



## Decision and Reasons for Decision

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**Citation:** *J6Q8CH and Office of the Health Ombudsman (No. 2)* [2019] QICmr 27 (6 August 2019)

**Application Number:** 314084

**Applicant:** J6Q8CH

**Respondent:** Office of the Health Ombudsman

**Decision Date:** 6 August 2019

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - SCOPE OF APPLICATION - deletion of irrelevant information - agency excluded information which fell outside the scope, or was irrelevant to the terms, of the access application - section 88 of the *Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - internal emails between agency staff and agency legal officer - whether the information would be privileged from production in a legal proceeding on the ground of legal professional privilege - section 67(1) of the *Information Privacy Act 2009* (Qld) - sections 47(3)(a) and 48 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST - personal information and privacy - accountability and transparency - whether disclosure would, on balance, be contrary to the public interest - section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - applicant contends agency did not locate all relevant documents - whether agency has taken all reasonable steps to locate documents but the documents cannot be found or do not exist - section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(e) and 52 of the *Right to Information Act 2009* (Qld)

## REASONS FOR DECISION

### Summary

1. The applicant applied<sup>1</sup> to the Office of the Health Ombudsman (**OHO**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to documents about, or referring to, her up until 19 April 2018.
2. OHO located 2,421 pages and 6 telephone recordings in response to the access application. OHO decided<sup>2</sup> to release 2,286 pages in full, the 6 telephone recordings in full, 109 pages in part, and to refuse access to 26 pages in full.
3. The applicant sought<sup>3</sup> internal review of OHO's decision and, on internal review, OHO varied<sup>4</sup> its original decision and released one further part page.
4. The applicant then applied<sup>5</sup> to the Office of the Information Commissioner (**OIC**) for an external review of OHO's decision to refuse access to information.
5. For the reasons set out below, I vary OHO's decision and find that:
  - information may be deleted from certain pages under section 88 of the IP Act on the basis that it is not relevant to the access application
  - access to the information in issue (as set out at paragraph 15 below) may be refused on the grounds that it comprises information that is exempt, or contrary to the public interest to disclose; and
  - access to the further documents sought in response to the access application may be refused on the grounds that they are non-existent or unlocatable.

### Background

6. Significant procedural steps taken in the external review are set out in the Appendix.
7. To avoid identifying the applicant, I have de-identified the OHO officers and the Queensland public hospital (**The Hospital**) named by the applicant in her submissions in this matter.
8. As noted above, the applicant sought internal review of OHO's decision and, on internal review, OHO varied<sup>6</sup> its original decision and released one further part page. Additionally, OHO varied the grounds of refusal for some of the initially refused information as also being irrelevant to the scope of the access application.
9. The applicant then applied to OIC for an external review of OHO's decision to refuse access to information and raised concerns that OHO had not located all relevant documents.
10. On external review, OHO located 503 additional pages<sup>7</sup> (**Additional Documents**) and of this disclosed 492 full pages, 10 part pages, and refused access to 1 full page to the

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<sup>1</sup> Access application dated 19 April 2018.

<sup>2</sup> On 19 June 2018.

<sup>3</sup> On 10 July 2018 and further detailed in the applicant's email to OHO of 11 July 2018 at 11:50 am.

<sup>4</sup> On 7 August 2018.

<sup>5</sup> By email dated 7 August 2018.

<sup>6</sup> On 7 August 2018.

<sup>7</sup> Letter to OIC dated 14 February 2019.

applicant.<sup>8</sup> On instruction from OIC, OHO emailed the Additional Documents, with the Information in Issue removed, to the applicant on 8 April 2019.

### Reviewable decision

11. The decision under review is OHO's internal review decision dated 7 August 2018.

### Evidence considered

12. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).
13. The applicant has provided extensive submissions to OIC.<sup>9</sup> A significant proportion of the applicant's submissions relate to complaints and applications that she has made to other agencies, Ministers and various entities.
14. In these reasons for decision, I have only considered and addressed submissions made by the applicant to the extent they raise matters relevant to the issues for determination in this review, as set out below.

### Information in issue

15. The **Information in Issue** is the information refused by OHO, and consists of:
- 26 full pages and parts of 109 pages to which access was refused in OHO's decision; and
  - 1 full page and parts of 10 pages in the Additional Documents.
16. While I am unable to disclose the content of the Information in Issue,<sup>10</sup> I generally categorise it as follows:

Category	Description
Category A Information <sup>11</sup>	Information irrelevant <sup>12</sup> to the scope of the access application comprising information regarding other OHO assessments and matters.
Category B Information <sup>13</sup>	Information refused on the basis it is subject to legal professional privilege in the form of file notes and emails. <sup>14</sup>
Category C Information <sup>15</sup>	Personal information <sup>16</sup> of individuals other than the applicant, including medical records, names, email addresses and telephone numbers, and intertwined personal information of the applicant.

<sup>8</sup> OHO also agreed to release their letter to the applicant dated 17 April 2018.

<sup>9</sup> As set out the Appendix.

<sup>10</sup> Section 121(3) of the IP Act which relevantly requires the Information Commissioner not to disclose information that is exempt or claimed to be contrary to the public interest information in a decision or reasons for a decision.

<sup>11</sup> 2 full pages and 9 part pages

<sup>12</sup> Section 88 of the IP Act.

<sup>13</sup> 3 full pages and 7 part pages.

<sup>14</sup> Section 67(1) of the IP Act and sections 47(3)(a) and 48, and schedule 3, part 7 of the *Right to Information Act 2009* (Qld) (**RTI Act**).

<sup>15</sup> 22 full pages and 103 part pages.

<sup>16</sup> *Personal information* is defined in section 12 of the IP Act as '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'.

## Issues for determination

17. Some issues were informally resolved on external review.<sup>17</sup> The remaining issues for determination are whether;
  - certain parts of the Information in Issue may be deleted<sup>18</sup> on the basis that it is irrelevant to the scope of the access application
  - access to the Information in Issue may be refused on the grounds that it is exempt,<sup>19</sup> or on balance would be contrary to the public interest<sup>20</sup> to disclose; and
  - OHO's searches are sufficient to be satisfied that all reasonable steps have been taken to locate documents responsive to the access application, and access to further documents sought may be refused because they are non-existent or unlocatable.<sup>21</sup>
18. An individual has a right to be given access to documents of an agency to the extent they contain the individual's personal information.<sup>22</sup> While the IP Act is to be administered with a pro-disclosure bias,<sup>23</sup> the right of access is subject to a number of exclusions and limitations, including grounds for refusal of access.
19. Section 67(1) of the IP Act provides that access to a document may be refused on the same grounds upon which access to a document could be refused under section 47 of the RTI Act. Section 47(3) of the RTI Act relevantly permits an agency to refuse access to documents:
  - to the extent they comprise exempt information<sup>24</sup>
  - to the extent they comprise information the disclosure of which would, on balance, be contrary to the public interest;<sup>25</sup> and
  - because documents are non-existent or unlocatable.<sup>26</sup>

## Category A information – irrelevant to the scope of the application

### Relevant law

20. Section 88 of the IP Act allows an agency to delete information that is irrelevant to the scope of the terms of the original application. This is not a ground for refusal of access, but a mechanism to allow irrelevant information to be deleted from documents which are identified for release to an applicant. In deciding whether information is irrelevant, it is necessary to consider whether the information has any bearing upon, or is pertinent to, the terms of the access application.

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<sup>17</sup> OHO was able to locate Additional Documents, of which 492 full pages and 10 part pages were provided to the Applicant. OHO also agreed to release their letter to the applicant dated 17 April 2018.

<sup>18</sup> Section 88 of the IP Act.

<sup>19</sup> Section 67(1) of the IP Act, which provides that access to a document may be refused on the same grounds upon which access to a document could be refused under section 47 of the RTI Act, and section 47(3)(a) and schedule 3, part 7 of the RTI Act.

<sup>20</sup> Section 67(1) of the IP Act and sections 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.

<sup>21</sup> Section 67(1) of the IP Act and section 47(3)(e) of the RTI Act.

<sup>22</sup> Under section 40(1)(a) of the IP Act.

<sup>23</sup> Section 64(1) of the IP Act.

<sup>24</sup> Section 47(3)(a) of the RTI Act.

<sup>25</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>26</sup> Sections 47(3)(e) and 52 of the RTI Act.

## Findings

21. OHO deleted information<sup>27</sup> which it submitted was irrelevant to the access application.
22. I have reviewed the Category A Information deleted by OHO and note it comprises information relating to other OHO assessments and matters unrelated to the applicant. Given the applicant sought access to information about or referring to her, the Category A information is not within the scope of the terms of the applicant's access application nor relevant to those terms.
23. As I am satisfied that the Category A Information is not responsive to the terms of the access application and has no relevance to the information being sought by the applicant, it may be deleted under section 88 of the IP Act on the basis that it is not relevant to the access application.<sup>28</sup>

## Category B Information – exempt information subject to legal professional privilege

### Relevant law

24. Schedule 3 of the RTI Act specifies the types of information Parliament has determined is exempt because its release would always be contrary to the public interest. Relevantly, information is exempt information if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.<sup>29</sup> This exemption reflects the requirements for establishing legal professional privilege at common law.<sup>30</sup>
25. Establishing whether legal professional privilege applies to information at common law requires that the information must comprise a communication:
  - made in the course of a lawyer-client relationship
  - that was and remains confidential; and
  - which was made for the dominant purpose of seeking or providing legal advice or for use in existing or reasonably anticipated legal proceedings.<sup>31</sup>
26. When each of these requirements is met, legal professional privilege is established. However, qualifications and exceptions to privilege<sup>32</sup> may, in particular circumstances, affect the question of whether information attracts or remains subject to it, and therefore is exempt under the RTI Act.

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<sup>27</sup> From 2 full pages and 9 part pages.

<sup>28</sup> *Underwood and Department of Housing and Public Works* (QICmr) 18 May 2012 at [15]-[17].

<sup>29</sup> Schedule 3, section 7 of the RTI Act.

<sup>30</sup> The doctrine of legal professional privilege is both a rule of evidence and a common law right. The High Court in *Daniels Corporation International Pty Ltd v Australian and Consumer Commissioner* (2002) 213 CLR 543 (*Daniels*) at [552] relevantly noted 'It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings' (footnotes omitted). See also *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 (*Esso*).

<sup>31</sup> *Esso* and *Daniels*.

<sup>32</sup> Such as waiver or improper purpose.

## Findings

27. The Category B Information comprises advice sought or received by hospital staff from in-house legal counsel at The Hospital<sup>33</sup> and is a small portion of the information in issue.<sup>34</sup>
28. The applicant submitted<sup>35</sup> that:
- The Hospital puts all of her matters through its lawyers in order to claim legal professional privilege as a ploy to deprive her of all her rights
  - the lawyer was not in the role of a legal advisor but was undertaking administrative duties
  - all of the contact between The Hospital and OHO would be available in discovery; and
  - claiming legal professional privilege conceals corruption at OHO and incriminating actions by the staff of The Hospital.

### Does Legal Professional Privilege apply?

29. The Category B Information embodies requests by The Hospital staff to The Hospital's in-house legal counsel<sup>36</sup> for legal advice, and the advice supplied in response. I am satisfied that it comprises communications which meet the requirements for legal professional privilege identified above. However, the question of whether the privilege was waived when the Category B Information was provided by The Hospital to OHO arises for consideration.

### Implied or express waiver

30. In some cases, communications may not be subject to legal professional privilege because privilege has been waived.<sup>37</sup> Legal professional privilege may be waived either:
- intentionally, by the client or client's agent disclosing a privileged communication to persons outside of the privileged relationship;<sup>38</sup> or
  - by implication of law, in circumstances where there is conduct by, or on behalf of, the client which is inconsistent with the maintenance of the privilege, whether the client intended that result or not.<sup>39</sup>
31. In considering whether there has been a waiver, I note the circumstances in which The Hospital documents, that contain the Category B Information, came to be in OHO's possession:

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<sup>33</sup> I note that the applicant has made multiple submissions on these refused documents and maintains that OHO was the client seeking legal advice. As relayed to the applicant by OIC on 26 April 2019 and 8 May 2019 the client seeking legal advice was not OHO, but hospital staff at The Hospital. Despite this advice from OIC, the applicant has continued to make submissions regarding OHO claiming legal privilege.

<sup>34</sup> Original information in issue – part pages: 61, 443-444 (duplicated at 821-822, 1056-1057); and full pages: 607, 626-629.

<sup>35</sup> By email on 26 April 2019, 27 April 2019 and 30 April 2019.

<sup>36</sup> LPP can attach to confidential communications between a government department or statutory authority and their salaried legal advisors - see *Waterford v Commonwealth of Australia* (1987) 163 CLR 54 at 62 – see also *Potter and Brisbane City Council* (1994) 2 QAR 37.

<sup>37</sup> Either expressly or impliedly.

<sup>38</sup> *Goldberg v Ng* (1994) 33 NSWLR 639 at 670.

<sup>39</sup> *Osland v Secretary to the Department of Justice* (2008) 234 CLR 275 at 296-297.

- OHO issued a section 48 Notice<sup>40</sup> to The Hospital requiring records be provided to OHO for the purposes of assessing the applicant's complaints
  - the privileged communications were captured by the terms of the section 48 Notice
  - The Hospital provided records to OHO in accordance with the section 48 Notice; and
  - OHO reviewed the records to assess the applicant's complaints.
32. From the material before me, it is clear that The Hospital is required by law to provide the records to OHO when in receipt of a section 48 Notice. This was a limited disclosure to OHO for a specific purpose, namely to assist OHO in the assessment of the applicant's complaints, and on the basis that it would not be disclosed to third parties, except as required by law.<sup>41</sup> I consider that such action on the part of The Hospital, in the particular circumstances of this matter, is not incompatible with the maintenance of the privilege.<sup>42</sup>
33. For the above reasons I am satisfied that the privilege attaching to the Category B Information has not been extinguished through express or implied waiver.

### **Improper purpose exception**

34. The applicant's submissions suggest that the application of legal professional privilege to the Category B Information would be in furtherance of an improper purpose (concealing corrupt or criminal actions of The Hospital).
35. For the improper purpose exception to apply a communication must be made in pursuit of an illegal or improper purpose.<sup>43</sup> In summarizing an established line of relevant case law the Assistant Information Commissioner in *Secher and James Cook University*<sup>44</sup> explained that:

*This exception operates to displace legal professional privilege where evidence exists that the relevant client has embarked on a deliberate course of action knowing that the proposed actions were contrary to law, and has made the relevant communications in furtherance of that illegal or improper purpose.*

*.... In establishing improper purpose, the standard of proof is high. The High Court has observed that it "is a serious thing to override legal professional privilege where it would otherwise be applicable" and as a result "vague or generalized contentions of crimes or improper purposes will not suffice."<sup>45</sup>*

36. The applicant alleged, in summary, that:
- medical providers cannot use legal privilege for anything whatsoever except an apology letter
  - The Hospital and OHO have engaged in deceptiveness, serious misconduct and harm
  - it is clear that providing the information (which is subject to legal professional privilege) will allow her to seek treatment, redress and compensation

<sup>40</sup> Section 48 of the *Health Ombudsman Act 2013* (Qld) (**HO Act**) requires an entity to comply, and affords no exceptions to entities that are not natural persons, such as The Hospital.

<sup>41</sup> Section 272 of the HO Act.

<sup>42</sup> *DF36ZV and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 17 December 2013), [28].

<sup>43</sup> *R v Bell; Ex parte Lees* (1980) 146 CLR 141.

<sup>44</sup> (Unreported, Queensland Information Commissioner, 6 June 2012).

<sup>45</sup> See *Shaw and Department of Justice and Attorney-General* [2014] QICmr 33 at [16]; see also *Commissioner of Australian Federal Police and Another v Propend Finance Limited and Others* (1997) 188 CLR 501 at 591-592 and *Murphy and Treasury Department* (1998) 4 QAR 446 at 31-43.

- if OHO was the client, they were improperly claiming privilege; and
- OIC, OHO and The Hospital (along with other government agencies) have colluded and engaged in reprisals, obstruction and sustained acts of malice against her, and engaged in a corrupt investigation.

Additionally, the applicant appeared to question whether the relevant correspondence had been with a lawyer at all.<sup>46</sup>

37. I have carefully considered the Category B Information and the applicant's submissions.<sup>47</sup> I am satisfied that the contents of the Category B Information do not evidence the applicant's view that staff at The Hospital obtained legal advice for the purpose of hiding corruption, reprisals or otherwise illegal activity.
38. I am also satisfied that the Category B information comprises communications between The Hospital in-house legal counsel and the Hospital staff, despite the applicant's submissions to the contrary, which I acknowledge were made in the absence of the content of the Category B Information.
39. There is no evidence in the information before me that the particular communications that comprise the Category B Information were made in preparation for, or in furtherance of, an illegal or improper purpose. Accordingly, I find that the improper purpose exception does not apply to preclude the application of legal professional privilege to the Category B Information.

### **Conclusion**

40. I find that the Category B Information comprises information subject to legal professional privilege; and that neither waiver nor improper purpose are made out; and that the information is therefore exempt and access to it may be refused on that basis.<sup>48</sup>

### **Category C Information – contrary to the public interest information**

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

41. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:<sup>49</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. 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.<sup>50</sup>

<sup>46</sup> Emails from applicant dated 4 December 2018, 28 January 2019, 1 March 2019, 6 March 2019, 7 March 2019, 26 April 2019, 27 April 2019, 30 April 2019, 28 May 2019 and 18 June 2019.

<sup>47</sup> At footnotes 33, 35, and 46.

<sup>48</sup> Under section 67(1) of the IP Act and sections 47(3)(a) and 48 of the RTI Act.

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

<sup>50</sup> However, there are some recognised public interest considerations that may apply for the benefit of an individual.



## Findings

43. I have taken no irrelevant factors into account in making my decision.

### Factors favouring disclosure

44. Under the RTI Act, a public interest factor favouring disclosure arises where the information in issue is the personal information of the applicant.<sup>51</sup>
45. As noted at paragraph 16 the Category C Information is predominantly the personal information of individuals other than the applicant. It comprises information gathered by OHO as a result of complaints made by the applicant about the treatment of a patient (**Patient X**) other than the applicant by The Hospital.<sup>52</sup> Consequently, it includes medical records, names, email addresses and telephone numbers of individuals other than the applicant.
46. However, three pages within the Category C Information include the applicant's personal information, in the context of a phone call the applicant made to the patient liaison service at The Hospital about Patient X's treatment.<sup>53</sup> This gives rise to the public interest factor favouring disclosure,<sup>54</sup> as, by virtue of being the applicant's opinion about Patient X's treatment,<sup>55</sup> these pages contain the applicant's personal information. Ordinarily, a high weight is given to this factor in favour of disclosure. However, in circumstances such as those in this matter, where disclosure of the applicant's opinion would also disclose the personal information of others (such as sensitive health information), I consider that a lower weight in favour of disclosure is warranted. Accordingly, I afford the personal information factor in favour of disclosure moderate weight.
47. I have considered whether the nature of the majority of the Category C Information gives rise to what can collectively be referred to as the accountability and transparency public interest factors in favour of disclosure. These factors arise where disclosure of information could reasonably be expected to enhance the Government's accountability and reveal the reason for a government decision and any background or contextual information that informed the decision.<sup>56</sup>
48. I consider that it is in the public interest for OHO to be transparent and accountable in how it deals with complaints that it receives. As noted above, the majority of the Category C Information concerns OHO's investigation of the applicant's complaints about the treatment of Patient X at The Hospital. I have carefully reviewed the Category C Information and the information already released to the applicant. Included within the information disclosed to the applicant was information about the outcome of OHO's investigation into her complaints about the treatment of Patient X and some information that was gathered in the course of that investigation. I consider that while disclosure of the Category C Information may go some way to addressing accountability and transparency factors, the information already disclosed to the applicant discharges such public interest factors. The disclosed information has revealed background information that informed OHO's decision concerning the applicant's complaints about Patient X's treatment at The Hospital, OHO's decision about that complaint and its reasons for the decision.

<sup>51</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>52</sup> Submissions received 28 January 2019, 6 March 2019 and 26 April 2019.

<sup>53</sup> Pages 1732-1734 which comprise file notes made by the patient liaison service at The Hospital about a phone call from the applicant lodging concerns about the treatment received by another individual at The Hospital.

<sup>54</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>55</sup> See definition of *personal information* at footnote 16 above.

<sup>56</sup> Schedule 4, part 2, items 1 and 11 of the RTI Act.

49. In light of the information already disclosed to the applicant and the sensitive nature of the Category C information, I consider that its disclosure would only marginally advance OHO's accountability and transparency and reveal the reason for OHO's decisions and any background or contextual information that informed the decisions. In these circumstances, I afford the accountability and transparency factors favouring disclosure<sup>57</sup> low weight.
50. The applicant submitted<sup>58</sup> that OIC must consider *"the impact on [her] of that withheld information"* and *"if the withheld document was critical to a decision made to not investigate medical malpractice ... the overriding interest is not a third party's privacy."* The applicant's submissions appear prima facie to raise public interest factors favouring disclosure relating to assisting inquiry into possible deficiencies in the conduct or administration of an agency or official;<sup>59</sup> revealing or substantiating that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct<sup>60</sup> and advancing the applicant's fair treatment in her dealings with OHO and other government agencies.<sup>61</sup>
51. It is clear from the applicant's submissions that she feels strongly about this point. I note that 2778 pages and 6 telephone recordings have been disclosed in full to the applicant and a further 119 part pages have been disclosed. These numerous pages of disclosed information<sup>62</sup> contain information about OHO's investigations and decisions concerning the applicant's complaints about **her** treatment at The Hospital, and provide significant detail about the investigations undertaken into the treatment received by Patient X.
52. I have carefully reviewed the Category C Information. Relevant to the applicant's submissions, it shows that, as part of their investigation into the applicant's complaints about Patient X's treatment, OHO obtained information from the Queensland Police Service and The Hospital. The Category C Information shows that OHO properly investigated the applicant's complaints, and The Hospital properly responded by providing medical records and details about Patient X. The Category C Information does not contain details of misconduct, malpractice or other unlawful conduct.
53. Accordingly, I am satisfied that disclosure of the Category C Information would not assist inquiry into possible deficiencies of conduct or administration, or reveal or substantiate that an agency or official engaged in misconduct or negligent, improper or unlawful conduct; nor would it further advance fair treatment of the applicant in her dealings with OHO or other agencies. In these circumstances, I consider these factors favouring disclosure<sup>63</sup> do not apply.
54. I have carefully considered all factors listed in schedule 4, part 2 of the RTI Act, and do not consider any other public interest factors in favour of disclosure of the Category C Information, beyond those identified above, apply.

### **Factors favouring nondisclosure**

55. 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>64</sup> A further factor

<sup>57</sup> Schedule 4, part 2, items 1 and 11 of the RTI Act.

<sup>58</sup> Submissions dated 7 August 2018.

<sup>59</sup> Schedule 4, part 2, item 5 of the RTI Act.

<sup>60</sup> Schedule 4, part 2, item 6 of the RTI Act.

<sup>61</sup> Schedule 4, part 2, item 10 of the RTI Act.

<sup>62</sup> 2778 full pages, 119 part pages, 6 full telephone recordings.

<sup>63</sup> Schedule 4, part 2, items 5, 6 and 10 of the RTI Act.

<sup>64</sup> Schedule 4, part 4, section 6(1) of the RTI Act.

favouring nondisclosure arises if disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy.<sup>65</sup>

56. As previously noted, the Category C Information almost entirely comprises the personal information<sup>66</sup> of other individuals, including the name of Patient X, about whose treatment the applicant made complaints; the investigation details, including medical records concerning Patient X; and the outcome of the investigations. I am satisfied that disclosure of the Category C Information could reasonably be expected to prejudice the protection of the right to privacy of other individuals and cause a public interest harm by disclosing their personal information. In my opinion the extent of the public interest harm and the impact on the privacy of individuals would be substantial in the event of disclosure. While, to an extent, this information is known to the applicant and this knowledge reduces the weight of these factors somewhat, it does not negate it. Taking this into account, along with the very sensitive nature of most of the Category C Information, I afford these factors favouring nondisclosure very high weight.
57. As noted at paragraph 46, three pages of the Category C Information include the applicant's personal information, in the context of a file note of a telephone call the applicant made to the patient liaison service at The Hospital about Patient X's treatment as discussed.<sup>67</sup> This would ordinarily raise a factor favouring disclosure, as, by virtue of being the applicant's opinion, these pages contain the applicant's personal information.<sup>68</sup> Section 90 of the IP Act provides a mechanism by which contrary to the public interest information may be deleted from a document where practicable. However, the applicant's personal information is so intertwined in these pages with the personal information about Patient X that it is impossible to disclose the applicant's personal information without also disclosing the personal information of the other individual.<sup>69</sup>
58. Relevantly, the information about Patient X comprises extremely sensitive and private health information. I consider that the factor favouring disclosure<sup>70</sup> of the applicant's personal information is significantly outweighed by the intrusion into Patient X's privacy and the public interest harm that would arise from disclosure of Patient X's information.
59. I have carefully considered all factors listed in schedule 4, parts 3 and 4 of the RTI Act, and have not identified any other public interest considerations telling in favour of nondisclosure of the Information in Issue, beyond those identified above.

### **Balancing the public interest**

60. In these circumstances, I consider that the very high weight afforded to the nondisclosure factors relating to protection of personal information and privacy<sup>71</sup> outweigh the transparency, accountability and applicant's information factors favouring disclosure<sup>72</sup> of the Category C Information.
61. I therefore find that disclosure of the Category C Information would, on balance, be contrary to the public interest and access to it may be refused on this basis.<sup>73</sup>

<sup>65</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>66</sup> See definition of *personal information* at footnote 16 above.

<sup>67</sup> Pages 1732-1734 which comprise file notes made by the patient liaison service at The Hospital about a phone call from the applicant lodging concerns about the treatment received by another individual at The Hospital.

<sup>68</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>69</sup> See *Poyton and Metro North Hospital and Health Service* [2016] QICmr 50 (13 December 2016) at [66].

<sup>70</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>71</sup> Schedule 4, part 3, item 3 and schedule 4, part 4, section 6(1) of the RTI Act.

<sup>72</sup> Schedule 4, part 2, items 1, 7 and 11 of the RTI Act.

<sup>73</sup> Under section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

## Non-existent or unlocatable documents

62. On external review, the applicant raised general concerns about the sufficiency of OHO's searches and referred<sup>74</sup> to the following three categories of additional documents, or types of documents, that she considered exist and have not been located by OHO:

Document or type of documents	Description
Category (i) documents	Records of Officer H's consultations with persons at The Hospital and the Office of the Chief Psychiatrist ( <b>OCP</b> ). <sup>75</sup>
Category (ii) documents	Additional documents held by Officer H, Officer Da, Officer A, Officer T, Officer G, Officer B, Officer Dr, Officer Pr and Officer Pe.
Category (iii) documents	A workplace health and safety assessment relating to the applicant. <sup>76</sup>

63. The applicant made particular submissions about the Category (i), (ii) and (iii) documents that she considered existed, but were not located by OHO. Specifically:

- *'There was a WHS risk assessment done on (the applicant) classing (her) as a hazard and googling photos of (her)'*
- *'Officer H consulted with many people at the hospital and OCP, but those consultations, phone records, emails and case notes are missing'; and*
- *'Officer H, Officer Da, Officer A, Officer T, Officer G, Officer B, Officer Dr, Officer Pr and Officer Pe should hold a lot of documents about me, but they are missing'.<sup>77</sup>*

64. The applicant made a number of submissions to OIC which described the way she felt OHO had failed to conduct sufficient searches. For example, the applicant contended that *'the corruption by OHO is very obvious and it is obvious the method of asking them to provide their notes themselves is inappropriate'* and went on to request that OIC *'get all emails from the server'* rather than *'by asking the author or their boss ... to provide their own emails'*.<sup>78</sup> Generally, the applicant submitted that she was not satisfied that the searches had been appropriately conducted by OHO.<sup>79</sup>

65. On external review, and at OIC's request, OHO conducted further searches for documents responsive to the application, including the Category (i), (ii) and (iii) documents. As a result of those further searches, OHO located and released the Additional Documents, which were Category (ii) documents.<sup>80</sup> OHO did not locate any Category (i) or Category (iii) documents.

66. The applicant asserted that the location of Additional Documents by OHO, and noting *'they withheld over 500 documents by not even searching them'*, was evidence that further additional documents were being withheld by OHO.<sup>81</sup>

<sup>74</sup> In the external review application.

<sup>75</sup> To avoid identifying the applicant, I have de-identified the OHO officers and the hospital specified in the applicant's submissions.

<sup>76</sup> The applicant submitted that *"this assessment by OHO classed her as a hazard and (OHO staff) googled photographs of her"*.

<sup>77</sup> In the external review application.

<sup>78</sup> Submission dated 16 March 2019.

<sup>79</sup> External review application. In an email sent on 8 August 2018, the applicant asserted that OHO's search was *'unreasonable because it did not mitigate bias, and consequently entire files were missing'*.

<sup>80</sup> The Additional Documents generally comprise emails OHO received from the applicant which were on-forwarded to OHO staff members. OHO also noted in its submissions to OIC dated 14 February 2019 that the applicant may already have copies of some of the Additional Documents as a result of previous IP access applications that targeted documents located within OHO's document management systems only.

<sup>81</sup> Submission dated 30 April 2019.

## Relevant law

67. Under the RTI Act, access to a document may be refused if the document is non-existent or unlocatable.<sup>82</sup>
68. To be satisfied that documents are non-existent, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors, including:<sup>83</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 to which the request relates.
69. When proper consideration is given to relevant factors, it may not be necessary for searches to be conducted.<sup>84</sup> In such instances, it is not necessary for the agency to search for the document — rather, it is sufficient that the relevant circumstances to account for the non-existent document are adequately explained by the agency.
70. However, if searches are relied on to justify a decision that the documents do not exist, all reasonable steps must be taken to locate the documents. What constitutes reasonable steps will vary from case to case as the search and enquiry process an agency will be required to undertake will depend on which of the key factors are most relevant in the particular circumstances.
71. To determine whether a document exists, but is unlocatable, the RTI Act requires consideration of whether there are reasonable grounds for the agency to be satisfied that the requested document has been or should be in the agency's possession; and whether the agency has taken all reasonable steps to find the document. In answering these questions, regard should again be had to the circumstances of the case and the key factors.<sup>85</sup>
72. The Information Commissioner's external review functions include investigating and reviewing whether agencies have taken reasonable steps to identify and locate documents applied for by applicants.<sup>86</sup> Generally, the agency that made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.<sup>87</sup> However, where an external review involves the issue of missing documents, the applicant has a

<sup>82</sup> Sections 47(3)(e) and 52 of the RTI Act. A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist—section 52(1)(a) of the RTI Act. 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—section 52(1)(b) of the RTI Act.

<sup>83</sup> *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (*Pryor*) at [19] which adopted the Information Commissioner's comments in *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009).

<sup>84</sup> For example, where it is ascertained that a particular document was not created because the agency's processes do not involve creating that specific document.

<sup>85</sup> *Pryor* at [21].

<sup>86</sup> Section 137(2) of the IP Act. The Information Commissioner also has power under section 115 to require additional searches to be conducted during an external review.

<sup>87</sup> Section 87(1) of the RTI Act.

practical onus to establish reasonable grounds to believe that the agency has not discharged its obligation to locate all relevant documents.

### Findings

73. OHO has relied on searches by its officers, and provided search certifications, to demonstrate that all relevant documents have been located. Accordingly, the question I must consider is whether OHO has taken *all reasonable steps* to locate documents *relevant to the access application*.
74. In processing the external review application, OHO conducted further searches of all OHO's electronic records systems,<sup>88</sup> made enquiries of relevant staff and provided search certifications to OIC. In respect of the further searches conducted on external review, OHO has relevantly submitted that:
  - no hard copy documents exist, as all documents relevant to the application were created or received electronically; and
  - searches of the Outlook email system and desktop folders of Officer's Pr and Da were undertaken with the assistance of OHO's IT service desk.
75. In respect of the Category (i) and (iii) documents, OHO has submitted<sup>89</sup> that:
  - there are no documents in relation to Officer H consulting with the OCP that exist within the scope of this access application (up to 19 April 2018). A document confirming that Officer H has **not** consulted with the OCP exists but falls outside the date range of this access application
  - a search of Officer H's email and desktop records did not locate any Category (i) documents and Officer H confirmed that they did not undertake consultations of the kind which would create Category (i) documents; and
  - a further search, using the applicant's name as the key search term, was undertaken of all OHO databases and no Category (iii) documents were located.
76. The manner in which an external review is conducted is, subject to the IP Act, at the Information Commissioner's discretion.<sup>90</sup> Neither an agency nor an applicant can direct the Commissioner in their conduct of an external review. There is no evidence before me to suggest that the officers who conducted the searches for responsive documents, either initially or on external review, have not undertaken those searches appropriately. The applicant's mere assertion of a belief that documents *may* or *should* have been created does not mean that further documents of this nature were in fact created. There is no objective evidence before me that leads to any expectation that further documents exist, or that that searches were not conducted properly.
77. In relation to the applicant's submissions that OHO withheld over 500 pages of information and this was evidence that further searches were required, I note that the terms of an applicant's access application will determine the parameters of the agency's searches.<sup>91</sup> In this matter the applicant agreed to narrow the scope of the access application and specifically excluded emails and letters the applicant sent to, and received from, OHO, and duplicated medical records.<sup>92</sup> Accordingly, I consider it is

<sup>88</sup> OHO advised that these systems include Resolve, HPRM, Microsoft Outlook, Windows Explorer shared drive and desktop folders. The search certifications provided to OIC on 14 February 2019 confirms that these searches were conducted by OHO's Information Management Officer.

<sup>89</sup> Submissions dated 14 February 2019.

<sup>90</sup> Section 108(1)(a) of the IP Act.

<sup>91</sup> *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491.

<sup>92</sup> The applicant emailed her agreement to the amended scope to the OHO officer on 28 May 2018.

reasonable that such documents were not captured by OHO's original searches and their absence from the original information is not demonstrative of a failure to undertake appropriate searches, but the result of the agreed scope of the access application between the applicant and OHO.

78. I consider that OHO has ensured all relevant staff have undertaken comprehensive and appropriately targeted searches of all possible locations where it was reasonable to expect that the types of information requested in the access application would be found. In these circumstances, I consider it unnecessary for further searches to be conducted in the manner requested by the applicant.

79. Based on all of the material before me, I consider that:

- OHO has conducted searches of all relevant locations where it was reasonable to expect that the types of information requested in the access application (including the Category (i) and (iii) documents and any further Category (ii) documents) would, if they existed, be found; and
- there are reasonable grounds to be satisfied that any further responsive documents, (including the Category (i) and (iii) documents and any further Category (ii) documents) are non-existent and access may be refused on this basis.<sup>93</sup>

## DECISION

80. I vary OHO's decision and find that:

- the Category A Information may be deleted on the basis that it comprises information that is irrelevant under section 88 of the IP Act
- access to the Category B Information may be refused on the basis that it is subject to legal professional privilege and therefore exempt under section 67(1) of the IP Act and section 47(3)(a) of the RTI Act
- access to the Category C Information may be refused on the basis that it is, on balance, contrary to the public interest to disclose under section 67(1) of the IP Act and 47(3)(b) of the RTI Act; and
- access to further documents sought in response to the access application may be refused under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act on the basis they are non-existent.

81. 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: 6 August 2019**

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<sup>93</sup> Under 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

## APPENDIX

### Significant procedural steps

Date	Event
7 August 2018	OIC received the external review application.
4 December 2018	OIC received the applicant's emails addressed to other agencies (which were copied to OIC).
5 December 2018	OIC received the applicant's submissions.
19 December 2018	OIC asked the agency to conduct further searches for responsive documents and provide submissions on deletion of irrelevant information and searches already undertaken.
14 February 2019	OIC received the Additional Information located by OHO and OHO's submissions and search certifications.
16 March 2019	OIC received the applicant's further submissions.
8 April 2019	OHO emailed the Additional Information to the applicant. OIC received three sets of submissions from the applicant.
26 April 2019	OIC conveyed its preliminary view to the applicant. OIC received the applicant's submissions.
27 April 2019	OIC received the applicant's further submissions.
30 April 2019	OIC invited the applicant to make further submissions by any written document or audio format she wishes. OIC received the applicant's further submissions.
8 May 2019	OIC provided the applicant with further information and invited the applicant to make further submissions.
28 May 2019	OIC received the applicant's further submissions.
18 June 2019	OIC received the applicant's further submissions.