



## Decision and Reasons for Decision

---

**Citation:** *Exemplar Health and Sunshine Coast Hospital and Health Service [2021] QICmr 27 (8 June 2021)*

**Application Number:** 315341

**Applicant:** Exemplar Health

**Respondent:** Sunshine Coast Hospital and Health Service

**Decision Date:** 8 June 2021

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENT NONEXISTENT OR UNLOCATABLE - where applicant contends further documents ought to exist - whether agency has taken all reasonable steps to locate responsive documents - whether access may be refused under sections 47(3)(e) and 52(1) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - IRRELEVANT INFORMATION - whether information may be deleted on the basis it is irrelevant to the terms of the access application - section 73 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST - personal information of other individuals - safeguarding personal information and the right to privacy of other individuals - product and pricing information - business or financial affairs of entities - whether disclosure would, on balance, be contrary to the public interest - whether access may be refused under section 47(3)(b) of the *Right to Information Act 2009* (Qld)

## REASONS FOR DECISION

### Summary

1. Exemplar Health applied<sup>1</sup> to the Sunshine Coast Hospital and Health Service (**SCHHS**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to various documents regarding the use of sanitising wipes, cleaning procedures and damage to, or failure of, equipment at facilities within the SCHHS.
2. SCHHS located 297 pages responsive to the access application and decided<sup>2</sup> to delete irrelevant information from the responsive documents and refuse access to other information on the grounds that it was either exempt from disclosure or its disclosure would, on balance, be contrary to the public interest.
3. Exemplar Health applied<sup>3</sup> to the Office of the Information Commissioner (**OIC**) for external review of SCHHS's decision and raised concerns about the sufficiency of the searches conducted.
4. For the reasons set out below, I vary SCHHS's decision and find that:
  - all reasonable searches have been conducted and access to further documents sought in response to the access application may be refused on the basis that they are nonexistent or unlocatable
  - some information may be deleted on the ground it is irrelevant to the access application;<sup>4</sup> and
  - access to the remaining information in issue<sup>5</sup> may be refused on the ground that disclosure would, on balance, be contrary to the public interest.

### Background

5. During the external review, SCHHS agreed<sup>6</sup> to release further information contained within parts of 4 pages<sup>7</sup> to Exemplar Health.
6. SCHHS also accepted<sup>8</sup> my preliminary view<sup>9</sup> that there was insufficient evidence before me to be satisfied that the breach of confidence exemption<sup>10</sup> was made out in relation to 46 pages but that disclosure of this information would nonetheless, on balance, be contrary to the public interest.
7. I subsequently conveyed<sup>11</sup> my preliminary view to Exemplar Health that access to:
  - further documents could be refused on the basis that they are nonexistent or unlocatable
  - some information could be deleted on the ground that it is irrelevant to the access application; and

---

<sup>1</sup> Application dated 22 October 2019.

<sup>2</sup> Decision dated 20 March 2020.

<sup>3</sup> External review application dated 21 April 2020.

<sup>4</sup> Referred to as the **Category A Information** in this decision.

<sup>5</sup> Referred to as the **Category B Information** in this decision.

<sup>6</sup> Submissions to OIC dated 20 November 2020, received on 2 December 2020.

<sup>7</sup> Being page 3 of the PDF titled '[AL] - Point 5 - Annexure', page 5 of the PDF titled '[GW] - Point 1 - Annexure', page 5 of the PDF titled 'Infectious Diseases - Point 4 - Annexure' and page 10 of the PDF titled 'CRS - Point 1 - Annexure'.

<sup>8</sup> Submission dated 17 February 2021.

<sup>9</sup> Letters dated 11 November 2020 and 15 December 2020.

<sup>10</sup> Section 47(3)(a) and schedule 3, section 8(1) of the RTI Act.

<sup>11</sup> Letter dated 9 March 2021.

- the remaining information in issue could be refused on the ground that disclosure would, on balance, be contrary to the public interest.
8. In response, Exemplar Health acknowledged the basis for my preliminary view and stated:<sup>12</sup>

*Exemplar Health confirms its position that it is not content for its External Review Request to be resolved informally by the Information Commissioner under clause 90 of the Act. Instead, Exemplar Health requires the Information Commissioner to issue its written decision in response to the External Review Request pursuant to s110 of the Act, including setting out the Information Commissioner's detailed reasons for its decision in writing.*

*For the avoidance of doubt, Exemplar Health is not content for the external review to be resolved with informally, thereby not necessitating a written decision, pursuant to s110(2) of the Act.*

9. Accordingly, a written decision is required to finalise this external review.
10. Significant procedural steps taken during the external review are set out in the Appendix.

### Reviewable decision

11. The decision under review is SCHHS's decision dated 20 March 2020.

### Evidence considered

12. 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).
13. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**),<sup>13</sup> particularly the right to seek and receive information.<sup>14</sup> 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.<sup>15</sup> 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 legislation<sup>16</sup>: '*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.*'<sup>17</sup>

### Information in issue

14. The information remaining for consideration appears within:
- **Category A Information:** 4 pages<sup>18</sup> and parts of 20 pages;<sup>19</sup> and

<sup>12</sup> Submission dated 30 March 2021.

<sup>13</sup> The HR Act came into force on 1 January 2020.

<sup>14</sup> Section 21 of the HR Act.

<sup>15</sup> *XYZ v Victoria Police (General)* [2010] VCAT 255 (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 at [111].

<sup>16</sup> *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>17</sup> *XYZ* at [573].

<sup>18</sup> Comprising pages 1-2 of the PDF titled 'Infectious Diseases - Point 4 - Annexure' and pages 4-5 of the PDF titled 'IMS - Point 4 - Annexure'.

<sup>19</sup> Comprising page 5 of the PDF titled 'Infectious Diseases - Point 4 - Annexure', pages 2-5 of the PDF titled 'IMS - Point 2 - Annexure' and pages 1-3, 6-10 and 52-58 of the PDF titled 'IMS - Point 4 - Annexure'.

- **Category B Information:** 52 pages<sup>20</sup> and parts of 22 pages.<sup>21</sup>

## Issues for determination

15. The issues for determination are whether:

- **Sufficiency of search:** access to further documents sought in response to the access application can be refused on the basis that they are nonexistent or unlocatable.
- **Irrelevant information:** certain information can be deleted on the basis that it is irrelevant to the terms of the access application.
- **Contrary to the public interest information:** access to other information can be refused on the ground that its disclosure would, on balance, be contrary to the public interest.

## Sufficiency of search

### Relevant law

16. Under the RTI Act, an individual has a right to be given access to documents of an agency.<sup>22</sup> However, this right of access is subject to limitations, including the grounds on which access to information may be refused.<sup>23</sup>
17. Access to a document may be refused if the document is nonexistent or unlocatable.<sup>24</sup> A document is unlocatable if it has been or should be in the agency's possession and all reasonable steps have been taken to find the document but it can not be found.<sup>25</sup> A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.<sup>26</sup>
18. To be satisfied that documents are nonexistent, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors including:<sup>27</sup>
- 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

---

<sup>20</sup> Comprising pages 18-42 of the PDF titled 'Infectious Diseases - Point 4 - Annexure', page 3 of the PDF titled 'CRS - Point 2 - Annexure' and pages 1 and 7-31 of the PDF titled 'IMS - Point 2 - Annexure'.

<sup>21</sup> Comprising pages 1-3 and 5-6 of the PDF titled '[AL]- Point 5 - Annexure', pages 4-5 and 14 of the PDF titled '[GW]- Point 1 - Annexure', pages 5 and 16-17 of the PDF titled 'Infectious Diseases - Point 4 - Annexure', pages 1, 3, 6 and 9 of the PDF titled 'CRS - Point 1 - Annexure', pages 1-2 of the PDF titled 'CRS - Point 2 - Annexure', pages 2-3 and 5-6 of the PDF titled 'IMS - Point 2 - Annexure' and page 12 of the PDF titled 'IMS - Point 4 - Annexure'.

<sup>22</sup> Section 23(1)(a) of the RTI Act.

<sup>23</sup> The grounds on which an agency may refuse access are set out in section 47(3) of the RTI Act.

<sup>24</sup> Sections 47(3)(e) and 52 of the RTI Act.

<sup>25</sup> Section 52(1)(b) of the RTI Act.

<sup>26</sup> Section 52(1)(a) of the RTI Act.

<sup>27</sup> *PDE and The University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (**PDE**). *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld), the requirements of which are replicated in section 52 of the RTI Act.

- the nature of the government activity the request relates to.<sup>28</sup>
19. When proper consideration is given to relevant factors, it may be unnecessary for searches to be conducted. However, if an agency or Minister relies on searches to justify a decision that the documents do not exist, all reasonable steps must be taken to locate the requested documents. The key factors identified above are also relevant to a consideration of whether an agency of Minister has taken all reasonable steps before concluding that documents are unlocatable.<sup>29</sup>

### **Findings**

20. In seeking an external review, Exemplar Health raised concerns about the searches conducted for documents responding to Requests 2. and 9. of the access application. I discuss each separately below.

#### **Request 2.**

21. Exemplar Health contends<sup>30</sup> that SCHHS failed to locate documents responding to Request 2. of the access application, providing OIC with a copy of a 1 page letter which responds to this request as evidence that insufficient searches had been conducted.
22. Request 2. of the access application sought access to:

*Correspondence from [DG] of AMCLA to Infection Management Service in relation to concerns raised as to damage to equipment which may have been attributed to [a named brand of disinfectant] wipes at ... Hospital for the period 1 January 2015 to 30 June 2015.*

23. I have reviewed the search material provided to OIC by SCHHS.<sup>31</sup> The search material reveals that searches were conducted by relevant individuals and business units of SCHHS and that they encompassed searches of Departmental and unit specific files, diary/calendar entries, emails (including archived), relevant databases, electronic and paper based files and briefing notes. These searches took more than 27 hours. Given the extent of the searches, I consider that they were satisfactory in the circumstances of this matter and I cannot identify any other searches that could reasonably be conducted.
24. Additionally, I note that SCHHS' decision stated<sup>32</sup> that it located 3 pages from Clinical Resource Service (**CRS**) and 31 pages from Infection Management Service which respond to Request 2. of the access application. SCHHS decided to release 6 pages and parts of 2 pages to Exemplar Health and refused access to the remaining 25 pages. This refused material is responsive to Request 2. of the access application and was not disclosed to Exemplar Health on the basis that to do so would, on balance, be contrary to the public interest (in this regard see paragraphs 37 to 44 below).
25. As noted above, in the course of the review I put the above to Exemplar Health. Exemplar Health has not provided any further information to suggest that additional documents exist.
26. In the absence of further submissions from the applicant and based on the above, I am satisfied that all reasonable searches have been conducted and I find that access to

---

<sup>28</sup> PDE at [37] - [38].

<sup>29</sup> Pryor and Logan City Council (Unreported, Queensland Information Commissioner, 8 July 2010) at [20] - [21].

<sup>30</sup> Application for external review dated 21 April 2020.

<sup>31</sup> By email dated 1 May 2020.

<sup>32</sup> At page 2.

further documents responding to Request 2. of the access application may be refused on the basis that the documents are nonexistent or unlocatable.

### Request 9.

27. Exemplar Health also raised concerns about the 2 page document released in the PDF titled '*CRS- Point 9 - Annexure.pdf*', contending<sup>33</sup> that they were in possession of a different version of that document in which additional words appear or have been changed.

28. Request 9. of the access application sought access to:<sup>34</sup>

*All memorandum issued from Clinical Resource Services to Departments within the SCHHS instructing changes to medical device cleaning protocols which directly references the use of [a named brand of disinfectant] wipes during 2016.*

[My emphasis]

29. Exemplar Health submitted:<sup>35</sup>

*In circumstances where there appear to be two versions of the memo referred to above, either there are multiple versions of the same document in existence which have not been disclosed or the document provided has been amended prior to disclosure without any reason for that amendment. The SCHHS's search for documents and the Decision is therefore incomplete.*

30. Given the concerns raised by Exemplar Health about the possibility of additional document/s existing which had not been located, these concerns were put to SCHHS and clarification was sought about the nature of the document located compared to the document in the possession of Exemplar Health.<sup>36</sup> In response, SCHHS's decision-maker stated<sup>37</sup> that the copy located and released in response to the access application is the final version of the memorandum and only version which was 'issued' and that it is possible that the version provided by Exemplar Health with the application for external review is an earlier version of the document which was **not** 'issued'. The decision-maker further stated that draft documents were not supplied to her for consideration.

31. As Request 9. of the access application seeks access to '*memorandum issued*', based on the information before OIC, I am satisfied that the issued document has been located and released to Exemplar Health. While I accept that Exemplar Health has in their possession a different version of that document, there is nothing before me to indicate that it was '*issued from Clinical Resource Services to Departments*'.

32. I conveyed my view on this point to Exemplar Health during the review. Exemplar Health maintained its position that a further document responsive to the application exists and has not been provided. However, Exemplar Health did not provide any further information or submissions to support their contention that additional 'issued' documents exist.

33. In the absence of independent evidence pointing to the existence of further 'issued' documents, and noting my comments above at paragraph 23 above regarding the searches conducted, I am satisfied that all reasonable searches for documents responding to Request 9. of the access application have been conducted, and that it is

<sup>33</sup> Application for external review dated 21 April 2020.

<sup>34</sup> Application for external review dated 21 April 2020.

<sup>35</sup> Application for external review dated 21 April 2020.

<sup>36</sup> Preliminary view letter to SCHHS dated 11 November 2020.

<sup>37</sup> Letter to OIC dated 20 November 2020 received on 2 December 2020.

not necessary for any further searches to be conducted. On this basis, I find that access to further documents responsive to Request 9. of the access application may be refused on the basis that the documents sought are nonexistent or unlocatable.

### **Irrelevant information**

#### ***Relevant law***

34. Section 73 of the RTI Act allows an agency to delete or refuse information that is irrelevant to the scope of an access application.

#### ***Findings***

35. I have considered the Category A Information which was deleted by SCHHS on the basis that it was irrelevant to the access application. While this information is contained within documents which also contain information which responds to Requests 2. and 4. of the access application, I am satisfied that the deleted information is not information which responds to Requests 2. or 4. of the access application, or any of the other requests within the access application. Rather, it is about other matters being dealt with by SCHHS.
36. Accordingly, I find that the Category A information can be deleted from the copies of the documents released to Exemplar Health.

### **Contrary to the public interest information**

#### ***Relevant law***

37. Under the RTI Act, access to information may be refused where its disclosure would, on balance, be contrary to the public interest.<sup>38</sup>
38. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:<sup>39</sup>
- 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.
39. 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 bias<sup>40</sup> and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.<sup>41</sup>

---

<sup>38</sup> Section 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. See Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' AIAL FORUM (48) April 2006; p 12 – 25 AIALF 12.

<sup>39</sup> Section 49(3) of the RTI Act.

<sup>40</sup> Section 44 of the RTI Act.

<sup>41</sup> Section 47(2) of the RTI Act.

## Findings

### Irrelevant factors

40. I am satisfied that no irrelevant factors arise in the circumstances of this case.

### Factors favouring disclosure

41. There is public interest in SCHHS being transparent and accountable in how it deals with issues relating to the management of assets.<sup>42</sup> The Category B Information appears in documents which relate to flow meters and the use of disinfectant wipes and comprises information about actions taken by SCHHS regarding damage to the flow meters. I accept that disclosing this type of information would advance these two public interest factors to some degree. However, I do not consider that disclosure of the Category B Information would advance SCHHS's accountability and transparency in any significant way, particularly given the information which has already been provided to Exemplar Health in response to the access application and further information released during this external review. I am satisfied that the information which has been released to Exemplar Health furthers its understanding of how SCHHS dealt with issues surrounding damage to flow meters, thereby reducing the weight to be afforded to the two public interest factors favouring disclosure. Accordingly, I afford these two factors favouring disclosure low weight.

### Factors favouring nondisclosure

42. A small portion of the Category B Information comprises the personal information<sup>43</sup> of third parties, including names, contact details and employment details. The RTI Act recognises that disclosing an individual's personal information to someone else could reasonably be expected to cause a public interest harm<sup>44</sup> and that a further public interest factor favouring nondisclosure arises if disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy.<sup>45</sup> I am satisfied that it is reasonable to expect that disclosing this Category B Information would be an intrusion into the privacy of those other individuals. Therefore, I afford significant weight to these two public interest factors which favour nondisclosure.
43. Some of the Category B Information is pricing information of various products and information communicated to SCHHS by other entities about flow meters and the use of disinfectant wipes. SCHHS argued<sup>46</sup> that disclosure of this type of information could reasonably be expected to prejudice the private, professional, commercial or financial affairs of entities.<sup>47</sup> I consider that disclosure of this information could reasonably be expected to negatively impact the business affairs of those other entities if information about their products and pricing are disclosed as this type of information has a degree of commercial sensitivity for suppliers of goods operating in a competitive market. Therefore, I afford significant weight to this public interest factor favouring nondisclosure.

---

<sup>42</sup> Schedule 4, part 2, items 1 and 3 of the RTI Act.

<sup>43</sup> 'Personal information' is 'information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion' – see definition in schedule 5 of the RTI Act and section 12 of the *Information Privacy Act 2009* (Qld).

<sup>44</sup> Schedule 4, part 4, section 6(1) of the RTI Act.

<sup>45</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>46</sup> At page 4 of the Reasons enclosed with SCHHS's decision dated 20 March 2020.

<sup>47</sup> Schedule 4, part 3, item 2 of the RTI Act.



### **Balancing the factors**

44. I have considered the pro-disclosure bias in deciding access to information.<sup>48</sup> On balance, I consider the nondisclosure public interest factors outweigh the disclosure public interest factors in relation to the Category B Information. Accordingly, my preliminary view is that access to the Category B Information may be refused on the basis that its disclosure would, on balance, be contrary to the public interest.

### **DECISION**

45. I vary SCHHS's decision by finding that the Category A Information may be deleted under section 73 of the RTI Act and access to the Category B Information may be refused under sections 47(3)(b) and 49 of the RTI Act. I also refuse access to the nonexistent or unlocatable information under sections 47(3)(e) and 52(1) of the RTI Act.
46. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

---

**Assistant Information Commissioner Corby**

**Date: 8 June 2021**

---

<sup>48</sup> Section 44 of the RTI Act.

## APPENDIX

### Significant procedural steps

Date	Event
21 April 2020	OIC received the application for external review.
24 April 2020	OIC notified SCHHS and the applicant that the application for external review had been received and requested procedural documents from SCHHS.
1 May 2020	OIC received the requested procedural documents from SCHHS and records of the searches conducted.
16 June 2020	<p>OIC notified SCHHS and the applicant that the application for external review had been accepted and requested from SCHHS a copy of:</p> <ul style="list-style-type: none"> <li>• the documents located clearly showing the information to which access was refused</li> <li>• any correspondence with consulted third parties; and</li> <li>• any further records of the searches conducted.</li> </ul>
3 July 2020	OIC received the requested documents from SCHHS.
11 November 2020	OIC conveyed a preliminary view to SCHHS.
2 December 2020	OIC received a submission from SCHHS dated 20 November 2020.
15 December 2020	OIC conveyed a further preliminary view to SCHHS.
11 February 2021	OIC received a further submission from SCHHS.
15 February 2021	OIC sought clarification from SCHHS in relation to their submission dated 11 February 2021.
17 February 2021	OIC received the requested clarification from SCHHS.
9 March 2021	OIC conveyed a preliminary view to the applicant and requested that SCHHS release further information to the applicant as agreed.
16 March 2021	OIC received confirmation that the further information had been released to the applicant by SCHHS.
30 March 2021	OIC received a submission from the applicant.