



Decision and Reasons for Decision

Citation:	<i>L77 and Office of the Health Ombudsman [2022] QICmr 6 (2 February 2022)</i>
Application Number:	316029
Applicant:	L77
Respondent:	Office of the Health Ombudsman
Decision Date:	2 February 2022
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - request for documents about the applicant's complaint about a medical practice and health practitioner - accountability and transparency - personal information and privacy - whether disclosure would, on balance, be contrary to public interest - section 67(1) of the <i>Information Privacy Act 2009 (Qld)</i> and sections 47(3)(b) and 49 of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied to the Office of the Health Ombudsman (**OHO**) under the *Information Privacy Act 2009 (Qld)* (**IP Act**) for access to documents relating to his complaint about a medical practice and a health practitioner.¹
2. OHO located relevant documents and granted access to 381 full pages. OHO decided to refuse access to 23 full pages and parts of 90 pages² on the ground disclosure would, on balance, be contrary to the public interest.³
3. The applicant sought internal review of OHO's decision and raised concerns about the adequacy of OHO's searches.⁴ On internal review, OHO affirmed its original decision and confirmed to the applicant that no additional relevant documents exist.⁵
4. The applicant then applied⁶ to the Office of the Information Commissioner (**OIC**) for external review of OHO's internal review decision.

¹ The application form is dated 16 December 2020 and was received by OHO on 17 December 2020. The scope of the application was confirmed in an exchange of correspondence between the applicant and OHO on 17 December 2020.

² OHO granted access to the remaining parts of these 90 pages.

³ Decision dated 23 March 2021.

⁴ On 23 March 2021.

⁵ Internal review decision dated 20 April 2021.

⁶ On 20 April 2021.

5. During the external review, OHO disclosed some additional information to the applicant. The applicant remains dissatisfied with the level of information released to him and has raised concerns about the adequacy of OHO's searches.
6. For the reasons set out below, I affirm OHO's decision and find that access may be refused to the remaining information in issue on the ground that disclosure would, on balance, be contrary to the public interest.⁷

Reviewable decision and evidence considered

7. The decision under review is OHO's internal review decision dated 20 April 2021.
8. Significant procedural steps taken during the current external review are set out in the Appendix of this decision. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including the footnotes and Appendix).
9. 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.⁸ 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.⁹

Information in issue

10. Information on 67 pages remains undisclosed to the applicant and is the subject of this decision (**Information in Issue**).¹⁰ The IP Act precludes me from describing the content of the Information in Issue in these reasons,¹¹ however, I can confirm that it appears in documents and correspondence received, obtained and created by OHO in investigating the applicant's complaint and comprises information about individuals other than the applicant, including their names, dates of birth, gender, contact details (such as residential addresses, email addresses and telephone numbers), work titles, qualifications, their personal circumstances and their opinions. There is also a significant level of duplication within the Information in Issue.

⁷ 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.

⁸ 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].

⁹ 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*'.

¹⁰ 2 full pages (numbered 421-422 of 494) and portions of information redacted from 65 partially disclosed pages (numbered 5-6, 29-30, 40-41, 50, 54, 56, 63, 65, 72, 76, 78, 100-101, 119, 123, 125, 137-138, 151, 155, 157, 162, 169, 176, 182-184, 186, 191, 279, 286, 288-293, 347-348, 360, 365, 368-369, 372-373, 377-379, 382-384, 387-390, 404-407, 416, 425 and 436 of 494).

¹¹ Section 121(3) of the IP Act, which prohibits the Information Commissioner from disclosing information that is claimed to be exempt information or contrary to the public interest information in an external review decision.

Issues for determination

11. The applicant seeks access to all information which has not been disclosed to him and contends that OHO has not conducted 'a proper search' for the documents he requested.¹²
12. The functions of the Information Commissioner on external review include investigating and reviewing whether an agency has taken reasonable steps to identify and locate documents applied for by applicants.¹³
13. After considering the information in the decision under review about OHO's record keeping systems and the documents located by OHO, I conveyed a preliminary view¹⁴ to the applicant that OHO had taken reasonable steps to locate the documents requested in the access application. I invited the applicant to identify any further, specific information he believed existed and was relevant to the application. While the applicant asked OIC to 'check for more information',¹⁵ he did not provide details about any further relevant documents he believed existed; nor did he seek to contest the preliminary view. On this basis, I notified the applicant that the issue about the adequacy of OHO searches was resolved and would not be dealt with in this decision.¹⁶
14. Therefore, the only remaining issue for determination is whether access to the Information in Issue may be refused on the ground disclosure would, on balance, be contrary to the public interest.

Relevant law

15. Under section 40 of the IP Act, an individual has a right to be given access to documents of an agency, to the extent they contain the individual's personal information. However, this right is subject to limitations, including the grounds for refusal of access.¹⁷
16. One refusal ground is where disclosing information would, on balance, be contrary to the public interest.¹⁸ 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.¹⁹
17. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision maker must:²⁰
 - identify factors irrelevant to the public interest and disregard them
 - identify factors in favour of disclosure of information

¹² Submission dated 7 July 2021.

¹³ Section 137(2) of the IP Act.

¹⁴ On 27 October 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 (section 103 of the IP Act).

¹⁵ Applicant's email dated 14 November 2021.

¹⁶ Email dated 18 November 2021.

¹⁷ 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).

¹⁸ Sections 47(3)(b) and 49 of the RTI Act.

¹⁹ 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.

²⁰ Section 49(3) of the RTI Act.

- identify factors in favour of nondisclosure of information; and
- decide whether, on balance, disclosure of the information would be contrary to the public interest.

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

Findings

19. The applicant has provided limited submissions in support of his position and generally asserts that OHO '*misconstrued privacy legislation*' and '*erred when masking certain parts of the documentation*'.²¹

Factors favouring disclosure

20. The RTI Act recognises the following factors favouring disclosure will arise where disclosing information could reasonably be expected to:

- enhance the Government's accountability²²
- 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,²³ and
- reveal the reason for a government decision and any background or contextual information that informed the decision.²⁴

21. OHO must be transparent and accountable in how it deals with complaints that it receives about health service providers. I acknowledge that disclosing the Information in Issue would provide the applicant with a complete picture of the information that was available to OHO in its investigation of the applicant's complaint. However, OHO has disclosed a significant amount of information to the applicant about its investigation of his complaint. In particular, the disclosed information records the investigative actions taken by OHO in respect of the applicant's complaint and includes most of the information OHO obtained during the investigation. I consider disclosure of this information has substantially advanced OHO's accountability and transparency, enabling scrutiny of OHO's regulatory functions. Given the limited nature of the Information in Issue, I do not consider its disclosure would further advance OHO's transparency or accountability in any significant way. In these circumstances, I attach low weight to these factors favouring disclosure.²⁵

22. Taking into account the nature of the Information in Issue, I can identify no other public interest considerations in favour of disclosure.²⁶

²¹ External review application and submissions dated 7 July 2021.

²² Schedule 4, part 2, item 1 of the RTI Act.

²³ Schedule 4, part 2, item 3 of the RTI Act.

²⁴ Schedule 4, part 2, item 11 of the RTI Act.

²⁵ Schedule 4, part 2, items 1, 3 and 11 of the RTI Act.

²⁶ Having carefully considered all factors listed in schedule 4, part 2 of the RTI Act, I cannot see how disclosing the Information in Issue 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 Information in Issue.

Factors favouring nondisclosure

23. The RTI Act recognises that there is a public interest harm²⁷ in disclosing the personal information of other individuals and that disclosing information which could reasonably be expected to prejudice the protection of an individual's right to privacy gives rise to a public interest factor favouring nondisclosure.²⁸
24. As noted above, the Information in Issue is information about individuals other than the applicant, which appears in the context of an investigation of the applicant's complaint about a medical practice and a health practitioner. I am satisfied the Information in Issue is the personal information²⁹ of these other individuals. Given the nature of this information and the context in which it appears, I am satisfied its disclosure would be a significant intrusion into the privacy of these individuals and the extent of the harm that would arise from its disclosure would be significant. I acknowledge that, as a result of the complaint and his involvement in OHO's investigation process, the applicant may be aware of some of the Information in Issue. However, I do not consider this reduces the weight of these nondisclosure factors to any significant degree, particularly as there can be no restriction on the use, dissemination or republication of information disclosed under the IP Act. Accordingly, I afford these factors favouring nondisclosure significant weight.³⁰

Balancing the public interest

25. I acknowledge the pro-disclosure bias in deciding access to documents under the IP Act.³¹ In addition to this, and for the reasons addressed above, I have identified some factors favouring disclosure of the Information in Issue (relating to OHO's transparency and accountability). Taking into account the limited nature of the Information in Issue, I afford these factors low weight.
26. On the other hand, I recognise the strong public interest in protecting the personal information and privacy of other individuals and avoiding a public interest harm through disclosing such information and have afforded significant weight to these public interest factors which favour nondisclosure.
27. On balance, I am satisfied that the public interest factors favouring nondisclosure 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.

DECISION

28. For the reasons set out above, I affirm OHO's decision and find that access to the Information in Issue may be refused on the ground that its disclosure would, on balance, be contrary to the public interest.³²

²⁷ Schedule 4, part 4, section 6(1) of the RTI Act.

²⁸ Schedule 4, part 3, item 3 of the RTI Act. The concept of 'privacy' is not defined in either the IP Act or RTI Act. It can, however, essentially be viewed as the right of an individual to preserve their 'personal sphere' free from interference from others (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).

²⁹ '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'.

³⁰ Schedule 4, part 4, section 6(1) and schedule 4, part 3, item 3 of the RTI Act.

³¹ Section 64 of the IP Act.

³² Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

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

T Lake
Acting Assistant Information Commissioner

Date: 2 February 2022

APPENDIX**Significant procedural steps**

Date	Event
20 April 2021	OIC received the application for external review.
24 May 2021	OIC notified the applicant and OHO that it had accepted the external review application and asked the applicant to confirm if he sought access to certain types of information. OIC also asked OHO to provide further information.
25 May 2021	The applicant confirmed he wished to access all refused information.
31 May 2021	OIC received the requested information from OHO.
9 June 2021	OIC requested further information from OHO.
22 June 2021	OIC received the requested information from OHO.
7 July 2021	OIC received the applicant's submissions.
19 July 2021	OIC conveyed a preliminary view to OHO that a small amount of information may be released to the applicant.
20 July 2021	OIC provided an update to the applicant.
21 July 2021	OIC received OHO's acceptance of the preliminary view.
27 July 2021	OIC notified the applicant that OHO had agreed to disclose further information and conveyed a preliminary view to the applicant regarding the remaining information.
17 August 2021	OIC received the applicant's submissions.
7 September 2021	OIC conveyed a further preliminary view to the applicant concerning the refused information.
28 October 2021	OIC conveyed a preliminary view to the applicant regarding the sufficiency of OHO searches and asked the applicant to identify the further documents he considered existed and were relevant to the application.
14 November 2021	OIC received the applicant's request for OIC to check for more information.
18 November 2021	OIC confirmed to the applicant that, in the absence of details about any further relevant documents he believed existed, the sufficiency of OHO's searches was no longer in issue on external review and would not be dealt with in the formal decision.