



## Decision and Reasons for Decision

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**Application Number:** 210231

**Applicant:** Q Squash Ltd

**Respondent:** Department of Local Government, Sport and Recreation

**Third Party:** Mr Fraser

**Decision Date:** 30 June 2008

**Catchwords:** **FREEDOM OF INFORMATION - decision by agency to disclose matter under the *Freedom of Information Act 1992* (Qld) - objection to disclosure by third party - application for external review by third party**

**FREEDOM OF INFORMATION - section 39 of the *Freedom of Information Act 1992* (Qld) - investigation by the Queensland Ombudsman - whether disclosure of matter in issue could reasonably be expected to prejudice the conduct of the Ombudsman’s investigation**

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## REASONS FOR DECISION

### Summary

1. I have decided that the matter in issue in this review:
  - is exempt from disclosure under section 39 of the *Freedom of Information Act 1992* (Qld) (FOI Act)
  - should not be disclosed to the third party in this review.

### Background

2. On 9 February 2007, an application was made under the FOI Act to the Department of Local Government, Sport and Recreation (Department) for access to the following documents:
  - Q Squash Review Report 2006
  - Q Squash's response to the Review Report
  - Department's letter to Q Squash concerning the conditioning of funding.
3. On 16 February 2007, the Department consulted Q Squash under section 51 of the FOI Act in relation to documents responsive to the applicant's FOI application (**documents in issue**).
4. On 2 March 2007, Q Squash informed the Department that it objected to the release of all documents in issue.
5. By letter dated 8 March 2007, Ms B Nosse, Principal Legal Officer, Legal and Administrative Review Services informed Q Squash and the initial FOI applicant of her decision to (**Initial Decision**):
  - release Document 1 in part on the basis that parts are exempt under section 45(1)(c) of the FOI Act
  - release Document 2 in part on the basis that parts are exempt under sections 44(1) and 45(1)(c) of the FOI Act
  - release Documents 4-8 in part on the basis that parts are exempt under section 44(1) of the FOI Act
  - release Documents 3 and 9 in full.
6. On 5 April 2007, Q Squash requested internal review of the Initial Decision.
7. By letter dated 2 May 2007, Ms J Mead, Director, Legal and Administrative Review Services, affirmed the Initial Decision (**Internal Review Decision**).
8. On 25 May 2007, Q Squash applied to this Office for external review of the Internal Review Decision.<sup>1</sup>

### Decision under review

9. The decision which is the subject of this external review is the Internal Review Decision of Ms Mead, dated 2 June 2007.

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<sup>1</sup> The initial FOI applicant is involved in this external review as a third party only.

### Steps taken in the external review process

10. Copies of the documents in issue were obtained from the Department and examined by this Office.
11. By letter dated 16 July 2007, I informed the initial FOI applicant of the external review application made by Q Squash and invited him to participate in the review as a third party.
12. On 24 July 2007, the initial FOI applicant informed this Office that he wished to participate in the external review.
13. Between July 2007 and February 2008, I exchanged various pieces of correspondence with the Department in order to:
  - clarify the exemption claims with respect to the documents in issue
  - obtain further submissions concerning the documents in issue.
14. By letter dated 12 February 2008, this Office requested Q Squash provide submissions setting out its objections to disclosure of the documents in issue.
15. On 29 February 2008, Q Squash provided this Office with submissions setting out its objections to disclosure of the documents in issue.<sup>2</sup>
16. On 18 March 2008, Q Squash informed this Office that as a result of a complaint made by Q Squash, the Queensland Ombudsman (Ombudsman) had decided to investigate the following issues:
  - whether the review conducted by the Department into Q Squash and used as the basis for the decision to terminate the funding arrangement was biased and unfair
  - whether the decision by the Department to terminate the funding agreement with Q Squash was improper and unfair.
17. By letter dated 1 May 2008, this Office requested submissions from the Ombudsman with respect to the application of section 39 of the FOI Act to the documents in issue.
18. By letter dated 15 May 2008 and in a telephone conversation on 23 May 2008, the Ombudsman provided submissions in relation to the application of section 39 of the FOI Act to the documents in issue.
19. By letter dated 30 May 2008, I informed Q Squash, the initial FOI applicant and the Department of my preliminary view that:
  - Documents 2 and 4-7 fall within the scope of the initial FOI application
  - the documents in issue in this review are exempt from disclosure under section 39 of the FOI Act.
20. On 19 June 2008, the initial FOI applicant:
  - informed this Office that he did not accept my preliminary view

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<sup>2</sup> Q Squash's objections were based on sections 39, 42(1)(ca) and 46(1)(b) of the FOI Act.

- made oral submissions in support of his contention that disclosure of the documents in issue was not exempt from disclosure under section 39 of the FOI Act.
21. The Department and Q Squash did not provide any response to my preliminary view and are therefore deemed to have accepted that view.
22. On 23 June 2008, the Ombudsman informed this Office that:
- the matters set out in paragraph 16 of this decision were still under investigation
  - it was not known when the investigation would be finalised.
23. By email dated 27 June 2008, the initial FOI applicant sought an extension of time within which to provide submissions in response to my preliminary view dated 30 May 2008. By return email of that date, I granted the initial FOI applicant an extension of time until 30 June 2008 to provide any further submissions he wished to make in this review.
24. By email dated 30 June 2008, the initial FOI applicant provided further submissions in response to that preliminary view.

### **Matter in issue**

25. The matter in issue in this review is set out in the table below:

<b>Document No.</b>	<b>Date</b>	<b>Description</b>	<b>Matter in issue</b>
1	July 2006	Q Squash Review Report	Parts of folios 15, 19, 22, 33, 35 and 57
2	29.11.06	Response from Q Squash	Whole document
4	22.11.06	Letter from Q Squash – Central Region	Whole document
5	Undated	Letter from Q Squash – Southern Region	Whole document
6	24.11.06	Letter from Southside Squash Centres	Whole document
7	22.11.06	Letter from Q Squash – Northern Region	Whole document

### **Findings**

#### ***Relevant legislation***

26. Under section 21 of the FOI Act, a person has a legally enforceable right to be given access to documents of an agency and official documents of a Minister. This right is subject to other provisions of the FOI Act, in particular, section 28 of the FOI Act, under which an agency can refuse access to exempt matter or an exempt document.<sup>3</sup>

<sup>3</sup> The exemptions are contained in Part 3, Division 2, sections 36-50 of the FOI Act.

27. Section 81(2) of the FOI Act provides that, if the decision under review is a disclosure decision<sup>4</sup>, the participant in the application for review who opposes the disclosure decision has the onus of establishing that:
- a decision not to disclose the document or matter is justified, or
  - the Commissioner should give a decision adverse to the person who wishes to obtain access to the document.
28. The effect of the decision under review, ie. the Internal Review Decision, was to disclose the matter in issue to the initial FOI applicant. Accordingly, that decision is a disclosure decision for the purpose of section 81 of the FOI Act. Given that Q Squash opposes the disclosure decision, it bears the onus under section 81(2) of the FOI Act of establishing that a decision not to disclose the matter in issue is justified or that the Commissioner should give a decision adverse to the person who wishes to obtain access to the document.
29. In this review, Q Squash has raised the application of section 39 of the FOI Act to support its opposition to the disclosure decision.

### **Section 39 of the FOI Act**

30. Q Squash contends that due to the current Ombudsman's investigation, the matter in issue in this external review is exempt under section 39 of the FOI Act. That section provides:

**39 Matter relating to investigations by ombudsman, reviews by Service Delivery and Performance Commission or audits by auditor-general etc.**

- (1) *Matter is exempt matter if its disclosure could reasonably be expected to prejudice the conduct of—*
- (a) *an investigation by the ombudsman; or*
  - (b) *an audit by the auditor-general; or*
  - (c) *a review by the Service Delivery and Performance Commission;*
- unless its disclosure would, on balance, be in the public interest.*

31. The phrase '*could reasonably be expected to*', as it appears in section 39 of the FOI Act, calls for a decision maker to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible and expectations for which real and substantial grounds exist.<sup>5</sup>
32. In a review in which reliance is placed upon section 39(1)(a) of the FOI Act, the crucial judgment to be made is whether or not the conduct of the Ombudsman's investigation could reasonably be expected to suffer prejudice as a consequence of disclosure of the matter in issue.

### **Application of section 39 of the FOI Act to the matter in issue**

33. In order for the matter in issue to be exempt from disclosure under section 39(1)(a) of the FOI Act, Q Squash, as the party objecting to disclosure, must establish that:
- an investigation is currently being conducted by the Ombudsman

<sup>4</sup> Section 81(3) of the FOI Act defines **disclosure decision** as a decision to disclose a document or matter contrary to the views of a person obtained under section 51 of the FOI Act.

<sup>5</sup> *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at paragraphs 154-160.

- there is a reasonable basis to expect that disclosure of the matter in issue could prejudice the conduct of that investigation
  - disclosure would not, on balance, be in the public interest.
34. For the purpose of examining the application of section 39 of the FOI Act to the matter in issue, I have also taken into account the submissions of the Ombudsman because of its lead role in the investigation.
35. The first requirement of section 39(1)(a) of the FOI Act is satisfied in that the Ombudsman recently informed this Office that the matters raised by Q Squash are still under investigation.<sup>6</sup>
36. With respect to the second requirement, Q Squash submits that disclosure of the matter in issue has the potential to lead to harassment and defamation of the Chief Executive Officer (CEO) of Q Squash but did not make any specific submissions with respect to the prejudice which the conduct of the Ombudsman investigation may suffer if the matter in issue is disclosed.
37. In support of its contention that disclosure of the matter in issue could reasonably be expected to prejudice the conduct of its investigation, the Ombudsman made the following submissions:

*...one complaint issue that was identified was the review of Q Squash that was undertaken by or at the request of [the Department] which culminated in the review report ... Included in this complaint issue are claims of bias and unfairness relating to the review and the contents of the report.*

*It may be that in the event that we sustain the complaint, it will be necessary to determine what (if any) action is appropriate concerning further distribution of the report, including the matter in issue. In circumstances such as this, we would prefer that the status quo remain and that the report containing the matter not be further distributed or made available to third parties.*

*In this regard, it is considered that disclosure of the matter in issue contained in the report may reasonably be expected to prejudice the conduct of our investigation of the Q Squash complaint against the Department.*

*... In balancing the public interest, consideration should be given to the rights of the individual, [CEO of Q Squash], in that, the matter in issue relate in the main to allegations against him. In all of the circumstances, I am satisfied, on balance, that there is no sufficient public interest in disclosure of the matter to third parties, at least before a final determination of the complaint is made.*

38. Essentially, the Ombudsman contends that the conduct of its investigation will be prejudiced if the matter in issue is disclosed because:
- claims of bias and unfairness have been made in relation to the review and the contents of the report
  - in conducting its investigation, the Ombudsman will be considering claims of bias and unfairness in relation to the review conducted by the Department into Q Squash and the content of the Review Report, ie. Document 1
  - if the complaint is sustained, action may be taken with respect to further distribution of Document 1 (including the matter in issue).

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<sup>6</sup> See paragraph 22 of this decision.

39. Specifically in relation to Documents 2 and 4-7, the Ombudsman contends that those documents are relevant to its investigation in terms of:
- whether natural justice was afforded to Q Squash
  - whether the Department provided Q Squash and its regional offices with a reasonable opportunity to respond
  - the manner in which the Department dealt with the responses it received from Q Squash.
40. The initial FOI applicant, Mr Fraser, contends that:
- disclosure of the documents in issue would not prejudice the Ombudsman's investigation
  - the Ombudsman's investigation is misguided and should concern the conduct of Q Squash, not the Department
  - the Ombudsman's investigation is being used by Q Squash to cause further delays and prevent the documents being released.
41. However, Mr Fraser did not make specific submissions with respect to the issue of prejudice to the conduct of the Ombudsman's investigation.<sup>7</sup>

#### ***Document 1***

42. The matter in issue in Document 1 primarily comprises allegations concerning the CEO of Q Squash.
43. I consider that disclosure of those allegations could prejudice the conduct of the Ombudsman's investigation particularly because the investigation concerns claims of bias and unfairness in the process which led to the creation of Document 1. In investigating those claims, the Ombudsman will need to have regard to the matter in issue without the influence of external opinion and judgment which may follow from disclosure of the matter in issue.
44. I also acknowledge the Ombudsman's submission that if the complaint is sustained, action may be taken with respect to further distribution of Document 1. In my view, disclosure of the matter in issue prior to finalisation of the Ombudsman's investigation could prejudice the conduct of the investigation in that the recommendations open to the Ombudsman may be limited and ineffectual.
45. Accordingly, I find that
- disclosure of the matter in issue in Document 1 could reasonably be expected to prejudice the conduct of the Ombudsman's investigation
  - the matter in issue in Document 1 is *prima facie* exempt from disclosure under section 39 of the FOI Act.

#### ***Documents 2 and 4-7***

46. Documents 2 and 4-7 each constitute a response to the Review Report sent by Q Squash to the Department. Documents 4-7 were prepared by regional offices of

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<sup>7</sup> As set out in paragraphs 37 and 38 of this decision. The Ombudsman's submissions were put to Mr Fraser in my preliminary view dated 30 May 2008.

Q Squash whereas Document 2 comprises the Q Squash CEO's response to the Review Report.

47. As set out in paragraph 39 of this decision, the following issues form part of the Ombudsman's investigation:
- whether natural justice was afforded to Q Squash
  - whether the Department provided Q Squash and its regional offices with a reasonable opportunity to respond
  - the manner in which the Department dealt with the responses it received from Q Squash.
48. I consider that Documents 2 and 4-7 are relevant to the issues set out in paragraph 47 of this decision in that their content:
- will be examined by the Ombudsman during its investigation of those issues
  - will go toward the Ombudsman's ultimate findings with respect to natural justice and therefore, the conduct of the Department
  - will assist in determining whether the review process conducted by the Department needs to be amended or repeated.
49. Accordingly, I am satisfied that:
- disclosure of Documents 2 and 4-7 could reasonably be expected to prejudice the conduct of the Ombudsman's investigation
  - Documents 2 and 4-7 are *prima facie* exempt from disclosure under section 39 of the FOI Act.

#### **Public interest considerations**

50. As I have found that the matter in issue is *prima facie* exempt from disclosure under section 39 of the FOI Act, the provision requires me to take into account public interest considerations relevant to disclosure of the matter in issue.
51. The Ombudsman contends that consideration should be given to the Q Squash CEO's privacy and that there is no sufficient public interest in disclosure of the matter in issue to third parties, at least before a final determination is made in relation to the complaint.
52. The initial FOI applicant contends that disclosure of the matter in issue is in the public interest because:
- large sums of government funds have been expended over a period of time with no result
  - the identities of the individuals involved is common knowledge as those people are involved in the relevant organisations or have been publicly working within the community.
53. On the information available to me, I have identified the following considerations which favour disclosure of the matter in issue:
- openness and transparency in government decision making
  - increased public understanding of the material relied upon by the Department in formulating Document 1.



54. In my view, the following public interest considerations support non-disclosure of the matter in issue:
- protecting the privacy of individuals involved in the review process and named in Document 1
  - preventing interference with or prejudice to the conduct of the investigation, including options in respect of recommendations that may be made regarding whether the matter in issue may have to be substituted or amended in light of the Ombudsman's ultimate findings.
55. I consider that the involvement of the relevant individuals in organisations and community activities, such that their identities are known to others including the initial FOI applicant, may diminish the interest in maintaining their privacy to a certain extent.
56. The initial FOI applicant also contends that he should be able to have access to Q Squash's responses because those documents reflect Q Squash in a positive way and their release to the public would benefit Q Squash. If this is the case, this submission could also diminish the privacy interest referred to above to an extent. However, I note that while this may mean that disclosure of such documents would be less likely to adversely affect particular individuals or organisations, it is also important to recognise that the relevance of those documents to the Ombudsman's investigation is in relation to the conduct of the Department in dealing with Q Squash's responses and the issue of whether natural justice was afforded to Q Squash during the review process. Therefore disclosure would still be prejudicial to the investigation on that basis. Further Q Squash has objected to disclosure and claimed that the matter in issue is exempt under the FOI Act. It therefore appears that such conduct does not support the initial FOI applicant's submissions in this regard.
57. I recognise the significance of the public interest considerations favouring disclosure set out at paragraph 53, however in this case I consider that the weight to be attributed to such considerations is reduced where the review process itself is under investigation and disclosure of the matter in issue would have the prejudicial effect set out above. In circumstances of this case I note that the Ombudsman's findings and recommendations will also contribute to satisfying such public interest considerations.
58. I also note the applicant's concern that section 39 of the FOI Act, the application of which was raised only recently in this review, is being used by Q Squash to further delay his access to the matter in issue.<sup>8</sup> However, I am not satisfied that this argument raises a public interest consideration which favours disclosure of the matter in issue. In all external reviews, this Office must consider the provisions of the FOI Act as they apply to the matter in issue, whilst having regard to the specific circumstances of the case. For the purpose of this review, the current Ombudsman's investigation is a relevant consideration which requires me to consider the application of section 39 of the FOI Act to the matter in issue.
59. I acknowledge that section 39 of the FOI Act may not apply to the matter in issue at a later time (ie. when the Ombudsman's investigation is complete). However, it does not follow that the initial applicant would necessarily be granted access to the matter in issue at this time but for the application of section 39 of the FOI Act. As set out above, other exemption claims were also raised by the Department and Q Squash during this review which could apply as a basis for refusing access to the matter in issue. However, I note it is not necessary to consider the application of those exemption provisions in this decision due to my findings in relation to section 39 of the FOI Act.

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<sup>8</sup> The applicant's initial FOI application was made on 9 February 2007.

60. In balancing the public interest considerations, I am satisfied that the public interest in:
- protecting the privacy of individuals
  - limiting the distribution of matter which is the product of government review process which is currently under review by the Ombudsman

sufficiently outweigh the public interest in openness and transparency in government decision making and increased public understanding of the material relied upon by the Department in formulating Document 1.

61. Accordingly, I am satisfied that disclosure of the matter in issue would not, on balance, be in the public interest.

### **Conclusion**

62. Based on the information before me in this review, I find that:
- disclosure of the matter in issue in this review could reasonably be expected to prejudice the conduct of the Ombudsman's investigation<sup>9</sup>
  - the public interest considerations favouring non-disclosure of the matter in issue outweigh those considerations in support of disclosure
  - the matter in issue in this review is exempt from disclosure under section 39 of the FOI Act.

### **DECISION**

63. I vary the decision under review, being the Internal Review Decision of Ms J Mead dated 2 May 2007, by finding that the matter in issue in this review is exempt from disclosure under section 39 of the FOI Act.
64. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

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**First Assistant Commissioner Rangihaeata**

**Date: 30 June 2008**

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<sup>9</sup> The investigation into the matters set out in paragraph 16 of this decision.