



Decision and Reasons for Decision

Citation: *E70 and Hon Dr Steven Miles MP, Minister for Health and Minister for Ambulance Services [2019] QICmr 58 (11 December 2019)*

Application Number: 314562

Applicant: E70

Respondent: Hon Dr Steven Miles MP, Minister for Health and Minister for Ambulance Services

Decision Date: 11 December 2019

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - documents about the applicant and their interactions with the agency - whether disclosing particular information could reasonably be expected to prejudice a system or procedure for the protection of persons, property or the environment - section 47(3)(a) and schedule 3, section 10(1)(i) of the *Right to Information Act 2009 (Qld)*

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

REASONS FOR DECISION

Summary

1. The applicant applied to an agency under the *Information Privacy Act 2009 (Qld)* (**IP Act**) for access to various documents about themselves and their interactions with the agency and the Minister for Health.
2. In accordance with section 57 of the IP Act, the agency transferred part of the applicant's request relating to documents held by the Minister for Health to the Hon Dr Steven Miles MP, Minister for Health and Minister for Ambulance Services (**the Minister**).¹

¹ The transferred part of the application was received by the Minister on 14 February 2019.

3. The portion of the application transferred to the Minister covers the period 1 January 2008 to 14 February 2019 and seeks access to:

ALL DOCUMENTS ABOUT ME INCLUDING EMAILS TO AND FROM MINISTRY OF HEALTH. INCLUDE PERSONS BLIND COPIED. INCLUDED GOOGLE SEARCHES AND DOWNLOADS ABOUT ME. [sic]

4. Queensland Health, under delegation from the Minister:²
 - advised the applicant that the current Minister's office did not have access to emails of former Ministers and their staff and, as the Minister was sworn in as Minister for Health and Minister for Ambulance Services on 12 December 2017, it had conducted searches for the period from 12 December 2017 to 14 February 2019; and
 - located 337 pages and decided³ to release this information, except for part of one page, which it refused on the ground that it is exempt information, namely information the disclosure of which could reasonably be expected to prejudice a system or procedure for the protection of persons, property or the environment.
5. The applicant applied⁴ to the Office of the Information Commissioner (**OIC**) for external review of the decision refusing access to part of one page and raised concerns about the sufficiency of the searches conducted by Queensland Health for documents relevant to the application.
6. For the reasons set out below, I vary the decision and find that:
 - part of one page can be refused on the ground that it is exempt information on the basis that its disclosure could reasonably be expected to prejudice a system or procedure for the protection of persons, property or the environment; and
 - access to further documents may be refused on the ground that they are nonexistent or unlocatable.

Background

7. Significant procedural steps taken during the external review are set out in the Appendix to this decision.

Reviewable decision

8. The decision under review is the decision dated 4 April 2019 made by an officer of Queensland Health under delegation from the Minister.

Evidence considered

9. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).

² Section 51(1) of the IP Act provides 'An access or amendment application to a Minister may be dealt with by the person the Minister directs, either generally or in a particular case.' The decision-maker states at page 1 of the decision 'My position of Manager, Privacy and Right to Information Unit holds delegation from the Minister for Health and Minister for Ambulance Services to undertake certain decisions...'

³ On 4 April 2019.

⁴ On 4 April 2019 at 5:55 pm.

10. The applicant provided extensive submissions during the review. I have considered all of this material and have only extracted those parts which I consider have relevance to the issues to be determined in this external review.

Information in issue

11. The **Information in Issue** comprises part of page 276 of the 337 pages located and considered in the decision under review.

Issues for determination

12. The issues arising for determination are whether the Minister can refuse access to:
- the Information in Issue on the ground that it is exempt information on the basis that its disclosure could reasonably be expected to prejudice a system or procedure for the protection of persons, property or the environment; and
 - further documents responsive to the transferred application on the ground that they are nonexistent or unlocatable.

Preliminary matter

13. The applicant submitted:⁵

...please remove [Assistant Information Commissioner] Rickard from all decisions regarding me because she has a history of bias and Prejudice and malice towards me... [sic]

14. The test for assessing apprehended bias for a decision maker, as described by the High Court, is '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'.⁶ The High Court has also noted that '[t]he question 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'.⁷
15. I have carefully considered the applicant's allegation of bias. There is nothing before me to suggest that the applicant's assertions are possessed of any substance. I have not, to my knowledge, dealt with the applicant in any capacity prior to this review and the applicant's other external reviews which have been received by OIC since January 2018. Further, I cannot identify any conflict of interest in my dealing with the application for review of Queensland Health's decision on behalf of the Minister.
16. During this review, when the position that the Information in Issue and the further documents sought may be refused was put to the applicant in the form of a preliminary view, the applicant was expressly advised that the purpose of the preliminary view was to give them the opportunity to put forward their views, and if the applicant provided additional information supporting their case, this would be considered and may influence the outcome.⁸ I consider that this process demonstrates that I was not so committed to the position that the further documents sought and the Information in Issue may be

⁵ Email dated 5 September 2019 at 12:21 pm.

⁶ *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.

⁷ *Isbester v Knox City Council* (2015) 255 CLR 135 at [20] per Kiefel, Bell, Keane and Nettle JJ.

⁸ Footnote 2 of OIC's letter to the applicant dated 5 September 2019.

refused that my conclusion was already formed and incapable of alteration, whatever evidence or arguments may be presented by the applicant.⁹

17. 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 I¹⁰ might not bring an impartial and unprejudiced mind to the resolution of this matter.

Refusal of access

18. In seeking an external review of Queensland Health's decision to refuse access to the Information in Issue, the applicant submitted:¹¹

A page withheld is relevant to explain why my matters were ignored and I was treated with prejudice. Ministerial systems resulting in disability abuse and rape should be transparent.

Relevant law

19. Under the IP Act, an individual has the right to be given access to documents of an agency to the extent they contain the individual's personal information.¹² However, the right to access documents is subject to certain limitations, including grounds for refusing access.¹³
20. One ground for refusing access to a document is if it comprises exempt information.¹⁴ The various types of exempt information are set out in schedule 3 of the RTI Act. Relevantly, one type of exempt information is information the disclosure of which could reasonably be expected to prejudice a system or procedure for the protection of persons, property or the environment.¹⁵
21. For information to qualify as this type of exempt information, the Information Commissioner has previously found that the following three elements must be satisfied:¹⁶
 - a) there exists an identifiable system or procedure
 - b) it is a system or procedure for the protection of persons, property or the environment; and
 - c) disclosure could reasonably be expected to prejudice that system or procedure.

Findings

22. The Queensland Fixated Threat Assessment Centre (**QFTAC**) was implemented in 2013 and is based at the Queensland Police Service (**QPS**) Headquarters in Brisbane. QFTAC is a joint initiative between the QPS and the Queensland Forensic Mental Health Service that identifies fixated individuals through their abnormal communications with public

⁹ With reference to the test for prejudgment noted in *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507 at [72] per Gleeson CJ and Gummow J.

¹⁰ As a delegate of the Information Commissioner under section 139 of the IP Act.

¹¹ Dated 4 April 2019 at 5:55pm.

¹² Section 43 of the IP Act.

¹³ Section 67(1) of the IP Act and section 47 of the *Right to Information Act 2009* (Qld) (**RTI Act**).

¹⁴ Section 67(1) of the IP Act and section 47(3)(a) of the RTI Act.

¹⁵ Schedule 3, section 10(1)(i) of the RTI Act.

¹⁶ *SQD and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 2 September 2010) at [9] applying *Ferrier and Queensland Police Service* (1996) 3 QAR 350.

office holders. QFTAC seeks to mitigate the risk posed by these individuals by linking them with mental health interventions and addressing other identified risk factors.¹⁷

23. I am satisfied that the evaluation of concerns regarding potentially fixated individuals by QPS and QFTAC comprises an identifiable system. This system is designed to ensure the safety and security of the subject individuals, the broader community and, in some instances, publicly/privately-owned property. It includes the identification of particular communications and referral of concerned individuals, as well as intelligence gathering exercises in order to anticipate and mitigate the risks posed by fixated behavior. On this basis, I consider that requirements a) and b) at paragraph 21 above are met.

24. In relation to the Information in Issue, the applicant submitted:¹⁸

...the health minister Mr Miles and his office secretly referred me to Queensland fixated threat assessment unit and also refused to respond to my complaints based on [an] imputed mental illness which was unreasonable for them [to do]... [sic]

and:

...you cannot tell a person how their information is being used in the system or otherwise the person will understand the system that is a ridiculous argument because every organisation has a system and there is nothing secretive about Queensland fixated persons unit... [sic]

25. It is my understanding that the applicant's submissions contend that there is nothing secretive about QFTAC, therefore disclosure of the Information in Issue could not prejudice QFTAC's system and, accordingly, requirement c) is not satisfied. However, on careful consideration of the QFTAC system, I am satisfied that revealing communications between agencies and QFTAC could reasonably be expected to allow individuals to use information contained within those communications to modify their behavior in such a way so as to avoid detection by the QFTAC system. Further, I consider it reasonable to expect that this would compromise the ongoing effectiveness of the QFTAC system as vulnerable individuals in need of mental health intervention and support may not be identified by the system. There is nothing before me, in the applicant's submissions or elsewhere, to suggest that these conclusions do not apply with respect to the Information in Issue in this matter. In these circumstances, I consider that disclosure of the Information in Issue could reasonably be expected to prejudice the ongoing effectiveness of QFTAC's system. Therefore, I am satisfied that requirement c) at paragraph 21 above is also met.

26. For these reasons, I find that access to the Information in Issue may be refused on the basis that its disclosure could reasonably be expected to prejudice a system or procedure for the protection of persons, property or the environment.¹⁹

27. Where information is found to be exempt, there is no scope under the legislation to take into account public interest arguments because Parliament has decided that it would be contrary to the public interest to disclose exempt information. In addition, the Information Commissioner does not have the power to direct that access be given to information that is found to be exempt.²⁰

¹⁷ See the *Police Communications Centre Mental Health Liaison Service Evaluation Report* (May 2016) at page 12 for further discussion:

https://www.qmhc.qld.gov.au/sites/default/files/evaluation_report_police_communications_centre_mental_health_liaison_service.pdf accessed on 6 December 2019.

¹⁸ Emails dated 5 September 2019 at 12:21 pm and 12:55 pm.

¹⁹ Section 67(1) of the IP Act and section 47(3)(a) and schedule 3, section 10(1)(i) of the RTI Act. For sake of completeness, I confirm that I have had regard to the exceptions listed in schedule 3, section 10(2) of the RTI Act and am satisfied that there is no evidence in the Information in Issue to establish that any of the stated exceptions apply.

²⁰ Section 118(2) of the IP Act.

Nonexistent or unlocatable documents

Relevant law

28. Under the IP Act, another ground for refusing access to a document is if the document is nonexistent or unlocatable.²¹ A document is nonexistent²² if there are reasonable grounds to be satisfied that the document does not exist. A document is unlocatable²³ if it has been or should be in the agency's possession and all reasonable steps have been taken to find it, but it cannot be found. Where circumstances that account for nonexistent and unlocatable documents are adequately explained by an agency, it will not be necessary for the agency to conduct additional searches.
29. On external review, if an applicant contends that all relevant documents have not been located, there is a practical onus on the applicant to provide reasonable grounds to believe that the agency or Minister has not discharged the obligation to locate all relevant documents. A mere assertion that more documents should have been created and/or located without any independent evidence pointing to the existence of further documents is not sufficient to found a reasonable belief as to the existence of further relevant documents.

Findings

30. In response to the application, the Minister's Chief of Staff conducted searches of the Health@ministerial.qld.gov.au email account and the Records Manager System for documents falling within the date range of 12 December 2017 to 14 February 2019. The Chief of Staff's record of searches²⁴ explains that '[all] items for "health" email address are registered, tracked within the department Records Manager System and where appropriate responses provided'. As a result of these searches, the Minister's Office located 337 pages which were released to the applicant with the exception of part of one page.²⁵
31. In seeking an external review, the applicant contended that further documents exist, stating:²⁶

Briefings were requested of OHO and GCUH in the release by Health Minister yet there are no responses from either party in corresponding IP requests, especially OHO review ...

Insufficient searches of minister responses explaining internally why my complaints were disregarded for rapes and torture at GCUH. [sic]

and:

Oho was asked to brief the health minister as [set out at page 135 of the documents located]. [sic]

and:

OIC, I sent an IP Review to you today. It was for health minister emails. [The Minister's Chief of Staff's] emails and drafts are missing. Also the person who blocked my email address is

²¹ Sections 47(3)(e) and 52(1) of the RTI Act.

²² Section 52(1)(a) of the RTI Act.

²³ Section 52(1)(b) of the RTI Act.

²⁴ Provided to OIC on 24 July 2019.

²⁵ Being the Information in Issue contained within page 276. Refusal of this part page is discussed under the heading *Refusal of access* above.

²⁶ Emails to OIC dated 4 April 2019 at 5:55 pm, 5:57 pm and 6:12 pm.

missing.

Please ensure any comment from the Health Minister alluding to mental health and psychiatric illness or poor character is disclosed as I will file a legal claim against Minister Steven Miles for disability abuse. [sic]

32. In response to the applicant's specific concerns, Queensland Health submitted:²⁷

In preparing this response I sought advice from the Office of the Minister for Health and Minister for Ambulance Services, specifically the Chief of Staff ... [who has] advised that [they are] satisfied that no further documents exist that match the parameters of the application, including the date range specified by the applicant, accordingly, no further searches were undertaken.

In the applicant's review [they] note... that briefings were requested from both OHO and GCUH, I reviewed those documents in light of whether there was a [requirement] to undertake further searches and note that the correspondence was marked as 'no response required (Note and file)'.

I note that the applicant also appears to refer to matters that postdate [their] application, specifically where [they] refer... to the person who allegedly blocked her...

33. In relation to the alleged blocking of the applicant, Queensland Health further submits:²⁸

- the Minister's Office has not blocked receipt of email communications from the applicant; and
- rather, the Minister's Office will only action email communications from the applicant which raise new complaints. All other email communications are marked as 'no response required'.

34. In response to the above findings, the applicant submitted:²⁹

...I would like you to find out why the health minister decided all of my Whistleblower complaints were requiring no further action...

35. It is my understanding that the decision of the Minister's Office to mark correspondence from the applicant as '*no response required (Note and File)*' is a source of significant concern for the applicant. Further, it is my understanding that the applicant considers that the reasons for the Minister's inaction regarding their complaints about rape and torture would have been documented, and could be based on adverse views held by the Minister about the applicant's mental health and character.

36. Beyond the applicant's assertions, there is nothing before me to suggest that such matters are the subject of further records held by the Minister's office.

37. The applicant was advised that, as the current Minister was sworn in as Minister for Health and Minister for Ambulance Services on 12 December 2017, it had conducted searches for the period from 12 December 2017 to 14 February 2019. The applicant has not, in the course of the external review, questioned Queensland Health's advice to them that the current Minister's office did not have access to emails of former Ministers and their staff. However, for sake of completeness, I note that documents of former ministers

²⁷ Dated 24 July 2019.

²⁸ On 4 September 2019.

²⁹ Dated 5 September 2019 at 12:21 pm.

are not in the possession or control of the current Minister and are therefore no longer 'documents of a Minister' for the purpose of an access application under the IP Act.³⁰

38. I also note that OIC's role in this external review is confined to determining whether Queensland Health, in making the decision on behalf of the Minister, has, as set out at paragraph 12 above, correctly applied the provisions of the IP Act to the Information in Issue and conducted all reasonable searches for the further documents sought. OIC does not have jurisdiction to investigate complaints about the conduct of agencies or Ministers or actions taken, or not taken, by their officers, or to answer questions about the content of released documents. Rather, OIC's role in this review is limited to reviewing the decision made by the Minister in relation to access to documents that were, or may have been, in existence on the day the application was received.
39. Given the practices and procedures of the Minister's Office relating to information management and in the absence of any material other than the applicant's assertions pointing to the existence of further documents, I am unable to identify any further searches that could be conducted for documents falling within the scope of the application to the Minister. In these circumstances, I am satisfied that all reasonable searches for these documents have been conducted, and that it is not necessary for any further searches to be conducted.
40. On the basis of the above, I find that access to further documents responsive to the application may be refused on the basis that the documents sought are nonexistent or unlocatable.³¹

DECISION

41. I vary the decision under review and find that the Minister can refuse access to:
- the part of one page comprising the Information in Issue on the ground that it is exempt information on the basis that disclosure could reasonably be expected to prejudice a system or procedure for the protection of persons, property or the environment;³² and
 - further documents on the basis that they are nonexistent or unlocatable.³³
42. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

A Rickard
Assistant Information Commissioner

Date: 11 December 2019

³⁰ See 2.2 Ministerial Records of the Queensland Ministerial Handbook: <https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/ministerial-handbook/information/records.aspx> accessed on 6 December 2019. See also *Philip Morris Ltd and Treasurer* [2013] AICmr 88 and *Thomas and Prime Minister* [2014] AICmr 18.

³¹ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

³² Under section 67(1) of the IP Act and sections 47(3)(a) and 48 and schedule 3, section 10(1)(i) of the RTI Act.

³³ Under section 67(1) of the IP Act and sections 47(3)(e) 52(1) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
4 April 2019	OIC received the applicant's application for external review and three emailed submissions.
15 April 2019	OIC notified Queensland Health, as delegate of the Minister, and the applicant that the application for external review had been received and requested procedural documents from Queensland Health.
16 April 2019	OIC received the requested documents.
15 May 2019	OIC notified Queensland Health and the applicant that the application for external review had been accepted and requested copies of the documents located and any records of the searches conducted from Queensland Health.
20 May 2019	OIC received emailed submissions from the applicant.
29 May 2019	OIC received copies of the documents located, redacted in accordance with the decision, and records of the searches conducted from Queensland Health.
1 July 2019	OIC wrote to Queensland Health and requested: <ul style="list-style-type: none"> • a marked-up copy of page 276 of the documents located • copies of any correspondence with a consulted third party • completed search certifications for officers of the Minister who conducted searches for documents; and • a submission about the searches.
24 July 2019	OIC received the requested documents and a written submission from Queensland Health.
8 August 2019	OIC received emailed submissions from the applicant.
27 August 2019	OIC received emailed submissions from the applicant.
28 August 2019	OIC received two emailed submissions from the applicant.
3 September 2019	OIC received a written submission from Queensland Health.
4 September 2019	OIC received an oral submission from Queensland Health.
5 September 2019	OIC conveyed a written preliminary view to the applicant. OIC received three emailed submissions from the applicant.
11 September 2019	OIC received emailed submissions from the applicant.
13 September 2019	OIC received emailed submissions from the applicant.
19 September 2019	OIC received emailed submissions from the applicant.
25 September 2019	OIC wrote to the applicant about their external reviews.
26 September 2019	OIC received emailed submissions from the applicant.