



Decision and Reasons for Decision

Citation:	<i>McLaren and Mental Health Review Tribunal [2023] QICmr 7 (14 February 2023)</i>
Application Number:	316857
Applicant:	McLaren
Respondent:	Mental Health Review Tribunal
Decision Date:	14 February 2023
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - APPLICATION OUTSIDE SCOPE OF ACT - ENTITIES TO WHICH ACT DOES NOT APPLY IN RELATION TO A PARTICULAR FUNCTION - training material used by agency - whether the application is to an entity to which the Act does not apply - section 32 and schedule 2, part 2, item 3 of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Mental Health Review Tribunal (**MHRT**) for access under the *Right to Information Act 2009 (Qld)* (**RTI Act**) to:
 - electroconvulsive therapy (**ECT**) training material for MHRT members (**Training Materials**);² and
 - various procedure documents (**Other Material**).
2. The MHRT decided³ that:
 - the application for access to the Training Materials was outside the scope of the RTI Act and the RTI Act did not apply;⁴ and
 - in relation to the Other Material:
 - the MHRT's Membership Professional Learning and Development Framework was responsive to the applicant's request and had been released;
 - the applicant's request for a copy of the procedures and tests applied by the MHRT in determining that '*publicly available scientific material*

¹ Access application dated 24 May 2022.

² In his access application dated 24 May 2022, the applicant provided that the '*MHRT Annual Report 2020-21 states that they arranged a lecture on electroconvulsive treatment (ECT) for the members of the tribunal as part of education. I requested a copy of that lecture...*' The scope of the access application was further clarified on internal review, as described below.

³ Decision dated 17 June 2022.

⁴ Sections 14(2), 17 and schedule 2, part 2, item 3 of the RTI Act.

- should be classified as “quasi-judicial” in nature’ had been considered in the decision to refuse access to the Training Materials; and*
- there were no documents responsive to the applicant’s remaining requests.⁵
3. The applicant then applied⁶ for internal review of the MHRT’s decision in relation to the Training Materials.⁷ On internal review, the MHRT decided that the Training Materials were documents to which the RTI Act does not apply.⁸
 4. The applicant then applied to the Office of the Information Commissioner (**OIC**) for external review of the MHRT’s internal review decision.⁹
 5. Having considered the terms of the applicant’s request, and the information provided by the MHRT, I am satisfied that:
 - the MHRT is an entity to which the RTI Act does not apply in relation to its judicial or quasi-judicial functions;¹⁰
 - the Training Materials relate to such functions; and
 - the application for access to the Training Materials is therefore outside the scope of the RTI Act.¹¹

Background

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

Reviewable decision

7. The decision under review is the MHRT’s internal review decision dated 1 August 2022.¹²

Evidence considered

8. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including the footnotes and the Appendix).
9. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.¹³ I consider a decision-maker will be ‘*respecting*,

⁵ Sections 27(1), 47(3)(e) and 52(1)(a) of the RTI Act.

⁶ Letter dated 5 July 2022, requesting an internal review.

⁷ In his letter dated 5 July 2022, the applicant did not dispute the MHRT’s decision in relation to the Other Material.

⁸ Internal review decision dated 1 August 2022. It is understood that prior to making an access application, the applicant had informally requested the ‘*course content*’, stating in a letter dated 22 March 2022 that ‘*I note that on p6 of the report, under the heading “Key learning and development initiatives,” the MHRT planned to offer a training course on ECT for its members early in 2021-22. I am researching the use of involuntary ECT in Australia, so I would be most grateful if you could forward me a copy of the course content*’. In the internal review decision dated 1 August 2022, the decision-maker stated that ‘*Whilst I cannot find a reference to an ECT lecture in the Annual Report, and indeed the Tribunal did not conduct any lectures during the relevant timeframe, I do note a reference to an ECT course. I have therefore taken your application to mean any documents or other information related to that course*’.

⁹ External review application dated 10 August 2022.

¹⁰ Section 17 and schedule 2, part 2, item 3 of the RTI Act.

¹¹ Section 32(1)(b)(ii) of the RTI Act.

¹² While the MHRT stated in its decision dated 17 June 2022 that the application fee had been waived, it is noted that:

- there are no provisions in the RTI Act which allow for such a waiver;
- in any event, section 85 of the RTI Act provides that ‘*A person affected by a reviewable decision may apply to have the decision reviewed by the information commissioner*’; and
- schedule 5 of the RTI Act provides that a ‘*reviewable decision*’ includes a decision that an access application is outside the scope of the RTI Act under section 32(1)(b).

¹³ Section 21(2) of the HR Act.

and acting compatibly with' that right, and others prescribed in the HR Act, when applying the law prescribed in the RTI Act and the *Information Privacy Act 2009* (Qld).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 similar pieces of Victorian legislation¹⁵ that *'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

Issue for determination

10. The issue for determination is whether the application for access to the Training Materials is outside the scope of the RTI Act¹⁷ because the Training Materials are documents of an entity to which the RTI Act does not apply in relation to a particular function.¹⁸ That is, whether the Training Materials are in relation to the MHRT's judicial or quasi-judicial functions under schedule 2, part 2, item 3 of the RTI Act.

Relevant law

11. Section 23 of the RTI Act provides that, subject to the RTI Act, a person has a right to be given access to documents of an agency. However, section 14(2) of the RTI Act provides that *'agency does not include an entity to which this Act does not apply'*.
12. Section 17 of the RTI Act provides that an entity to which the RTI Act does not apply means *'an entity mentioned in schedule 2, part 2'* which expressly includes *'a tribunal in relation to the tribunal's judicial or quasi-judicial functions'*.¹⁹
13. Under section 32 of the RTI Act an entity can decide that an application is outside the scope of the RTI Act if the application has been made to *'an entity to which this Act does not apply'*.²⁰ For the purposes of internal and external review, schedule 5 of the RTI Act provides that a reviewable decision includes a decision that an access application is outside the scope of the RTI Act under section 32(1)(b).

Applicant submissions

14. The applicant stated that:²¹

In view of the Public Service principles of transparency, accountability and the overriding duty of care of the Government and Public Service to disabled or disadvantaged members of the public, especially to those whose civil rights have been curtailed through no fault of their own, I submit that there is no justification for the secrecy over this material. Specifically, there is no good reason to withhold it, and the blanket rejection of requests on the basis that the material may relate to "quasi-judicial functions" is so broad that it removes the MHRT from any conceivable review when there is an overriding public interest in ensuring that the actions of the MHRT are beyond reproach.

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]. I further note that OIC's approach to the HR Act set out in this paragraph was considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (where Judicial Member McGill saw *'no reason to differ'* from our position).

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

¹⁶ *XYZ* at [573].

¹⁷ Under section 32(1)(b)(ii) of the RTI Act.

¹⁸ Under section 17 of the RTI Act.

¹⁹ Schedule 2, part 2, item 3 of the RTI Act.

²⁰ Section 32(1)(b)(ii) of the RTI Act.

²¹ In his letter dated 5 July 2022.

15. On 1 September 2022, OIC wrote to the applicant and expressed a preliminary view²² that his application for access to the Training Materials fell outside the scope of the RTI Act²³ because the RTI Act does not apply to the MHRT in relation to its quasi-judicial functions. The applicant made further submissions in support of his case for disclosure.²⁴ In particular, the applicant submitted that the preliminary view *'errs at a number of points'* and broadly raised public interest arguments in favour of disclosure of the requested information. In subsequent submissions on external review the applicant stated that:²⁵

...I dispute your decision that the material in the ECT course relates to the MHRT's "quasi-judicial functions." ...Accordingly, I want a copy of the test you apply in these matters which allows you to decide that any material stands or does not stand "in relation to the quasi-judicial functions of the MHRT."

16. I have considered the various submissions made by the applicant as to why disclosure of the Training Materials would be in the public interest. I also note the applicant's request for clarity around the test applied in determining that the Training Materials are in relation to the MHRT's judicial or quasi-judicial functions. I have set out the relevant law above²⁶ and my findings in relation to these sections below.

Findings

17. The MHRT is a tribunal formerly established under the repealed *Mental Health Act 2000* (Qld), and continued under the *Mental Health Act 2016* (Qld) (**MH Act**).²⁷
18. An access application made to an agency listed in schedule 2, part 2 of the RTI Act, including a tribunal, requires an assessment of the application to determine which functions it relates to. That is, in considering whether the Training Materials can be requested under the RTI Act, it is necessary for me to determine whether the Training Materials are in relation to the MHRT's judicial or quasi-judicial functions.
19. The Macquarie Dictionary defines judicial to include *'relating to courts of law or to judges'*.²⁸ The Macquarie Dictionary defines quasi-judicial as *'having characteristics of a judicial act but performed by an administrative agency'*.²⁹
20. Section 705 of the MH Act sets out the MHRT's jurisdiction, which includes hearing and deciding applications for approvals of regulated treatment.³⁰ Section 232 of the MH Act defines regulated treatment to include ECT.
21. It has also been expressly established that the expression *'in relation to'* under schedule 2, part 2 of the RTI Act is to be construed broadly by Justice CRR Hoeben in *Carmody v Information Commissioner & Ors (5)*³¹ regarding schedule 2, part 2, item 7 of the RTI Act that *'It is clear that relational expressions such as "connected with" and "in relation to" are capable of extremely broad application'*.

²² It is the practice of OIC to convey a preliminary view, based on an assessment of the material before the Information Commissioner or her delegate at that time, to an adversely affected participant. This is to explain the issues under consideration to the participant, and affords them the opportunity to put forward any further information they consider relevant to those issues. It also forms part of the Information Commissioner's processes for early resolution of external reviews.

²³ Under section 32(1)(b)(ii) of the RTI Act.

²⁴ Letter dated 10 September 2022.

²⁵ By letter dated 2 November 2022.

²⁶ As expressed in preliminary view letters to the applicant dated 1 September 2022 and 25 October 2022.

²⁷ Section 704 of the MH Act.

²⁸ Macquarie Dictionary (Seventh Edition).

²⁹ Macquarie Dictionary (Seventh Edition).

³⁰ Section 705(1)(b)(ii) and Chapter 12 Part 9 of the MH Act.

³¹ [2018] QCATA 18 at [51].

22. The Training Materials relate to the training of the MHRT's members in relation to their decision-making duties.³² Applications for approvals of ECT are heard and decided by MHRT members. The MHRT's decision states that:³³

*...training materials provided to members to assist in exercising their jurisdiction under the Mental Health Act 2016... are produced to be provided only to Tribunal members to assist with exercising their quasi-judicial functions and are not otherwise broadly distributed.*³⁴

[emphasis added]

23. On the information before me, including the terms of the access application, the information set out in the MHRT's decisions and the applicant's submissions, and based on the matters set out above, I am satisfied that:

- the MHRT's decision-making functions are judicial or quasi-judicial functions of a tribunal;
- the Training Materials relate to the MHRT's judicial or quasi-judicial functions and they comprise documents of an entity to which the RTI Act does not apply in relation to a particular function;³⁵ and
- the application for access to the Training Materials is outside the scope of the RTI Act.³⁶

24. I note that the applicant has raised public interest concerns and requested an explanation of how OIC has measured the scientific veracity of the Training Materials. As I have concluded that the RTI Act does not apply to the Training Materials, these are not relevant to my consideration in this matter.

DECISION

25. For the reasons outlined above, I affirm the MHRT's decision and find that the Training Materials are documents of an entity to which the RTI Act does not apply in relation to a particular function and the access application for Training Materials therefore falls outside the scope of the RTI Act.

26. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Shiv Martin
Assistant Information Commissioner

Date: 14 February 2023

³² Decisions dated 17 June 2022 and 1 August 2022.

³³ In the decision dated 17 June 2022.

³⁴ In the internal review decision dated 1 August 2022 the MHRT has further stated that *'the material is to support and assist the Tribunal's decision making'*.

³⁵ Under section 17 and schedule 2, part 2, item 3 of the RTI Act.

³⁶ Under section 32(1)(b)(ii) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
10 August 2022	OIC received the application for external review.
11 August 2022	OIC requested preliminary documents from the MHRT.
12 August 2022	OIC received the preliminary documents from the MHRT.
26 August 2022	OIC received further documents from the MHRT.
1 September 2022	OIC advised the applicant and the MHRT that the application for external review had been accepted. OIC conveyed a preliminary view to the applicant.
8 September 2022	OIC received submissions from the applicant contesting OIC's preliminary view (dated 10 September 2022).
25 October 2022	OIC conveyed a further preliminary view to the applicant.
2 November 2022	OIC received submissions from the applicant contesting OIC's further preliminary view.