



Decision and Reasons for Decision

Citation: *J154DA and Townsville Hospital and Health Service [2015] QICmr 29 (20 November 2015)*

Application Number: 312483

Applicant: J154DA

Respondent: Townsville Hospital and Health Service

Decision Date: 20 November 2015

Catchwords: ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL OF ACCESS - DOCUMENTS UNLOCATABLE OR NONEXISTENT - documents about incident in which applicant was physically restrained - applicant contends additional documents exist - an agency may refuse access to a document because the document is nonexistent or unlocatable - whether the agency has taken all reasonable steps to locate the documents but the documents cannot be found or do not exist - section 67(1) of the *Information Privacy Act 2009 (Qld)* and sections 47(3)(e) and 52 of the *Right to Information Act 2009 (Qld)*

ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - SCOPE OF ACCESS APPLICATION - security footage of incident involving applicant and policy document of agency - whether information is outside scope of the access application - section 40 of the *Information Privacy Act 2009 (Qld)*

REASONS FOR DECISION

Summary

1. The applicant applied to the Townsville Hospital and Health Service (**Hospital**) under the *Information Privacy Act 2009 (Qld)* (**IP Act**) for access to information¹ relating to her admission to and treatment in hospital during a specified eight day period, including a complaint (**Complaint**) made by her partner concerning an incident on the first night after her admission in which she was physically restrained, her hearing aids were dislocated and one of them was damaged (**the Incident**).
2. In its original decision, the Hospital located and granted access to 257 in full pages and refused access to the Complaint on the ground that it was unlocatable.

¹ *J154DA* applied to the Hospital for '[a]ll documentation of mental health. Also copy of complaint lodged by [the applicant's partner] 28/10/14 -> week 5/11/14' from 'October - to present date 6/3/15'.

3. After the applicant lodged an internal review application, the Hospital located and granted access to a further four pages in full.
4. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Hospital's decision that the Complaint was unlocatable, and submitted that the Hospital should have located other documents about the Incident as well, especially an incident report. On external review, the Hospital located six further pages relevant to the application and agreed to release them to the applicant.
5. In relation to the documents that the applicant submitted should have been located, I vary the Hospital's decision and find that:
 - some of them² can be refused on the basis that they are unlocatable and/or do not exist; and
 - the remainder³ are outside the scope of the applicant's access application.

Background

6. Significant procedural steps relating to the external review are set out in the Appendix to this decision.

Reviewable decision

7. Section 97(2) of the IP Act requires that an agency of Minister decide an internal review application **and notify** the applicant of that decision within 20 business days. While the Hospital decided and posted its internal review decision on the twentieth business day, it was not received by the applicant until two days later. In these circumstances, given the notification requirement in section 97(2) of the IP Act, the reviewable decision in this external review is a decision the Hospital is taken to have made at the end of the 20 business days affirming its original decision issued on 27 April 2015.

Evidence considered

8. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).
9. The applicant (via her partner whom she authorised to make submissions on her behalf⁴) provided submissions⁵ to OIC supporting her case. Whilst I have carefully considered all of the applicant's submissions, not all matters raised are relevant to the issues for determination. I have summarised and addressed the applicant's submissions below to the extent they are relevant to the issues for determination.

Issues for determination

10. The applicant applied for external review of the Hospital's decision that a document recording the Complaint was unlocatable. On external review, it was agreed⁶ that OIC would consider whether documents about the Incident exist, and—if so—whether the Hospital has taken all reasonable steps to locate them.

² The Category A Documents as defined at [12] below.

³ The Category B Documents as defined at [14] below.

⁴ In her application for external review.

⁵ By telephone discussions with an officer of OIC on 18 August 2015, 8 September 2015 and 12 November 2015, letter to OIC dated 8 September 2015 (received 15 September 2015) and email to OIC received 12 November 2015.

⁶ By telephone conversation between an officer of OIC and the applicant on 23 June 2015.

11. The applicant submitted⁷ that the following specific documents should have been located and released to her by the Hospital, but had not been:
 - incident reports about the applicant being put in lockdown, damage to one of her hearing aids, a flooding toilet, urinating outside, and being restrained by staff
 - a document setting out findings following the Nursing Unit Manager's investigation of the Complaint
 - reports by the applicant's treating doctor about her being put into lockdown and sustaining bruising and a dislocated thumb; and
 - other documents about bruises⁸ and dislocated thumb sustained by the applicant in the Incident.
12. Taking into account the applicant's application for external review and submissions, it is necessary that I consider whether the above documents – which, for the purpose of this decision, I will refer to as the **Category A Documents** – are unlocatable and/or nonexistent.
13. The applicant also submitted⁹ that the following documents should have been disclosed to her by the Hospital:
 - CCTV security footage; and
 - policies about restraining patients, managing patient violence and Hepatitis C.
14. It is necessary that I consider whether these documents – which, for the purpose of this decision, I will refer to as the **Category B Documents** – are outside the scope of the applicant's access application.
15. I will deal with each of these matters in turn.

Category A Documents

Relevant law

16. Under the *Right to Information Act 2009* (Qld) (**RTI Act**), a person has a right to be given access to documents of an agency.¹⁰ However, this right is subject to other provisions of the RTI Act, including grounds on which an agency may refuse access to documents.¹¹ Relevantly, an agency may refuse access to documents¹² which:
 - do not exist;¹³ or
 - have been (or should be) in an agency's possession, but cannot be located.¹⁴
17. A document is nonexistent if there are reasonable grounds for the agency or Minister dealing with the access application to be satisfied that the document does not exist. To be satisfied that documents do not exist, a decision-maker must rely on their particular

⁷ At pages 2 and 3 of letter to OIC dated 8 September 2015.

⁸ Showing more bruising than that recorded in a document detailing an inspection of the applicant's skin at the time of her admission which records multiple bruises (page 77 of 161 of the Townsville Hospital records released to the applicant). In this regard, the applicant submitted on 12 November that the document in question did not record bruises consistent with those recorded in photographs taken by her partner after the Incident, and did not record her dislocated thumb.

⁹ At page 3 of letter to OIC dated 8 September 2015.

¹⁰ Section 23 of the RTI Act.

¹¹ These grounds are set out in section 47 of the RTI Act.

¹² Under section 47(3)(e) of the RTI Act.

¹³ Section 52(1)(a) of the RTI Act.

¹⁴ Section 52(1)(b) of the RTI Act.

knowledge and experience and have regard to a number of key factors.¹⁵

18. By considering these factors, an agency may ascertain that a particular document was not created because, for example, its processes do not involve creating the specific document. In such instances, it is not necessary for the agency to search for the document. It is sufficient that the relevant circumstances to account for the nonexistent document are explained.
19. In assessing whether documents are nonexistent, an agency may also conduct searches. Where searches are conducted, an agency must demonstrate that it has taken all reasonable steps to locate responsive documents, prior to deciding that the documents are nonexistent.¹⁶ In determining whether all reasonable steps have been taken, regard should be had to the key factors.¹⁷
20. To determine whether a document exists, but is unlocatable, the RTI requires consideration of whether:
 - there are reasonable grounds for the agency to be satisfied that the requested document has been or should be in the agency's possession; and
 - the has agency taken all reasonable steps to find the document.¹⁸
21. In answering these questions, regard should be had to the circumstances of the case and the key factors.¹⁹

Analysis

22. During the processing of the applicant's application, the Hospital performed searches for documents responsive to the applicant's access application in the following locations:
 - the Health Security Database
 - the PRIME – Clinical Incidents system
 - RecFind, which is a records management program used by the Mental Health Service Group to capture, track and locate both electronic and physical records
 - the computer of a Team Leader (previously Acting Nurse Unit Manager) in the Adult Mental Health group; and
 - the Finance and Materials Management Information System database
 - the general purpose vouchers folder.
23. As a result of those searches, the Hospital located the following types of medical records for the applicant:
 - Consumer Integrated Mental Health Application records
 - Community Chart records; and
 - her Townsville Hospital records.

¹⁵ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (*Pryor*) at [19] which adopted the Information Commissioner's comments in *PDE and the University of Queensland* [2009] QICmr 7 (9 February 2009) (*PDE*) at [37]. The key factors include: 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) and other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested document/s and the nature of the government activity to which the request relates.

¹⁶ As set out in *PDE* at [44]. See also section 130(2) of the RTI Act.

¹⁷ *PDE* at [49].

¹⁸ Section 52(1)(b) of the RTI Act.

¹⁹ *Pryor* at [21].

24. All documents in these records that fell within the date range of the application (comprising 257 pages in total) were released to the applicant in full.
25. Pursuant to the Hospital's purported internal review decision, an additional four pages were released to the applicant. These pages comprised a two page file note of a meeting on 30 October 2014 attended by the applicant, her partner, her sister, the Acting Nurse Unit Manager of the hospital unit that treated the applicant and an administration officer (**Meeting File Note**), a one page tax invoice regarding a hearing aid for the applicant, and a one page general purpose voucher regarding the Hospital's payment for that hearing aid.
26. On external review, OIC spoke with and wrote to the Hospital about whether any Complaint or incident report existed, and asked the Hospital to undertake further searches for such documents. The Hospital located and granted access in full to an additional six pages, comprising a 'PRIME – Clinical Incident Report' and three 'Health Security Database Incident Reports'.
27. Also on external review, the Team Leader (previously Acting Nurse Unit Manager) of the Adult Mental Health group provided the following explanation regarding how the Hospital decided to pay for a new hearing aid for the applicant to OIC, which OIC relayed to the applicant:²⁰

After the complaint from [the applicant's] partner, I consulted with the staff in the HDU [High Dependency Unit], they confirmed that there had been a restraint and after [the] restraint the hearing aid had been found on the floor crushed. The staff members acknowledged that it was probably stood on. I [saw] the crushed pieces of hearing aid. I went and spoke to Program Manager – ... and it was acknowledged that we should replace the hearing aid. The partner provided us with [an] invoice and the hearing aids were purchased via the Business Manager and her support officer [...]. I did not actually see the invoice as it was sent straight to [the Business Manager's support officer].

28. Further, the Hospital has also provided OIC with signed search certifications which identify all searches performed by the hospital and confirm the basis for the Hospital's view that all documents in its possession had been located.
29. As noted above,²¹ the applicant has submitted that the following specific documents should have been located:
 - a. a document recording the Complaint
 - b. incident reports about the applicant being put in lockdown, damage to one of her hearing aids, a flooding toilet, urinating outside, and being restrained by staff
 - c. a document setting out findings following the Nursing Unit Manager's investigation of the Complaint
 - d. reports by the applicant's treating doctor about her being put into lockdown and sustaining bruising and a dislocated thumb; and
 - e. other documents about bruises and dislocated thumb sustained by the applicant in the Incident.
30. I have carefully considered the searches conducted by Hospital at each stage (that is, initially, in relation to the purported internal review, and on external review), and the Hospital's explanation of those searches in its submissions to OIC, in light of the key factors.²² Having regard to the nature of the documents listed at a. to e. above, the

²⁰ In its preliminary view letter dated 31 August 2015.

²¹ At [10] and [11] of this decision.

²² PDE at [37] and Pryor at [19].

Hospital's recordkeeping practices and systems and the locations searched, I am satisfied that Hospital's searches targeted appropriate locations in a comprehensive manner and made enquiries with a relevant staff member (namely, the then Acting Nursing Unit Manager).

31. Specifically, in relation to the Complaint (a.), I note²³ that the Complaint was made in relation to the Incident – that is, the physical restraint of the applicant, dislocation of her hearing aids and damage to one of them on the applicant's first night in hospital. On the information before me, it appears that the applicant's partner became aware of the Incident on 29 October 2014, and complained to hospital staff that day. The Meeting File Note (released pursuant to the purported internal review decision) indicates that a meeting about the treatment of the applicant was held on 30 October 2014, the following day. The Meeting File Note records that the meeting commenced with an invitation to the applicant's partner to list his complaints and concerns, and that the applicant's partner then raised the Incident and other issues, which were discussed by the parties present. Given the timing and content of the Meeting File Note, I consider it reasonable to conclude that the file note may comprise the Hospital's record of the Complaint, and that no other, separate document recording the Complaint was created.
32. In relation to incident reports that the applicant submits should have been located and disclosed (b.), I note that the Hospital released in full all documents (totalling six pages) located as a result of searches undertaken of the areas which hold its incident reports—namely, the Health Security Database and the PRIME – Clinical Incident system. I further note that three of the six pages record instances where the applicant was restrained by hospital staff. I also note that, while the six pages do not specifically address the other matters that the applicant submitted would be addressed in incident reports,²⁴ they record non-compliant behaviour by the applicant, and how it was managed by hospital staff, in general terms. Given these considerations, it appears likely that incident reports addressing the specific matters raised by the applicant (other than being restrained by hospital staff) were not created.
33. In relation to the applicant's submissions regarding a document setting out findings regarding the Complaint (c.), I acknowledge the applicant's understanding that the then Acting Nurse Unit Manager would investigate the Complaint and make written findings. However, I also note that the Meeting File Note, which is a contemporaneous record of discussions involving the applicant, her partner and the then Acting Nursing Unit Manager, does not record this understanding. Further, I note that the explanation provided by the then Acting Nurse Unit Manager regarding the Hospital's decision to pay for a new hearing aid (provided to OIC on external review and relayed to the applicant) sets out the practical steps taken by the then Acting Nurse Unit Manager after the meeting to address the Complaint. In these circumstances, I consider it reasonable to conclude that no document setting out the then Acting Nurse Unit Manager's findings regarding the complaint was created.
34. In relation to the applicant's submissions regarding reports by her treating doctor about being put into lockdown and sustaining bruising and a dislocated thumb (d.) and any other documents about these injuries (e.), I note that the applicant may have sustained bruising when being physically restrained, and note a reference to thumb injuries in the Meeting File note. Consequently, I consider that the factual scenario that forms the basis of the applicant's submissions – that is, that she sustained bruising and a dislocated thumb during the Incident – appears possible. I also note that doctor's reports or other documents regarding such injuries – if they were created – would most

²³ As set out at [1] of this decision.

²⁴ That is, the applicant being put in lockdown, damage to one of her hearing aids, a flooding toilet, and urinating outside.

likely have been recorded in the applicant's medical records, or referred to in them. The Hospital released in full the entirety of the three types of medical records (that is, Consumer Integrated Mental Health Application, Community Chart and Townsville Hospital medical records) it held regarding the applicant which came within the period covered by the application – however, no such reports or other documents were located among these records, or referred to in them. In these circumstances, it appears reasonable to conclude that either these types of documents were never created and do not exist or, if they were created, they cannot be located.

35. On careful consideration of the Hospital's searches at each stage, its submissions in relation to these searches and the documents located as a result of them, I am satisfied that the Hospital has conducted comprehensive searches in all appropriate locations, and consider that these searches are sufficient to conclude that the Hospital has taken all reasonable steps to locate the Category A Documents.
36. Further, as set out above, on careful consideration of the nature of the various types of documents raised by the applicant, on the information before me, I consider it likely that the types of documents at a., b. and c. above cannot be located as they were never created and do not exist. I am also satisfied that the types of documents at d. and e. cannot be located as they either do not exist, or are unlocatable despite all reasonable searches.
37. In these circumstances, I am satisfied that the Hospital is entitled²⁵ to refuse access to all of the Category A Documents on the ground that they are nonexistent or unlocatable.²⁶

Category B Documents

38. I have considered the applicant's submissions regarding the Category B Documents in light of the scope of her access application.
39. In relation to the policies about restraining patients, managing violent patients and Hepatitis C that the applicant submits should have been located by the Hospital and provided to her, I note that such policies would not contain any personal information²⁷ about the applicant. Given that the applicant's access application was made under the IP Act, and therefore can only apply to documents which contain the applicant's personal information, it cannot apply to such policies.²⁸
40. In relation to the CCTV security footage raised by the applicant, I note that such footage – if it exists – could possibly contain the applicant's personal information and, if this was the case, the footage could be sought in an application under the IP Act. However, on careful consideration of the terms of the applicant's access application – which specified *'[a]ll documentation of mental health. Also copy of complaint lodged by [the applicant's partner] 28/10/14 -> week 5/11/14'* – I am satisfied that the wording of applicant's particular application cannot reasonably be interpreted as covering CCTV security footage.
41. Given these considerations, I find that both types of Category B Documents raised by the applicant are outside the scope of her access application.

²⁵ Under section 47(3)(e) of the RTI Act.

²⁶ Section 52(1)(a) of the RTI Act.

²⁷ As defined in section 12 of the IP Act.

²⁸ OIC notes, however, that such policies should generally be available via administrative release, rather than an access application under the RTI Act.

DECISION

42. For the reasons set out above, I vary the Hospital's decision and find that:

- the Category A Documents can be refused²⁹ on the ground that they are nonexistent or unlocatable;³⁰ and
- the Category B Documents are outside the scope of the applicant's access application.

43. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

A Rickard
Acting Assistant Information Commissioner

Date: 20 November 2015

²⁹ Section 67(1) of the IP Act and section 47(3)(e) of the RTI Act.

³⁰ Section 52(1) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
6 March 2015	The Hospital received the applicant's access application.
27 April 2015	The Hospital issued its decision to the applicant, in which it decided to release 257 pages in full and refuse access to one document (the Complaint) on the basis that it was unlocatable.
28 April 2015	The Hospital received the applicant's application for internal review of the decision.
26 May 2015	The Hospital issued its internal review decision to the applicant.
4 June 2015	OIC received the applicant's application for external review of the Hospital decision. The application authorised the applicant's partner to conduct the external review on her behalf.
9 June 2015	OIC notified the Hospital that the external review application had been received and requested it provide relevant procedural documents by 16 June 2015.
17 June 2015	OIC received the requested procedural documents from the Hospital.
23 June 2015	By telephone conversation, an officer of OIC clarified the issue for consideration on external review with the applicant, and confirmed that the applicant considered that the Hospital had failed to locate documents that the applicant considered were responsive to her application – namely the Complaint and other documents about the Incident, especially an incident report.
25 June 2015	OIC notified the applicant and the Hospital that it had accepted the external review application. OIC requested the Hospital provide a copy of the documents located in response to the applicant's access application and its search records by 9 July 2015.
1 July 2015	By telephone conversation, an officer of OIC advised the Hospital that the decision for consideration on external review was a decision the Hospital was taken to have made at the end of the 20 business days affirming its original decision issued on 27 April 2015.
15 July 2015	OIC received the requested information from the Hospital.
16 July 2015	By telephone conversation, an officer of OIC obtained the Hospital's clarification regarding some of the requested information.
17 July 2015	By telephone conversation, an officer of OIC made further queries with the Hospital regarding some of the requested information.
21 July 2015	The Hospital provided OIC with further information in response to OIC's queries.
27 July 2015	OIC requested the Hospital undertake further searches for documents relating to the Incident.
13 August 2015	The Hospital provided OIC with information about the further searches conducted by it.
18 August 2015	OIC received the applicant's submissions supporting her case.

28 August 2015	OIC received a further search certification from the Hospital.
31 August 2015	OIC requested the Hospital release a further six located pages to the applicant by 7 September 2015.
31 August 2015	OIC conveyed its preliminary view to the applicant and invited her to provide submissions supporting her case by 14 September 2015 if she did not accept the preliminary view.
2 September 2015	The Hospital released the further six located pages to the applicant.
8 September 2015	The applicant notified OIC she had received the six pages released by the Hospital. She also advised she did not agree with OIC's preliminary view and provided submissions supporting her case.
21 September 2015	OIC received the applicant's further submissions (dated 8 September 2015) supporting her case.
30 October 2015	OIC wrote to the applicant to confirm its understanding of the applicant's submissions and to seek clarification regarding one type of document raised by the applicant.
12 November 2015	By telephone conversation, an officer of OIC obtained the applicant's clarification regarding her submissions and the type of document raised by OIC on 30 October 2015. OIC also received the applicant's clarification by email.