

Disclosure of quality assurance committee membership

Allatt & ACT Government Health Directorate

(Administrative Review) [2012] ACAT 67 (28 September 2012)

By Donella Piper

The applicant, Mr Craig Allatt, was married to Ms Emily Vermeulen. Nine days after the birth of their child in April 2008, Ms Vermeulen presented to Mental Health ACT with the condition puerperal psychosis. She had no previous history of mood disorder or psychosis. Ms Vermeulen remained under the psychiatric care of the Woden Mental Health Team until January 2009 when, tragically, she died. The clinical treatment of Ms Vermeulen was reviewed by a Mental Health Clinical Review Committee (CRC) in late January 2009.

The applicant made a FOI request seeking access to the CRC's terms of reference; procedures, results of the review; submissions made to the CRC, the CRC's notes, working papers, and any other documents relating to Ms Vermeulen's treatment; and the names of the CRC members who reviewed Ms Vermeulen's treatment. The release of a number of documents, including the CRC membership, was refused under this request, based upon the exemptions set out in ss38, 40 and 42 of the *Freedom of Information Act 1989* (ACT) (FOI Act).

Section 38 of the FOI Act states:

'A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.'

The respondents relied upon Part 8 of the *Health Act 1993* (ACT) (Health Act), which provides for protection of the secrecy of certain persons and information, including a member of a Quality Assurance Committee (QAC) such as the Mental Health CRC, as set out in s122 of the Health Act. More specifically, the respondent believed that much of the information requested was 'protected'¹ and 'sensitive'² information under the Health Act, release of which would be an offence under s125 of that Act.³

As a backup, the respondent relied on s40(1)(a) and (b)

of the FOI Act, which exempts from disclosure documents containing certain operations of agencies if its disclosure would, or could reasonably be expected to, prejudice the effectiveness of procedures or methods or the objects of particular tests, examinations or audits conducted or to be conducted by an agency.

The applicant made a second FOI request seeking 'any document that relates to how the Health Directorate came to its current understanding of the meaning and operation of s125 of the Health Act'.

By the time of the first hearing day of the application on 2 March 2012, the number of documents in dispute had been considerably reduced and comprised 58 documents. For 41 of these documents, an exemption from disclosing the names of members of a QAC was claimed under s38 of the FOI Act in combination with s125 of the Health Act, as well as an exemption under s40 of the FOI Act. The remainder of the 58 documents (that is, 17 documents) were claimed to be exempt from release by reason of legal professional privilege (under s42 of the FOI Act).⁴

ISSUES FOR DETERMINATION

The Tribunal identified the issues for determination as follows:

1. Does an exemption under s38 of the FOI Act apply to prevent the release of the names of members of a QAC, because s125 of the Health Act is a provision prohibiting persons from disclosing information of that kind?
2. If the names of members of a QAC are not exempt under s38 of the FOI Act, is that information exempt under ss40(1)(a) or (b) of the FOI Act because disclosure of the names would prejudice the effectiveness or attainment of the objects of examinations or audits conducted by the Health Directorate?
3. Does a legal professional privilege exemption under s42 of the FOI Act apply to the documents identified by the Health Directorate as exempt on that basis?
4. What effect, if any, does the *Human Rights Act 2004*

(ACT) (Human Rights Act) have on the Tribunal's review of the decision by the Health Directorate to claim exemptions for release of documents under the FOI Act?

Application of the *Human Rights Act 2004* (ACT)

The Tribunal held that it was itself a public authority as defined in s40 of the *Human Rights Act*⁵ because it was acting in an administrative capacity in exercising the scope of the respondent's functions upon an application for review being filed with the Tribunal.⁶ Therefore, the Tribunal's starting point must be to interpret the legislation in a manner consistent with both the *Legislation Act 2001* (ACT) and the *Human Rights Act*.⁷ Furthermore, the Tribunal considered that the relevant methodology for applying the *Human Rights Act* to the current case was steps 1 to 3A of the sequence set out in the judgment of Penfold J in *Re Application for Bail by Isa Islam (Re Islam)* [2010] ACTSC 147; (2010) 244 FLR 158 at [232].⁸

Did a s38 exemption apply to prevent the release of the QAC members' names?

In applying the steps to s38 of the FOI Act, the Tribunal held that s38 of the FOI Act did not apply in relation to the requests. The Tribunal held that the names of the QAC members that reviewed the treatment of Ms Vermeulen in 2009 was not "sensitive information", as defined in s124 of the *Health Act*. While the respondent urged that the overall statutory intention was to protect the anonymity of QAC members, the Tribunal considered that this was not the primary focus of the secrecy provisions. Rather, the focus is on protecting from disclosure the identity of health service receivers and treating health practitioners and information provided in confidence to QACs. If protecting the identity of QAC members from disclosure was an important consideration, s124(a) could easily have included a specific subparagraph to that effect.⁹

Also, the names of the QAC members who reviewed the treatment of Ms Vermeulen in 2009 was not 'protected information', as defined in s123 of the *Health Act*. If an information-holder divulges information about names under the FOI Act, that action would not enliven the operation of s125 of the *Health Act* because the information is not 'protected information' and the disclosure would not be 'reckless' for the purposes of s125(1)(b)(ii). Documents relating to the identity of members of a QAC were therefore not exempt from release to the applicant under s38 of the FOI Act.¹⁰

Did a s40 exemption apply to prevent the release of the QAC members' names?

The Tribunal accepted that some inconvenience to the QAC process may occur if the names of those persons participating in a particular meeting of the Mental Health Clinical Review Committee are publicly disclosed; namely, that some members may be reluctant to participate in particular reviews other than on an anonymous basis. However, the respondent did not adduce any tangible evidence that prejudice would affect the procedures of,

or the attainment of the objects of the agency. Although it was assumed by both witnesses for the respondent that things might not go as smoothly if the information was revealed, there was no evidence of actual prejudice or of any circumstance that had changed for the better since secrecy provisions had been put in place. Furthermore, the Tribunal considered that there was a high public interest in transparency and accountability of the CRC process. While it was extremely important to the process that individual views and opinions were not attributed to the author of those opinions, identification of the members' collective views and identities, in the opinion of the Tribunal, carried fewer risks. On balance, the Tribunal considered that the public interest favours disclosure. Therefore, s40(2) of the FOI Act operates so that the relevant documents are not exempt under s40(1) of the FOI Act.¹¹

Were some documents subject to legal professional privilege?

The Tribunal held that the respondent's actions in withholding 17 documents subject to a claim for legal professional privilege were confirmed.¹²

CONCLUSION

Subsequent to the decision an appeal has not been lodged. The decision demonstrates the substantial public interest that must be weighed up against protecting the identity of members of quality review processes. The practical implications of the decision are that health professionals who are members of CRCs should be aware that they may be named under FOI claims. More than this, the decision is important because it provides a detailed explanation of the methodology of interpretation under the *Human Rights Act* in the ACT. ■

Notes:

1 'Protected information' includes sensitive information and is defined in s123, *Health Act 1993* (ACT). **2** 'Sensitive information' is defined in s124, *Health Act 1993* (ACT). **3** Section 125, *Health Act 1993* (ACT). **4** Documents subject to legal professional privilege are defined in s42, *FOI Act 1989* (ACT). **5** *Allatt & ACT Government Health Directorate (Administrative Review)* [2012] ACAT 67 (28 September 2012) at [63]-[64]. Public authorities must act consistently with human rights, as per s40B *Human Rights Act 2004* (ACT). **6** *Ibid* at [63]-[67]. **7** *Ibid* at [65]-[77]. **8** *Ibid* at [73]-[74]. The steps are: Step 1: Identify all meanings of the provision that are available under ordinary principles of statutory interpretation and consistent with legislative purpose (the available meanings), including meanings generated by applying s30 of the *Human Rights Act* but also meanings that would be available apart from s30. Step 2: Set aside for the time being any available meaning that is not human rights-compatible under s30. Step 3: Examine the remaining available meanings (that is, those that are human rights-compatible). Step 3A: If there are one or more available meanings that are human rights-compatible, then that meaning, or the one of those meanings required by s139 of the *Legislation Act* to be preferred, is adopted. **9** *Ibid* at [78]-[94]. **10** *Ibid* at [95]-[97]. **11** *Ibid* at [98]-[105]. **12** *Ibid* at [106]-[107].

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