



Decision and Reasons for Decision

Citation:	<i>H89 and Metro North Hospital and Health Service</i> [2020] QICmr 18 (27 March 2020)
Application Number:	314266
Applicant:	H89
Respondent:	Metro North Hospital and Health Service
Decision Date:	27 March 2020
Catchwords:	<p>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 public interest – whether access may be refused under section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(b) of the <i>Right to Information Act 2009</i> (Qld)</p> <p>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 – sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009</i> (Qld)</p>

REASONS FOR DECISION

Summary

1. The applicant applied to Metro North Hospital and Health Service (**MNHHS**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to all of her 'medical records including mental health'.¹
2. MNHHS located 503 pages and decided to give access to this information, except for certain information requested from and/or provided by third parties to health professionals (**Third Party Information**).
3. The applicant applied² for external review of the decision. On external review, some further information (the substance of which was already known to the applicant) was released to the applicant by MNHHS.

¹ Access application received by MNHHS on 26 September 2018.

² On 12 November 2018.

4. Following this further disclosure, access remains refused to Third Party Information appearing on 18 pages. The applicant is also dissatisfied with the sufficiency of the searches conducted by MNHHS.
5. I affirm MNHHS' decision and find that access to the Third Party Information may be refused under section 67(1) of the IP Act, and section 47(3)(b) of the *Right to Information Act 2009* (Qld) (**RTI Act**). I also find that MNHHS has taken all reasonable steps to identify and locate the documents the applicant has applied for.

Background

6. The evidence, submissions, legislation and other material I have considered in reaching my decision are as disclosed in these reasons (including in footnotes and Appendix).
7. I have also had regard to the *Human Rights Act 2019* (Qld),³ particularly the right to seek and receive information.⁴ I consider a decision-maker will be '*respecting and acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the RTI Act.⁵ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act.

Reviewable decision

8. The decision under review is MNHHS' decision dated 18 October 2018.
9. The applicant has submitted to OIC that she has recently made a further access application to MNHHS, and has sought to have that access application '*amalgamated*' with this external review.⁶ This later application is not currently the subject of an external review, and the IP Act does not contemplate the amalgamation of applications on external review.

Evidence considered

10. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (particularly footnotes and Appendix).

Information in issue

11. As noted in paragraph 3 above, during the external review, certain information has been released to the applicant by MNHHS.⁷ The information remaining in issue is the Third Party Information appearing on 18 pages of medical records.⁸

Issues for determination

12. The issues for determination are whether:

³ Referred to in these reasons as the **HR Act**, and which came into force on 1 January 2020.

⁴ Section 21 of the HR Act.

⁵ *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 [11].

⁶ The applicant's submissions dated 31 January 2020 foreshadowed this, and further submissions on 3 March 2020 requested that the '*granting/refusal of access be combined with this External Review Application*'.

⁷ In her external review application, the applicant also advised that she did not seek access to a mobile telephone number appearing on page 147 of Volume 1 of the documents. Accordingly, I have not considered whether the applicant is entitled to this information.

⁸ Specifically, information on CIMHA page 14-15, 18 and 23, Volume 1 pages 129-131, 137, 141, 142, 148, 150-152, 154 and 162, and Volume 2 pages 64 and 79.

- access to the Third Party Information may be refused under the RTI Act on the basis that disclosure is, on balance, contrary to the public interest; and
 - whether access to any further documents may be refused on the basis that they do not exist.
13. The applicant has raised numerous concerns about OIC's processes. On external review, the applicant has had several opportunities to make submissions.⁹ A preliminary view was conveyed to the applicant early in the review process.¹⁰ In the time since, the applicant has provided more than 400 pages of submissions and requested nine extensions of time to provide these submissions. In terms of identifying opportunities for early resolution and promoting settlement of the review,¹¹ from an early stage,¹² the applicant has indicated that she seeks a formal written decision in the matter, and that she intends to appeal this decision to QCAT.
14. I have assessed each of the applicant's submissions, and as a result of these submissions, additional information has been released to her.¹³ I have also considered the applicant's submissions in revising my preliminary assessment of the issues in this review.¹⁴ In my reasons for decision, I have referred to the applicant's submissions to the extent that they are relevant to the issues for my consideration.
15. The applicant has also raised concerns about the inclusion of further documents on her medical records after the date of her access application, being 12 November 2018. In assessing the issues for determination, I have only considered the applicant's entitlement to access documents in existence on the date of her access application, and have not considered records that were created following that date.¹⁵

Third party information

Relevant law

16. Under the IP Act, access to documents may also be refused to the extent they comprise information the disclosure of which would, on balance, be contrary to the public interest.¹⁶ 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.¹⁷
17. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:¹⁸
- identify factors irrelevant to the public interest and disregard them

⁹ The Information Commissioner is required to adopt procedures that are fair, having regard to the obligations of the commissioner under the Act and to ensure each participant has an opportunity to present their views to the commissioner by making written or oral submissions: Section 110(2) of the IP Act

¹⁰ On 1 March 2019. Subsequent views were conveyed on 11 July 2019 and 27 November 2019. On each occasion, the applicant was invited to provide submissions in response.

¹¹ Section 103(1) of the IP Act.

¹² In her submission dated 18 March 2019, the applicant stated that she requires a formal decision so that an appeal can be made.

¹³ Following negotiation with MNHHS, as noted in paragraph 3 and 11 above.

¹⁴ This view was conveyed to the applicant by letter dated 27 November 2019. The applicant then provided further submissions in response on 31 January 2020 and 3 March 2020.

¹⁵ Section 47(1) of the IP Act provides that an access application is taken only to apply to documents that are, or may be, in existence on the day the application is received.

¹⁶ Section 67(1) of the IP Act and section 47(3)(b) of the RTI Act.

¹⁷ 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.

¹⁸ Section 49(3) of the RTI Act.

- 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.

Irrelevant factors

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

Factors favouring disclosure

19. There is a general public interest in advancing public access to government-held information, and the IP Act is administered with a '*pro-disclosure bias*', meaning that an agency should decide to give access to information, unless giving access would, on balance, be contrary to the public interest.¹⁹
20. The Third Party Information contains the applicant's own personal information, albeit intertwined with personal information of third parties. This gives rise to a factor in favour of disclosure.²⁰ In terms of the weight to be attributed to this factor, a person's healthcare information appearing in their medical records is a matter at the core of their personal sphere, and accordingly, I consider it carries significant weight.
21. I also consider that disclosure of the Third Party Information could reasonably be expected to enhance MNHHS' accountability and inform the community of its operations.²¹ In considering the weight to be afforded to this factor, I note that the applicant has already been granted access to a significant amount of information by MNHHS,²² and the nature of the Third Party Information is such that it provides limited information about the actions of MNHHS. This is reflected in the applicant's lengthy submissions about the governance of an organisation that she believes is related to one of the third parties who provided information to MNHHS. However, the Third Party Information does provide some limited insight into the information available to MNHHS at particular times, and may provide some background to the applicant's interactions with staff at the relevant hospital. For these reasons, I afford these factors low weight in favour of disclosure.
22. The applicant has raised concerns that the Third Party Information has not been fact-checked/verified and is inaccurate, malicious and vindictive. Given these concerns, I have considered the factor that favours disclosure where disclosure could reasonably be expected to reveal that information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant.²³ However, the nature of the Third Party Information is that it records third parties' concerns and opinions. Such information is, by its very nature, shaped by factors such as the individuals' memories, impressions and points of view. This inherent subjectivity 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 the factor to apply, it is not sufficient to show that the opinions/concerns are disputed. Accordingly, in my view, this factor does not carry any weight.

¹⁹ Section 64(1) of the IP Act.

²⁰ Schedule 4, part 2, item 7 of the RTI Act.

²¹ Schedule 4, part 2, item 1 and 3 of the RTI Act.

²² The applicant was granted full access to 476 pages, and partial access to 27 pages (the only redaction on one of these pages was a mobile telephone number, and a further eight full pages were released during the review).

²³ Schedule 4, part 2, item 12 of the RTI Act.

23. 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 Third Party Information.²⁴ A factor 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, or reveal or substantiate that an agency or official has engaged in misconduct, or negligent, improper or unlawful conduct²⁵
 - advance fair treatment in accordance with the law in dealings with agencies;²⁶ or
 - contribute to the administration of justice generally (including procedural fairness) or for a person.²⁷
24. As noted above, the information is such that it is comprised of opinions/concerns of third party individuals, and does not provide any information of substance concerning the conduct of MNHHS or the hospital. Similarly, although the applicant understandably would like to know what has been said about her, I am not able to see how disclosure of this information would contribute to administration of justice for her (or more generally). Accordingly, in the circumstances of this matter, I have given minimal weight to these factors favouring disclosure.

Factors favouring nondisclosure

Personal information and Privacy

25. The RTI Act recognises that disclosure would cause a public interest harm if it would disclose personal information of a person, whether living or dead.²⁸ The term '*personal information*' is defined as follows in the RTI Act:²⁹
- information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*
26. The Third Party Information is comprised of information requested from and/or provided by third parties to health professionals. For the most part, it is uncontroversial that the information and opinions appearing in the documents are the third party individuals' personal information, as it is comprised of their actions, opinions and concerns, and their identities are apparent from the information. However, in relation to some of the information, the applicant contends that the third party has used a false name, or a pseudonym, and has provided extensive evidence to the Information Commissioner in support of her contention that the individual is '*fictitious*'.
27. I am satisfied that even if the individual has used a false name, their identity can '*reasonably be ascertained*' from the information. That is, using additional information, such as the surrounding information in the documents and contextual information

²⁴ External review application.

²⁵ Schedule 4, part 2, item 6 of the RTI Act.

²⁶ Schedule 4, part 2, item 10 of the RTI Act.

²⁷ Schedule 4, part 2, item 16 and item 17 of the RTI Act.

²⁸ Schedule 4, part 4, item 6(1) of the RTI Act. In *Kelson v Queensland Police Service & Anor* [2019] QCATA 67, Daubney J, President of the Queensland Civil and Administrative Tribunal explained that the Information Commissioner is '*not required to reason how the disclosure of the personal information could amount to a public interest harm; that harm is caused by the very disclosure of the information itself*' at [94]

²⁹ See schedule 5 of the RTI Act which refers to section 12 of the IP Act.

concerning the individuals' connection and contact with the applicant, the third party's identity can reasonably be ascertained.

28. Accordingly, I am satisfied that the personal information harm factor applies, including if an individual has used a false name. In terms of the weight of this factor, having considered the sensitive nature of the information, and the circumstances of its provision to MNHHS, I am satisfied that the harm would range from moderate to significant.
29. A separate factor favouring nondisclosure will arise where disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy.³⁰ The concept of 'privacy' is not defined in the RTI Act. It can, however, essentially be viewed as the right of an individual to preserve their '*personal sphere*' free from interference from others.³¹ I am satisfied that disclosure of the Third Party Information would interfere with the personal sphere of the relevant third parties, as it would disclose communications involving sensitive opinions and concerns conveyed to (or sought by) a health care provider.³² In terms of the weight to be attributed to this factor, I am satisfied that the prejudice would range from moderate to significant, depending on the nature and context of the information provided.

Confidential information

30. Finally, a factor favouring nondisclosure arises where disclosure of the information could reasonably be expected to prejudice an agency's ability to obtain confidential information.³³ I am satisfied that people who provide information to healthcare professionals do so with an expectation of confidentiality. The very nature of the information in issue here is that it comprises information provided to healthcare practitioners for their assessment of the applicant. I acknowledge that the applicant has concerns about the accuracy of the information and the hospital's response to it. However, even where the content of the information is disputed, disclosure of it could reasonably be expected to discourage other individuals from coming forward with confidential information to the hospital in the future. Given the importance of healthcare professionals obtaining information from the community in order to make informed assessments and provide appropriate care, I afford this factor significant weight.

Balancing the public interest

31. I acknowledge the prodisclosure bias of the IP Act, and I have attributed significant weight in favour of the applicant accessing her own medical record. I also acknowledge that there is a public interest in MNHHS being accountable and transparent, and the applicant understanding the background to its decisions. However, given the specific and limited nature of the Third Party Information, these factors are outweighed by the moderate to significant weight I have attributed to factors concerning personal information and privacy, and the significant weight attributed to the prejudice to MNHHS' ability to obtain confidential information. Accordingly, I am satisfied that disclosure of the Third Party Information would, on balance, be contrary to the public interest.

³⁰ Schedule, 4, part 3, item 3 of the RTI Act.

³¹ Paraphrasing the Australian Law Reform Commission's definition of the concept in '*For your information: Australian Privacy Law and Practice*' Australian Law Reform Commission Report No. 108 released 12 August 2008, at paragraph 1.56. Cited in *Balzary and Redland City Council; Tidbold (Third Party)* [2017] QICmr 41 (1 September 2017) at [28].

³² For the same reasons as set out above, I consider the prejudice applies even if an individual used a false name when communicating with MNHHS.

³³ 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 Third Party Information in this review.

MNHHS' searches

32. The applicant has raised concerns about the sufficiency of MNHHS' searches. She is concerned that the following documents have not been located:³⁴
 - referrals generated by information contained in Consumer Integrated Mental Health Application (**CIMHA**)³⁵
 - details of certain telephone calls and a letter
 - complaints to '*Patient Liaison Officers*' and outcomes of these complaints; and
 - triage and assessment documents in relation to a particular admission.
33. Overall, having considered the applicant's voluminous submissions, it is my understanding that the applicant contends that she has not been provided with her complete medical records, including mental health records.
34. I have considered the information released to the applicant, which is comprised of:
 - a copy of her CIMHA electronic file comprising direct entry records and scanned records (including consumer assessments and progress notes); and
 - two volumes of scanned paper files comprising hospital medical records within the date range of the access application.³⁶
35. Searches conducted by MNHHS included:³⁷
 - obtaining the relevant paper records from the medical records unit
 - mental health records (electronically generated through CIMHA and scanned paper records)
 - a search of the *Auslab* system to search for pathology records
 - a search of an application called *Intelle Connect* to search for medical imaging records; and
 - use of the '*Viewer*' tool to search for discharge summaries.³⁸
36. MNHHS also submitted to OIC that incident forms and complaints³⁹ do not form part of a patient's medical record, and that some of the concerns raised by her relate to information that has, in fact, been released.⁴⁰ MNHHS also provided responses to some of the questions raised by the applicant in external review submissions by explaining that:
 - 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

³⁴ In submissions to OIC dated 7 June 2019, July 2019 and 31 January 2020.

³⁵ CIMHA is a State-wide electronic mental health database that is the designated patient record for the purposes of the *Mental Health Act 2016* (Qld).

³⁶ This includes the paper medical file (including clinical information from various units within the relevant hospital, private practice clinic information, outpatient information and some records of the hospital's acute care team, and pathology records, medical imaging records and discharge records).

³⁷ Submissions provided by MNHHS on 10 July 2019.

³⁸ MNHHS submitted that if there is an admission of more than one day with a discharge summary, they use the Viewer tool to search the discharge summary.

³⁹ To the Consumer Liaison Office.

⁴⁰ More specifically, MNHHS has confirmed that the triage and assessment documents sought by the applicant appear at page 26 onwards of volume 1 of the paper files released to her.

records.

37. I have considered the applicant's concerns about documents that she considers may be missing, but having regard to MNHHS' recordkeeping practices, the searches conducted, and the information located, I am satisfied MNHHS has taken all reasonable steps to locate the information sought by the applicant with clear reference to its current and historical record keeping practices and policies. Accordingly, I find that access to any further information may be refused on the basis that it does not exist.⁴¹

DECISION

38. I affirm MNHHS decision to refuse access to details on the Third Party Information under section 67(1) of the IP Act and sections 47(3)(b) of the RTI Act. I also refuse access to any further information under 47(3)(e) and 52(1)(a) of the RTI Act on the basis that it is nonexistent.
39. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

S Martin
Assistant Information Commissioner

27 March 2020

⁴¹ Section 47(3)(e) and 52(1)(a) of the RTI Act. Also, as noted above, I consider that complaint/incident records fall outside the scope of the access application dated 26 September 2018 which sought access to all of the applicant's *'medical records'* including *'mental health'*.

APPENDIX

Significant procedural steps

Date	Event
12 November 2018	OIC received the application for external review.
13 November 2018	OIC requested relevant procedural documents from MNHHS.
14 November 2018	OIC received the requested procedural documents.
26 November 2018	OIC notified the applicant and MNHHS that the external review application had been accepted. OIC requested additional information from MNHHS.
27 November 2018	OIC received the requested information from MNHHS.
22 January 2019	OIC provided the applicant with an update on the status of the review.
1 March 2019	OIC conveyed a preliminary view to the applicant and requested submissions in response.
18 March 2019	OIC received submissions from the applicant. The applicant requested additional time to provide further submissions.
19 March 2019	OIC granted the applicant's extension request, and clarified procedural issues.
5 April 2019	OIC received a further extension request from the applicant.
8 April 2019	OIC granted the applicant's extension request.
26 April 2019	OIC received (and granted) a further extension request from the applicant.
10 May 2019	OIC received a further extension request from the applicant.
14 May 2019	OIC granted the applicant's extension request.
24 May 2019	OIC received a further extension request from the applicant.
27 May 2019	OIC granted the applicant's extension request.
7 June 2019	OIC received submissions from the applicant.
12 June 2019	OIC received submissions from the applicant.
20 and 21 June 2019	The applicant advised that she was seeking to make further submissions, and OIC granted an extension to provide these submissions.
24 June 2019	The applicant called OIC to discuss her sufficiency of search concerns and procedural issues. OIC wrote to the applicant requesting further and final submissions, and advised that it was considering her sufficiency of search concerns.
5 July 2019	OIC received submissions from the applicant and a request for an extension to provide further submissions.
10 July 2019	OIC received submissions by telephone from MNHHS concerning the searches it had conducted.
11 July 2019	OIC conveyed a preliminary view to the applicant concerning her sufficiency of search concerns, and requested submissions in response.
2 August 2019	OIC received an extension request from the applicant.
6 August 2019	OIC granted the applicant's extension request.
5 September 2019	OIC received submissions from the applicant.
17 October 2019	OIC wrote to MNHHS concerning the release of certain information to the applicant.

Date	Event
6 November 2019	OIC wrote to MNHHS to confirm it would release certain information to the applicant.
15 November 2019	MNHHS confirmed that it had released certain information to the applicant.
27 November 2019	OIC conveyed a revised preliminary view to the applicant and requested submissions in response.
12 and 13 December 2019	OIC received (and granted) an extension request from the applicant.
31 January 2020	OIC received submissions from the applicant and a request for an extension to provide further submissions.
4 February 2020	OIC granted the applicant's extension request.
27 February 2020	OIC received (and granted) a further extension request from the applicant.
2 and 3 March 2020	OIC received further submissions from the applicant.