



Decision and Reasons for Decision

Citation: *H12 and Metro North Hospital and Health Service [2020] QICmr 36 (26 June 2020)*

Application Number: 314575

Applicant: H12

Respondent: Metro North Hospital and Health Service

Decision Date: 26 June 2020

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST - information identifying medical and administrative staff - transparency and accountability in public health system - allegations of misconduct - prejudice to other individuals' right to privacy - public interest harm through disclosure of personal information - whether disclosure would, on balance, be contrary to the public interest - whether access to information may be refused under section 47(3)(b) of the *Right to Information Act 2009 (Qld)*

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - public hospital records relating to care and treatment of applicant's deceased adult son - whether agency has taken all reasonable steps to locate documents - whether further documents exist - whether access to documents may be refused under sections 47(3)(e) of the *Right to Information Act 2009 (Qld)*

REASONS FOR DECISION

Summary

1. The applicant applied¹ to Queensland Health² under the *Right to Information Act 2009 (Qld)* (**RTI Act**) seeking access to information concerning his deceased adult son.³ In particular, the applicant sought information relating to blood tests, pathology records and scans, his complaint to the Office of the Health Ombudsman (**OHO**), and a 'clinical review' into his son's death.
2. MNHHS located 77 pages and various radiology images, and decided to give access to this information, subject to the redaction⁴ of staff details (**Staff Personal Information**).

¹ Access application dated 15 December 2018.

² On 10 January 2019, the application was transferred to Metro North Hospital and Health Service (**MNHHS**).

³ In April 2013, the applicant's adult son passed away in the Palliative Care Unit of Prince Charles Hospital.

⁴ On 13 pages.

MNHHS refused access to the Staff Personal Information on the basis that it was exempt information.⁵

3. The applicant sought external review by applying to the Office of the Information Commissioner (**OIC**). Further documents⁶ were located on review, and released to the applicant by MNHHS, with Staff Personal Information redacted.⁷
4. The information that remains in issue in this review is the Staff Personal Information redacted from the original documents and from the additional documents located on external review. The applicant also raised concerns about the sufficiency of MNHHS' searches.
5. For the reasons set out below, I vary the deemed decision and find that:
 - disclosure of the Staff Personal Information would, on balance, be contrary to the public interest and therefore, access to it may be refused under section 47(3)(b) of the RTI Act; and
 - MNHHS has taken all reasonable steps to locate information responding to the application and access to any further information may be refused under section 47(3)(e) of the RTI Act on the basis that is nonexistent under section 52(1)(a) of the RTI Act.

Background

6. Significant procedural steps taken during the external review are set out in the Appendix. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including in footnotes and the Appendix).
7. The decision under review is the decision deemed to have been made by MNHHS refusing access to all of the information requested in the access application.⁸
8. The applicant sought internal review by MNHHS but due to the impact of the deemed decision, the RTI Act required him to proceed directly to the Information Commissioner for external review.⁹ The applicant has ongoing concerns about the circumstances surrounding his internal review application.¹⁰ I acknowledge those concerns but also note that the applicant has not been disadvantaged in terms of review rights as he remained entitled to apply for external review, and his application was accepted by the Information Commissioner.¹¹
9. The applicant provided extensive written submissions to the Information Commissioner supporting his case.¹² While I have carefully reviewed all of those submissions, certain concerns the applicant has raised are not matters which the Information Commissioner has jurisdiction to consider in conducting an external review under the RTI Act.¹³

⁵ Decision dated 18 February 2019. However, that decision was issued outside the statutory timeframe, resulting in a deemed decision under section 46 of the RTI Act. The decision was treated by OIC as an early submission setting out MNHHS' position on disclosure.

⁶ 24 pages.

⁷ On 11 pages.

⁸ See footnote 5 above.

⁹ Section 81 of the RTI Act.

¹⁰ Including that he was provided with the incorrect email address to submit this application resulting in MNHHS expressing the view to him that it was not received within the prescribed statutory timeframe for internal review. MNHHS wrote to the applicant on 16 April 2019 seeking to address his concerns and confirming his right to apply for external review.

¹¹ Despite it too being made, technically, out of time. OIC exercised the discretion to accept the external review application.

¹² Submissions to OIC dated 20 June 2019, 9 October 2019, 21 March 2020 and 28 May 2020. I have also considered the applicant's internal and external review applications.

¹³ Confirmed in OIC's letter to the applicant dated 4 October 2019.

Accordingly, in reaching this decision, I have only considered the applicant's submissions to the extent they are relevant to the issues for determination on external review.

10. In reaching this decision, I have also had regard to the *Human Rights Act 2019* (Qld),¹⁴ particularly the applicant's right to seek and receive information.¹⁵ 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 RTI Act.¹⁶ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act.

Information in issue

11. The only information remaining in issue is the Staff Personal Information that has been redacted from pathology records and internal and external MNHHS correspondence records.¹⁷ The Staff Personal Information is comprised of the names, initials and identifying position titles of medical and administrative staff, email addresses, phone numbers, signatures and one incidental reference to a staff member's travel away from the hospital.

Issues for determination

12. The primary issue for determination is whether access to the Staff Personal Information may be refused under the RTI Act. MNHHS submitted¹⁸ that access to the Staff Personal Information should be refused on the basis that disclosure could reasonably be expected to result in staff being subjected to a serious act of harassment or intimidation.¹⁹ During the review, I formed the view that the requirements of that exemption were not satisfied, in the circumstances of this case.²⁰ MNHHS subsequently submitted that disclosure would, on balance, be contrary to the public interest. Therefore, that is the only ground of refusal I have considered in these reasons.
13. During the review, the applicant accepted that the '*clinical review*' aspect of his sufficiency of search concerns had been addressed.²¹ However, as his general concerns about sufficiency of search extended beyond that particular issue, I have, in these reasons, considered whether MNHHS has taken all reasonable steps to locate documents in response to the scope of the application.
14. The applicant also raised concerns about the conduct of the MNHHS' decision-maker²² in processing his access application and in dealing with his internal review application,²³ and generally about the procedure followed on external review.²⁴
15. I have noted the applicant's concerns, however, these procedural issues, and the administration of the access application are not within my external review jurisdiction. My role, in conducting merits review is to '*step into the shoes*' of the primary decision-maker to determine what is the correct and preferable decision concerning access to

¹⁴ Referred to in these reasons as the **HR Act**, and which came into force on 1 January 2020.

¹⁵ Section 21 of the HR Act.

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

¹⁷ Appearing on 13 pages of the information originally released, and 11 pages of the information located on external review.

¹⁸ Both in its decision letter dated 18 February 2019, and in submissions dated 31 October 2019, 4 December 2019 and 19 February 2020.

¹⁹ Schedule 3, section 10(1)(d) of the RTI Act.

²⁰ Having regard to MNHHS and the applicant's submissions concerning the issue.

²¹ Submissions dated 28 May 2020, page 9. The applicant accepted that MNHHS took all reasonable steps to locate all documents concerning the '*clinical review*' into his son's death. He did however, express disappointment that the content of that document did not meet his expectations.

²² And the conduct of Queensland Health in relation to his internal review application.

²³ As outlined in his application for external review dated 16 April 2019.

²⁴ Applicant's submissions dated 28 May 2020, pages 12 and 19.

documents,²⁵ not to investigate the agency's procedures or allegations relating to the conduct of agency officers. While I note the Information Commissioner has obligations relating to disciplinary action, I do not consider that there is any evidence in this case to enliven those provisions.²⁶

16. With respect to the applicant's concerns about the procedure followed on external review, I am satisfied that this process has been conducted in accordance with the requirements of the RTI Act. Noting that the Information Commissioner has the broad discretion as to the procedure to be followed on a review, I consider the applicant has been afforded an opportunity to advance submissions in support of his case, with adequate time to respond, and that the agency's position and OIC's view on the issues was conveyed clearly, with reference to relevant legal provisions.

Staff Personal Information

Relevant law

17. Under the RTI Act, access to documents may be refused to the extent they comprise information the disclosure of which would, on balance, be contrary to the public interest.²⁷ 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.²⁸
18. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:²⁹
- identify factors irrelevant to the public interest and disregard them
 - identify factors in favour of disclosure of information
 - identify factors in favour of nondisclosure of information; and
 - decide whether, on balance, disclosure of the information would be contrary to the public interest.
19. No irrelevant factors arise in the circumstances of this case and I have not taken any into account in making my decision.³⁰

Factors favouring disclosure

20. There is a general public interest in advancing public access to government-held information, and the RTI Act is administered with a '*pro-disclosure bias*', meaning that an agency should decide to give access to information, unless giving access would, on balance, be contrary to the public interest.³¹

²⁵ Section 105(1)(b) of the RTI Act.

²⁶ Under section 113 of the RTI Act, at the completion of an external review, if the Information Commissioner is of the opinion that there is evidence that an agency's officer has committed a breach of duty or misconduct in the administration of the Act and the evidence is, in all the circumstances, of sufficient force to justify doing so, the Information Commissioner must bring the evidence to the notice of the principal officer of the agency.

²⁷ Section 47(3)(b) of the RTI Act. Section 47(2)(b) of the RTI Act requires the grounds to be interpreted narrowly.

²⁸ However, there are some recognised public interest considerations that may apply for the benefit of an individual. See Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 AIAL Forum 12, 14.

²⁹ Section 49(3) of the RTI Act.

³⁰ Including the factor concerning the seniority of the person who created the document, which was raised by the applicant in his submissions.

³¹ Section 44(1) of the RTI Act.

21. I consider that disclosure of the Staff Personal Information could reasonably be expected to enhance the accountability of MNHHS and provide contextual information.³² In considering the weight to be afforded to these factors, I note that the applicant has already been granted access to a significant amount of information, and the nature of the Staff Personal Information is such that it does not provide insight into the extent or type of care provided to the applicant's son, or the actions taken by the hospital following his son's death. I have considered the applicant's submissions that '*more than not, [such information] has great importance as to a person's actions, negligence, unlawful acts etc.*'³³ However, I remain of the view that given the nature of the Staff Personal Information, these factors only carry low weight.
22. I have also considered the applicant's submission that redaction of the Staff Personal Information means that he is not able to ascertain the identity of those he considers failed to carry out their duties in their office. He submits that on occasions, their conduct may amount to breaches, misconduct, criminal conduct, or negligence, and that some comments in the documents may amount to defamation.³⁴ Factors favouring disclosure will arise if disclosure could reasonably be expected to:
- allow or assist inquiry into possible deficiencies in the conduct or administration of an official³⁵
 - reveal or substantiate that an agency or official has engaged in misconduct, or negligent, improper or unlawful conduct³⁶
 - advance fair treatment in accordance with the law in dealings with agencies;³⁷ or
 - contribute to the administration of justice generally (including procedural fairness) or for a person.³⁸
23. I acknowledge the applicant's submission that the Staff Personal Information is required in order to '*establish the causal connection between parties as to evidence, commission of various breaches, negligence of parties and for defamation purposes*'. The applicant further submits:³⁹
- I need to know the identity of those involved in malfeasance, is far greater in the public interest, than me not caring less about those not involved and disregarding their identity as valueless, though I must first be able to determine those who have no involvement. Only the full disclosure will allow me to make such a determination.*
24. I have considered these submissions, and accept that to a certain extent, disclosure of the identity of every person involved in the applicant's son's care (and in subsequent hospital and OHO processes) may allow for a targeted inquiry into alleged wrongdoing, and allow actions or statements to be attributed to particular individuals. However, in terms of the weight to be attributed to the factors listed above, the information already released to the applicant provides him with detailed information about pathology and radiology results/findings, correspondence with OHO, and the mortality review into his son's death.

³² Schedule 4, part 2, items 1 and 11 of the RTI Act. The applicant also raised schedule 4, part 2, item 3 of the RTI Act, but given the nature of the Staff Personal Information, I do not consider this factor applies.

³³ Applicant's submissions dated 28 May 2020, page 33.

³⁴ Applicant's submissions dated 28 May 2020, pages 37 and 39.

³⁵ Schedule 4, part 2, item 5 of the RTI Act.

³⁶ Schedule 4, part 2, item 6 of the RTI Act.

³⁷ Schedule 4, part 2, item 10 of the RTI Act.

³⁸ Schedule 4, part 2, item 16 and item 17 of the RTI Act.

³⁹ Applicant's submissions dated 28 May 2020, page 45.

25. I consider the information that has been released already assists the applicant's inquiry into his various allegations of deficiencies/misconduct, and provides significant insight into the topics raised by his access application, advancing his fair treatment when dealing with the relevant hospitals. In terms of the factors concerning the administration of justice, assuming that the applicant has a reasonable basis for pursuing a remedy, my view is that he would already have the information needed to do so, i.e. detailed information about pathology and radiology results/findings and the names of the relevant agency and hospitals. In the event that MNHHS or one of the relevant hospitals were defending an action in relation to the applicant's son's care, it would be a matter for them to join particular individuals as co-defendants; the applicant does not need their names or identifying details to commence an action/proceeding. Accordingly, in the circumstances, I afford each of the above factors low weight.
26. The applicant has noted⁴⁰ that a factor favouring disclosure will arise where disclosure of the information could reasonably be expected to reveal environmental or health risks or measures relating to public health and safety.⁴¹ While I acknowledge that the access application was for information concerning his son's health care, the nature of the information remaining in issue (being the personal information of staff) is such that it is not capable of revealing a health risk, or measures relating to public health or safety. Accordingly, I am not satisfied that this factor applies.

Factors favouring nondisclosure

Personal information and privacy

27. The RTI Act recognises that disclosure would cause a public interest harm⁴² if it would disclose personal information of a person, whether living or dead.⁴³ The term '*personal information*' is defined as follows in the RTI Act:⁴⁴

information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

28. The Staff Personal Information is comprised of information about individuals whose identities are apparent, as it includes their names, contact details or other identifying information. Accordingly, I am satisfied that it comprises the personal information of those individuals and that the public interest harm factor applies. I accept that the harm arising from the disclosure of routine personal work information of public servants is generally low, on the basis that officers are performing public duties. However, in the particular circumstances of this case, I consider that the harm arising from disclosure is deserving of higher weight. I take this view because the information appears in the context of staff dealing with end-of-life care and serious illness, either as a frontline service-provider, or in dealing with concerns/complaints the applicant raised after his son's death, as a grieving family member. These are challenging and confronting scenarios that I consider go beyond the routine work day-to-day duties of public servants. Accordingly, I afford this factor moderate weight.

⁴⁰ Applicant's submissions dated 28 May 2020, page 16.

⁴¹ Schedule 4, part 2, item 14 of the RTI Act.

⁴² Schedule 4, part 4, item 6(1) of the RTI Act. In *Kelson v Queensland Police Service & Anor* [2019] QCATA 67, Daubney J, President of the Queensland Civil and Administrative Tribunal explained that the Information Commissioner is '*not required to reason how the disclosure of the personal information could amount to a public interest harm; that harm is caused by the very disclosure of the information itself*' at [94].

⁴³ The applicant has raised concerns about reliance on a separate factor that applies in relation to the personal information of a person who has died under schedule 4, part 3, item 5 of the RTI Act. For clarity I note that I do not consider this factor applies (as the information is about staff, not the applicant's son) and I have not relied on this factor in reaching my decision.

⁴⁴ See schedule 5 of the RTI Act which refers to section 12 of the *Information Privacy Act 2009* (Qld).

29. A separate factor favouring nondisclosure will arise where disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy.⁴⁵ The concept of 'privacy' is not defined in the RTI Act. It can, however, essentially be viewed as the right of an individual to preserve their '*personal sphere*' free from interference from others.⁴⁶ For the reasons discussed in the preceding paragraph, I am satisfied that disclosure of the Staff Personal Information would interfere with the personal sphere of the relevant staff.⁴⁷ I also note that some of the Staff Personal Information is comprised of incidental references to relatively junior administrative staff, information that discloses work locations/direct contact details, or personal travel information. Accordingly, I afford this factor moderate weight.

Balancing the public interest

30. I acknowledge the pro-disclosure bias of the RTI Act and the important public interest in ensuring that a public health provider, such as MNHHS, is accountable for its actions and transparent in its operations, and treatment of patients. However, the applicant has been granted access to a significant volume of information which I consider, has allowed a substantial degree of insight into MNHHS' actions and operations. I am not satisfied that the Staff Personal Information would meaningfully advance those public interest factors to any significant degree. Similarly, given the information that has already been released, I do not consider that the Staff Personal Information would meaningfully assist the applicant's inquiry, reveal or substantiate his allegations of misconduct or negligence, or significantly advance his fair treatment or assist in the administration of justice.
31. On the other hand, given the context in which the Staff Personal Information appears, I am satisfied that disclosure would intrude into other individuals' personal spheres and cause a moderate level of public interest harm in disclosing their personal information in this case. In summary, while the public health system must be accountable for its actions, that must be balanced against the public interest in individuals' personal details being protected.
32. On balance, I find the factors favouring disclosure are outweighed by the moderate weight of the factors which seek to safeguard the personal information and right to privacy of other individuals.
33. Therefore, I find that Staff Personal Information may be refused under section 47(3)(b) of the RTI Act as disclosure would, on balance, be contrary to the public interest.

Sufficiency of search

34. On review, the applicant raised concerns that MNHHS had not located:⁴⁸
1. attachments to certain emails from OHO⁴⁹
 2. progress updates and notification of the Coroner's decision from OHO⁵⁰
 3. all documents regarding a proposed conciliation with Queensland Health

⁴⁵ Schedule, 4, part 3, item 3 of the RTI Act.

⁴⁶ Paraphrasing the Australian Law Reform Commission's definition of the concept in '*For your information: Australian Privacy Law and Practice*' Australian Law Reform Commission Report No. 108 released 12 August 2008, at paragraph 1.56. Cited in *Balzary and Redland City Council; Tidbold (Third Party)* [2017] QICmr 41 (1 September 2017) at [28].

⁴⁷ While the privacy interest in routine work information of public servants ordinarily carries low weight, it is relevant to consider the specific context in which the information appears and circumstances of the case: see for example *O52 and Queensland Ombudsman* [2020] QICmr 31 (11 June 2020) at [67].

⁴⁸ As set out in the applicant's internal review application dated 15 March 2019 and submissions to OIC on 9 October 2019. OIC confirmed and then clarified the scope of the applicant's concerns by letters dated 4 October 2019 and 15 October 2019.

⁴⁹ Attachments to certain emails dated 3 December 2014 from OHO.

⁵⁰ Which were referred to in a letter from OHO to the Director-General of Queensland Health dated 27 November 2014.

4. all documents concerning advice, recommendations or suggestions by OHO; and
 5. information concerning a clinical review into the death of his son.
35. During the review, MNHHS located documents responding to items 1 and 5 above, and these documents were provided to the applicant (with Staff Personal Information redacted).⁵¹ In relation to item 5, while the applicant agreed that all reasonable steps have now been taken to locate all documents, he remains dissatisfied with the clinical review process that was conducted by the hospital. Under the RTI Act, the external review jurisdiction does not extend to considering whether information recorded in agency documents meets an applicant's expectations. Further, I am unable to investigate or comment upon the thoroughness (or otherwise) of a particular agency process.
36. In considering whether MNHHS has taken all reasonable steps to locate information in relation to items 2, 3 and 4 above, I have taken into account that documents responding to items 2 and 4 would be held within MNHHS's central communications unit (which is called 'MD16'), or within MNHHS' legal services team. In relation to item 3, I understand that any such records would be held by MNHHS' Consumer Liaison Office (Safety and Quality Unit). I have considered records of searches and enquiries conducted within each of these units, as well as evidence of further searches of the Office of the Executive Director (in relation to each hospital) and MNHHS' electronic document and records management system.⁵² I am satisfied that the searches conducted by MNHHS were targeted to the appropriate areas, comprehensive and reasonable in the circumstances.
37. Taking into account MNHHS' recordkeeping practices as they relate to the type of documents requested by the applicant, the searches conducted,⁵³ and the information located, I am satisfied that MNHHS has taken all reasonable steps to locate information in response to the application. Accordingly, I find that access to any further information may be refused on the basis that it does not exist.⁵⁴

DECISION

38. I vary the deemed decision and find that access to:
- the Staff Personal Information may be refused under section 47(3)(b) of the RTI Act as its disclosure would, on balance, be contrary to the public interest; and
 - any further information may be refused under section 47(3)(e) of the RTI Act on the basis that it is nonexistent, under section 52(1)(a) of the RTI Act.
39. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

K Shepherd
Assistant Information Commissioner

26 June 2020

⁵¹ Thereby resolving those issues.

⁵² Search records in relation to the original located documents were provided to OIC by MNHHS on 20 June 2019, and search records following further searches conducted on external review were provided to OIC by MNHHS on 4 December 2019 and 19 February 2020.

⁵³ An agency may rely on searches to satisfy itself that a document does not exist. In those cases, all reasonable steps must be taken to locate the documents.

⁵⁴ Section 47(3)(e) and 52(1)(a) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
16 April 2019	OIC received the application for external review.
18 April 2019	OIC requested preliminary documents from MNHHS.
29 April 2019	MNHHS supplied the preliminary documents to OIC.
13 May 2019	OIC advised the applicant and MNHHS that the application for external review had been accepted, and noted certain processing issues. OIC requested the information in issue and search records from MNHHS.
20 June 2019	OIC received the information in issue, processing documents and search records from MNHHS. OIC received submissions from the applicant.
4 October 2019	OIC wrote to the applicant clarifying the scope of the review. OIC requested that MNHHS provide a submission, search records and conduct further searches.
9 October 2019	OIC received a submission from the applicant.
15 October 2019	OIC wrote to the applicant and confirmed the sufficiency of search issues to be considered.
22 October 2019	OIC wrote to MNHHS and clarified the sufficiency of search issues to be considered.
31 October 2019	OIC received submissions and copies of additional located documents from MNHHS.
19 November 2019	OIC conveyed its preliminary view to MNHHS.
4 December 2019	OIC received a submission from MNHHS.
6 December 2019	OIC requested further information from MNHHS.
17 February 2020	OIC requested that MNHHS urgently provide the requested information.
19 February 2020	OIC received further information from MNHHS.
3 March 2020	OIC requested that MNHHS release additional information to the applicant.
4 March 2020	OIC conveyed a preliminary view to the applicant.
4 March 2020	The applicant advised OIC by telephone that he did not agree with the preliminary view, and raised certain procedural issues.
10 March 2020	MNHHS advised that additional information had been released to the applicant by post.
21 March 2020	OIC received submissions from the applicant, and a request for an extension of time to provide further submissions.
25 March 2020	OIC provided the applicant with an extension of time to provide further submissions, until 29 May 2020.
28 May 2020	OIC received further submissions from the applicant.