



Decision and Reasons for Decision

Citation:	<i>J6Q8CH and Office of the Health Ombudsman [2019] QICmr 11 (9 April 2019)</i>
Application Number:	314083
Applicant:	J6Q8CH
Respondent:	Office of the Health Ombudsman
Decision Date:	9 April 2019
Catchwords:	<p>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 <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(b) and 49 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 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 <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld)</p>

REASONS FOR DECISION

Summary

1. The applicant applied¹ 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 during the period 20 April 2018 to 15 May 2018.
2. OHO located 55 pages in response to the access application and decided² to release those documents to the applicant, subject to the deletion of portions of information appearing on two pages.³

¹ Access application dated 15 May 2018.

² On 19 June 2018.

³ The Department refused access to these portions of information on the ground their disclosure would, on balance, be contrary to the public interest.

3. The applicant sought⁴ internal review of OHO's decision and, on internal review, OHO affirmed⁵ its original decision.
4. The applicant then applied⁶ to the Office of the Information Commissioner (**OIC**) for an external review of OHO's decision refusing access to information and raised concerns that OHO had not located all relevant documents.
5. On external review, OHO located 329 pages of additional documents (**Additional Documents**) and disclosed these to the applicant. Despite this, the applicant remained concerned that OHO had not located all relevant documents and made submissions accordingly.
6. For the reasons set out below, I vary OHO's decision and find that access may be refused on the grounds that:
 - the information in issue, as set out at paragraph 12 below, comprises contrary to the public interest information; and
 - further documents sought in response to the access application are nonexistent or unlocatable.

Background

7. Significant procedural steps taken in the external review are set out the Appendix.

Reviewable decision

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

Evidence considered

9. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and appendix).
10. The applicant has provided extensive submissions to OIC.⁷ A large proportion of the applicant's submissions relate to complaints and applications that she has made to other agencies, Ministers and various entities.
11. 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

12. The **Information in Issue** consists of portions of information appearing on two pages.⁸ I am unable to disclose the content of the Information in Issue,⁹ however, I generally categorise it as the personal information¹⁰ of individuals other than the applicant.

⁴ On 10 July 2018 and further detailed in the applicant's email to OHO of 11 July 2018 at 11:50 am.

⁵ On 7 August 2018.

⁶ By email dated 7 August 2018.

⁷ As set out the Appendix.

⁸ Pages numbered 18 and 37.

⁹ Section 121(3) of the *Information Privacy Act 2009* (Qld), which relevantly requires the Information Commissioner not to disclose information that is claimed to be contrary to the public interest information in a decision or reasons for a decision.

¹⁰ *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

13. Some issues were informally resolved on external review.¹¹ The remaining issues for determination are whether:
- access to the Information in Issue may be refused on the basis that its disclosure would, on balance, be contrary to the public interest; and
 - OHO's searches are sufficient to be satisfied that all reasonable steps have been taken to locate documents responding to the access application and access to further documents sought can be refused on the basis that they are nonexistent or unlocatable.

Contrary to the public interest information

Relevant law

14. An individual has a right to be given access to documents of an agency to the extent they contain the individual's personal information.¹² While the IP Act is to be administered with a pro-disclosure bias,¹³ the right of access is subject to a number of exclusions and limitations, including grounds for refusal of access.
15. 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 *Right to Information Act 2009* (Qld) (**RTI Act**). Section 47(3) of the RTI Act relevantly permits an agency to refuse access to documents to the extent they comprise information the disclosure of which would, on balance, be contrary to the public interest.¹⁴
16. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:¹⁵
- 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.
17. 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.¹⁶

Findings

Irrelevant factors

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

¹¹ OHO accepted OIC's preliminary view that disclosing part of the refused portions of information would not, on balance, be contrary to the public interest and OHO disclosed that information to the applicant.

¹² Under section 40(1)(a) of the IP Act.

¹³ Section 64(1) of the IP Act.

¹⁴ Section 47(3)(b) of the *Right to Information Act 2009* (Qld).

¹⁵ Section 49(3) of the RTI Act.

¹⁶ However, there are some recognised public interest considerations that may apply for the benefit of an individual.

Factors favouring disclosure

19. Under the RTI Act, public interest factors favouring disclosure 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.¹⁷
20. OHO must be transparent and accountable about how it deals with complaints that it receives. Having said that, in this matter it is evident from the information before me that OHO disclosed to the applicant almost all the information it located in response to the access application. I consider this disclosed information has significantly advanced OHO's accountability and revealed substantial background information that informed its decision concerning the applicant's complaint about her treatment at a hospital. Taking into consideration the nature of the Information in Issue, being the personal information¹⁸ of other individuals, I do not consider that its disclosure would further advance OHO's accountability and transparency in any significant way nor reveal the reason for OHO's decisions and any background or contextual information that informed the decisions. In these circumstances, I afford these accountability and transparency factors favouring disclosure¹⁹ low weight.
21. The applicant submitted²⁰ that OIC '*... must take into account that [she is] a protected class of person and [she is] only one person being victimised by what appears to be possibly hundreds of public Servants in power over [her]*' and that '*the accumulated impact on [her] and on other people in [her] class who have been stigmatised and as a result of that been targeted by organised collective violence and malfeasance of public servant in power such as doctors and such as police, and being exploited raped and criminalised to keep them silent and discredited.*' These submissions appear to raise factors favouring disclosure relating to revealing or substantiating that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct²¹ and advancing the applicant's fair treatment in her dealings with OHO and other government agencies.²²
22. It is clear from the applicant's submissions that she feels strongly about this point. As noted above, almost all of the information located in response to the access application has been disclosed to the applicant. This includes information about OHO's decisions concerning the applicant's complaint about her treatment at a hospital. There is no evidence in the information before me (either in the Information in Issue or the information already released to the applicant) which supports the applicant's contention that OHO and/or hospital staff have acted inappropriately in the management of the applicant's complaint or the applicant's treatment by the hospital. Given the information already released to the applicant and the nature of the Information in Issue, being the personal information of other individuals, I am satisfied that disclosure of the Information in Issue will not reveal or substantiate that an agency or official engaged in misconduct or negligent, improper or unlawful conduct or further advance fair treatment of the applicant in her dealings with OHO or other agencies. In these circumstances, I afford these factors favouring disclosure²³ no weight.
23. I have carefully considered all factors listed in schedule 4, part 2 of the RTI Act, and can identify no other public interest considerations telling in favour of disclosure of the Information in Issue, beyond those identified above.

¹⁷ Schedule 4, part 2, items 1 and 11 of the RTI Act.

¹⁸ See definition of *personal information* at footnote 10 above.

¹⁹ Schedule 4, part 2, items 1 and 11 of the RTI Act.

²⁰ Submissions dated 6 December 2018.

²¹ Schedule 4, part 2, item 6 of the RTI Act.

²² Schedule 4, part 2, item 10 of the RTI Act.

²³ Schedule 4, part 2, items 6 and 10 of the RTI Act.

Factors favouring nondisclosure

24. The RTI Act recognises that disclosing an individual's personal information to someone else can reasonably be expected to cause a public interest harm²⁴ and that a further factor favouring nondisclosure arises if disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy.²⁵
25. As previously noted, the Information in Issue comprises the personal information²⁶ of other individuals. While the Information in Issue appears in OHO's 'Delegate decision' documents concerning the applicant's complaint about her treatment at a hospital, it is solely about those other individuals.²⁷ I am satisfied that disclosure of the Information in Issue could reasonably be expected to prejudice the protection of the right to privacy of those other individuals and cause a public interest harm by disclosing their personal information. Given the nature of the Information in Issue, and taking into account that the extent of the harm in disclosing this personal information would be substantial and the impact disclosure would have on the privacy of those individuals, I afford the factors favouring nondisclosure significant weight.
26. I have carefully considered all factors listed in schedule 4, parts 3 and 4 of the RTI Act, and can identify no other public interest considerations telling in favour of nondisclosure of the Information in Issue, beyond those identified above.

Balancing the public interest

27. In these circumstances, I consider that, on balance, the factors favouring nondisclosure are determinative as they outweigh the factors favouring disclosure. Accordingly, I find that disclosure of the Information in Issue would, on balance, be contrary to the public interest and access to it may be refused on this basis.²⁸

Nonexistent or unlocatable documents

28. On external review, the applicant raised general concerns about the sufficiency of OHO's searches and referred²⁹ 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 a hospital. ³⁰
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. ³¹

²⁴ Schedule 4, part 4, section 6(1) of the RTI Act.

²⁵ Schedule 4, part 3, item 3 of the RTI Act.

²⁶ See definition of *personal information* at footnote 10 above.

²⁷ The balance of the 'Delegate decision' documents have been disclosed to the applicant.

²⁸ Under section 67(1) of the IP Act and section 47(3)(b) of the RTI Act.

²⁹ In the external review application.

³⁰ To avoid identifying the applicant, I have de-identified the OHO officers and the hospital specified in the applicant's submissions.

³¹ The applicant submitted that this assessment classed her as a hazard and googled photographs of her.

29. During the external review, OIC unsuccessfully sought³² to obtain from the applicant further details in support of the applicant's sufficiency of search submissions concerning the Category (i), (ii) and (iii) documents.
30. While the applicant did not provide more particular submissions about the Category (i), (ii) and (iii) documents, she did make a number of submissions to OIC which described the way she felt OHO had failed to conduct sufficient searches. For example, the applicant contends '*My concern is that a person with conflict of interest at OHO controlled and corrupted searches*',³³ '*there are lots of missing documents*'³⁴ and '*searches have been done by corrupt OHO staff...*'³⁵ Generally, the applicant submitted that she was not satisfied that the searches had been appropriately conducted by OHO.³⁶ Further, the applicant requested³⁷ that the '*full searches be redone using IT and taken from server data, not the persons you can see breached due process being in charge of providing their own records*'.³⁸
31. Additionally, the applicant submitted that further responsive information, including the Category (i) and (iii) documents, *may* have been created.
32. On external review, OHO conducted further searches at OIC's request 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.³⁹ OHO did not locate any Category (i) or Category (iii) documents.

Relevant law

33. Under the RTI Act, access to a document may be refused if the document is nonexistent or unlocatable.⁴⁰
34. To be satisfied that documents are nonexistent, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors, including:⁴¹
 - 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

³² By letter dated 10 October 2018 and in a subsequent telephone conversation with the applicant on 19 October 2018.

³³ Submission dated 5 March 2019.

³⁴ Submission dated 8 March 2019.

³⁵ Submission dated 16 March 2019.

³⁶ External review application. In submissions dated 8 August 2018, the applicant asserted that OHO's search was '*unreasonable because it did not mitigate bias, and consequently entire files were missing*'.

³⁷ Submissions dated 11 October 2018.

³⁸ These submissions are repeated in the applicant's further submissions dated 5, 8 and 16 March 2019.

³⁹ 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 9 November 2018 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.

⁴⁰ 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.

⁴¹ *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).

- 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.
35. When proper consideration is given to relevant factors, it may not be necessary for searches to be conducted.⁴² 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 nonexistent document are adequately explained by the agency.
36. 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.
37. 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.⁴³
38. 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.⁴⁴ 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.⁴⁵ However, where an external review involves the issue of missing documents, the applicant has a practical onus to establish reasonable grounds to believe that the agency has not discharged its obligation to locate all relevant documents.

Findings

39. OHO has relied on searches by its officers 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*.
40. In processing the application, OHO conducted further searches of all OHO's electronic records systems⁴⁶ and made enquiries of relevant staff. In respect of the further searches conducted on external review, OHO has relevantly explained that:
- no hard copy documents exist, as all documents relevant to the application were created or received electronically; and
 - searches of the outlook and desktop folders of Officer's Pr and Da were undertaken with the assistance of OHO's IT service desk.
41. In respect of the Category (i) and (iii) documents, OHO has submitted⁴⁷ that:

⁴² 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.

⁴³ *Pryor* at [21].

⁴⁴ 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.

⁴⁵ Section 87(1) of the RTI Act.

⁴⁶ OHO advised that these systems include Resolve, HPRM, Microsoft outlook, Windows Explorer shared drive and desktop folders. The search record and certification provided to OIC confirms that these searches were conducted by OHO's Information Management Officer.

⁴⁷ Submissions dated 9 November 2018.

- 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 are the subject of the 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.
42. The manner in which an external review is conducted is, subject to the IP Act, at the Information Commissioner's discretion.⁴⁸ 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 her belief that documents *may* 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.
43. I am satisfied that additional responsive documents, if they existed, would be located within OHO's records that have been searched. In these circumstances, I consider it unnecessary for further searches to be conducted in the manner requested by the applicant.
44. 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 nonexistent and access may be refused on this basis.⁴⁹

DECISION

45. I vary OHO's decision and find that access may be refused on the grounds that access to:
- further documents sought in response to the access application can be refused under section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act on the basis that they are non-existent; and
 - the Information in Issue may be refused on the basis that it comprises information contrary to the public interest to disclose under section 67(1) of the IP Act and section 47(3)(b) of the RTI Act.
46. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

Assistant Information Commissioner Corby

Date: 9 April 2019

⁴⁸ Section 108(1)(a) of the IP Act.

⁴⁹ 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.
10 October 2018	OIC asked the applicant to provide a further written submission detailing the specific, additional documents the applicant considers OHO has not located.
11 October 2018	OIC received the applicant's further submissions, including the applicant's request that OIC call to obtain her further sufficiency of search submissions.
19 October 2018	OIC called the applicant seeking to discuss issues relevant to the external review. The applicant declined to discuss the review issues in that call.
22 October 2018	OIC conveyed a preliminary view to OHO and asked OHO to conduct further searches for responsive information.
1 and 19 November 2018	OIC received the further documents located by OHO and OHO's submissions and search certifications.
22 November 2018	OIC conveyed its preliminary view to the applicant.
27 November 2018	OHO provided a link and password to the applicant to enable the applicant to access the information released in accordance with OIC's preliminary view and the Additional Documents.
4, 5, 6 and 7 December 2018	OIC received the applicant's further submissions.
5 March 2019	OIC invited the applicant to make further submissions. OIC received the applicant's further submissions.
8 March 2019	OIC provided the applicant with further information about the searches conducted by OHO
8 and 16 March 2019	OIC received the applicant's further submissions.