FOI Act.

⁶ As I consider the information at item 6 on page 24 falls outside the scope of the FOI Application it is unnecessary to consult with the named individual.

documents to the applicant, subject to any consultations or out of scope material being removed as noted above. Accordingly, I have requested that QH provide the applicant with access to these documents (or parts of documents).

Matter remaining in issue in this review

14. During the course of this review QH withdrew its claim under section 29B of the FOI Act, but indicated it still wished to rely on section 28A(1) of the FOI Act in respect of documents requested by the applicant but not able to be found and sections 44(1) and 40(c) of the FOI Act in relation to documents/parts of documents located in the context of external review 210590 and this review.
15. Accordingly, the issues to be determined in this review are whether:
 - a) there are reasonable grounds to be satisfied that particular documents requested by the applicant do not exist and accordingly, whether QH can refuse access to those documents under section 28A(1) of the FOI Act
 - b) QH can rely on sections 44(1) and 40(c) of the FOI Act to refuse the applicant access to documents or parts of documents.

Section 28A of the FOI Act

16. Section 28A of the FOI Act provides:

28A Refusal of access—documents nonexistent or unlocatable

- (1) *An agency or Minister may refuse access to a document if the agency or Minister is satisfied the document does not exist.*

Example—

documents that have not been created

- (2) *An agency or Minister may refuse access to a document if-*

(a) the agency or Minister is satisfied the document has been or should be in the agency's or Minister's possession; and

(b) all reasonable steps have been taken to find the document but the document can not be found.

Example—

- *documents that have been lost*
- *documents that have been disposed of under an authority given by the State Archivist*

17. In *PDE and the University of Queensland*⁷ (**PDE**) the Information Commissioner indicated that:⁸

Sections 28A(1) and (2) of the FOI Act address two different scenarios faced by agencies and Ministers from time to time in dealing with FOI applications: circumstances where the document sought does not exist and circumstances where a document sought exists (to the extent it has been or should be in the agency's possession) but cannot be located. In the former circumstance, an agency or Minister is required to satisfy itself that the document does not exist. If so satisfied, the agency or Minister is not required by the FOI Act to carry out all reasonable steps to find the document. In the latter circumstance an

⁷ (Unreported, Office of the Information Commissioner, 9 February 2009).

⁸ At paragraph 34.

*agency or Minister is required to satisfy itself that the document sought exists (to the extent that it has been or should be in the agency's possession) **and** carry out all reasonable steps to find the document before refusing access.*

'Satisfied'

18. In *PDE* the Information Commissioner also considered how an agency is to satisfy itself as to the non-existence of documents sought by an applicant and indicated that to be satisfied that a document does not exist, it is necessary for the agency to rely upon its particular knowledge and experience with respect to various key factors including:
 - the administrative arrangements of government
 - the agency structure
 - the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
 - the agency's practices and procedures (including but not exclusive to its information management approach)
 - other factors reasonably inferred from information supplied by the applicant including:
 - the nature and age of the requested document/s
 - the nature of the government activity the request relates to.
19. To be satisfied under section 28A(2) of the FOI Act that a document can not be found an agency must take all reasonable steps to locate a document. Section 28A(1) is silent on the issue of how an agency is to satisfy itself that a document does not exist.
20. When proper consideration is given to the key factors discussed at paragraph 18 above and a conclusion reached that the document sought does not exist, it may be unnecessary for the agency to conduct searches. However, where searches are used to substantiate a conclusion that the document does not exist, the agency must take all reasonable steps to locate the documents sought.⁹
21. Therefore, in applying section 28A(1) of the FOI Act it is relevant to firstly ask whether there are reasonable grounds to be satisfied that the requested documents do not exist. If the agency has used searches to satisfy itself that the additional documents sought do not exist, it is then necessary to consider whether the agency has taken all reasonable steps to find the additional documents sought.

QH's reasons

22. In the decision under review QH states that in relation to items 1-3 & 7-8 of Part One and item 7 of Part Two of the FOI Application:
 - it searched for documents by conducting a physical review of all hard copy files in the following locations:
 - Human Resources Department Cairns Base Hospital – office of the Director HRM

⁹ See *PDE*.

- Workplace Health and Safety offices at Cairns Base Hospital – files held by Ms Anna Mintowt-Czyz
 - Office of the Executive Director of Medical Services at Cairns Base Hospital
 - Office of the Clinical CEO
 - Office of the former District Manager
 - Office of Dr Sue Anastasios, Medical Superintendent, Mossman Hospital/DSMPHS
 - Mossman Hospital.
23. QH states that despite undertaking the above searches, it was unable to find any responsive documents to items 1-3 & 7-8 of Part A and item 7 of Part B of the FOI Application for the following reasons:
- a) during the time period between the FOI Application and when the events the applicant is interested in occurred, there were a number of substantial organisational changes occurring at both a staff and process level within the District
 - b) several of the specific individuals that were identified as possibly holding relevant material are no longer employed by QH
 - c) the Cairns District Executive Office has had a number of people acting in senior management positions for short periods of time, making continuity an issue. This has been further compounded by a similar level of staff changeover among the administrative staff occupying the Executive Support Officer roles in the Executive Office
 - d) it is QH's belief that where communications have taken place between particular individuals, these communications were primarily verbal and were not necessarily documented
 - e) it was advised by the District's Information Division that a search for the possible existence of electronic communications, where it is unknown whether any e-mail communications exist, is an impossible task.
24. In response to further requests from the Office, QH provided me with information about the individuals approached and the specific areas which were searched as a consequence of receiving the FOI Application.
25. In denying access to documents under section 28A of the FOI Act, QH contends that it has taken all reasonable steps to locate relevant documents within the District and has concluded that the documents do not exist.

The applicant's submissions

26. In response to QH's searches and submissions above, the applicant submits the following:
- QH's searches for documents have been inadequate
 - QH does not appear to have approached relevant staff members who could have been of assistance

- in relation to QH's submission at a) and c) above, the applicant does not consider that a time period of two years is an excuse for documents to be 'lost'
- in relation to QH's submission at b) above, the applicant contends that several of the individuals noted were still employed by QH at the time of his FOI Application, and even if they were not, this does not justify the absence of documents
- in relation to QH's submission at e) above, the applicant comments that the reason for conducting a search is to locate documents that may exist and if it was known that documents existed then there would be no need to do a search.

Application of section 28A(1) of the FOI Act

Are there reasonable grounds to be satisfied that the requested documents do not exist?

27. QH contend that, pursuant to section 28A(1) of the FOI Act a number of documents requested by the applicant cannot be located and therefore do not exist. In addition, as a consequence of information received by the Office during the course of this review it became apparent that some documents which would have responded to parts of the FOI Application had been destroyed.

Documents supplied to, or created by Dr Barrett

28. In relation to documents which the applicant contends were supplied to or created by Dr Elizabeth Barrett during the DSMPHS review (this includes those requested at items 2, 4 and 6 of Part A; and items 1, 5 and 6 of Part B of the FOI Application), a staff member of this Office contacted Dr Barrett who confirmed in a Statutory Declaration the following:
- she was engaged by QH to undertake a review of the DSMPHS
 - during the course of the DSMPHS review, she conducted consultations with staff members on a confidential basis
 - she does not recall being advised by QH of any requirements with respect to document retention
 - she destroyed all her notes and any written statements given to her concerning the DSMPHS review.
29. QH asserts that Dr Barrett was employed by a private company (Skilled Medical) and that working documents used by her during the DSMPHS review were not provided to QH on completion of that review.
30. At item 5 of Part A of the FOI Application the applicant requests access to a copy of the DSMPHS Review report given to Ms Beckett and Dr Humphrey by Dr Barrett. In relation to this request the applicant states:

Surely any information demonstrating how Dr Barrett verified the information upon which she based her recommendations to QH should have been given to the District in her report? If such verification was not requested by QH, then it indicates that the District was prepared to accept her recommendations possibly based on nothing but personal opinions of DSMPHS staff.

31. In relation to this request, the applicant disputes QH's submission that apart from a summary of recommendations and related powerpoint presentation (already provided

to the applicant as a consequence of his previous FOI application to QH), Dr Barrett did not provide QH with any other 'report.'

32. Having considered the applicant's submissions, those of QH and Dr Barrett, I am satisfied that:
- the Terms of Reference for the DSMPHS review states that Dr Barrett was required to 'make appropriate recommendations to the District Manger and the Clinical CEO, Cairns and Hinterland Health Service District.' There was no specific requirement that Dr Barrett compile a report and although QH has previously referred to a 'report' in submissions relating to external review 210590, it seems that this is a reference to the recommendations made by Dr Barrett upon completion of the review
 - in accordance with the Terms of Reference, Dr Barrett provided QH with her recommendations on or about 20 June 2007
 - all written statements provided to or notes created by Dr Barrett during the review (including records of staff interviews) have been destroyed and therefore do not exist for the purposes of the FOI Act.
33. In view of my findings above, I confirm that QH was entitled to rely on section 28A(1) of the FOI Act to refuse access to the following documents on the basis the documents do not exist:
- documents which the applicant believes were provided to, or created by Dr Barrett, including any documents responsive to items 2, 4 and 6 of Part A; and items 1, 5 and 6 of Part B
 - the DSMPHS report requested at item 5 of Part A.

Electronic communications

34. The FOI Application seeks access to a number of discussions the applicant believes took place between various individuals. Although QH considered the possibility that such discussions occurred electronically it submitted that it was unable to conduct searches of electronic communications as several issues would make this an impossible task.
35. In relation to this submission, I requested that QH provide evidence on why these searches could not be performed.
36. In its response QH confirmed that further searches of its email back up system for twenty users (being those individuals named by the applicant in his FOI Application) would require a central restoration of Post Office and mail boxes for its electronic mail system. QH estimates that the cost of doing this would be approximately \$97 000 and take 97-144 days.
37. Although the applicant maintains a belief that evidence of the discussions between the named individuals should exist, in the absence of any evidence which indicates that such information was actually created electronically and given that much of what does exist indicates very little formal documentation of issues surrounding the DSMPHS review, I do not consider that further searches of QH's email system are warranted given the time and expense involved for QH in undertaking a search that in all likelihood would be fruitless.

38. Accordingly, as I am not convinced that the email communications alleged to exist by the applicant were ever created, I am satisfied that QH may rely on section 28A(1) of the FOI Act to refuse access to such documents.
39. In relation to the remainder of documents sought by the applicant, whilst QH continues to refuse access on the basis of section 28A(1) of the FOI Act, having regard to the searches undertaken by QH in response to the FOI Application, I consider it more appropriate to consider the existence of such documents in the context of section 28A(2) of the FOI Act.

Application of section 28A(2) of the FOI Act

40. Section 28A(2) of the FOI Act requires me to determine whether
- a) A document has been or should be in the agency's possession; and
 - b) all reasonable steps have been taken to find the document/s.
41. The decision as to whether an agency has taken all reasonable steps to find a document must be made on a case by case basis, and where relevant, with reference to:
- the key factors in the FOI and internal review applications including the nature of the documents sought
 - the date the documents may have been created and the personnel who may have been responsible for creating them
 - the regulatory obligations and/or aspect of service delivery that might be involved
 - departmental approval processes and delegations in relation to the document or service in respect of which documents are sought
 - the agency's record keeping practices, including where and in what form the documents sought may be stored, multiple locations, requirements under the *Public Records Act 2002* (Qld) including retention and disposal regimes.

Documents concerning Dr Barrett's appointment and remuneration

42. In items 1 and 8 of Part A of the FOI Application, the applicant seeks information concerning Dr Barrett's appointment by QH to conduct the DSMPHS review.
43. QH initially claimed that it was unable to locate any documents concerning this part of the FOI Application. As it was my view that such documents would have been created, I requested that QH conduct further and more extensive searches.
44. As a consequence of further searches undertaken by QH during the course of this review¹⁰ QH located three documents detailing the amount paid to Skilled Medical for Dr Barrett's services. As QH has indicated that it does not object to these documents being released to the applicant, I have requested that the applicant be provided with access to these documents as soon as possible.
45. In relation to the existence of documents concerning Dr Barrett's appointment, QH has indicated that despite conducting extensive searches it has been unable to find any

¹⁰ Which included conducting searches at an offsite storage facility.

documents to substantiate the existence of a contract, suggesting the process had been very informal.

46. Although it would be expected that documentation relating to this appointment would exist, in relation to further requests for information concerning this issue QH has confirmed that:
- previous deficiencies in the tendering and contracting process in the Cairns district have been brought to its attention in the context of a recent audit and as a consequence, it is in the process of taking corrective action to ensure these problems do not reoccur
 - in May 2009 it undertook a review of its record keeping practices in the Cairns district and in accordance with the recommendations in that review has developed an action plan to improve its records management.
47. I consider that QH's submissions above provide a sufficient explanation as to why documents relating to Dr Barrett's appointment cannot be found. Accordingly, I am satisfied that access to these types of documents may be refused under section 28A(2) of the FOI Act.
48. Although I accept that QH's previous poor record keeping practices are the likely cause of its inability to locate documents in this review, I am satisfied that its subsequent actions to address these problems particularly in relation to its tendering/contracting practices in the Cairns region will prevent similar shortcomings in the future.

Unlocatable documents

49. I am satisfied in the current circumstances that in relation to the remainder of the documents requested in the FOI Application which have not been located by QH, that:
- QH has undertaken extensive searches for these documents in locations where the documents, if in existence, would likely be found
 - QH has confirmed its records management practices at the time the documents sought would have been created were poor and also that its tendering and contracting practices in the Cairns region at the relevant time were quite informal
 - there is a lack of evidence to support an argument that the information sought would exist in a documented form.
50. Accordingly, I find that in relation to the remainder of the documents sought, there are reasonable grounds to be satisfied that all reasonable steps have been taken by QH to find the documents, however for the purposes of section 28A(2) of the FOI Act the documents can not be found.

Section 44(1) of the FOI Act

51. QH contends that six documents previously located in external review 210590 are partially exempt from disclosure under section 44(1) of the FOI Act because the information concerns the personal affairs of a person, other than the applicant.
52. I note the documents can be identified as follows:
- a complaint letter (page 56 of Part Two) (**complaint letter**)

- a letter from Q-COMP to QH regarding the workcover claim of one of its staff (pages 59-63 of Part One) (**Q-COMP letter**).

53. Section 44(1) of the FOI Act provides:

44 Matter affecting personal affairs

- (1) *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*

54. The test for whether matter qualifies for exemption under section 44(1) of the FOI Act is in two parts, as follows:

- would disclosure of the matter in issue disclose information that is properly characterised as information concerning the personal affairs of a person?
- if (i) is answered affirmatively, a public interest consideration favouring non-disclosure is established and the matter in issue will be *prima facie* exempt. However, if the public interest considerations favouring disclosure outweigh all identifiable public interest considerations favouring non-disclosure, a finding that disclosure of the matter in issue would, on balance, be in the public interest, is warranted.

55. In *Stewart and Department of Transport*¹¹ the Information Commissioner discussed the meaning of the phrase '*personal affairs of a person*' as it appears in the FOI Act.¹² In particular, the Information Commissioner said that:

- information concerns a person's personal affairs if it concerns the private aspects of a person's life
- there is a substantial grey area within the ambit of the phrase '*personal affairs*', but that phrase has a well-accepted core meaning which includes matter relating to:
 - family and marital relationships
 - health or ill health
 - relationships and emotional ties with other people
 - domestic responsibilities or financial obligations.

56. Whether or not information contained in a document comprises information concerning an individual's personal affairs is a question of fact, to be determined according to the proper characterisation of the information in question.

Findings of fact

57. I have reviewed the relevant documents and make the following findings of fact.

58. In *Stewart*¹³ and *Pearce and Qld Rural Adjustment Authority; Various Landholders (Third Parties)*¹⁴ the Information Commissioner accepted that a person's signature

¹¹ (1993) 1 QAR 227 (**Stewart**).

¹² See paragraphs 79-114 of *Stewart*.

¹³ At paragraph 80.

comprises the personal affairs of a person for the purposes of section 44(1) of the FOI Act. Accordingly, the signature as it appears in the complaint letter can be properly characterised as personal affairs information and is *prima facie* exempt.

59. In relation to the making of a complaint, the Information Commissioner has previously determined¹⁵ that the fact that a person makes a complaint about a matter of concern to them, was information concerning that person's personal affairs. Although the Information Commissioner stated in that case that the fact of making a complaint may be distinguished from the substance of the complaint, in this case the nature of the complaint identifies the individual complainant and therefore to disclose any part would disclose that person's personal affair and therefore is personal affairs information under section 44(1) of the FOI Act, which is *prima facie* exempt.
60. The parts of the Q-COMP letter claimed by QH to be exempt under this provision comprise information about the health and identity of a person other than the applicant. As indicated above, information of such a nature falls within the well-accepted core meaning of personal affairs for the purposes of section 44(1) of the FOI Act.
61. Accordingly, I am satisfied that the complaint letter and Q-COMP letter are *prima facie* partially exempt under section 44(1) of the FOI Act, subject to the public interest balancing test.

Public interest balancing test

62. The 'public interest' refers to considerations affecting the good order and functioning of community and governmental affairs, for the well-being of citizens. In general, a public interest consideration is one which is common to all members of the community, or a substantial segment of them, and for their benefit. The public interest is usually treated as distinct from matters of purely private or personal interest. However, some recognised public interest considerations may apply for the benefit of individuals in a particular case.
63. In *Fox and Department of Police*,¹⁶ the Information Commissioner indicated that:

Because of the way that section 44(1) of the FOI Act is worded and structured, the mere finding that information concerns the personal affairs of a person other than the applicant for access must always tip the scales against disclosure of that information (to an extent that will vary from case to case according to the relative weight of the privacy interests attaching to the particular information in issue in the particular circumstances of any given case), and must decisively tip the scales if there are no public interest considerations which tell in favour of disclosure of the information in issue. It therefore becomes necessary to examine whether there are public interest considerations favouring disclosure, and if so, whether they outweigh all public interest considerations favouring non-disclosure.
64. Accordingly, it is necessary to examine whether there are public interest considerations favouring disclosure, and if there are, whether they outweigh all public interest considerations favouring non-disclosure.
65. After careful consideration of this issue, I have not identified any public interest considerations which would favour full disclosure of the complaint letter and Q-COMP letter in this case.

¹⁴ (1999) 5 QAR 242.

¹⁵ In *Byrne and Gold Coast City Council* (1994) 1 QAR 477.

¹⁶ (2001) 6 QAR 1 at paragraph 19.

66. Accordingly, I am satisfied that:

- there are no public interest considerations favouring disclosure which would outweigh the public interest consideration favouring non-disclosure of this information
- the complaint letter and Q-COMP letter are partially exempt from disclosure under section 44(1) of the FOI Act.

Section 40(c) of the FOI Act

67. In relation to 4 documents (3 of which were located in response to a prior application to QH by the applicant and 1 which was located in this review) QH has claimed that the documents qualify for full or partial exemption under section 40(c) of the FOI Act.

68. I have reviewed this matter in detail and note it comprises:

- concerns about the applicant's behaviour and proposed strategies for addressing matters pertaining to the applicant (page 23 of Part One and pages 59, 61 and 62 of Part Two) (**Category A information**)
- information pertaining to another QH employee's complaint (page 60 of Part Two) (**Category B information**)
- information about another individual's performance management (information adjacent to item 6.2 of the final progress report of implementation of "Mossman hospital review" recommendations dated 4 January 2008 located by QH during the course of this review) (**Category B information**).

69. Section 40(c) of the FOI Act provides:

40 Matter concerning certain operations of agencies

Matter is exempt matter if its disclosure could reasonably be expected to—

...

(c) have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; or;

...

unless its disclosure would, on balance, be in the public interest.

70. The Information Commissioner has previously discussed the operation of section 40(c) of the FOI Act¹⁷ and for that provision to apply here, the following criteria must be established:

- that an adverse effect on the management or assessment by QH of its personnel could reasonably be expected to follow on from disclosure of the relevant documents; and
- that the adverse effect/s, either individually or in aggregate, constitute a substantial adverse effect on the management or assessment by QH of its personnel.

¹⁷ *Pemberton and The University of Queensland* (1994) 2 QAR 293, *Murphy and Queensland Treasury* (1995) 2 QAR 774, *Shaw and The University of Queensland* (1995) 3 QAR 107 and *McCann and Queensland Police Service* (1997) 4 QAR 30.

71. If the above requirements are satisfied, I must then consider whether the disclosure of the documents in issue would nevertheless, on balance, be in the public interest.

72. The interpretation of the phrase 'could reasonably be expected to' was dealt with in *Attorney-General v Cockcroft*,¹⁸ in the context of the section 43(1)(c)(ii) (business affairs) exemption contained in the Commonwealth FOI Act, where Bowen CJ and Beaumont J said:

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 ...

73. 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 40(c) of the FOI Act.

74. Whether the adverse effect claimed amounts to a substantial adverse effect on the management or assessment by an agency of its personnel will depend on the meaning attributed to those terms. The adjective "substantial" in the phrase "substantial adverse effect" means grave, weighty, significant or having a serious effect.¹⁹

75. The Information Commissioner has previously noted²⁰ that management of staff performance, including taking action if there are concerns about the performance or behaviour of a member of staff is an aspect of the management by an agency of its personnel. For similar reasons, I consider that information concerning an individual's decision to resign from their position within an organisation may also be considered part of an agency's management of its personnel.

Could an adverse effect reasonably be expected to follow from disclosure?

76. QH submitted in external review 210590 that disclosure of information pertaining to the applicant and another QH employee's complaint could reasonably be expected to have a substantial adverse effect on the management of its personnel because:

- it is critical that staff have confidence in processes which facilitate the management and assessment of staff and operations – this is particularly significant in small community health facilities such as the DSMPHS
- QH is reliant on information such as that contained within the relevant documents to ensure the continued effectiveness of its management and evaluation processes

¹⁸ (1986) 64 ALR 97 (**Cockcroft**).

¹⁹ *Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 at paragraphs 148-150.

²⁰ In *WLS and Queensland Rail* (Unreported, Queensland Information Commissioner, 31 October 2002) at paragraph 28.

- release of the information would cause a significant erosion of trust between employer and staff (particularly where it is of a personal and/or private nature)
- if disclosed, it has the potential to jeopardise the current operation of the workplace by negatively affecting staff management, workplace relationships and the delivery of high quality health care.

77. In relation to the Category B information located by QH during the course of this review, QH submit that its disclosure could reasonably be expected to have a substantial adverse effect on the management of its personnel because:

- it comprises information about an individual's work performance related to QH's Performance Appraisal and Development (**PAD**) process
- the PAD process enables organisational goals to be more effectively achieved and provides a mechanism whereby all staff can benefit in terms of recognition, feedback, career planning and personal development
- an effective PAD procedure requires confidentiality to be maintained
- disclosure of a PAD process would compromise the efficacy of the PAD process and contribute to the erosion of trust between employer and employee, thereby affecting the morale of QH staff affected by the disclosure
- release of the Category B information would be contrary to QH's policy (IRM 8.2 PAD).

Findings of fact

78. The question I must ask is: *Is it reasonable to expect that disclosure of the relevant information will have a substantial adverse effect on the management or assessment by QH of its personnel?*

79. In relation to the Category A information, I do not consider that disclosure of the majority of this information would have a substantial adverse effect on the management or assessment by QH of its personnel because:

- the applicant has previously been provided with access to similar information
- there is no evidence before me to suggest that any substantial adverse effect to QH's management or assessment of its personnel has occurred since that information was disclosed to him
- the fact that there was no substantial adverse effect from the previous disclosure of similar information is evidence that a substantial adverse effect could not reasonably be expected to follow on from its subsequent release under the FOI Act.

80. However, in respect of the Category B information and parts of the Category A information, I consider that the disclosure of this information would have a substantial adverse effect on the management or assessment by QH of its personnel because:

- the information identifies an individual needing to be performance managed and an employee of QH who had raised concerns with QH (including QH's efforts to meet with the named individual) with neither matter relating to the applicant

- if it became known amongst staff of QH that such information was being treated insensitively by QH and/or released this may have a deterrent effect on other employees providing QH with similar information necessary to monitor and manage staff concerns and performance in the future.
81. Accordingly, I consider that release of the Category B information and parts of the Category A information could reasonably be expected to have a substantial adverse effect on the management or assessment by QH of its personnel by:
- inhibiting members of staff from raising concerns about workplace matters with senior management of QH in the future
 - preventing QH from assessing and managing poor staff performance in a confidential manner.

Public interest balancing test

82. As I am of the view that the requirements of section 40(c) of the FOI Act are met in respect of the Category B information and some of the Category A information, I must now consider whether there are public interest considerations favouring disclosure of that information which, on balance, outweigh the public interest in protecting QH from any substantial adverse effect on its management or assessment of its personnel.
83. In this review I consider that the public interest in enhancing the accountability of QH for the way it carries out its personnel management functions may be relevant.

Accountability of government

84. Facilitating the accountability of government is a public interest consideration recognised by section 4 of the FOI Act. Enabling accountability of government also promotes informed public participation in the processes of government, recognised as one of the FOI Act's major objectives.
85. The question in this case is whether disclosure of the relevant information would allow members of the public a better understanding of action taken by QH and enable them to better scrutinise and assess QH's performance.²¹
86. Accordingly, I must consider whether disclosure of the Category B information and some of the Category A information would materially enhance this public interest consideration to an extent that warrants it being accorded significant weight in favour of disclosure.
87. Although I acknowledge the significant public interest in enhancing the accountability of government agencies in respect of the performance of their functions, I am satisfied that in this case disclosure of the Category B information and some of the Category A information would not materially enhance this public interest consideration because the information does not indicate action taken by QH in relation to the issues described. On this basis, this public interest consideration is of little or no weight in the circumstances.

²¹ *Burke and Department of Families, Youth and Community Care* (1997) 4 QAR 205

Summary - public interest considerations

88. Having regard to the discussion above, I am satisfied that in relation to the Category B information and some of the Category A information:
- the public interest consideration favouring disclosure is insufficient to outweigh the public interest in avoiding a substantial adverse effect on the management or assessment by QH of its personnel
 - this information qualifies for exemption under section 40(c) of the FOI Act.

DECISION

89. I vary the reviewable decision by finding that QH:
- is entitled to rely on section 28A of the FOI Act to refuse access to those documents sought in the FOI Application, but unable to be located because the documents were either never created or that all reasonable steps have been taken to find the documents, but they can not be found.
90. In relation to information located by QH in external review 210590, which I have determined is relevant to this review I am satisfied that:
- the complaint letter and Q-COMP letter qualify for partial exemption under section 44(1) of the FOI Act
 - the Category B information and some of the Category A information qualifies for exemption under section 40(c) of the FOI Act
 - the remainder of the information should be released to the applicant.
91. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

Victoria Corby
Assistant Information Commissioner

Date: 30 November 2010

Appendix

Significant procedural steps

1. By letter dated 21 January 2009, the applicant wrote to QH requesting access to a range of documents²² (**FOI Application**).
2. In its letter dated 4 June 2009, QH decided to (**Initial Decision**):
 - refuse to deal with parts of the FOI Application under section 29B of the FOI Act on the basis that the applicant had made a previous application for the same documents
 - refuse access to documents under section 28A of the FOI Act on the basis that some of the documents sought in the FOI Application do not exist.
3. By letter dated 12 June 2009, the applicant wrote to QH to request an internal review of the Initial Decision (**Internal Review Application**).
4. As QH did not make a decision within the time period allowed under the FOI Act, its Principal Officer was taken to have made a decision on or about 14 July 2009 affirming the Initial Decision (**Refusal of Access Decision**).²³
5. By letter dated 13 July 2009, the applicant wrote to the Office of the Information Commissioner (**the Office**) to request an external review of the Refusal of Access Decision (**External Review Application**).
6. By letter dated 13 August 2009, the Office requested that QH provide it with a copy of the Initial Decision and Internal Review Application in addition to any documents that were exempted from release under the FOI Act.
7. By letter dated 13 August 2009, the Office informed the applicant that the External Review Application had been accepted.
8. By email dated 8 September 2009, QH provided the Office with a copy of the FOI Application, the Internal Review Application and Initial Decision.
9. By letter dated 21 December 2009, I requested that QH provide this Office by 18 January 2010 with further information in relation to any searches it had done for documents requested in the FOI Application and also any supporting submissions it wished to make.
10. By letter dated 13 July 2010, the Office wrote to the Director-General of QH and requested that QH respond to my letter at paragraph 8 above by 27 July 2010.
11. A response from QH to the above letter was received by the Office on 27 July 2010.
12. The Office met with relevant staff members of QH on 31 August 2010.
13. In emails to QH dated 1 September 2010 and 6 September 2010, the Office clarified matters which remained outstanding in this review.

²² The table on pages 4 - 5 of this Decision sets out this request.

²³ See section 52(6) of the FOI Act.

14. In emails dated 6 and 7 September 2010 and correspondence received on 14 September 2010, QH provided the Office with further information and submissions relevant to the review.
15. In emails dated 21 September 2010, QH provided the Office with submissions relevant to its section 40(c) claim and provided copies of further documents it had located.
16. In an email dated 14 October 2010, QH clarified what actions it had taken to improve its records management systems.
17. On 30 November 2010 a staff member of the Office attempted to consult with the QH employee named on pages 56 and 60 of Part Two but was unable to speak with that individual.