



Decision and Reasons for Decision

Citation:	<i>A70 and Central Queensland Hospital and Health Service [2021] QICmr 24 (3 June 2021)</i>
Application Number:	315713
Applicant:	A70
Respondent:	Central Queensland Hospital and Health Service
Decision Date:	3 June 2021
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - disclosure of information prohibited by an Act - personal information of other individuals - safeguarding personal information and the right to privacy of other individuals - whether disclosure would, on balance, be contrary to the public interest - whether access may be refused under section 67(1) of the <i>Information Privacy Act 2009 (Qld)</i> and section 47(3)(b) of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied¹ to Central Queensland Hospital and Health Service (**CQHHS**) for access under the *Information Privacy Act 2009 (Qld)* (**IP Act**) to a 6 page report prepared by a Review Panel in response to a request to evaluate the applicant's performance (**Report**).
2. CQHHS did not make a decision within the relevant processing period² and was therefore taken to have made a decision refusing access to the information sought.³
3. The applicant applied⁴ to the Office of the Information Commissioner (**OIC**) for external review of this deemed decision.
4. OIC granted⁵ CQHHS further time to deal with the access application.⁶

¹ Access application dated 10 July 2020.

² Set out in section 22 of the IP Act.

³ Under section 66(1) of the IP Act. CQHHS advised the applicant of the deemed decision by letter dated 28 September 2020.

⁴ Application for external review dated 28 September 2020.

⁵ On 30 October 2020.

⁶ Under section 106(2) of the IP Act.

5. CQHHS did not make a decision within the further time granted and was therefore taken to have made a decision affirming the deemed decision.⁷
6. The applicant applied⁸ to OIC for external review of this decision affirming the deemed decision.
7. During the external review, CQHHS agreed⁹ to release parts of 5 pages of the Report to the applicant.¹⁰
8. For the reasons set out below, I find that access to the remaining information within the Report may be refused on the ground that disclosure would, on balance, be contrary to the public interest.

Reviewable decision

9. The decision under review is the decision CQHHS is deemed to have made refusing access to the requested information.

Evidence considered

10. Significant procedural steps taken during the external review are set out in the Appendix.
11. In reaching my decision, I have had regard to the submissions, evidence, legislation, and other material referred to throughout these reasons (including footnotes and Appendix).
12. In her submissions,¹¹ the applicant questions whether she is *'being treated fairly like any other Australian citizen would have been treated'* and asked that OIC *'uphold the Australian culture of fairness and provide a less blackened out report.'* In reaching my decision, I have applied the relevant law to the circumstances of this matter as would be the case for any other applicant, Australian citizen or otherwise.
13. I have also had regard to the *Human Rights Act 2019 (Qld) (HR Act)*,¹² particularly the right to seek and receive information.¹³ I consider a decision-maker will be *'respecting and acting compatibly with'* that right and others prescribed in the HR Act, when applying the law prescribed in the IP Act and the *Right to Information Act 2009 (Qld) (RTI Act)*.¹⁴ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation¹⁵: *'it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.'*¹⁶

⁷ Under section 106(3) of the IP Act.

⁸ Application for external review dated 9 November 2020.

⁹ As set out in CQHHS's submission (being the draft decision prepared in response to the access application) dated 10 November 2020.

¹⁰ CQHHS confirmed to OIC on 28 January 2021 that this information had been released to the applicant.

¹¹ Submission to OIC dated 4 February 2021.

¹² The HR Act came into force on 1 January 2020.

¹³ Section 21 of the HR Act.

¹⁴ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

¹⁵ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁶ **XYZ** at [573].

Information in issue

14. The information remaining for consideration is the refused information appearing within 1 page and parts of 5 pages of the Report (**Information in Issue**).

Issue for determination

15. The issue for determination is whether access to the Information in Issue can be refused on the ground that its disclosure would, on balance, be contrary to the public interest.

Relevant law

16. Under the IP Act, an agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.¹⁷
17. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:¹⁸
- identify any irrelevant factors and disregard them
 - identify relevant public interest factors favouring disclosure and nondisclosure
 - balance the relevant factors favouring disclosure and nondisclosure; and
 - decide whether disclosure of the information would, on balance, be contrary to the public interest.
18. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of public interest lies in a particular case. I have carefully considered these lists, together with all other relevant information, in reaching my decision. Additionally, I have kept in mind the RTI Act's pro-disclosure bias¹⁹ and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.²⁰

Findings

19. The Information in Issue comprises:
- i) personal information of third parties, such as information about their employment history or patient details; and
 - ii) thoughts and observations provided to the Review Panel by third parties about the applicant.

Irrelevant factors

20. I have not taken any irrelevant factors into account in reaching my decision.

Factors favouring disclosure

21. Factors favouring disclosure will arise if disclosure could reasonably be expected to enhance the accountability and transparency of CQHHS regarding its management of

¹⁷ Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act. The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

¹⁸ Section 49(3) of the RTI Act.

¹⁹ Section 44 of the RTI Act.

²⁰ Section 47(2)(a) of the RTI Act.

- staff, for example, by revealing background or contextual information to decisions.²¹ As noted at paragraph 19 above, the information at i) comprises the personal information of third parties. I do not consider that disclosure of this information would advance CQHHS's accountability and transparency in any way. On the other hand, the information at ii) comprises information provided to the Review Panel by third parties about the applicant. I accept that disclosing this information would advance these factors to some degree. However, I consider that the information which CQHHS has released to the applicant would further her understanding of what information was available to the Review Panel, and therefore CQHHS, and provide background information. Accordingly, while I consider that these three factors do not apply in relation to the information at i), I afford them moderate weight in relation to the information at ii).
22. I acknowledge that the information at ii) contains the applicant's personal information²² and forms part of the Report which is about the applicant's work performance. I acknowledge that information about the applicant's work performance is a matter at the core of her personal sphere, and therefore I have afforded significant weight to this factor in relation to the information at ii).
23. The applicant submits:²³
- she has been '*denied natural justice since this whole process was commenced*'
 - serious accusations were made against her; and
 - she believes natural justice requires that she be able to '*verify legally the contents of this report*' so that she can clear her name.
24. The applicant's submissions raise natural justice or procedural fairness concerns. Given these submissions, I have also considered whether factors favouring disclosure related to the fair treatment of individuals and the administration of justice also arise for consideration.²⁴
25. At common law, the fair hearing aspect of procedural fairness requires that, before a decision that will deprive a person of some right, interest or legitimate expectation is made, the person is entitled to know the case against them and to be given the opportunity of replying to it.²⁵ This does not mean that the person is entitled to access copies of all relevant material. Rather, the person must be provided with adequate information about the material that is credible, relevant and significant to the adverse finding to be made, so that the person can be given the opportunity to make effective representations to the decision-maker.²⁶
26. In the present circumstances, the information which has been disclosed to the applicant details the performance review process and the conclusion reached by the Review Panel. Given this position, and noting the content of the Information in Issue, I do not consider that disclosure of the Information in Issue could reasonably be expected to advance the applicant's fair treatment or afford her procedural fairness; or is required to enable the applicant to pursue a remedy or evaluate whether a remedy is available or worth pursuing.²⁷ Therefore, I am satisfied that the fair treatment and procedural fairness factors are not relevant to the public interest test under the IP Act. And, even if it could

²¹ Schedule 4, part 2, items 1, 3 and 11 of the RTI Act.

²² Schedule 4, part 2, item 7 of the RTI Act.

²³ Submission to OIC dated 4 February 2021.

²⁴ Schedule 4, part 2, items 6, 16 and 17 of the RTI Act.

²⁵ *Kioa v West* (1985) 159 CLR 550 (*Kioa*) at 584 per Mason J.

²⁶ *Kioa* at 629 per Brennan J.

²⁷ *Willsford and Brisbane City Council* (1996) 3 QAR 368 at [17] and confirmed in *1OS3KF and Department of Community Safety* (Unreported, Queensland Information Commissioner, 16 December 2011).

be accepted that they were relevant, they would warrant no more than low weight, given the nature of the Information in Issue.

Factors favouring nondisclosure

27. The RTI Act recognises that disclosing an individual's personal information to someone else can reasonably be expected to cause a public interest harm²⁸ and that a further factor favouring nondisclosure arises if disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy.²⁹ As noted at paragraph 19 above, the information at i) comprises the personal information of third parties. While the information at ii) appears within a Report which is about the applicant's work performance, it also comprises the personal information of third parties. Given the sensitive nature of the information and the circumstances of its provision, I am satisfied that disclosure would disclose private details about the third parties, thus giving rise to a reasonable expectation of intrusion into their private life or 'personal sphere'. Accordingly, I afford significant weight to these two factors favouring nondisclosure of the Information in Issue.
28. Nondisclosure will also be favored where disclosure is prohibited by an Act.³⁰ Relevantly, section 138 of the *Hospital and Health Boards Act 2011* (Qld) (**HHB Act**),³¹ operates to prevent a person being compelled to produce a report prepared as a result of a clinical review in compliance with a requirement under an Act. CQHHS submit:³²

The [Report] is a Clinical Review in accordance with Division 3 Clinical Reviews - [HHB Act], requested by the CQHHS Chief Executive and conducted by ANZCA as the independent clinical reviewer.

Division 3 outlines a specific duty of confidentiality on the Clinical Reviewer (s.132 HHB Act) and furthermore s.138 HHB Act outlines specific protections for the report produced through the clinical review process...

29. I accept CQHHS's submission that the Report is a clinical review for the purpose of Part 6, Division 3 of the HHB Act and that disclosure of the Report is therefore prohibited by section 138 of the HHB Act. I therefore afford significant weight to this factor favouring nondisclosure of the Information in Issue.

²⁸ Schedule 4, part 4, section 6(1) of the RTI Act.

²⁹ Schedule 4, part 3, item 3 of the RTI Act.

³⁰ Schedule 4, part 3, item 22 of the RTI Act.

³¹ **138 Protection for reports**

(1) *This section applies to a report prepared as a result of a clinical review, other than as a result of a review undertaken to provide clinical advice to a health service investigator.*

(2) *The report—*

(a) *cannot be accessed under any order, whether of a judicial or administrative nature; and*

(b) *is not admissible in any proceeding, other than a proceeding for an offence under this division.*

(3) *A person must not, and cannot be compelled to, produce the report, or give evidence relating to the report—*

(a) *in any proceeding, other than a proceeding for an offence under this division; or*

(b) *in compliance with a requirement under an Act or legal process.*

(4) *In this section—*

order *includes a direction or other process.*

proceeding *includes—*

(a) *a civil proceeding; or*

(b) *a criminal proceeding; or*

(c) *a proceeding under the Health Practitioner Regulation National Law.*

³² Submission to OIC dated 17 November 2020.

30. A further factor favouring nondisclosure arises where disclosure of the information could reasonably be expected to prejudice an agency's ability to obtain confidential information.³³ CQHHS submits:³⁴

The effectiveness of a Clinical Review of this kind is determined by the clinicians peers to participate in the review and give information confidentially, freely, and without fear of retribution. Release of confidential or identifiable information would potentially undermine the purpose of the clinical review process.

31. I am satisfied that people who provide information to a performance review panel do so with an expectation of confidentiality. The very nature of the information is such that it is sensitive and provided with the purpose of informing the performance review panel so that they can assess the performance of an employee. In my view, disclosure of the information could reasonably be expected to discourage other individuals from coming forward with confidential information to performance review panel's in the future. Given the importance of a performance review panel being fully informed in order to provide an accurate report, I afford significant weight to this factor favouring nondisclosure of the information at ii).

Balancing the public interest

32. I have considered the pro-disclosure bias in deciding access to information.³⁵ On balance, I consider the nondisclosure factors outweigh the disclosure factors in relation to both the information at i) and ii). Accordingly, I find that access to the Information in Issue may be refused on the basis that its disclosure would, on balance, be contrary to the public interest.

DECISION

33. I vary CQHHS's deemed decision and find that access to the Information in Issue may be refused under section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.
34. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

Louisa Lynch
Right to Information Commissioner

Date: 3 June 2021

³³ Schedule 4, part 3, item 16 of the RTI Act. I have also considered schedule 4, part 4, section 8, however I am not satisfied this factor applies to all of the Third Party Information in this review.

³⁴ Submission to OIC dated 17 November 2020.

³⁵ Section 44 of the RTI Act.

APPENDIX**Significant procedural steps**

Date	Event
9 November 2020	OIC received the application for external review.
10 November 2020	OIC notified CQHHS and the applicant that the application for external review had been accepted and requested from CQHHS a copy of: <ul style="list-style-type: none"> • a copy of the access application • any correspondence between CQHHS and the applicant in the processing of the application • a copy of all documents relevant to the access application marked-up, to reflect CQHHS's position on disclosure; and • a submission detailing any grounds for refusing access.
17 November 2020	OIC received the requested documents from CQHHS.
21 December 2020	OIC conveyed a preliminary view to the applicant and requested CQHHS release information to the applicant as agreed.
28 January 2021	OIC received confirmation that CQHHS had released information to the applicant as agreed.
4 February 2021	OIC received a submission from the applicant.
8 March 2021	OIC conveyed a further preliminary view to the applicant.