

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Application 270/2005

Participants:

Dr Bruce Flegg MP
Applicant

Queensland Health
Respondent

DECISION AND REASONS FOR DECISION

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REASONS FOR DECISION**1. Background**

- 1.1 The applicant seeks review of a decision by Queensland Health to refuse him access to parts of a Draft Report regarding an investigation into circumstances surrounding deaths of people awaiting cardiac services at The Prince Charles Hospital (TPCH), dated November 2004.
- 1.2 By letter dated 16 February 2005, the applicant sought access to: *"The Mahar Report by Queensland Health which investigated deaths in the public health system and looked at the criteria for placing people on cardiac waiting lists"*.
- 1.3 By letter dated 6 April 2005, Ms Heal, Principal Policy Officer, Legal and Administrative Law Unit, Queensland Health, advised the applicant of her decision to grant full access to 42 pages and partial access to 4 pages. In that letter, Ms Heal advised the applicant that she had refused access to parts of 4 pages of the Draft Report on the basis that those parts were exempt matter under s.40(c) of the *Freedom of Information Act 1992 Qld* (FOI Act).
- 1.4 By letter dated 11 April 2005, the applicant applied for an internal review of Ms Heal's decision dated 6 April 2005, stating that he believed it was *"in the best interest of the Queensland public to release the entire document as to have a complete view of cardiac waiting lists and deaths in the public health system"*.
- 1.5 By letter dated 28 April 2005, Dr Scott, Senior Executive Director, Queensland Health, advised the applicant that he had conducted an internal review of Ms Heal's decision dated 6 April 2005, and had decided to affirm Ms Heal's decision.
- 1.6 By letter dated 5 May 2005, the applicant applied for external review of Dr Scott's decision dated 28 April 2005, under Part 5 of the FOI Act. In that letter, the applicant reiterated his statement, reproduced above, as contained in his internal review application, and stated that he understood that *"if necessary any patients or staff names can be blocked out so as to not identify individuals by name"*.

2. Steps taken in the external review process

- 2.1 A copy of the matter in issue was obtained and examined. A copy of the final version of the report as published, after the applicant's FOI access application was made, was also obtained.
- 2.2 By letter dated 4 July 2005, I advised the applicant that it was my preliminary view that the matter in issue qualified for exemption under s.40(c) of the FOI Act, and invited the applicant to make submissions in support of his case for disclosure.
- 2.3 By letter dated 14 July 2005, the applicant advised that he did not accept my preliminary view and made submissions in support of his case for disclosure.
- 2.4 By letter dated 26 July 2005, I provided Mr Crofts, Director, Legal Unit, Queensland Health, with a copy of the applicant's submissions dated 14 July 2005 and invited Queensland Health to lodge any further submissions and/or evidence it wished to rely on to support its case for exemption of the matter in issue.

- 2.5 By letter dated 5 December 2005, Mr Crofts provided further submissions and a statutory declaration of Dr Cleary, Acting District Manager of TPC Health Service District. I note Dr Cleary stated that he had also held the position of Executive Director Medical Services at TPC Health Service District at the time of the investigation and preparation of the report in issue. By letter dated 5 December 2005, the applicant was provided with a copy of Mr Crofts' letter and Dr Cleary's statutory declaration on 5 December 2005 and invited to respond with submissions.
- 2.6 By letter dated 8 December 2005, the applicant advised this Office that he continued to seek full disclosure of the Draft Report and provided further submissions in support of his case for disclosure.
- 2.7 In making my decision in this matter, I have taken into account the following:
- the contents of the matter in issue, and the balance of the draft and final versions of the report;
 - the applicant's FOI access application dated 16 February 2005, application for internal review dated 11 April 2005, and application for external review dated 5 May 2005;
 - Ms Heal's initial decision dated 6 April 2005, and Dr Scott's internal review decision dated 28 April 2005;
 - correspondence from the applicant, including submissions, dated 14 July 2005 and 8 December 2005;
 - correspondence from Queensland Health, including submissions, dated 5 December 2005; and
 - correspondence to the applicant dated 4 July 2005 and 5 December 2005, and to Queensland Health dated 26 July 2005.

3. Matter in issue

- 3.1 The matter in issue has been substantially reduced during the course of this external review through agreement with the parties. The matter remaining in issue in this review comprises paragraphs 4 and 5 under heading "7.2.7 Standard of Referral for Cardiac Surgery", which are located on page 28, immediately above the heading "7.2.8 Data Management".

4. Application of section 40(c) of the FOI Act

- 4.1 Section 40(c) of the FOI Act provides:

40. 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; ...

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

- 4.2 In applying s.40(c) to the matter in issue, it is necessary to determine:

- (a) whether any adverse effects on the management or assessment by an agency of its personnel could reasonably be expected to follow from disclosure of the matter in issue. There must be expectations for which real and substantial

grounds exist (see *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, at paragraphs 154-160); and

- (b) whether the adverse effects amount to a substantial adverse effect on the management or assessment by an agency of its personnel. The adjective "substantial" in the phrase "substantial adverse effect" means grave, weighty, significant or serious effects (see *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663, at paragraphs 148-150).

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

4.3 The matter remaining in issue comprises two paragraphs of page 28 of the Draft Report. The relevant part of the Draft Report details observations made by investigating officers based on interviews with staff from TPCCH during the course of the investigation. Queensland Health has advised that the Draft Report, with the exception of the paragraphs originally in issue in this review, was released as a final report.

4.4 Dr Scott stated in his internal review decision of 28 April 2005, that:

... the matter in issue consists of subjective statements made by the investigating officers concerning the evidence obtained in the course of staff interviews, where some of the individuals who were interviewed have expressed concern about statements that have been attributed to them, which they assert are wrong or have been taken out of context.

(my underlining)

4.5 The Draft Report states (at page 6) that interviews conducted by the investigating officers were not tape-recorded.

4.6 The application for external review dated 5 May 2005 stated "*we believe that it is in the best interest of the Queensland Public to release the entire document as to have a complete view of cardiac waiting lists and deaths in the public health system*".

4.7 Mr Croft, in his letter dated 5 December 2005, submitted:

I would emphasise one specific point made in Dr Scott's reasons for decision; namely, that the authors of the report in issue had "identified certain areas in relation to staff working relationships and communications which, at the time the Draft Report was prepared, required improvement". In his 14 July 2005 letter to you, Dr Flegg himself acknowledged the Report's identification of difficulties in staff working relationships at that time ... [referring to an extract of Dr Flegg's letter:] "[The report in question by Messrs Mahar and Johnson] paints a situation where staff conflict and administrative deficiency are impairing the ability to deliver quality cardiac services in a major way to a large part of the State".

However, as stated by both Dr Scott (in his internal review decision) and Dr Cleary (in his statutory declaration), enormous efforts have been undertaken in order to restore proper functioning to the cardiac services department at The Prince Charles Hospital. Queensland Health submits that release of the matter remaining in issue would have a significantly

detrimental effect on the currently very good working relationships and collegial environment in the department, and ultimately impact on the ability to maintain a leading role in the delivery of cardiac services to the people of Queensland.

I concur with the views expressed previously by both Ms Heal and Dr Scott, in their respective decisions, that while there is a significant public interest in Queensland Health's accountability and transparency in relation to the delivery of cardiac services in Queensland, and the assessment of the proper functioning of those services, that public interest has been adequately served by release of the balance of the report in issue, and that the potentially damaging effects of release of the small portion of matter remaining in issue outweigh the public interest arguments favouring release of that matter.

4.8 Dr Cleary, in his statutory declaration dated 20 December 2005, stated:

9. *In my former capacity as [Executive Director Medical Services], I was directly involved in discussions with the then District Manager (Ms Gloria Wallace), and with clinicians in the cardiology and cardiac surgery services who had been interviewed by the investigators, regarding the potential impact of disclosure of portions of the draft report. In the course of those discussions, clinicians expressed to us serious concerns about inconsistencies between statements they had made when interviewed by Drs Mahar and/or Johnson and certain assumptions and conclusions drawn by Drs Mahar and Johnson in the draft report.*
10. *The staff members concerned expressed to me, and to Ms Wallace, the view that disclosure of portions of the draft report which contained erroneous statements or conclusions, or information that had been taken out of context, would be extremely damaging to their professional reputations and would significantly damage the working relationships between staff in the two areas. At least one staff member indicated that the implications of such release could be so damaging that his position would become untenable and he would be compelled to resign.*
11. *As EDMS, I was well aware of the issues canvassed in the draft report, and I fully support the views expressed by individual staff members regarding conclusions made by Drs Mahar and Johnson based on unvalidated information. ...*
- ...
14. *To my direct knowledge there have been enormous efforts made to restore that department to proper functioning, and those efforts have resulted in much improved working relationships and cooperation between staff in the constituent areas of specialty at the present time.*
15. *Based on my past experience as EDMS, and my current position as Acting District Manager, I consider that disclosure of the matter in issue in the present external review would have an enormously destabilising effect, and ultimately have an extremely detrimental impact on the service, by undermining the trust and respect of clinical staff towards one another, and the collegial approach to delivery of*

world-class health care services.

4.9 In response, the applicant submitted, by letter dated 8 December 2005, that he continued to seek disclosure of the final two paragraphs in issue for the following reasons:

- *The information is vital and in the best interest of the public*
- *Dr Cleary's view is not impartial and we have a different view that the release of the whole document has an overriding public interest and benefit*
- *If paragraphs contain opinions of staff that these opinions are very relevant and should be released*
- *As there are concerns about identifying the persons involved we are happy for the names of these employees of Queensland Health to be suppressed*
- *As Dr Cleary stated in the last paragraph of his statutory declaration that thedisclosure of the matter in issue in the present external review would have an enormously establishing effect, and ultimately have an extremely detrimental impact on the service, by undermining the trust and respect of clinical staff towards one anotherI would like to reiterate that we are happy for names to be suppressed so as to alleviate any adverse effects on staff involved.*

4.10 Having examined the matter in issue, I agree that if the matter remaining in issue were disclosed, revealing purported views of staff within a small team, the accuracy of which is subject to dispute, there could be a real expectation that it is likely to result in significant disruption to workplace relations between different types of staff in the cardiac services area. The conclusions and recommendations contained in the balance of the Draft Report recognise the significance of such workplace relations to the effective management of the cardiac services area of TPCCH to ensure successful delivery of such services. I am therefore satisfied that the disclosure of the relevant parts of the Draft Report could reasonably be expected to have a substantial adverse effect on the management by an agency of the agency's personnel.

4.11 In this case the matter remaining in issue contains observations made by the investigating officers, presenting views that are the issue of some dispute by the witnesses to whom they are attributed. In some cases, such views are not directly attributed to individual staff, however, as submitted by Queensland Health, it would not be difficult in a small team for such staff, or types of staff in that particular workplace to be identified in relation to such views. Similarly, I am satisfied that, where names are attributed to comments made, removal of such names would not be sufficient to avoid identification of staff, particularly given the small number of staff involved. In light of the concerns raised about the accuracy of statements made in the two paragraphs of the Draft Report, and the likely adverse effect of disclosure of these two paragraphs on the improved working relationships of the staff in the two relevant areas in the TPCCH, and the subsequent implications for the provision of health care services, I am satisfied that the public interest weighs in favour of non-disclosure in this case.

4.12 I am satisfied that the release of all but two paragraphs of the Draft Report, and the publishing of the Final Report, satisfies the public interest in Queensland Health's accountability for the delivery of public sector health services. Significantly, in light of the concerns regarding the accuracy of the specific contents of the two paragraphs remaining in issue raised by those to whom the views are attributed, these sections of the

Draft Report, due to their unreliability, do not assist in ascertaining a "complete view of cardiac waiting lists and deaths in the public health system". I am therefore satisfied that the disclosure of the matter remaining in issue would not, on balance, be in the public interest.

Conclusion

- 4.13 For the reasons outlined in paragraphs 4.1-4.12 above, I find that the matter remaining in issue qualifies for exemption under s.40(c) of the FOI Act as its disclosure could reasonably be expected to have a substantial adverse effect on the management by an agency of the agency's personnel and its disclosure would not, on balance, be in the public interest.

DECISION

- 5.1 I decide to affirm the decision under review (being the decision dated 28 April 2005 by Dr Scott on behalf of Queensland Health) by finding that the matter remaining in issue in this review qualifies for exemption under s.40(c) of the FOI Act. This decision finalises review no. 2005/F0270.

CATHI TAYLOR
INFORMATION COMMISSIONER

Date: 25 January 2006