



## Decision and Reasons for Decision

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<b>Citation:</b>	<i>Parnell and Queensland Police Service</i> [2017] QICmr 8 (7 March 2017)
<b>Application Number:</b>	312806
<b>Applicant:</b>	Parnell
<b>Respondent:</b>	Queensland Police Service
<b>Decision Date:</b>	7 March 2017
<b>Catchwords:</b>	<p><b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION ACT - REFUSAL OF ACCESS - CONTRARY TO THE PUBLIC INTEREST INFORMATION - medical records of deceased family member - personal information of third parties - whether disclosure would, on balance, be contrary to the public interest - whether access to information may be refused under section 47(3)(b) of the <i>Right to Information Act 2009</i> (Qld)</b></p> <p><b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION ACT - REFUSAL OF ACCESS - NONEXISTENT DOCUMENTS - applicant submits agency has failed to locate all records - whether agency has taken all reasonable steps to locate documents relevant to access application - whether access to further documents may be refused under sections 47(3)(e) and 52(1)(a) of the <i>Right to Information Act 2009</i> (Qld)</b></p>

## REASONS FOR DECISION

### Summary

1. The applicant applied to the Queensland Police Service (**QPS**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) seeking access to the medical records of his deceased daughter, which were seized by QPS from a private hospital following her death (**Medical Records**).<sup>1</sup>
2. The Public Safety Business Agency (**PSBA**), on behalf of QPS,<sup>2</sup> refused access to the Medical Records on the basis that disclosure would, on balance, be contrary to the public interest.<sup>3</sup> The applicant then applied to the Office of the Information Commissioner (**OIC**) for external review of PSBA's decision.

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<sup>1</sup> Access application dated 16 February 2016.

<sup>2</sup> At the time of the access application and the decision under review, PSBA provided corporate and business services on behalf of QPS, including delegated decision making under section 30 of the RTI Act.

<sup>3</sup> By decision dated 21 March 2016.

3. On external review, most of the Medical Records were released to the applicant, following negotiations between OIC, QPS, Sunshine Coast Hospital and Health Service (**SCHHS**),<sup>4</sup> and the private hospital.<sup>5</sup> The only information that was not released, and that remains in issue in this review, is the personal information of individuals other than the applicant or his daughter appearing in the Medical Records (**Third Party Information**). The applicant also remains concerned about alleged missing information.<sup>6</sup>
4. I have decided to vary PSBA's decision, and find that:
  - disclosure of the Third Party Information would, on balance, be contrary to the public interest and therefore, access to it may be refused under section 47(3)(b) of the RTI Act; and
  - any further information is non-existent under section 52(1)(a) of the RTI Act and therefore, access to it may be refused under section 47(3)(e) of the RTI Act.

## Background

5. The applicant's adult daughter passed away in a private hospital in early 2016. The Medical Records show that at the time of her death, she was suffering from a serious illness. The applicant made a complaint to QPS concerning his daughter's death, and during the resulting investigation, QPS seized the Medical Records (comprising 11 pages) from the private hospital. PSBA confirmed to OIC that the QPS investigation is complete, and QPS found no evidence of negligence or criminal behaviour.<sup>7</sup> The applicant however, remains firmly of the view that his daughter's death was caused by her treating doctors.
6. Significant procedural steps taken by OIC in conducting the external review are set out in the Appendix to these reasons.

## Reviewable decision

7. The decision under review is the decision of PSBA, dated 21 March 2016, made on behalf of QPS, refusing access to the Medical Records under section 47(3)(b) of the RTI Act.

## Evidence considered

8. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).
9. The applicant provided written and oral submissions to OIC supporting his case.<sup>8</sup> While I have carefully reviewed all of those submissions, certain concerns the applicant has raised are not matters which the Information Commissioner has jurisdiction to consider in conducting an external review under the RTI Act.<sup>9</sup> Accordingly, in reaching this

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<sup>4</sup> OIC consulted with SCHHS concerning two pages of the Medical Records on 27 October 2016. SCHHS confirmed by email to OIC on 28 October 2016 that it had no objection to the release of these pages to the applicant (with the exception of certain Third Party Information).

<sup>5</sup> Under section 90(1) of the RTI Act, OIC is required to promote settlement of external review applications. In discharging this obligation, OIC will facilitate negotiations between the review participants in an effort to reduce the number of issues requiring formal determination.

<sup>6</sup> Email to OIC dated 10 January 2017.

<sup>7</sup> PSBA's submissions to OIC dated 29 April 2016.

<sup>8</sup> Including his external review application dated 13 April 2016, submissions made by telephone to OIC on 23 May 2016 and 11 July 2016, and email submissions to OIC dated 3 November 2016, 10 January 2017 and 31 January 2017.

<sup>9</sup> As explained by letter from OIC to the applicant dated 17 January 2017.

decision, I have only considered the applicant's submissions to the extent they are relevant to the issues for determination on external review.

### Information in issue

10. As noted in paragraph 3 above, during the course of the external review, the majority of the Medical Records were released to the applicant, with only the Third Party Information redacted. The Third Party Information is therefore, the only information remaining in issue in this review and comprises the personal details in the Medical Records of individuals other than the applicant or his daughter (including information concerning a family-member of the deceased, and the names, contact details and signatures of private hospital medical staff).

### Issues for determination

11. The issues for determination in this review are whether:
  - access to the Third Party Information may be refused under the RTI Act on the basis that disclosure is, on balance, contrary to the public interest;<sup>10</sup> and
  - whether access to any further documents may be refused on the basis that they do not exist.<sup>11</sup>

### Third Party Information

#### Relevant law

12. The RTI Act is administered with a pro-disclosure bias, meaning that an agency should decide to give access to information, unless giving access would, on balance, be contrary to the public interest.<sup>12</sup>
13. 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. However, there are some recognised public interest considerations that may apply for the benefit of an individual.
14. The RTI Act identifies various factors that may be relevant to deciding the balance of the public interest<sup>13</sup> and explains the steps that a decision-maker must take<sup>14</sup> in deciding the public interest as follows:
  - identify any irrelevant factors and disregard them
  - identify relevant public interest factors favouring disclosure and nondisclosure
  - balance the relevant factors favouring disclosure and nondisclosure; and
  - decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.

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<sup>10</sup> Under section 47(3)(b) of the RTI Act.

<sup>11</sup> Under section 47(3)(e) and section 52(1)(a) of the RTI Act.

<sup>12</sup> Section 44(1) of the RTI Act. The various grounds for refusing access are set out in section 47 of the RTI Act, including section 47(3)(b) of the RTI Act which is the relevant public interest ground.

<sup>13</sup> Schedule 4 of the RTI Act lists factors that may be relevant when deciding whether disclosure of information would, on balance, be contrary to the public interest. This list is not exhaustive and therefore, other factors may also be relevant in a particular case.

<sup>14</sup> Section 49(3)(a) of the RTI Act.

## Findings

15. No irrelevant factors arise in the circumstances of this case and I have not taken any into account in making my decision.
16. The only factor favouring disclosure of the Third Party Information that I am able to identify is the general public interest in advancing access to government-held information, i.e., the pro-disclosure bias.<sup>15</sup> The information concerns a family-member of the deceased, and the names, contact details and signatures of medical staff working in the private hospital.
17. Most of the Medical Records (including information concerning the applicant's daughter's treatment) have already been released to the applicant, and while I accept that disclosure of that information was in the interests of improving the social well-being of the community and could reasonably be expected to enhance QPS's accountability by showing the evidence available to it in its investigation,<sup>16</sup> I do not consider such factors arise in relation to disclosure of the Third Party Information. The Information Commissioner has previously expressed the view that it is difficult to see how disclosure of the names of individuals employed outside the public sector could enhance government accountability or official transparency.<sup>17</sup> Similarly here, it is difficult to see how disclosure of the personal information of hospital staff who are not public servants and are not remunerated by public funds, or the disclosure of information about a family member, would serve to enhance government accountability or transparency.
18. In considering relevant nondisclosure factors, I am satisfied that the Third Party Information comprises the personal information of the relevant individuals and that disclosure could reasonably be expected to prejudice the protection of these individuals' right to privacy.<sup>18</sup> In relation to the family member of the deceased, I consider the extent of public interest harm to be significant.<sup>19</sup> Information provided to healthcare services during the treatment leading up to the untimely death of a family member is extraordinarily sensitive.
19. I am also satisfied that the interest in safeguarding the personal information of hospital staff and protecting their privacy carries significant weight in favour of nondisclosure. These individuals are private sector employees,<sup>20</sup> who, through the course of their work may encounter challenging individuals and emotionally difficult situations, necessitating a degree of privacy from their dealings in the workplace.
20. Accordingly, I am satisfied that the public interest in protecting the privacy of other individuals and safeguarding their personal information which appears in the Medical Records carries such significant weight so as to outweigh the general public interest in promoting access to government-held information. Disclosure of the Third Party

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<sup>15</sup> Section 44 of the RTI Act.

<sup>16</sup> The Information Commissioner has previously recognised the existence of a public interest in the social and economic well-being of the community, particularly in assisting an individual with the grieving process and assisting in understanding the circumstances surrounding a relative's death: see *Keogh and Department of Health* (Unreported, Queensland Information Commissioner, 31 August 2010). See also schedule 4, part 2, item 1 and item 9 of the RTI Act.

<sup>17</sup> *Underwood and Department of Housing and Public Works* (No. 1) [2016] QICmr 11 (17 March 2016) at [61] to [62].

<sup>18</sup> Giving rise to the factors favouring nondisclosure in schedule 4, part 3, item 3 (to the extent that the relevant individuals are still alive) and schedule 4, part 4, section 6 of the RTI Act.

<sup>19</sup> In *E9IH9N and Metro South Hospital and Health Service* [2016] QICmr 18 (27 May 2016), it was held that releasing third party personal information appearing in (mental health) medical records would constitute a significant intrusion into the privacy of the relevant individuals and the extent of the public interest harm that could be anticipated from disclosure would be significant.

<sup>20</sup> For a discussion of the personal information of private sector employees, as well as a discussion of routine and non-routine personal work information of public sector employees, see *Kiepe and The University of Queensland* (Information Commissioner of Queensland, 1 August 2012) at [18] to [21].

Information would, on balance, be contrary to the public interest and access may be refused under section 47(3)(b) of the RTI Act.

### Further documents

21. During the external review, the applicant submitted to OIC that he suspects that the Medical Records are incomplete.<sup>21</sup>

### Relevant law

22. An agency must take all reasonable steps to locate the documents sought in an access application. Access to a document may be refused if the document is non-existent or unlocatable.<sup>22</sup> A document is non-existent if there are reasonable grounds to be satisfied the document does not exist.<sup>23</sup> To be satisfied that documents are non-existent, a decision-maker must rely on their particular knowledge and experience and have regard to a number of factors.<sup>24</sup> When the factors are properly considered, it may not be necessary for the agency to conduct searches for documents.
23. Generally, it is the agency that made the decision under review that has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.<sup>25</sup> However, where the issue of missing documents is raised, the applicant bears a practical onus to establish reasonable grounds to believe that the agency has not discharged its obligation to locate all relevant documents.<sup>26</sup> A suspicion or mere assertion is not sufficient to satisfy this onus.

### Findings

24. QPS has confirmed to OIC that the 11 pages of Medical Records were the only documents seized by QPS during its investigation into the applicant's daughter's death. QPS also explained to OIC that, given that there was no indication of any negligence or criminal behaviour, these were the only documents required to complete its investigation.<sup>27</sup>
25. While further medical records relating to the applicant's daughter may exist, I consider that any such documents would be held by the relevant hospital(s) where the applicant's daughter received treatment. Therefore, such documents would not fall within the scope of the access application made to QPS.<sup>28</sup> I am satisfied that there is no evidence before me—aside from the applicant's assertion that the Medical Records are incomplete—to suggest that QPS would hold any further documents. Further, given the circumstances which led to the Medical Records coming into the possession of QPS and QPS's explanation of its investigation process, I do not consider it is reasonable to expect that QPS would hold any further documents responsive to the access application.

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<sup>21</sup> By email to OIC dated 10 January 2017.

<sup>22</sup> Sections 47(3)(e) and 52 of the RTI Act.

<sup>23</sup> Section 52(1)(a) of the RTI Act.

<sup>24</sup> *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [19] which adopted the Information Commissioner's comments in *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009). The key factors include: the administrative arrangements of government; the agency structure; the agency's functions and responsibilities; the agency's practices and procedures and other factors including the nature and age of the requested document/s and the nature of the government activity to which the request relates.

<sup>25</sup> Section 87(1) of the RTI Act.

<sup>26</sup> See *Mewburn and Department of Local Government, Community Recovery and Resilience* [2014] QICmr 43 (31 October 2014) at [13].

<sup>27</sup> By letter from PSBA to OIC dated 29 April 2016.

<sup>28</sup> The access application specifically noted that the Medical Records he was seeking were seized by QPS following his daughter's death. In any event, an access application under section 24 of the RTI Act is made for 'access to a document of an agency' (in this case QPS). Documents that are not within QPS's possession or control (see section 12 of the RTI Act), including medical records held by other agencies and private entities, are not captured by the access application.

26. Accordingly, I find that QPS has taken all reasonable steps to locate documents responding to the access application and that any further documents do not exist, in accordance with section 52(1)(a) of the RTI Act. Therefore, I am satisfied that access to any further documents may be refused under section 47(3)(e) of the RTI Act.

## **DECISION**

27. For the reasons set out above, I vary the decision under review and find that:

- disclosure of the Third Party Information would, on balance, be contrary to the public interest and therefore, access to it may be refused under section 47(3)(b) of the RTI Act; and
- access to any further information may be refused under section 47(3)(e) of the RTI Act as it does not exist.

28. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act

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**K Shepherd**  
**Assistant Information Commissioner**

**Date: 7 March 2017**

## APPENDIX

### Significant procedural steps

Date	Event
13 April 2016	OIC received the application for external review of QPS's decision.
14 April 2016	OIC notified the applicant that it had received his application for external review and notified PSBA that the external review application had been received and requested relevant procedural documents from PSBA.
22 April 2016	OIC received the procedural documents from PSBA.
28 April 2016	OIC notified the applicant and PSBA that it had accepted the external review application. OIC also requested information from PSBA as to whether information beyond the 11 pages located by QPS, was obtained from the private hospital following the death of the applicant's daughter.
29 April 2016	PSBA confirmed to OIC that only 11 pages were seized by QPS from the private hospital.
4 May 2016	PSBA provided OIC with a copy of the 11 pages.
23 May 2016	OIC conveyed a preliminary view to the applicant that access may be refused to the Medical Records and invited the applicant to provide submissions supporting his case.
23 May 2016	OIC received submissions from the applicant by telephone.
2 June 2016	The applicant confirmed that he did not accept the preliminary view and that he continued to seek release of the Medical Records.
27 June 2016	OIC wrote to the applicant to explain its view in more detail and to give him another opportunity to provide further submissions.
11 July 2016	OIC received submissions from the applicant by telephone concerning, among other things, his involvement with his daughter's treatment and care.
14 July 2016	OIC advised PSBA that OIC's preliminary view concerning release of the Medical Records had changed based on the applicant's oral submissions.
11 August 2016	OIC contacted the private hospital to advise of the external review.
30 August 2016	OIC received information from the relevant private hospital.
2 September 2016	OIC updated the applicant on the progress of the external review.
27 September 2016	QPS confirmed to OIC that it no longer objected to release of the Medical Records.
5 October 2016	The applicant contacted OIC to confirm he continued to seek access to the Medical Records.
13 October 2016	OIC provided the applicant with an update on the external review, advised that our preliminary view had changed based on his submissions and explained the third party consultation process.
20 October 2016	OIC wrote to the private hospital and conveyed its view that the applicant was entitled to access the Medical Records (subject to the redaction of Third Party Information) and invited the private hospital to become a participant and to make submissions if it did not accept the preliminary view.
27 October 2016	OIC contacted SCHHS to seek its view on disclosure of two pages of the Medical Records.
28 October 2016	SCHHS confirmed to OIC that it did not object to release of the two pages of Medical Records (subject to removal of some personal information).

Date	Event
3 November 2016	OIC received email from applicant outlining concerns with the process and raising accusations of wrongdoing concerning his daughter's care.
8 November 2016	OIC received confirmation from the private hospital that it was willing to accept OIC's view, subject to the redaction of certain personal information.
15 November 2016	OIC confirmed with QPS that it no longer objected to release of the Medical Records, subject to the deletion of certain personal information.
25 November 2016	OIC emailed the applicant addressing his concerns about the external review process, advising that OIC had recently finished consulting with relevant third parties and confirming OIC's preliminary view on disclosure.
1 December 2016	OIC contacted the private hospital by telephone and confirmed that the Medical Records would be released to the applicant with certain personal information redacted.
8 December 2016	<p>OIC wrote to the applicant to confirm that QPS would release the Medical Records to him subject to the deletion of certain personal information, to explain OIC's view about the deletion of this personal information and ask him to confirm whether he wishes to continue with the review.</p> <p>OIC also wrote to QPS to confirm its preliminary view and to request that QPS release the Medical Records (with certain personal information redacted) by 16 December 2016.</p>
21 December 2016	QPS advised OIC that it had sent the Medical Records to the applicant (with certain personal details redacted).
10 January 2017	The applicant emailed OIC raising concerns about his daughter's care and requesting verification that the Medical Records from QPS were complete.
17 January 2017	OIC wrote to the applicant to confirm the preliminary view OIC had formed on the issues in the review and to address his various concerns. OIC gave the applicant an opportunity to make further and final submissions.
31 January 2017	The applicant wrote to OIC and asked a number of questions concerning his daughter's care and her death, and confirmed his request for access to the names of other individuals appearing in the Medical Records.
2 February 2017	OIC confirmed to the applicant that the next step in the review process would be to issue a formal written decision to finalise the review.