



Decision and Reasons for Decision

Citation:	<i>J84 and Office of the Health Ombudsman</i> [2019] QICmr 42 (1 October 2019)
Application Number:	314466
Applicant:	J84
Respondent:	Office of the Health Ombudsman
Decision Date:	1 October 2019
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST - complaints about medical treatment - accountability and transparency in a complaints process - matter of serious interest to the community - assist inquiry into conduct of agency or official - personal information of other individuals - prejudice future supply of confidential information - whether disclosure would, on balance, be contrary to the public interest - whether access to information may be refused under 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)

REASONS FOR DECISION

Summary

1. The applicant applied¹ under the *Information Privacy Act 2009* (Qld) (**IP Act**) to the Office of the Health Ombudsman (**OHO**) for access to documents relating to her complaints about health practitioners.
2. OHO located 938 pages and decided to refuse access to three full pages and parts of 22 pages² on the basis that disclosure of information would, on balance, be contrary to the public interest.³
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of OHO's refusal of access decision. The applicant's submissions indicate that she holds significant grievances about her medical treatment and other dealings with government agencies.
4. I affirm OHO's decision to refuse access to information under section 67(1) of the IP Act and section 47(3)(b) of the RTI Act, on the basis that its disclosure would, on balance, be contrary to the public interest.

¹ Email dated 11 January 2019.

² OHO granted access to 913 pages in full and the remaining parts of the 22 pages.

³ Decision dated 20 February 2019, relying on section 67(1) of the IP Act and section 47(3)(b) of the *Right to Information Act 2009* (Qld) (**RTI Act**).

Background

5. Significant procedural steps taken by OIC in conducting the external review are set out in the Appendix to these reasons.
6. The decision under review is OHO's refusal of access decision dated 20 February 2019.
7. Evidence, submissions, legislation and other material considered in reaching this decision is referred to in these reasons (including footnotes and Appendix).

Information in issue

8. The information in issue appears in emails/correspondence, database entries, internal OHO forms, a proposed referral to AHPRA⁴, an AHPRA assessment report, and mental health progress notes (about the applicant).⁵
9. The majority of the Refused Information is about a medical practitioner who was the subject of one of the applicant's complaints (**Medical Practitioner Information**).⁶
10. The Refused Information also contains incidental references to other individuals⁷ and contact details such as email/residential addresses and telephone numbers (**Third Party Information**).⁸ Parts of the applicant's mental health progress notes (**Medical Records**) are also in issue.

Issue for determination

11. The issue for determination in this review, is whether access to the Refused Information may be refused under the IP Act on the bases that disclosure would, on balance, be contrary to the public interest.

Relevant law

12. The IP Act provides individuals with a right to be given access to documents of a Queensland government agency, to the extent they contain the individual's personal information.⁹ This right, is however, subject to some limitations, including the grounds on which access to information may be refused.¹⁰
13. Access may be refused to information if its disclosure would, on balance, be contrary to the public interest.¹¹ 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.¹² This means that in general, a public interest consideration is one which is

⁴ OHO receives all complaints about health practitioners in Queensland, but in dealing with a complaint, OHO has the discretion to refer certain complaints to the Australian Health Practitioners Registration Agency (**AHPRA**) to manage.

⁵ Parts of 21 pages and three full pages (of the AHPRA assessment report). In these reasons, I have collectively referred to the information in issue as the **Refused Information**. The number of part release pages which is the subject of this decision (21) is one less than what was originally in issue, due to the agreement of OHO (at a late stage of the review) to release some additional information to the applicant (as referred to in the Appendix).

⁶ Pages 170-171, 196, 247, 249-252.

⁷ Including basic contact details of the medical practitioner referred to at paragraph 9.

⁸ One page (page 356) also contains information and personal details of a second medical practitioner who was the subject of another complaint made by the applicant (which OHO decided not to investigate). As it is of a less sensitive character to the Medical Practitioner Information, I have therefore, categorised it with the Third Party Information.

⁹ Section 40 of the IP Act.

¹⁰ The grounds are set out in section 47 of the RTI Act. Section 67(1) of the IP Act provides that access may be refused to information in the same way and to the same extent as information may be refused under the RTI Act

¹¹ Section 47(3)(b) of the RTI Act.

¹² Chris Wheeler, 'The Public Interest: We know it's important, but do we know what it means' (2006) 48 *AIAL Forum* 12, 14.

common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests.

14. Various factors may be relevant to deciding where the balance of the public interest lies¹³ and a decision-maker is required to take specific steps in reaching a decision on disclosure.¹⁴
15. The factors listed in schedule 4 to the RTI Act generally require that the particular outcome that the factor is intended to promote or protect against '*could reasonably be expected*' to result from disclosure. In assessing whether an event '*could reasonably be expected*' to occur, the Information Commissioner has found:¹⁵

The words call for the decision-maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.

16. Similarly, the words '*could reasonably be expected*' have been interpreted in other jurisdictions as follows:¹⁶

... "require a judgement to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous" to expect a disclosure of the information in issue could have the prescribed consequences relied on.

17. Taking the above into account, my assessment of, and findings in relation to, the public interest factors relevant in this case, are set out below.

Findings

18. No irrelevant factors arise in the circumstances of this case and I have not taken any into account in making my decision.
19. I have had regard to the pro-disclosure bias, as required by section 64 of the IP Act.

Factors favouring disclosure

20. The applicant's submissions discuss a range of issues associated with her negative experiences with healthcare providers and other government agencies. The applicant considers that she has been treated unfairly and refers to various incidents that she argues have caused her significant distress, and which she says have impacted the financial, social and health aspects of her life.¹⁷
21. The public interest will favour disclosure of information that could reasonably be expected to:
 - enhance the Government's accountability¹⁸ and inform the community of the Government's operations¹⁹

¹³ Including the non-exhaustive list of factors in schedule 4 of the RTI Act.

¹⁴ Section 49 of the RTI Act. The steps include: disregarding any irrelevant factors, identifying relevant factors favouring disclosure and nondisclosure and balancing the relevant factors.

¹⁵ *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at [154]-[160].

¹⁶ **Smolenski v Commissioner of Police, NSW Police [2015] NSWCATAD 21 at [34]**, citing *Commissioner of Police, NSW Police Force v Camilleri (GD)* [2012] NSWADTAP 19 at [28], *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 at [61] and *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at 190.

¹⁷ Submissions to OIC dated 2 July 2019.

¹⁸ Schedule 4, part 2, item 1 of the RTI Act.

¹⁹ Schedule 4, part 2, item 3 of the RTI Act.

- contribute to positive and informed debate on important issues or matters of serious interest²⁰; and
 - reveal the reason for a government decision and background/contextual information to the decision.²¹
22. I accept that disclosure of some of the Refused Information, particularly the Medical Practitioner Information, would provide the applicant with a more comprehensive understanding of the background/contextual information that was available to OHO (and AHPRA) in making decisions in connection with the applicant's complaints, and to a lesser extent, some further details about the decision making process. In considering the weight to be attributed to these factors, it is relevant that OHO granted the applicant access to over 900 pages in response to the access application. Having reviewed the released information, I consider it has served to significantly discharge the above public interest factors as the applicant has been well informed of the investigation and decision making process. In the circumstances, I am satisfied that these factors carry moderate weight in favour of disclosure.
23. I also consider that the issue of medical practitioner conduct, and the vigour of investigations by regulatory agencies into complaints about medical practitioners, is a matter of serious interest to the general community. As stated above, a significant volume of information has already been disclosed to the applicant about the handling of her complaints, including outcome notifications. I consider this has served to discharge this public interest factor to some extent, and therefore, afford it moderate weight in favour of disclosure of the Medical Practitioner Information.
24. The Medical Records comprise the applicant's personal information. This raises a factor favouring disclosure which is routinely afforded significant weight due to the fundamental importance of individuals having access to their personal information held by a government agency.²² In four pages of the Medical Records²³, I am satisfied that the applicant's personal information is inextricably intertwined with the personal information of others such that it cannot be separated to allow disclosure. I am satisfied that this reduces the weight in favour of its disclosure to moderate, and also raises factors in favour of nondisclosure (in relation to safeguarding the personal information and right to privacy of other individuals, discussed below).
25. Given the nature of the concerns raised by the applicant, including allegations of unjust treatment and abuse, I have also considered whether disclosure of the Refused Information could reasonably be expected to contribute to administration of justice, procedural fairness and/or advance her fair treatment.²⁴ The applicant has not specifically argued that she requires the Refused Information to assess or pursue a legal remedy or further complaints process.²⁵ Given the Refused Information is mostly about a medical practitioner, I am unable to identify how it could contribute to the administration of justice for the applicant, or advance her fair treatment and therefore, I find that these factors do not apply.²⁶ I do however, afford low weight to the public interest in procedural fairness as the Refused Information, particularly the Medical Practitioner Information,

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

²¹ Schedule 4, part 2, item 11 of the RTI Act.

²² Schedule 4, part 2, item 7 of the RTI Act.

²³ Mental Health Progress Notes at pages 774, 870, 872 (duplicated at 873). The only other information redacted from other pages of the progress notes consists of contact telephone numbers of other individuals (eg. friends/family).

²⁴ Schedule 4, part 2, items 10, 16 and 17 of the RTI Act.

²⁵ *Willsford and Brisbane City Council* (1996) 3 QAR 368. The Information Commissioner found that administration of justice considerations will arise for contemplation in balancing the public interest where disclosure of information would assist in the pursuit of a legal remedy, or to evaluate whether a remedy is available or worth pursuing.

²⁶ If I am incorrect in this finding and these factors do apply, I would afford them nominal weight, given the nature of the Refused Information.

formed part of the body of evidence considered by OHO (and AHPRA) in dealing with the applicant's complaint.

26. The applicant raises a number of concerns about her treatment in the public health system, including allegations that mental health service providers are influenced by funding models.²⁷ Therefore, I have also considered whether disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct of an agency or official.²⁸ In determining the weight of this factor, I acknowledge that the Refused Information concerns complaints about medical treatment received by the applicant in the public hospital system. I also note that OHO and AHPRA have notified the applicant of the outcome of the investigations and information about the decision making/investigation process. However, I accept that disclosure of the Refused Information could reasonably be expected to allow or assist the applicant's inquiry, but only minimally, given the particular nature of the Refused Information.²⁹
27. The applicant submits that she has been subjected to fraudulent and criminal acts,³⁰ therefore, I have also considered whether disclosure of the Refused Information would contribute to the enforcement of the criminal law³¹ or could reasonably be expected to reveal the information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant.³² While I have considered these factors, there is insufficient evidence before me to establish that either factor applies in this case.
28. For the sake of completeness, I cannot see how disclosure of the Refused Information could reasonably be expected to further any other pro-disclosure factors arguably arising from the applicant's submissions, or any other information available to me.

Factors favouring nondisclosure

29. As noted above, the Refused Information is generally about other individuals, including names, contact details and other personal information.³³ The Medical Practitioner Information is of a particularly sensitive nature. Taking this into account, and given the complaint context in which the Refused Information appears, I find that the following factors favouring nondisclosure are relevant:
 - disclosure could reasonably be expected to cause a public interest harm if disclosure would disclose personal information of a person³⁴
 - disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy³⁵; and
 - prejudice the future supply of confidential information.³⁶
30. As I have stated, the Medical Practitioner Information is of a sensitive nature, as it relates to aspects of the practitioner's conduct in his profession, in the context of an investigation

²⁷ Submissions to OIC dated 2 July 2019.

²⁸ Schedule 4, part 2, item 5 of the RTI Act.

²⁹ I have also turned my mind to the public interest factor in schedule 4, part 2, item 6 of the RTI Act which seeks to promote disclosure of information that may reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct. However, on the face of the information available to OIC, I have not been able to establish the requirements for this factor to apply. Also, having regard to the limitations in section 120 and 121 of the IP Act, this is not an appropriate case for me to make a hypothetical finding as to the potential application of this factor.

³⁰ Submissions to OIC dated 2 July 2019.

³¹ Schedule 4, part 2, item 18 of the RTI Act.

³² Schedule 4, part 2, item 12 of the RTI Act.

³³ 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'*.

³⁴ Schedule 4, part 4, section 6 of the RTI Act.

³⁵ Schedule 4, part 3, item 3 and the RTI Act.

³⁶ Schedule 4, part 4, section 8(1) of the RTI Act.

of a complaint about the practitioner. While I am limited in the extent to which I can describe the exact content,³⁷ I am satisfied that it comprises his personal information, the disclosure of which could lead to a significant public interest harm and that it is not 'routine' in nature.³⁸ I also consider that disclosure would negatively impact the practitioner's right to privacy. While the concept of 'privacy' is not defined in either the IP Act or 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.³⁹ While information about a person's public service employment is not routinely considered to form part of their private sphere, the Medical Practitioner Information, is of such a nature that I am satisfied it attracts a significant level of privacy in this case.

31. I am also satisfied that disclosure of certain Medical Practitioner Information⁴⁰ could reasonably be expected to prejudice the future supply of confidential information. Complainants/notifiers generally participate in complaint processes on the understanding that information they provide will only be used for the purpose of conducting the investigation, and any subsequent disciplinary processes. There is no information available to me to indicate that the information provided by other individuals, in this Assessment Report, was done so on any other basis. Given the sensitive nature of the information, I consider it reasonable to expect that it was provided with an expectation of confidentiality.
32. I am satisfied that disclosing the information in the assessment report, under the IP Act, which imposes no restrictions on further dissemination, could reasonably be expected to impact on the ability of OHO⁴¹ to obtain confidential information in future investigations into health practitioner conduct. I consider there is a reasonable likelihood that complainants/notifiers would be reluctant to fully cooperate in an investigation process. Accordingly, I am satisfied disclosure of the information could reasonably be expected to prejudice the future supply of confidential information in relation to health practitioner conduct investigations. In the circumstances, I afford this factor significant weight.
33. The Third Party Information comprises the names and contact details of other individuals. On the spectrum of sensitivity, this information is not at the higher end, however, it still comprises the personal information of other individuals. The RTI Act recognises that disclosure of such information could reasonably be expected to lead to a public interest harm. In assessing the level of harm and weight of this factor, it is relevant that the applicant is likely to be aware of some of the information due to her role as complainant, and the subject matter being her medical treatment. Despite this, I am satisfied that the public interest factors which seek to protect other people's personal information and privacy still apply to the Third Party Information, particularly given that the information appears in the context of a medical treatment complaint investigation. I afford these factors moderate weight in favour of nondisclosure of the Third Party Information.
34. As noted at paragraph 10 above, information on four pages of the Medical Records comprises the personal information of other individuals, but appears within the applicant's mental health progress notes. I am satisfied that information is 'shared' personal information which cannot be severed. I afford moderate weight in favour of nondisclosure of this information.

³⁷ Sections 120 and 121 of the IP Act.

³⁸ Information relating to day-to-day work activities and responsibilities of a public service employee may generally be disclosed despite it falling within the definition of personal information. However, agency documents can also contain personal information of public servants, which is not routine work information and to which nondisclosure factors will apply: *Underwood and Department of Housing and Public Works* (Unreported, Queensland Information Commissioner, 18 May 2012) at [60].

³⁹ 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.

⁴⁰ Page 251, comprising a page of assessment report prepared by AHPRA in managing the complaint referred to it by OHO.

⁴¹ Including associated bodies, such as AHPRA and the various health practitioner registration boards, which manage complaints referred to them by OHO.

Balancing of the relevant factors

35. As I have canvassed in these reasons, the volume of information released to the applicant by OHO was extensive and served to comprehensively inform the applicant of the relevant investigation and decision making processes relating to her complaints about medical treatment. In view of that, and given the Refused Information is largely the personal information of other individuals, I find that the weight of the factors which seek to enhance the accountability and transparency of government complaint handling processes, is moderate. I also afford moderate weight to the public interest in contributing to positive and informed debate on a matter of serious interest, ie. thorough investigations into complaints about health practitioners.
36. I am satisfied that there is a strong public interest in the applicant having access to her own personal information and have taken this into account in relation to certain parts of her Medical Records which remain redacted. However, as that information is intertwined with the personal information of others, I am satisfied it cannot be severed so as to allow disclosure and therefore, the weight in favour of disclosure is reduced to moderate. I have also found that disclosure of the Refused Information could reasonably be expected to contribute to procedural fairness and assist inquiry into possible deficiencies in conduct. However, the weight of those factors is only minimal given the particular nature of the Refused Information.
37. Conversely, I am satisfied that the public interest factors which favour nondisclosure of other people's personal information and are intended to safeguard other individuals' private spheres, carry significant weight, particularly in relation to the Medical Practitioner Information, which is highly sensitive in nature. Those factors also carry moderate weight in protecting the Third Party Information, despite its reduced sensitivity. I am also satisfied that the public interest in ensuring the confidentiality of information provided by a complainant/notifier in an investigation into health practitioner conduct/medical treatment, and mitigating prejudice to its future supply, carries significant weight in favour of nondisclosure, in relation to information in the AHPRA assessment report.
38. In view of the above, I find that that the factors favouring nondisclosure carry more weight than the pro-disclosure factors. On balance, I find that disclosure of the Refused Information would be contrary to the public interest and therefore, access to it may be refused under the IP Act.

DECISION

39. For the reasons set out above, I affirm OHO's decision to refuse access to the Refused Information under section 67(1) of the IP Act and section 47(3)(b) of the RTI Act as its disclosure would, on balance, be contrary to the public interest.
40. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

K Shepherd
Assistant Information Commissioner

Date: 1 October 2019

Appendix

Significant procedural steps

Date	Event
20 February 2019	OIC received the external review application.
21 February 2019	OIC notified the applicant and OHO that it had received that application for external review and requested relevant procedural documents. OIC received the requested documents from OHO.
6 March 2019	OIC notified the applicant and OHO that it had accepted the application for external review.
15 April 2019	OIC conveyed a preliminary view to the applicant that access to the information in issue may be refused. The applicant provided submissions to OIC in response, raising concerns about the preliminary view.
27 May 2019	OIC wrote to the applicant to confirm the preliminary view and gave her another opportunity to provide submissions. The applicant telephoned OIC to reiterate her concerns about OIC's preliminary view.
14 and 24 June and 1 July 2019	The applicant telephoned OIC to provide further submissions. In these conversations, the applicant asked OIC to contact Legal Aid Queensland (LAQ) as LAQ had previously represented the applicant in other matters. LAQ subsequently confirmed to OIC that it was unable to assist the applicant in the external review process and that it would correspond with the applicant directly to confirm this.
2 July 2019	OIC received further written submissions from the applicant. OIC provided OHO with an update on the status of the review.
3 July 2019	The applicant provided further oral submissions to OIC.
4 July 2019	OIC wrote to the applicant to confirm her submissions were being considered, and that a formal written decision would be required to finalise the review.
17 September 2019	OIC provided OHO with an update on the status of the review, and conveyed a view that some of the information in issue on pages 246 and 247 would not, on balance, be contrary to the public interest to disclose. OHO agreed with OIC's view and agreed to disclose the information to the applicant.