



## Decision and Reasons for Decision

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**Citation:** *H89 and Metro North Hospital and Health Service [2021] QICmr 18 (4 May 2021)*

**Application Number:** 315348

**Applicant:** H89

**Respondent:** Metro North Hospital and Health Service

**Decision Date:** 4 May 2021

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - applicant contends further documents exist - whether agency has taken all reasonable steps to locate documents - whether access may be refused on the basis that the documents do not exist or are unlocatable - whether access may be refused under section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(e) and 52(1) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST - access refused to information about other individuals - personal information and privacy - whether disclosure would, on balance, be contrary to the public interest - whether access may be refused under section 67(1) of the *Information Privacy Act 2009* (Qld) and section 47(3)(b) of the *Right to Information Act 2009* (Qld)

## REASONS FOR DECISION

### Summary

1. The applicant applied<sup>1</sup> to Metro North Hospital and Health Service (**MNHHS**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to various documents, as detailed in Annexure A, relating to her medical and mental health records held by MNHHS.
2. MNHHS located 176 pages and decided<sup>2</sup> to refuse access to information contained within parts of 4 pages on the ground that disclosure would, on balance be contrary to the public interest (**Information in Issue**). The remaining information was released to the applicant.<sup>3</sup>

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<sup>1</sup> Access application received by MNHHS on 28 February 2020.

<sup>2</sup> Decision dated 18 March 2020.

<sup>3</sup> Contained within 172 pages and parts of 4 pages.

3. The applicant applied<sup>4</sup> to the Office of the Information Commissioner (**OIC**) for external review of the decision refusing access to the Information in Issue and raised concerns that MNHHS had failed to locate all relevant documents.
4. For the reasons set out below, I affirm MNHHS's decision and find that access to information in this review may be refused on the following grounds:
  - further documents responsive to the access application are nonexistent or unlocatable; and
  - disclosure of the Information in Issue would, on balance, be contrary to the public interest.

## Background

5. The applicant has previously sought access to various documents relating to her medical and mental health records held by MNHHS. That previous access application was the subject of external review 314266, which was finalised by a written decision on 27 March 2020.<sup>5</sup>
6. Significant procedural steps taken during the current external review are set out in Annexure B of this decision.

## Reviewable decision

7. The decision under review is MNHHS' decision dated 18 March 2020.

## Evidence considered

8. During this external review, the applicant requested<sup>6</sup> that OIC take into account submissions made by the applicant in relation to her previous external review, which involved similar information and issues to those for determination in this review.<sup>7</sup> I have considered all this material on reaching my decision on the issues to be determined in this external review.
9. In reaching my decision, I have had regard to the submissions, evidence, legislation and other material referred to throughout these reasons (including footnotes and Annexures).
10. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>8</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 IP Act and *Right to Information Act 2009* (Qld) (**RTI Act**).<sup>9</sup> I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act.

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<sup>4</sup> External review application received 8 April 2020.

<sup>5</sup> *H89 and Metro North Hospital and Health Service* [2020] QICmr 18 (27 March 2020).

<sup>6</sup> Submissions to OIC dated 19 November 2020, 7 December 2020 and 1 March 2021.

<sup>7</sup> Submissions to OIC dated 12 November 2018, 18 March 2019, 7 June 2019, 12 June 2019, 5 July 2019, 5 September 2019, 31 January 2020, 2 March 2020 and 4 March 2020 (including attachments) in relation to external review 314266.

<sup>8</sup> Section 21 of the HR Act.

<sup>9</sup> *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].

## Information in issue

11. As set out at paragraph 2 above, the Information in Issue is contained within parts of 4 pages.<sup>10</sup>

## Allegations by the applicant relating to bias and procedural fairness

12. Before addressing the issues for determination, I will first deal with preliminary issues raised by the applicant.
13. On 5 November 2020, after completing a preliminary assessment of the issues in this review, Assistant Information Commissioner Rickard wrote to the applicant to explain that she had formed a preliminary view (**OIC's preliminary view letter**) that:
- MNHHS had taken all reasonable steps to locate the information requested in the access application and access to further documents may be refused on the ground they are nonexistent or unlocatable; and
  - access to the Information in Issue may be refused on the ground that disclosure would, on balance, be contrary to the public interest.
14. The applicant was also advised that if she did not accept the preliminary view, she was invited to lodge a submission in support of her case.
15. In response to OIC's preliminary view letter, the applicant provided a submission raising a number of concerns relating to the processes adopted by OIC in dealing with her external review:<sup>11</sup>

1. *Information Privacy Act 2009 (Old) requires the commissioner on publication of decisions to arrange to have any information contrary to public interest information not disclosed.*

...

- *I submit the publication of my name on any decision is contrary to public interest information...*

...

2. *It is generally accepted, as a minimum, 10 clear business days following receipt of documents is maybe considered giving procedural fairness. This practice has previously been objected to and sometimes more reasonable times to respond e.g. 20 business days were advised - these objections now are to no avail, whilst reverting to grossly unfair practices.*

- a. *This letter dated and postmarked as (Thursday) 5 November 2020, requiring a submission by (Thursday) **19 November, 2020** gives ten business days following the date the letter is written.*

- b. *The letter was received on Monday 9 November 2020 (the probable earliest delivery by Australia Post) and my calculation would suggest 10 clear business days to provide a submission would be Tuesday, 24 November 2020.*

3. *Communications regarding this application for external review leave a lot to be desired - taking into account the Office of Information Commissioner's (OIC) planned pandemic management's method of dealing with any correspondence/external review lodgment etc (considered 'a nonsense') ...*

...

- I propose dealing with the contents of the matters relevant to the External Review in a later submission*

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<sup>10</sup> Comprising page 1 of the pages located relating to Item 10 of the access application and pages 1-3 of the pages located relating to Item 12 of the access application.

<sup>11</sup> Submission to OIC dated 19 November 2020.

*The submission regarding Lack of Procedural Fairness [is] incomplete and will be dealt with in a later submission.*

...

4. *All External Review 314266 submissions and annexures thereto are required to be part of this external review. These submissions were ignored in External Review 314266. I require these submissions are not again ignored*

...

5. *Copies of submissions from MNHHS- Health Service have not been provided.*

...

6. *Identification of the files as to being file one or two in External Review 314266 are required.*

*It is essential previous submissions and annexures from external review 314266 are included in this external review and a greater provision of procedural fairness is required, together with MNHHS - Health Service submissions and response to queries.*

*Please provide notification of these requirements being met. Then provide a more reasonable time frame in which to provide further submissions.*

16. I wrote to the applicant on 25 November 2020 rejecting the contention that she had not been afforded procedural fairness in this process and advised her that:

- her name would be anonymised in our written decision
- her submissions, including annexures, relating to external review 314266 would be considered in this review to the extent they are relevant to the issues being considered in this review
- while OIC does not provide copies of submissions to other participants in an external review, where a submission is made that is relevant to the issues being decided, and will negatively affect another external review participant, that submission will be communicated to other participants to afford procedural fairness
- a submission of this nature was received from MNHHS in relation to this review and was consequently communicated to the applicant in OIC's preliminary view letter; and
- an extension until 16 December 2020 was granted for the applicant to provide a response to OIC's preliminary view letter.

17. In response, the applicant repeated her previous submissions noted at paragraph 15 and further stated:<sup>12</sup>

*Following from the incomplete submission regarding this preliminary view; OIC's advisement dated (Thursday) 25 November 2020 (post stamped Friday 26 November 2020), (received Monday 30 November 2020 stating: 'my letter of 19 November 2020 raises a number of issues regarding this external review'.*

...

***OIC's advisement of 26 November 2020 states:***

I note OIC's statement: 'You contend ... you have not been afforded procedural fairness in this process. This contention is rejected'.

*OIC have not offered any substantive reasons as to why this contention is rejected.*

*Only to state more 'nonsense and piffle':*

*'acknowledging the passage of time sine [sic] your application was received, OIC's letter dated 5 November 2020 set out Assistant Information Commissioner Rickard's preliminary view on the issues we are considering in this review and reasons for her view. You were*

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<sup>12</sup> Submission dated 7 December 2020.

provided with an opportunity to provide a submission supporting your case should you not agree to resolve this review informally'

*How can OIC prepare a preliminary view without having any input from myself? Nor provide copies of MNHHS - TPCH Health Services' submissions? Nor consider the submissions in the earlier External Review [3]14266 (Under appeal to QCAT APL ...)*

*How is your statement 'you will consider these submissions in this review to the extent they are relevant to the issues being considered in this review' providing procedural fairness? I have requested all submissions are to be considered not those you decided are relevant to the issues being considered in this review.*

*How can OIC proceed to prepare a preliminary view contrary to the provisions of the IP Act wherein there is a mandatory requirement to attempt to settle an external review? This was not attempted in any way, shape or form under any circumstances whatsoever.*

*I now refute totally your rejection and will continue to outline my reasons in following submissions.*

...

*The submissions were not considered in external review 314266; you indicate you **will consider these submissions in this review to the extent they are relevant to the issues being considered in this review.***

*With respect, may I suggest OIC is not across the issues in either this external review nor external review 314266 (on appeal to QCAT APL ...); I have no faith in OIC deciding the relevance of prior submissions.*

...

**OIC's advisement of 26 November 2020 states:**

I note your request to be provided with a copy of any submissions OIC has received from Metro North Hospital and Health Service (the Health Service). While we do not provide copies of submissions to other participants in an external review, where a submission contains information relevant to the issues being decided, and will negatively affect another external review participant, that information will be communicated to other participants in order to afford procedural fairness. Information of this nature contained within submissions received from the Health Service in relation to this review is set out within OIC's Letter.

*This is more nonsense; there is no other participant to this external review.*

*OIC continually state:*

**OIC is an independent body that conducts merit-based reviews of specific government decisions on access to, and amendment of, documents. As an independent body we review decisions in a fair and unbiased way.**

*OIC also advises submissions from other parties are to be made available to all participants.*

*I question: how do these practices, procedures and policies contribute to the provision of procedural fairness or OIC's independence?*

*It seems very obvious OIC are demonstrating there is a culture - some OIC's officers: are always right; do not make mistakes; do not know what is right; are prejudicially biased including 'motivationally' focussing on private, personal, partisan interests of the decision maker/s and possibly those of third parties. I will suggest this type of behaviour is rife across the whole of government.*

***I ask: Do OIC Officers, either individually or collectively, know what is 'Right'?***

***I ask: Are OIC Officers infallible i.e. they do not make mistakes?***

***I ask: Are OIC Officers, either individually or collectively, prejudicially biased including motivationally focussing on private, personal, partisan interests of the decision maker/s and possibly those of third parties?***

***I ask: What policies, practices, procedures and guidelines OIC have in place making sure all OIC Officers: know what is 'Right'; do not make mistakes; are not prejudicially biased including motivationally focussing on private, personal, partisan interests of the decision maker/s and possibly those of third parties?***

...

*... Identification of the files as to being file one or two in External Review 314266 are required.*

*It is essential all previous submissions and annexures from external review 314266 are included in this external review and a greater provision of procedural fairness is required, together with MNHHS - Health Service submissions and response to queries.*

*Please provide notification of these requirements being met. Then provide a more reasonable time frame in which to provide further submissions.*

***OIC's advisement of 26 November 2020 states:***

*I note your advice that you intend to make further submissions in support of your case. Please provide you [sic] submissions to OIC by 16 December 2020. This additional time takes into account any postal delays that may be experienced.*

*This is a grossly inadequate time frame and a further instance of a lack of procedural fairness in relation to providing submissions.*

*Without knowing:*

- i. to what extent you propose to consider submissions in external review 314266 I am left with no other alternative than to re submit submissions.*
- ii. what is in MNHHS - TPCH Hospital Service's submissions, I am placed at a serious disadvantage.*
- iii. Which files the information in this review relates to external review 314266 I am unable to provide the information I feel is missing.*

***Please be advised OIC have had this external review since 7 April 2020 and you proceed to issue a preliminary view on 5 November 2020 (received 9 November 2020) without any input from myself...***

- i. OIC expected submissions in response by 19 November 2020 accompanied with a threat to proceed to formally resolve the review taking away any appeal rights if this date is not complied with*
- ii. OIC then say you will consider submissions in external review 314266 to the extent they are relevant in this external review without being across the issues in either review;*
- iii. OIC fail to provide copies of MNHHS - TPCH Hospital Services submissions claiming there are other participants and advising you have notified me by way of the preliminary view of these submissions*
- iv. OIC fail to provide details of the files in this review as they relate to the files in external review 314266*
- v. Now, further expecting a submission by 16 December 2020.*

*There is no procedural fairness; no independence in conducting this review; with seemingly bias both internally at OIC and the MNHHS – TPCH Health Service – I suggest the bias in [sic] not even apprehended bias.*

*As a minimum an extension is required until at least Monday, 1 February 2021.*

18. On 14 January 2021, Assistant Information Commissioner Rickard wrote to the applicant and advised her that:

- to ensure procedural fairness, it is the practice of OIC to issue a preliminary view letter to an adversely affected party which appraises them of the issues under consideration and affords them the opportunity to put forward any further information they consider relevant to those issues
  - a preliminary view may assist in resolving an external review
  - OIC was not able to provide the applicant with further guidance on whether the PDF's located in response to this access application correspond with file one or two as received by the applicant in response to the access application the subject of external review 314266; and
  - an extension until 8 February 2021 was granted to respond to OIC's preliminary view letter.
19. The applicant subsequently requested<sup>13</sup> two further extensions to provide her response to OIC's preliminary view letter, which were granted.<sup>14</sup>
20. In her submission dated 1 March 2021, the applicant again raised issues relating to bias and failure to provide procedural fairness:<sup>15</sup>

***Perception of Bias or apprehended Bias***

...

*... I object to your statements 'further relevant information', and 'their consideration to the extent they are relevant to the issues'.*

***Where is your authority to decide if my submissions will be considered further relevant information and/or their consideration to the extent they are relevant to the issues?***

***Please Note:*** *All of my submissions are relevant. If you treat my submissions in any way as being irrelevant your office fails in its statutory obligations to review an agency decision in an unbiased and independent manner- 'demonstrating the correct decision has been made'.*

*These are incidences of people in Office of Information Commissioner's (OIC) organization demonstrating they are: always right; never make mistakes; do not know what is right; are prejudicially biased including 'motivationally' focusing on private, personal, partisan interests of the decision maker/s and possibly those of third parties particularly when reviewing decisions of agencies; and their decision makers being protected as work colleagues.*

...

***Failure to Provide Procedural Fairness***

*... It seems OIC has already made [its] final decision in external review 315348.*

*OIC continues to demonstrate the final decision in external review 315348 has already been decided by 'preliminary view' dated 5 November 2020.*

*OIC demonstrates there is no intention of entertaining any other possible outcome regardless; officer's responses to matters raised continually refer to statements in the 'preliminary view' dated 5 November 2020;*

*OIC demonstrates being biased and lacking independence in this external review; particularly as there are many incidences of people in OIC's organization demonstrating they are: always right; never make mistakes; do not know what is right; are prejudicially biased including 'motivationally' focusing on private, personal, partisan interests of the decision maker/s and possibly those of third parties particularly when reviewing decisions of agencies; and their decision makers being protected as work colleagues.*

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<sup>13</sup> By letters dated 8 February 2021 and 22 February 2021.

<sup>14</sup> Until 22 February 2021 and 1 March 2021 respectively.

<sup>15</sup> Submission to OIC dated 1 March 2021.

...  
OIC's response 14 January 2021 is more 'nonsense and piffle (as well as rhetoric and spin)' to these particular issues raised in partial submission (Part II) dated 7 December [2020]

...  
This continually constant rhetoric and spin is contrary to all principles of procedural fairness both according to the IP Act and common law - these statements are contradictory in the extreme.

**OIC is not: listening to the applicant; comprehending the applicant's written English word; prepared to entertain any other possibility and continues to say MNHHS - Health Service (TPCH) and OIC are always right; and never wrong - therefore demonstrating to the highest possible degree there is a lack of independence and are prejudicially biased including 'motivationally' focusing on private, personal, partisan interests of the decision makers and possibly those of third parties particularly when reviewing decisions of agencies; and their decision makers being protected as work colleagues**

...  
The failure to provide procedural fairness in this external review has continued ...

21. I have considered the applicants allegation of bias generally against officers of OIC, alongside the High Court's test for assessing apprehended bias for a decision maker. The High Court's test requires consideration of 'if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide'.<sup>16</sup> The High Court has also noted that:

*[t]he question of whether a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made is largely a factual one, albeit one which it is necessary to consider in the legal, statutory and factual contexts in which the decision is made.*<sup>17</sup>

22. OIC is an independent statutory body that conducts merits review of government decisions about access to, and amendment of, documents. The procedure to be followed on external review is, subject to the IP Act, within the discretion of the Information Commissioner.<sup>18</sup> In order to ensure procedural fairness (as required by both the IP Act<sup>19</sup> and common law), 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 appraises that participant of the issues under consideration and affords them the opportunity to put forward any further information they consider relevant to those issues.
23. In this review, the participants are the applicant and MNHHS. As set out at paragraphs 13-14 above, Assistant Information Commissioner Rickard conveyed OIC's preliminary view to the adversely effected participant, the applicant, by letter dated 5 November 2020. (In this regard, I note that it is OIC's usual practice to email correspondence to participants in an external review, however, in this matter the applicant has requested that all correspondence be sent to her postal address.<sup>20</sup> Given this, there are delays in the applicant receiving our correspondence.) The applicant was advised that she could respond to OIC's preliminary view letter and provide additional information supporting her case, which would be considered and may influence the outcome.<sup>21</sup> I consider that this advice demonstrates that Assistant Information

<sup>16</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ. See also *Michael Wilson & Partners Limited v Nicholls* (2011) 244 CLR 427 at [31] per Gummow ACJ, Hayne, Crennan and Bell JJ.

<sup>17</sup> *Isbester v Knox City Council* (2015) 255 CLR 135 at [20] per Kiefel, Bell, Keane and Nettle JJ.

<sup>18</sup> Section 108 of the IP Act.

<sup>19</sup> Section 110 of the IP Act.

<sup>20</sup> As set out in her application for external review. I also note that in external review 314266, the applicant indicated that she did not want to receive correspondence via email.

<sup>21</sup> Footnote 1. of OIC's preliminary view letter to the applicant dated 5 November 2020.



Commissioner Rickard was not so committed to her preliminary view that her conclusions were already formed and incapable of alteration, whatever evidence or arguments may be presented by the applicant.<sup>22</sup>

24. For this decision, I have reviewed the entirety of the applicant's submissions, including the submissions provided by the applicant in external review 314266, and carefully considered them to the extent they are relevant to the issues for determination. Apart from this external review regarding which I am a delegate of the Information Commissioner,<sup>23</sup> I have not to my knowledge dealt with the applicant in any capacity, and cannot identify any conflict of interest in my dealing with her application for review of MNHHS' decision. I do not consider that the fact that the applicant has made allegations of bias generally against officers of OIC has altered my conduct of the review or consideration of the issues before me in any way. In these circumstances, paraphrasing the High Court's test, I am unable to identify any basis for finding that a fair-minded lay observer might reasonably apprehend that I<sup>24</sup> might not bring an impartial and unprejudiced mind to the resolution of this matter.

### Issues for determination

25. I will now turn to a consideration of the issues for determination in this review. The issues for determination are:
- **Sufficiency of search** - whether access to further documents sought in response to the access application may be refused on the basis that they are nonexistent or unlocatable.
  - **Contrary to the public interest** - whether access to the Information in Issue may be refused on the ground that its disclosure would, on balance, be contrary to public interest.

### Sufficiency of search

#### Relevant law

26. Under the IP Act, a person has a right to be given access to documents of an agency or Minister.<sup>25</sup> However, this right is subject to provisions of the IP Act and RTI Act including the grounds on which an agency or Minister may refuse access to documents.<sup>26</sup>
27. Access to a document may be refused if the document is nonexistent or unlocatable.<sup>27</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 cannot be found.<sup>28</sup> A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.<sup>29</sup>

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<sup>22</sup> With reference to the test for prejudgment noted in *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at [72] per Gleeson CJ and Gummow J.

<sup>23</sup> Under section 139 of the IP Act.

<sup>24</sup> As a delegate of the Information Commissioner under section 139 of the IP Act.

<sup>25</sup> Section 40 of the IP Act.

<sup>26</sup> Section 67(1) of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent it could refuse access to the document under section 47 of the RTI Act were the document to be the subject of an access application under the RTI Act.

<sup>27</sup> Section 67(1) of the IP Act and sections 47(3)(e) and 52 of the RTI Act.

<sup>28</sup> Section 52(1)(b) of the RTI Act.

<sup>29</sup> Section 52(1)(a) of the RTI Act.

28. 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>30</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
    - the nature of the government activity the request relates to.<sup>31</sup>
29. 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>32</sup>

### **Findings**

30. In her external review application, the applicant contended<sup>33</sup> that insufficient searches had been conducted by the agency and that MNHHS had not provided her with her complete medical records. The applicant also stated<sup>34</sup> that the *'documents released do not identify which file the information comes from — without this identification I am not able to detail the information possibly missing.'*
31. On external review, MNHHS explained that:<sup>35</sup>
- after receiving the access application, the applicant was advised that MNHHS considered the current access application was for documents that had not previously been considered in response to her previous access application, which was at the time the subject of external review 314266
  - searches were conducted of the Consumer Integrated Mental Health Application (CIMHA), the Viewer tool, the applicant's paper medical record, Outlook and with the Consumer Liaison Officer; and
  - the searches resulted in the location of 176 pages.
32. OIC's preliminary view letter<sup>36</sup> to the applicant set out Assistant Information Commissioner Rickard's preliminary view, following a preliminary assessment of the information before her, that the searches undertaken by MNHHS for documents which respond to the access application were reasonable and she had not been able to identify any additional searches that could reasonably be conducted for responsive documents.

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<sup>30</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.

<sup>31</sup> *PDE* at [37] - [38].

<sup>32</sup> *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [20] - [21].

<sup>33</sup> Submission to OIC dated 6 April 2020.

<sup>34</sup> Submission to OIC dated 6 April 2020.

<sup>35</sup> Submission to OIC dated 13 May 2020 and record of searches conducted on 28 February 2020 provided to OIC by email on 21 October 2020.

<sup>36</sup> Letter dated 5 November 2020.

Assistant Information Commissioner Rickard also acknowledged the applicant's concern about not being able to identify where the information located originated from and noted that MNHHS had itemised her requests within the decision and provide the documents to her in separate PDF documents corresponding with those items.

33. In response, the applicant continued to submit that '[i]dentification of the files as to being file one or two in External Review 314266 [is] required'.<sup>37</sup> The applicant also submitted:<sup>38</sup>

**Scope of Documentation sought**

*The application for access to Metro North Hospital and Health Services - The Prince Charles Hospital failed to address the request of Queensland Health [CIMHA] records. OIC is also failing to address this issue i.e. ignoring the inclusion of the specific documents in the application/s both for access and external review.*

**Applicant's Submission Part VI External Review 314266 dated 28 February 2020 - page 1 of 3 states:**

*I wish to draw your attention to matters OIC have ignored in this external review:*

- *OIC's failure to obtain (via: extending the scope of the access request) all Consumer Integrated Mental Health Application (CIMHA) (Electronic) records - that is the designated patient record for the purposes of the Mental Health Act 2016 (Old) (i.e. records of Queensland Health, as opposed to TPCH CIMHA scanned records)- as advised by Manager, Mental Health Act Administration Team 26 July 2019.*

*OIC's Preliminary View 11 July 2019 evidences these records exist.*

*Applicant's Submission-Part V dated 31 January 2020 (Item 23, page 6 of 55) and providing additional evidence of their existence (electronic records) (via General Practitioner Viewer) (Item 25, pages 6-7 of 55).*

34. In relation to the access application being for documents generated since the applicant's previous request, MNHHS's decision stated:<sup>39</sup>

*Your requests have been itemised to assist with releasing the documents to you. I have collated updated documents generated since the prior release in October 2018, in addition to the documents you have requested. It appears that parts of the request have been provided to you in your previous application released to you in October 2018. I confirm that this application is for documents that have not been previously been provided to you, however I am releasing some documents to you again as they are listed in your request that you have referenced under heading "Additional Evidence of missing CIMHA (electronic records) via General Practitioner viewer" of your request" [sic].*

35. Although not raised by MNHHS in the decision, I consider that it was open to MNHHS to refuse to deal with the access application to the extent it was for documents previously requested under section 62(3)(b)(i) or (d)(i) of the IP Act.

36. In relation to the applicant's request that OIC identify whether the PDF's located in response to this access application correspond with file one or two as received by the applicant in response to the access application the subject of external review 314266, I do not consider that OIC's function in relation to this external review extends to answering questions about the documents released to the applicant by MNHHS. Rather,

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<sup>37</sup> Submissions to OIC dated 19 November 2020 and 7 December 2020.

<sup>38</sup> Submissions to OIC dated 1 March 2020.

<sup>39</sup> At page 2.

the issues to be considered in this review are those set out in paragraph 25 above, being whether:

- access to further documents sought in response to the access application may be refused on the basis that they are nonexistent or unlocatable; and
- access to the Information in Issue may be refused on the ground that its disclosure would, on balance, be contrary to public interest.

37. Further, in the decision on external review 314266 Assistant Information Commissioner Martin noted that MNHHS had explained that:<sup>40</sup>

- *a patient's medical records can be found on both their electronic and paper files;*
- *the lack of exact chronology can be accounted for by the adding of records from electronic applications to the paper files; and*
- *there have been various filing systems used at the hospital in recent years, eg. using different dividers and this affects how the paper file is set out in older records.*

38. Given the above, I consider that 'gaps', in a chronological sense, can be anticipated in the applicant's paper medical file taking into account the way it is managed as described by MNHHS. Therefore, even if the applicant knew whether the documents located in response to the current application were from file one or file two as received by the applicant in response to the access application the subject of external review 314266, I do not consider that this would assist the applicant in any significant way to make a submission about what documents are '*possibly missing*' in response to the current access application. I am also satisfied that there is no reason to discredit the search efforts of MNHHS as set out above as there is nothing before me to suggest that MNHHS has not been genuine in the searches conducted.

39. As set out at paragraph 31 above, MNHHS conducted searches within CIMHA for documents responding to the current access application. The applicant's assertion that MNHHS and OIC have '*failed to address the request of Queensland Health [CIMHA] records*' is not supported by the searches conducted by MNHHS. Other than this assertion, the applicant has not provided any independent evidence or cogent arguments pointing to the existence of further documents. In the absence of any such evidence or argument pointing to the existence of further documents and in light of the searches conducted by MNHHS and the scope of the applicant's access application, I am satisfied that all reasonable searches for documents in response to the access application have been conducted. On this basis, access to further documents responsive to the access application may be refused on the ground that the documents sought are nonexistent or unlocatable.<sup>41</sup>

## **Contrary to the public interest**

### ***Relevant law***

40. An agency may also refuse access to information where its disclosure would, on balance, be contrary to the public interest.<sup>42</sup>

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<sup>40</sup> H89 and Metro North Hospital and Health Service [2020] QICmr 18 (27 March 2020) at [36].

<sup>41</sup> Under section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

<sup>42</sup> Section 67(1) of the IP Act and 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' (2006) 48 AIAL Forum 12, 14-16.

41. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:<sup>43</sup>
- 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.
42. 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>44</sup> and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.<sup>45</sup>

## Findings

### Irrelevant factors

43. No irrelevant factors arise in the circumstances of this case and I have not taken any into account in reaching my decision.

### Factors favouring disclosure

44. Public interest factors favouring disclosure will arise if disclosure could reasonably be expected to enhance the accountability and transparency of MNHHS regarding its dealings with members of the public including, for example, by revealing background or contextual information to decisions.<sup>46</sup> The Information in Issue comprises information provided by third parties to healthcare professionals. I accept that disclosing this information would advance these factors to some degree. However, I do not consider that the disclosure of the Information in Issue would advance MNHHS's accountability and transparency in any significant way, particularly given the applicant has already been provided with access to a significant amount of information by MNHHS and the nature of the Information in Issue is that it provides more insight into the personal information of third party individuals than the decisions and actions of MNHHS. I am satisfied that the information which *has* been disclosed to the applicant furthers her understanding of what information was available to MNHHS and provides background information to her interactions with staff at the hospital and that this understanding would not be significantly improved upon disclosure of the Information in Issue. Accordingly, I afford these three factors favouring disclosure low weight.
45. I acknowledge that the Information in Issue also contains the applicant's personal information<sup>47</sup> and forms part of her medical records. I acknowledge that her health care information is a matter at the core of her personal sphere, and therefore I have afforded significant weight to the public interest factor in favour of disclosure where the information is the personal information of the applicant.

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<sup>43</sup> Section 49(3) of the RTI Act.

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

<sup>45</sup> Section 47(2) of the RTI Act.

<sup>46</sup> Schedule 4, part 2, items 1, 3 and 11 of the RTI Act.

<sup>47</sup> Schedule 4, part 2, item 7 of the RTI Act. '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 IP Act.

46. The applicant raised concerns that the Information in Issue had not been fact-checked and that the complaints are *'erroneous; and spurious; and scurrilous; and defamatory'*.<sup>48</sup> Given these concerns, I have considered the factor that favours disclosure which arises where disclosure could reasonably be expected to reveal that information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant.<sup>49</sup> The Information in Issue records third parties' concerns and opinions about the applicant's mental health. While such information is, by its very nature, shaped by factors such as the individuals' memories, impressions and points of view and is inherently subjective, this does not mean that it is necessarily incorrect or unfairly subjective, or that disclosure of the information could reasonably be expected to reveal this. For this public interest factor to apply, it is not sufficient to show that the applicant disputes the opinions/concerns. I have carefully reviewed the Information in Issue and I am satisfied that its disclosure could not reasonably be expected to reveal that it is incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant. Accordingly, I consider that this factor carries no weight.
47. I have also considered the applicant's concerns about her treatment by the hospital, and her submission that she has not been given the opportunity to repudiate the views contained in the Information in Issue. 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 official<sup>50</sup>
  - reveal or substantiate that an agency or official has engaged in misconduct, or negligent, improper or unlawful conduct<sup>51</sup>
  - advance fair treatment in accordance with the law in dealings with agencies;<sup>52</sup> or
  - contribute to the administration of justice generally (including procedural fairness) or for a person.<sup>53</sup>
48. As noted above, the Information in Issue is comprised of opinions/concerns of third party individuals who contacted the MNHHS with concerns about the applicant and does not provide any information of substance concerning the conduct of MNHHS or the hospital. It reveals only that the MNHHS made notes about the concerns expressed by the third party individuals. Accordingly, in the circumstances of this matter, I do not consider that disclosure of the Information in Issue gives rise to the factors set out at paragraph 47 above.

### **Factors favouring nondisclosure**

49. The RTI Act recognises that disclosing an individual's personal information to someone else can reasonably be expected to cause a public interest harm<sup>54</sup> and that a further factor favouring nondisclosure arises if disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy.<sup>55</sup>

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<sup>48</sup> Submissions to OIC dated 8 April 2020 and 1 March 2021.

<sup>49</sup> Schedule 4, part 2, item 12 of the RTI Act.

<sup>50</sup> Schedule 4, part 2, item 5 of the RTI Act.

<sup>51</sup> Schedule 4, part 2, item 6 of the RTI Act.

<sup>52</sup> Schedule 4, part 2, item 10 of the RTI Act.

<sup>53</sup> Schedule 4, part 2, item 16 and item 17 of the RTI Act.

<sup>54</sup> Schedule 4, part 4, section 6(1) of the RTI Act.

<sup>55</sup> Schedule 4, part 3, item 3 of the RTI Act.

50. The applicant submits:<sup>56</sup>

***There is no third party participant in this external review under any circumstances - The complaints are: anonymous i.e. the complainants cannot be identified under any circumstances; cannot be sent notices; cannot be a party to any legal claim; fictitious; and not authorized by the Committee Minutes of ... Society.***

***I submit it is in the public interest because: allowing this nonsense the agency and OIC are both condoning and perpetuating by making of anonymous mental health complaints on a whim and a fancy without being fact checked, regardless of the complaints being erroneous; and spurious; and scurrilous; and defamatory.***

***Documents including minutes verifying ... Society committee members did not authorize such a mental health complaint; as well as the only name volunteered of '[A]' is not a committee member are included in External Review 314266 Submission Part VI dated 28 February 2020 pages 1-3 together with chronology and annexures 1 - 27. These documents were ignored in their entirety in External Review 3[1]4266 as OIC's decision was made and sent out as a matter of convenience and expediency.***

51. While the Information in Issue appears within the applicant's medical records, it also comprises the personal information of third parties who are readily identifiable from that information. Given the sensitive nature of the information and the circumstances of its provision to MNHHS, I am satisfied that disclosure would disclose private details about the third parties, thus giving rise to a reasonable expectation of intrusion into their private life or '*personal sphere*'.<sup>57</sup> Accordingly, I afford these two factors favouring nondisclosure significant weight.
52. A further factor favouring nondisclosure arises where disclosure of the Information in Issue could reasonably be expected to prejudice an agency's ability to obtain confidential information.<sup>58</sup> I am satisfied that people who provide information to health care professionals do so with an expectation of confidentiality. The very nature of the information is such that it is sensitive and provided with the purpose of informing the hospital so that they can treat a current or future patient. I acknowledge that the applicant considers the information provided to be inaccurate, and that she has a number of concerns about the hospital's response to the information provided. However, even where the content of the information is disputed, disclosure of that information could reasonably be expected to discourage other individuals from coming forward with confidential information to the hospital, or hospitals in general, in the future. Given the importance of healthcare professionals being fully informed to provide appropriate care, I afford this factor significant weight.

### **Balancing the factors**

53. I have considered the pro-disclosure bias in deciding access to information.<sup>59</sup> On balance, I consider the nondisclosure factors<sup>60</sup> outweigh the disclosure factors<sup>61</sup> in relation to the Information in Issue. Accordingly, access to the Information in Issue is

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<sup>56</sup> Submission to OIC dated 1 March 2021.

<sup>57</sup> 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 (Volume 1)*, released 30 May 2008, at [1.56]. Cited in *Balzary and Redland City Council; Tidbold (Third Party)* [2017] QICmr 41 (1 September 2017) at [28].

<sup>58</sup> Schedule 4, part 3, item 16 of the RTI Act. I have also considered schedule 4, part 4, section 8, however I am not satisfied this factor applies to all of the Information in Issue in this review.

<sup>59</sup> Section 64 of the IP Act.

<sup>60</sup> Schedule 4, part 2, items 1, 3, 5, 6, 7, 10, 11, 12, 16 and 17 of the RTI Act.

<sup>61</sup> Schedule 4, part 3, items 3 and 16 and part 4, sections 6(1) and 8 of the RTI Act.

refused on the basis that its disclosure would, on balance, be contrary to the public interest.<sup>62</sup>

## **DECISION**

54. I affirm MNHHS's decision to refuse access to the Information in Issue under section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act. I also refuse access to the nonexistent or unlocatable information under section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.
55. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

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**Assistant Information Commissioner Corby**

**Date: 4 May 2021**

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<sup>62</sup> Under section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.



## ANNEXURE A

### Terms of the access application

Records pertaining to:

- All [of the applicant's] *Medical and Mental Health*
- All *Complaints/Incidents made by [the applicant] including those to Customer Liaison Officers (CLO) – (Not provided previously)*
- *Queensland Health's Consumer Integrated Mental Health (CIMHA) electronic records – designated patient record for the purposes of the Mental Health Act 2016 (Qld) (i.e. records of Queensland Health, as opposed to [the hospital's] CIMHA scanned Records) as advised by Manager, Mental Health Administration Team 26 July 2019 (Not provided previously)*
- *Privacy Application filled out by [hospital] Staff dated*

*Agencies: Department of Health; and ... Hospital*

*All information, documents, correspondence, photos, phone calls, emails, file notes, memos, discussions, reports regarding the records held by Queensland Health and ... Hospital and/or any other information of any nature whatsoever excepting that already provided under a previous application dated 26 September 2018 (Access Decision - Number: IA ... October 2018 - ... UR Number: ...)*

- *currently awaiting an external review decision.*
- *Anything else that may be on the file or the data base or held in any other place regardless of the information*
- *All submissions made to OIC regarding previous RTI external review application*

*The complete file – in no way limiting it and to include the following Department of Health documentation as viewed on a General Practitioner Viewer and stating 'Expand for details':*

*Additional Evidence of missing CIMHA (electronic records) via General Practitioner viewer:*

- *13 July 2009 21:15 – 14 July 2009 07:30, [named individual] ... Hospital Mental Health Service Organisation*
- *21 May 2010 08:54 – 21 May 2010 13:17 [named individual] ... Hospital*
- *19 Jun 2012 20:32 – 19 June 2012 22:47 [named individual] ... Hospital*
- *19 June 2012 20:45 – 23 July 2012 14:00 [named individual] ... Mental Health Services Organisation (2 Pages)*
- *25 Dec 2015 17:31 – 25 Dec 2015 20:34 [named individual] ... Hospital*
- *7 Sep 2018 18:00 – 18 Sep 18:08 [named individual] ... Hospital Mental Health Service Organisation*
- *20 Sep 2018 13:31 – 24 Sept 2018 13:46 [named individual] ... Hospital Mental Health Service Organisation*
- *4 Oct 2018 12:24 – 10 Oct 2018 17:07 [named individual] ... Hospital Mental Health Service Organisation*
- *7 Nov 2019 17 :51 – Outpatient Department – Episode Number ...*

**ANNEXURE B****Significant procedural steps**

<b>Date</b>	<b>Event</b>
8 April 2020	OIC received the application for external review dated 6 April 2020.
27 April 2020	OIC notified MNHHS that the application for external review had been received and requested procedural documents.
28 April 2020	OIC received the requested procedural documents from MNHHS.
11 May 2020	OIC notified MNHHS that the application for external review had been accepted and requested: <ul style="list-style-type: none"> <li>• a copy of the documents located clearly showing the information to which access was refused</li> <li>• any records of the searches conducted</li> <li>• additional information regarding the processing of the application.</li> </ul>
12 May 2020	OIC prepared correspondence to the applicant notifying her that the external review application had been accepted. As the applicant requested correspondence by post only, OIC was unable to post the correspondence to the applicant at this time due to measures put in place in response to the COVID-19 pandemic.
13 May 2020	OIC received the requested documents and a submission addressing the searches conducted and additional information requested from MNHHS.
21 July 2020	OIC wrote to the applicant explaining delays in processing her external review due the closure of the office in response to the COVID-19 pandemic and enclosed the letter to the applicant dated 12 May 2020.
9 October 2020	OIC wrote to MNHHS requesting that: <ul style="list-style-type: none"> <li>• officers of MNHHS who conducted searches for documents responding to the access application complete search certifications; and</li> <li>• MNHHS provide a submission about its searches for documents responding to the access application, including the outcome of any additional searches required.</li> </ul>
21 October 2020	OIC received the requested search certification and submission from MNHHS.
5 November 2020	OIC conveyed a preliminary view to the applicant.
19 November 2020	OIC received a submission from the applicant.
25 November 2020	OIC wrote to the applicant providing a response to concerns raised in her 19 November 2020 submission and granted an extension of time to respond to the preliminary view.
7 December 2020	OIC received a further submission from the applicant.
18 December 2020	OIC received a further submission from the applicant.
6 January 2021	OIC notified the applicant that it would proceed to issue a decision to finalise the review.

Date	Event
14 January 2021	OIC wrote to the applicant providing a response to concerns raised in her 7 December 2020 submission and granted an extension of time to respond to the preliminary view.
8 February 2021	OIC received a request for a further extension to enable the applicant to respond to the preliminary view.
10 February 2021	OIC wrote to the applicant and granted an extension of time to respond to the preliminary view.
22 February 2021	OIC received a request for a further extension to enable the applicant to respond to the preliminary view. OIC wrote to the applicant and granted an extension of time to respond to the preliminary view.
1 March 2021	OIC received a further submission from the applicant.