



## Decision and Reasons for Decision

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**Citation:** *T96 and Office of the Health Ombudsman [2022] QICmr 8*  
(2 March 2022)

**Application Number:** 316185

**Applicant:** T96

**Respondent:** Office of the Health Ombudsman

**Decision Date:** 2 March 2022

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - request for documents about the applicant's complaints concerning a medical practice and health practitioners - whether information concerns applicant's personal information - whether information is outside the scope of the access application - section 40 of the *Information Privacy Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST - personal information of other individuals - 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 - NONEXISTENT OR UNLOCATABLE DOCUMENTS - whether agency has taken all reasonable steps to locate requested documents - whether access to further documents can be refused on the ground they are nonexistent or unlocatable - section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(e) and 52(1) of the *Right to Information Act 2009* (Qld)

## 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 certain documents concerning six complaints he made about a medical practice and three health practitioners.

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<sup>1</sup> The access application was received on 30 April 2021. By email dated 6 May 2021, the applicant agreed to narrow the application, by excluding certain types of documents.

2. OHO located relevant documents and granted access to 167 full pages. OHO decided to refuse access to 347 full pages and parts of 35 pages, on the ground disclosure would, on balance, be contrary to the public interest.<sup>2</sup>
3. The applicant then applied<sup>3</sup> to the Office of the Information Commissioner (**OIC**) for external review of OHO's decision and raised a concern about the adequacy of OHO's searches.
4. For the reasons set out below, I vary OHO's decision and find that:
  - certain information may be excluded from consideration as it is outside the scope of the application
  - access to information may be refused on the ground its disclosure would, on balance, be contrary to the public interest;<sup>4</sup> and
  - access to any further documents may be refused on the basis they do not exist or cannot be located.<sup>5</sup>

### Reviewable decision

5. The decision under review is OHO's decision dated 7 July 2021.

### Evidence considered

6. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix).
7. Generally, it is necessary that decision makers have regard to the *Human Rights Act 2019* (Qld) (**HR Act**), as section 11(1) of the HR Act provides that '[a]ll individuals **in Queensland** have human rights' (my emphasis). Given the applicant resides outside of Australia, I have not had direct regard to the HR Act. Where the HR Act applies, doing so is construed as '*respecting and acting compatibly with*' the rights prescribed in the HR Act.<sup>6</sup> Accordingly, had it been necessary for me to have regard to the HR Act, the requirements of section 58(1) of that Act would be satisfied and the observations of Bell J in *XYZ* about the interaction between the Victorian analogues of Queensland's legislation would apply.<sup>7</sup>
8. Significant procedural steps relating to the external review are set out in the Appendix.

### Information in issue and issues for determination

9. The applicant is dissatisfied with the information that has been disclosed to him. He contends that '*many of these records were improperly masked*' and that OHO's search '*did not appear complete*'.<sup>8</sup>

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<sup>2</sup> Decision dated 7 July 2021.

<sup>3</sup> External review application dated 7 July 2021. The applicant also emailed OHO on 7 July 2021 concerning the decision. OHO asked the applicant to confirm whether he was seeking internal review of OHO's decision. As the applicant did not respond, he was taken not to have made a valid application for internal review.

<sup>4</sup> Under section 67(1) of the IP Act and sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld) (**RTI Act**). Section 67(1) of the IP Act sets out that an agency may refuse access to information in the same way and to the same extent that the agency could refuse access to the document under section 47 of the RTI Act were the document the subject of an access application under the RTI Act.

<sup>5</sup> Under section 67(1) of the IP Act and sections 47(3)(e) and 52 of the RTI Act.

<sup>6</sup> *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

<sup>7</sup> See *XYZ* at [573] where His Honour states '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act*'.

<sup>8</sup> External review application dated 7 July 2021.

10. The undisclosed information (**Information in Issue**) appears on 382 pages<sup>9</sup> of records received, obtained and created by OHO in investigating the applicant's complaints. While I am unable to describe the content of the Information in Issue in any detail,<sup>10</sup> I can confirm that it comprises:
- a 348 page policy and procedures manual created by a medical practice (**Manual**);<sup>11</sup> and
  - portions of information about individuals other than the applicant, including their names and other identifying information, dates of birth, work titles, qualifications, employment information, contact details<sup>12</sup> and signatures (**Third Party Information**).
11. The issues for determination are whether:
- the Manual is outside the scope of the application, which was made under the IP Act<sup>13</sup>
  - access to the Third Party Information may be refused on the ground that disclosure would, on balance, be contrary to the public interest;<sup>14</sup> and
  - access to further documents may be refused on the basis that they do not exist or cannot be located.<sup>15</sup>

## Manual

12. Under the IP Act, an individual has the right to be given access to documents of a Queensland government agency, to the extent they contain the individual's personal information.<sup>16</sup> A document will be outside the scope of an access application made under the IP Act if it does not contain the applicant's personal information.<sup>17</sup>
13. The Manual is an internal document of a medical practice which is used by the medical practice as part of its business, medical and compliance operations.
14. Having carefully reviewed the Manual, I am satisfied that it is a document which is unrelated to the applicant and that it does not comprise, or contain, any of the applicant's personal information. On this basis, I am satisfied that the Manual falls outside the scope of the application, which was made under the IP Act, and therefore cannot be considered in this review.<sup>18</sup>

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<sup>9</sup> Although OHO's decision refers to 347 full pages and 35 part pages being refused, the Information in Issue comprises 348 full pages and parts of 34 pages.

<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> Pages numbered 186-533 of 549.

<sup>12</sup> Including direct telephone numbers, mobile telephone numbers, fax numbers and email addresses. This includes, on page 166, a private business' email address, given its nomination as the direct contact for a specified individual whose name has been redacted at the top of that page.

<sup>13</sup> Section 40 of the IP Act.

<sup>14</sup> Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

<sup>15</sup> Sections 47(3)(e) and 52 of the RTI Act.

<sup>16</sup> Section 40 of the IP Act.

<sup>17</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'.

<sup>18</sup> As notified to the applicant on 7 September 2021, he can request access to non-personal information by lodging a fresh application with OHO under the RTI Act.

### Third Party Information

15. The right of access under the IP Act is subject to limitations, including the grounds for refusal of access.<sup>19</sup> One refusal ground is where disclosing information would, on balance, be contrary to the public interest.<sup>20</sup> 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>21</sup>
16. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:<sup>22</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.
17. The applicant has provided limited submissions in support of his request for disclosure of the Information in Issue, asserting only that he believes refused information '*should be revealed*'.<sup>23</sup>

### **Irrelevant factors**

18. I have not taken any irrelevant factors into account in making my decision.

### **Factors favouring disclosure**

19. The RTI Act recognises the following factors favouring disclosure will arise where disclosing information could reasonably be expected to:
  - enhance the government's accountability<sup>24</sup>
  - inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community;<sup>25</sup> and
  - reveal the reason for a government decision and any background or contextual information that informed the decision.<sup>26</sup>
20. OHO must be transparent and accountable in how it deals with complaints that it receives about health service providers. OHO has disclosed a significant amount of information to the applicant about its investigations of his complaints. In particular, the disclosed information records the investigative actions taken by OHO in respect of the applicant's complaints and includes some of the information OHO obtained during those

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<sup>19</sup> The grounds on which access can be refused are set out in section 47 of the RTI Act. As noted above, access may be refused to information under the IP Act in the same way and to the same extent as information may be refused under the RTI Act (see section 67(1) of the IP Act).

<sup>20</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>21</sup> 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.

<sup>22</sup> Section 49(3) of the RTI Act.

<sup>23</sup> External review application.

<sup>24</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>25</sup> Schedule 4, part 2, item 3 of the RTI Act.

<sup>26</sup> Schedule 4, part 2, item 11 of the RTI Act.

investigations.<sup>27</sup> I consider disclosure of this information has substantially advanced OHO's accountability and transparency, enabling scrutiny of OHO's regulatory functions. Taking into account the limited nature of the Third Party Information, I do not consider its disclosure would further advance these factors in any significant way and accordingly, I afford them only low weight.<sup>28</sup>

21. A small amount of information about the applicant appears within the Third Party Information.<sup>29</sup> I am satisfied this information about the applicant comprises his personal information and this gives rise to a factor favouring disclosure to which I afford high weight.<sup>30</sup> However, this information about the applicant is intertwined with the personal information of other individuals to such an extent that it cannot be disclosed without also disclosing the personal information of those other individuals (which raises the nondisclosure factors discussed below).
22. I have carefully considered all other factors listed in schedule 4, part 2 of the RTI Act and can identify no other public interest considerations which favour disclosure of the Third Party Information.<sup>31</sup>

### **Factors favouring nondisclosure**

23. 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>32</sup> A further factor favouring nondisclosure will also arise where disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy.<sup>33</sup>
24. The Third Party Information is about other individuals and appears in the context of regulatory investigations into complaints received about health service providers. I am satisfied this information comprises the personal information of those other individuals. Although most of this information is solely about other individuals, some of it is, as noted above, intertwined with a small amount of the applicant's personal information. Given the personal nature of the Third Party Information and the regulatory investigation context in which it appears, I am satisfied that its disclosure would be a significant intrusion into the privacy of these individuals and the extent of the harm that could be expected to arise from its disclosure would be significant. I acknowledge that the applicant may be aware of some of the Third Party Information, given the content of his complaints and his involvement in OHO's investigation processes. However, taking into account the complaint context of the Third Party Information, I do not consider this reduces the weight of these nondisclosure factors, particularly as there can be no restriction on the use, dissemination or republication of information disclosed under the IP Act. On this basis, I afford significant weight to these factors which favour nondisclosure of the Third Party Information.

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<sup>27</sup> In this regard, I note that, by email dated 6 May 2021, the applicant agreed to narrow the application by excluding audio recordings he had sent to OHO, duplicate documents, documents that he had sent to OHO and documents OHO had sent to him.

<sup>28</sup> Schedule 4, part 2, items 1, 3 and 11 of the RTI Act.

<sup>29</sup> On page 546 of 549.

<sup>30</sup> Schedule 4, part 2, item 7 of the RTI Act.

<sup>31</sup> I cannot see how disclosing the Third Party Information could, for example, contribute to a positive and informed debate on important issues or matters of serious interest or ensure effective oversight of expenditure of public funds (schedule 4, part 2, items 2 and 4 of the RTI Act); advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies (schedule 4, part 2, item 10 of the RTI Act); reveal that the information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant (schedule 4, part 2, item 12 of the RTI Act); reveal health risks or measures relating to public health and safety (schedule 4, part 2, item 14 of the RTI Act); or contribute to the administration of justice (schedule 4, part 2, items 16 and 17 of the RTI Act). In the event that further relevant factors exist in favour of disclosure, I am satisfied that there is no evidence before me to suggest that any would carry sufficient weight to outweigh the significant weight that I have afforded to the public interest factors that favour the nondisclosure of the Third Party Information.

<sup>32</sup> Schedule 4, part 4, section 6(1) of the RTI Act.

<sup>33</sup> Schedule 4, part 3, item 3 of the RTI Act.

### **Balancing the public interest**

25. I have taken into account that the IP Act is to be administered with a pro-disclosure bias.<sup>34</sup> For the reasons set out above, I am satisfied that privacy considerations and the protection of the personal information of other individuals warrant significant weight in favour of nondisclosure of the Third Party Information, particularly given the regulatory investigation context in which it appears.
26. On the other hand, I have afforded high weight to the factor favouring disclosure of a small amount of the applicant's personal information within the Third Party Information, however, that personal information of the applicant is inextricably intertwined with the personal information of other individuals. In addition, and for the reasons outlined above, I have identified additional factors which favour disclosure of the Third Party Information (being those relating to OHO transparency and accountability). However, taking into account the limited nature of the Third Party Information, I have afforded these factors only low weight. For completeness and in the absence of any substantive submissions from the applicant, I have also considered all other factors listed in schedule 4, part 2 of the RTI Act. However, I do not consider that any other factors favouring disclosure apply.
27. On balance, I am satisfied that the nondisclosure factors outweigh the factors which favour disclosure. Accordingly, I find that access to the Third Party Information may be refused on the basis that its disclosure would, on balance, be contrary to the public interest.

### **Nonexistent or unlocatable documents**

28. On external review, the functions of the Information Commissioner include investigating and reviewing whether an agency has taken reasonable steps to identify and locate documents applied for by applicants.<sup>35</sup> However, access to a document may be refused if it is nonexistent or unlocatable.<sup>36</sup>
29. To be satisfied that documents are nonexistent, an agency must rely on their particular knowledge and experience and have regard to a number of key factors.<sup>37</sup> If searches are relied on to justify a finding that documents do not exist, all reasonable steps must be taken to locate the documents. What constitutes reasonable steps will vary from case to case, depending on which of the key factors are most relevant in the particular circumstances.
30. 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

<sup>34</sup> Section 64 of the IP Act.

<sup>35</sup> Section 137(2) of the IP Act. Recently, in *Webb v Information Commissioner* [2021] QCATA 116 at [6], the Queensland Civil and Administrative Tribunal confirmed that this function does not contemplate the Information Commissioner will 'in some way check an agency's records for the relevant documents' and that, ultimately, the Information Commissioner is to rely on the agency to search for requested documents.

<sup>36</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>37</sup> These factors are identified in *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) at [37]-[38]. The key factors include: 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. These factors were more recently considered in *Van Veendendaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017) and *P17 and Queensland Corrective Services* [2020] QICmr 68 (17 November 2020).

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 relevant key factors.<sup>38</sup>

31. The decision under review notes that OHO searched its electronic and hard copy files and located 9 files of documents which were relevant to the application. The applicant sought review of OHO's searches as he believes '*the search commenced by both MDC and OHO was not thorough*'.<sup>39</sup>
32. After considering the scope of the applicant's request,<sup>40</sup> the nature of the applicant's dealings with OHO and the documents located by OHO, OIC conveyed a preliminary view<sup>41</sup> to the applicant that OHO had taken reasonable steps to locate the documents requested in the access application. OIC invited the applicant to provide any evidence he may have pointing to the existence of further, relevant documents. The applicant did not provide any further details supporting his concerns about OHO's searches.
33. Having reviewed the terms of the application, the decision under review, the applicant's submissions and the documents located by OHO, I consider that OHO has conducted searches of locations where it would be reasonable to expect the types of information requested in the access application to be stored.
34. In view of the above, there is nothing before me, other than the applicant's general assertion that OHO's searches were incomplete or not thorough, to support an expectation that additional relevant documents exist. Accordingly, I am satisfied that OHO has taken all reasonable steps to locate documents relevant to the access application, and access to further documents may be refused on the basis they do not exist or cannot be located.<sup>42</sup>

## DECISION

35. For the reasons set out above, I vary OHO's decision and find that:
  - the Manual may be excluded from consideration as it is outside the scope of the application<sup>43</sup>
  - access to Third Party Information may be refused on the ground its disclosure would, on balance, be contrary to the public interest;<sup>44</sup> and
  - access to any further documents may be refused on the basis they do not exist or cannot be located.<sup>45</sup>

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<sup>38</sup> Pryor at [21].

<sup>39</sup> External review application.

<sup>40</sup> Including the types of documents that he agreed to exclude from the application scope.

<sup>41</sup> On 7 September 2021. It is the practice of OIC to convey a preliminary view, based on an assessment of the material before the Information Commissioner or her delegate at that time, to an adversely affected participant. This is to explain the issues under consideration to the participant and affords them the opportunity to put forward any further information they consider relevant to those issues. It also forms part of the Information Commissioner's processes for early resolution of external reviews.

<sup>42</sup> Under 67(1) of the IP Act and section 47(3)(e) of the RTI Act.

<sup>43</sup> Section 40 of the IP Act.

<sup>44</sup> Under section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

<sup>45</sup> Under section 67(1) of the IP Act and sections 47(3)(e) and 52 of the RTI Act.

36. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

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**T Lake**  
**Acting Assistant Information Commissioner**

**Date: 2 March 2022**

**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
7 July 2021	OIC received the external review application.
14 July 2021	OIC notified the applicant and OHO that it had accepted the external review application and asked OHO to provide further information. OIC received information from OHO.
5 August 2021	OIC received further information from OHO.
7 September 2021	OIC conveyed a preliminary view to the applicant and asked the applicant to confirm if he wished to proceed with the review. The applicant confirmed he wished to proceed with the review.