Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Citation:	**T51 and Townsville Hospital and Health Service [2024] QICmr 58 (7 November 2024)**
Application Number:	**317685 and 317700**
Applicant:	**T51**
Respondent:	**Townsville Hospital and Health Service**
Decision Date:	**7 November 2024**
Catchwords:	**ADMINISTRATIVE LAW - RIGHT TO INFORMATION - SCOPE OF APPLICATION - application to access historical medical records - scope sets parameters for agency searches - whether date range can be expanded on external review - section 43 of the *Information Privacy Act 2009* (Qld)** **ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - historical medical records - agency submits medical records would have been validly destroyed - whether agency has taken all reasonable steps to locate requested records - whether access may be refused under section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(e) and 52(1)(b) of the *Right to Information Act 2009* (Qld)**

REASONS FOR DECISION

Summary

1. The applicant made two related access applications to Townsville Hospital and Health Service (**Health Service**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) seeking access to medical records pertaining to specific incidents.

2. The first application sought documents about the applicant's presentation to the Emergency Department at the relevant Hospital between January 1989 to January 1991 in connection with injuries requiring stitches.[1] The second application sought documents between 1 January 1974 and 1 March 1979 about the applicant's presentation to the Emergency Department and/or the Outpatients Clinic for an injury to his foot.[2]

[1] Application validated on 19 September 2023. The applicant also requested metadata.
[2] Application validated on 27 September 2023. The applicant also requested metadata.

3. The Health Service made the same decision in both applications, finding that documents could not be located because they did not exist.[3]
4. The applicant lodged a request for internal review of one of the Health Service's decisions.[4] The Health Service varied its original decision by finding that the requested records were unlocatable.[5]

5. The applicant did not receive the second decision posted by the Health Service[6] and as a result that decision was taken to have been made outside the timeframe required by the IP Act resulting in a deemed decision.[7]

6. The applicant applied to the Information Commissioner for external review of both decisions.[8]

7. During the external reviews the Health Service agreed to disclose its search records (**Search Records**) and documents evidencing destruction of medical records along with information about the applicant located in an admissions register (**Admissions Register**)[9] to the applicant to assist with resolution of the reviews. Those disclosures did not resolve the applicant's concerns and he provided OIC with extensive submissions outlining why he disagreed with the Health Service's position on destruction of his records.[10]

8. For the reasons set out below I have decided to:

   - affirm the Health Service's internal review decision in External Review No. 317685 and find the requested medical records are unlocatable;[11] and
   - vary the Health Service's deemed decision in External Review No. 317700 and find that the requested medical records are unlocatable.[12]

Significant procedural steps

9. Significant procedural steps relating to the external reviews are set out in the Appendix.

Reviewable decisions

10. In External Review No. 317685 the reviewable decision is the Health Service's internal review decision on 10 November 2023 refusing access to the medical records on the basis they are unlocatable.

11. In External Review No. 317700 the reviewable decision is the Health Service's deemed decision, refusing access to the medical records.

Evidence considered

[3] On 27 September 2023 for the first application (**External Review No. 317685**) and on 10 October 2023 for the second application (**External Review No. 317700**).
[4] On 19 October 2023 (for External Review No. 317685).
[5] On 10 November 2023.
[6] The decision letter was posted on 10 October 2023 and returned to the Health Service by Australia Post on 22 November 2023 as unclaimed mail.
[7] Section 66 of the IP Act.
[8] On 28 November 2023 (for External Review No. 317685) and on 30 November 2023 (for External Review No. 317700).
[9] Sent to the applicant on 15 April 2024.
[10] In submissions dated 19 April 2024 and received on 20 May 2024 (**19 April Submissions**).
[11] Under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(b) 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.
[12] Ibid.

12. 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).

13. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.[13] I consider a decision-maker will be *'respecting and acting compatibly with'* that right, and others prescribed in the HR Act, when applying the law prescribed in the RTI Act and IP Act.[14] I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between the equivalent pieces of Victorian legislation:[15] *'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.'[16]

14. The applicant submitted that OIC had misrepresented his submissions.[17] During the course of the review, the applicant provided 121 pages of submissions to OIC, drafted in a verbose writing style which presented significant interpretation challenges.[18] OIC spent considerable time endeavouring to interpret the applicant's voluminous submissions and to the extent they relate to issues for determination in these reviews, I have addressed them in this decision.[19]

Issues for determination

15. The substantive issue for determination in each review is whether the Health Service may refuse access to the requested medical records on the basis they are unlocatable.[20] In determining that issue, I must consider whether the Health Service has taken all reasonable steps to locate the medical records.

16. The applicant also contested the interpretation of the scope of his applications and sought to expand his requests (by date range) during the review process. As the terms of an application are a key factor to which I must have regard when determining the issue outlined in the preceding paragraph, I have also made findings on the scope of his applications which are the subject of these reviews.

Preliminary issues

17. Before considering the issues for determination, it is necessary to deal with certain preliminary matters arising from the applicant's submissions.[21]

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[13] As embodied in section 21 of the HR Act.
[14] *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]. I further note that OIC's approach to the HR Act set out in this paragraph was considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (where Judicial Member McGill saw 'no reason to differ' from our position).
[15] *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[16] *XYZ* at [573].
[17] Page 14 of the 19 April Submissions.
[18] The applicant also marked his submissions *'private, personal and confidential'* despite being advised in our 15 April 2024 correspondence that we are unable to accept confidential submissions. The applicant has also previously been advised that our Office is unable to accept confidential submissions from a review participant, owing to our obligations to afford procedural fairness to participants and to provide reasons for our decisions (*O96 and Ergon Energy Queensland Pty Ltd* [2019] QICmr 32 (26 August 2019) at [34]). I have quoted or summarised the applicant's submissions throughout this decision to the extent necessary to fulfil those obligations while ensuring his personal information is protected throughout this decision, including anonymisation of his name as the applicant.
[19] The applicant did not disclose to OIC any disability nor did he request any adjustments during this review. Accordingly, we have proceeded based on our examination of his submissions, on their face.
[20] Section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(b) of the RTI Act.
[21] 19 April Submissions. As these submissions total 51 pages, I have summarised them to the extent possible.

18. Following receipt of my preliminary view,[22] the applicant suggested that the Information Commissioner should reassign the two external reviews to avoid the appearance of bias.[23] I have taken this as a submission that the applicant considers the preliminary view to be evidence of apprehended bias.[24]

19. I have not to my knowledge dealt with the applicant in any personal or professional capacity prior to these reviews, and cannot identify any conflict of interest in my dealing with his application for review of the Health Service's decisions to refuse access to the requested documents. In these circumstances, and paraphrasing the High Court's test for apprehended bias, I am satisfied there is no basis for finding that a fair-minded lay observer might reasonably apprehend that I might not bring an impartial and unprejudiced mind to the resolution of this matter.[25]

20. The applicant also made submissions that:

- OIC's advice to him of his option to make a fresh application for records outside the scope of his current matters amounted to an abrogation of his rights[26]
- OIC's acknowledgement in our preliminary view of the applicant's extensive concerns and time taken to formulate his submissions demonstrates an improper ulterior motive by OIC to paint his actions as unreasonable[27]
- OIC's preliminary view is evidence that OIC is *'improperly acting'* under the *'dictation'* of the Health Service and its *'very improper motives'* in pursuit of an abuse of the processes of the IP Act[28]
- OIC's preliminary view is also evidence of some kind of decoy, to obfuscate the Health Service's failure to consider relevant considerations and its consideration of irrelevant considerations; and the Health Service has caused OIC to *'fall into jurisdictional errors'*, *'adopt errors of law'* and propose findings *'that are not based on any logically probative material for some improper undisclosed ulterior purpose'*[29]
- the Medical Register and Search Records disclosed to him to assist with informal resolution are haphazard and superfluous; appear to be generated as an egregious or retaliatory action in response to the applicant *'exercising his rights'* to external review; and appear intended to overwhelm him as an impecunious applicant without administrative resources[30]
- with respect to an email in the Search Records from a Health Service employee apologising to a colleague for the lateness of her response owing to resourcing impacts, the applicant considers this amounts to a demarcation dispute; is a completely irrelevant personal concern; has *'absolutely nothing to do with [the employee's] very official role under the IPA'*; the applicant cannot be held responsible for this in any way; it is an *'outburst'* in a work email; it is a *'subtly defamatory kind of call towards some kind of agregious* [sic] *retaliatory approach or action against myself'* (the applicant) for the applicant having the *'audacity'* to

[22] Dated 15 April 2024.
[23] Page 50 of the 19 April Submissions.
[24] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 (***Ebner***) at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ; also *Michael Wilson & Partners Limited v Nicholls* (2011) 244 CLR 427 at [31] per Gummow ACJ, Hayne, Crennan and Bell JJ.
[25] Ibid.
[26] Pages 18-19 of the 19 April Submissions.
[27] Footnote 49 on page 18 of the 19 April Submissions.
[28] Page 50 of the 19 April Submissions.
[29] Page 50 of the 19 April Submissions.
[30] Page 47-48 of the 19 April Submissions *'…the department's proposed responses, on the whole, thus far, herein, veritably appear as, only a seemingly somewhat haphazard array of documentation, containing all manner of superfluous information, apparently, mostly anyhow, generated, merely as, some kind of-perhaps even quietly (like) agregious* [sic] *(or retaliatory anyhow)-reaction to, my sort of having the audacity to, exercise my rights, to external reviews, herein[126], which veritably seems, designed, to kind of swamp-or perhaps even attempt to overwhelm-this very impecunious applicant (as an ordinary citizen, with very little administrative resources of my own then[127])'* [footnotes omitted].

exercise his lawful right of access under the IP Act; and although he would not insist on a *'formal written apology'* he requests it[31]

- *'that said sort of proposed response* [from the Health Service]*, is merely no more than a ruse, in order to covering* [sic] *up some sort of indiscretion, like the loss-and/or outright theft-of records, and/or some uncalled for damage',*[32] and
- complaints about the Health Service's recordkeeping system.[33]

21. In these same submissions the applicant also appeared to suggest that OIC's disciplinary action power under section 126 of the IP Act should be enlivened in this review:[34]

> *105 uh, only to go on, I hasten to note, further, later, and right near the end, in purporting to sort of wrap (things) up, at about the middle of page-No. 4, in your letter (of 15/05/23), to (in hindsight, anyhow) seemingly kind of blithely propose, to the very effect of that, in any event, on (an) external review, your office, might never have, any powers, regarding the record-keeping practices of an agency; whereas; as I've already discussed, in some detail, in footnote-No. 78, above, herein (and please, see also then, the bit of a discussion, in point, in the very body of the text, in about the middle of page-No. 28, above, herein), well, that sort of notion, seems only patently incorrect, in light of the very wide expanse, e.g. of the said particular powers, as specifically granted to your office, under Division 5, of Part 9, of Chapter 3, of the IPA, not to mention, Section-No. 126, which, I hasten to add, now, would not seem to have been drafted, with the intention of being only so more kind of dryly interpreted, as if to merely be about, say, e.g. breaches of discipline, that might only have been perpetrated, in the very course of processing, an-amendment or-access application, to hand, in the very external review concerned then, for, even as far back as their very inception, in Section-No. 96, of the FOI Act, such provisions, were always explicitly framed, as being about, evidence that an officer of the agency has been guilty of a breach of duty or of misconduct in the administration of the Bill (i.e. with my red underline added, for particular consideration, herein), which obviously encompasses, or may well be seen to have, at least, at times, touched upon, the very potential-or possibilities (anyhow), for issues involving more systemic corruption, in an agency's proposed practices, of purporting to administer its obligations, under the said legislative scheme (cf. Section-No. 113, of the RTI Act, too), itself, anyhow, to arise, and be investigated, quite thoroughly, even in terms of matters of some general importance then, upon such an external review-process, you see? ...*

22. As I understand the applicant's submissions, they make serious allegations about the conduct of Health Service and OIC employees – in particular, the applicant's allegation that OIC is *'improperly acting'* under the *'dictation'* of the Health Service and its *'very improper motives'* in pursuit of an abuse of the processes of the IP Act.[35] The applicant has not provided any evidence, other than his assertions, to corroborate any of the allegations in his submissions, including those summarised above at paragraph 20 and as set out below:

> *the very terms of that said preliminary view, would seem to indicate, how, your office appears to only be improperly acting, under the dictation of, the very improper motives of the department, itself, in pursuit, of which, the said preliminary view seems to have been so sort of engineered (so to speak), moreover, well, all, of that, appears to be, nothing other than, an abuse of the processes, under Part 9, of Chapter 3, of the IPAS* [sic]*, and that is, as apparently designed, like I say, as merely some sort of decoy, that is, in order to obfuscating, how the department failed to take into account, all the relevant considerations, as regards my access applications, focused down, instead, on completely irrelevant ones, whilst seeking to have your office fall into jurisdictional*

[31] Pages 45-47 of 19 April Submissions.
[32] Page 49 of 19 April Submissions.
[33] Footnote 66 on pages 24-25 of the 19 April Submissions.
[34] Footnote 105 on pages 39-40; (and pages 28, 29, 31 and 46) of the 19 April Submissions.
[35] At page 50 of the 19 April Submissions [footnotes omitted].

> *errors, not to mention, otherwise adopting errors of law, and, proposed findings that are not based on any logically probative material, for some only improper undisclosed ulterior purpose-or purposes-then.*

23. OIC's practice of conveying a preliminary view to adversely affected review participants is an accepted means affording review participants procedural fairness and an opportunity to provide submissions in support of their case before a final, formal decision is made.[36]

24. I accept that the applicant is disappointed with the information he has received from the Health Service, and I acknowledge that he has been largely dissatisfied with the processing of his applications and his experience with the external review process. However, his concerns in my view are in the nature of service complaints and expressions of dissatisfaction with the process. While he has made some serious allegations, I do not consider there is any evidence, beyond his assertions, to enliven the offence[37] or disciplinary action provisions[38] nor otherwise trigger the Information Commissioner's reporting obligations. I have therefore, not dealt with them further in these reasons.

Scope of applications

Relevant law

25. The IP Act requires that an access application must *'give sufficient information concerning the document to enable a responsible officer of the agency or Minister to identify the document'*.[39]

26. There are sound practical reasons for requiring the documents sought in an access application to be clearly and unambiguously identified, including that the terms of the access application set the parameters for an agency's response and the direction of an agency's search efforts.[40] The Information Commissioner has also found that the scope of an access application may not be unilaterally widened on external review.[41]

27. The Information Commissioner has held that although the principles outlined at paragraph 26 above are *'in the context of the repealed FOI Act'* they *'remain relevant and are consistent with the object and pro-disclosure bias of the RTI Act'* [footnotes removed].[42] Likewise, I consider that these principles are also relevant and consistent with the object[43] and pro-disclosure bias[44] of the IP Act.

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[36] *Underwood v Metro North Hospital and Health Service* [2024] QCATA 88 at [11] and [13].
[37] Sections 184 and 186 of the IP Act.
[38] Section 126 of the IP Act. In any event, I note that OIC is not required to account to an applicant if action is taken or not taken by OIC in accordance with section 126 of the IP Act, or the equivalent section in section 113 of the RTI Act (*K77 and Department of State Development and Infrastructure (Office of Industrial Relations)* [2024] QICmr 24 (5 June 2024) at [30]).
[39] Section 43(2)(b) of the IP Act.
[40] *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491 at [8] (***Cannon***) considering equivalent provisions in the now repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**); *O80PCE and Department of Education and Training* (Unreported, Queensland Information Commissioner, 15 February 2010) at [33] (***O80PCE***); *H40 and Queensland Police Service* [2023] QICmr 30 (28 June 2023) at [13]; *M34 and Sunshine Coast Hospital and Health Service* [2023] QICmr 55 (5 October 2023) at [13].
[41] *Robbins and Brisbane North Regional Health Authority* (1994) 2 QAR 30 at [17]; *Arnold and Redland City Council* (Unreported, Queensland Information Commissioner, 17 October 2013) at [17] to [21]; *Simpson MP and Department of Transport and Main Roads* (Unreported, Queensland Information Commissioner, 29 July 2011) at [11] to [22]; and *Fennelly and Redland City Council* (Unreported, Queensland Information Commissioner, 21 August 2012) at [15].
[42] *Lindeberg and Department of Treaty, Aboriginal and Torres Strait Islander Partnerships, Communities and the Arts* [2023] QICmr 34 (30 June 2023) at [19].
[43] Section 3(1)(b) of the IP Act.
[44] Section 64(1) of the IP Act.

Applicant's submissions

28. The applicant made submissions regarding the scope of his access application:[45]

> *Now, in order to seeking to sort of pick you up on, the very terms of your said proposed preliminary view, and starting out, under the very first heading, and in respect of your proposed discussions, supposedly about, the* ***Background,*** *at page-No. 2, of your said letter (of 15/04/24), just to begin, with a bit of housekeeping-of sorts-then, I would, as always, like I say, only with resect, propose to sort of observe, to the effect of that, your said proposed preliminary view, might, i.e. in the course of the references, as proposing to sort of culminate[31], in the very footnote-No. 2, in that said page-No. 2, in your said letter (of 15/04/24) then, in some very generalised kinds of citations of, my said letter, of the last 29th of December, well, as I was going to say then, such comments, might be seen to have somewhat anyhow-kind of misrepresented, the very nature of my submissions, as made in the course of my having to go all pen to paper (so to say), and draft a response, over the very Christmas break, to your office's … correspondence (of 21/12/23)[32], insomuch as that, inter alia[33], my having got the kind of impression, that [OIC] was intending to have your office sort of focus down, in this very sort of way (now) then, upon more merely technically argued details, with her explicit references to, both of these external review-matters, in the form of a kind of simplistic two-item-list, of the very so-called (as your office says then) date ranges[34], well, I might have-albeit kind of hastily then-reiterated[35], how I would, still not accept, being so sort of tied down, in isolation, as it were then, to such kinds of details, in any-or either-event[36], whilst highlighting-albeit without actually specifying the details (or just so meticulously sort of going over all of the material again) then, e.g. how I had already painstakingly taken the department to task, on such sorts of issues, e.g. in the very paragraph-No. 10, at the bottom of page-No. 15, through to, about the middle of page-No. 17, of my said application for internal review (of 19/10/23), and that is to say, whilst, even now, as I said, in each instance-of both access applications then, the suggested sorts of date ranges, were only ever intended as general kinds of guidelines…*
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> *(a) as I so expressly did[41] ; well; an applicant, may be seen to have indicated, how, the timeframes so alluded to, are only so generally-or roughly then-expressed, as more of a mere guide, as to the sorts of possibilities, of the actual time-or times (as the case may be then)-of the events involved; and what is more-to the very point (in any event) then;*
>
> *(b) given the, not, so narrowly focused wording, of clause-(b), of subsection-(2), of Section-No. 43, of the IPA[42], i.e. as providing only that, an access application must give sufficient information ... to enable an agency ... to identify the document-sought (i.e. with the red underlines added, for particular emphasis, herein, then);*
>
> [sic] [footnotes omitted]

Findings

29. I understand the applicant to be submitting, *inter alia*, that the date ranges he provided were only intended to be *'general kinds of guidelines'* and that the scope of his application should not be unnecessarily limited by the dates he originally provided.

30. It is well settled that the scope of an application sets the parameters for an agency's searches.[46] In these reviews, I consider it was reasonable for the Health Service to rely on the date ranges the applicant originally provided and use those dates as parameters for its searches, particularly given the historical nature of the requested

[45] Pages 14-16 of the 19 April Submissions.
[46] *Cannon* at [8] cited in *O80PCE* at [33]; *Van Veenendaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017) at [15] and *Ciric and Queensland Police Service* [2018] QICmr 30 (29 June 2018) at [20].

documents. I do not accept the applicant's submission that the dates were to be used as general guidelines only, nor do I consider it would be reasonable for the scope of the applications to be expanded on external review so as to require the agency to search broader date ranges.

31. I am satisfied the scope of each application is as follows:

    a) In External Review No. 317685 the access application under review seeks access to the applicant's medical records from January 1989 to January 1991.
    b) In External Review No. 317700 the access application under review seeks access to the applicant's medical records from 1 January 1974 to 1 March 1979.

Unlocatable documents

Relevant law

32. Under the IP Act an individual is entitled to access their personal information held by government.[47] This right of access is not absolute but subject to the provisions of the IP Act and RTI Act,[48] including grounds for refusing access.[49] Relevantly, an agency may refuse access if the requested documents are unlocatable.[50] Parliament has recognised that government records will be unlocatable if they have been lawfully disposed of under authority given by the State Archivist.[51]

33. To determine that a document is unlocatable, the legislation requires consideration of whether there are reasonable grounds to be satisfied that the requested document has been or should be in the agency's possession; and, if so, whether the agency has taken all reasonable steps to find the document.[52] In answering these questions, regard should be had to the circumstances of the case and the relevant key factors[53] including 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. What constitutes *'all reasonable steps'* will vary from case to case and is dependent on the circumstances[54] and is a different test to all *possible* steps.[55]

34. OIC's functions on external review are set out in the IP Act[56] to include investigating and reviewing whether an agency has taken all reasonable steps to locate documents applied for by applicants.

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[47] Section 40 of the IP Act.
[48] Section 40(1)(a) of the IP Act provides that '**[s]*ubject to this Act***, *an individual has a right to be given access under this Act to documents of an agency to the extent they contain the individual's personal information'* (emphasis added).
[49] Section 67(1) of the IP Act allows an agency or Minister to refuse access to a document in the same way and to the same extent the agency or Minister could refuse access to the document under section 47 of the RTI Act were the document to be the subject of an access application under the RTI Act.
[50] Section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(b) of the RTI Act.
[51] See examples to section 52(1)(b) of the RTI Act.
[52] *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [20]-[21] (***Pryor***) which adopted the Information Commissioner's findings in *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (***PDE***).
[53] *Pryor* at [19] and [21]. See also *P17 and Queensland Corrective Services* [2020] QICmr 68 (17 November 2020).
[54] *Webb v Information Commissioner* [2021] QCATA 116 at [5] per McGill J (***Webb***).
[55] *P52 and Fraser Coast Regional Council* [2024] QICmr 7 (19 February 2024) at [24]; *S55 and Queensland Police Service* [2023] QICmr 3 (30 January 2023) at [23].
[56] The external review functions are set out in section 137 of the IP Act.

Applicant's submissions

35. The applicant made detailed submissions[57] in support of his position that his medical records should have been located, contesting evidence of destruction of his records and arguing that it would be reasonable for the Health Service to conduct further searches. I have summarised the applicant's submissions below, to the extent I consider they are relevant to the issue for determination:

    a) the applicant disagrees the evidence *'conclusively'* proves his records have been destroyed[58]
    b) the disposal order of the Health Service in 2013 outlines certain records for destruction but the applicant considers there is no evidence that **his** childhood records have been destroyed in that process[59]
    c) OIC is incorrectly relying on a mere citation from the Health Service that it destroyed his childhood medical records[60]
    d) OIC has relied on the State Archivist authorisation but just because there is an authorisation doesn't mean it was used[61]
    e) OIC has failed to appreciate this special class of information being health information[62]
    f) the Information Commissioner's findings must be distinguished from *PDE* and *Pryor* because those matters *'merely concerned'* a citizen's right to their personal information although *'of an administrative nature'* held by a *'mere local government'* whereas he is seeking access to his medical records which would *'obviously'* and reasonably *'attract a far more stringent sort of threshold to be met'*[63]
    g) the applicant submits the Health Service is required to search its backup system;[64] and
    h) the applicant suggests the Health Service took indiscriminate steps to locate documents which does not satisfy the threshold for refusing access to unlocatable documents.[65]

Searches by the Health Service

36. The Health Service conducted searches of:

    - its patient administration system, known as HBCIS (Hospital Based Corporate Information System)
    - the physical file area
    - the archive shed
    - the Grace Records Management web portal
    - the admission and discharge registers for the relevant Hospital; and
    - the Emergency Department registers.

37. The Health Service also searched its disposal records (**Disposal Records**) and provided the Search Records and Disposal Records to OIC. Those records can be described as follows:[66]

[57] The 19 April Submissions, totalling 51 pages.
[58] Page 13 of the 19 April Submissions.
[59] Pages 20-26 of the 19 April Submissions.
[60] Page 19 of the 19 April Submissions.
[61] Footnote 66 on pages 24-25 of the 19 April Submissions.
[62] Page 26 of the 19 April Submissions.
[63] Pages 29-39 of the 19 April Submissions.
[64] Pages 41-43 of the 19 April Submissions.
[65] Pages 36-39 of the 19 April Submissions.

- extracts from the Health Service database pertaining to the applicant's patient profile
- the relevant Hospital emails between staff detailing their searches; and
- memos seeking and receiving disposal approval.

38. The Health Service also pointed to the Health Sector (Clinical Records) Retention and Disposal Schedule (**RDS**) operating in 2013 which relevantly authorised disposal of certain records, as follows:

    - medical records from childhood must be retained for 10 years subsequent to a person attaining 18 years of age (relevant to External Review No. 317700, for records between 1974-1979); and
    - medical records must be retained for 10 years after last patient/client service provision or medico-legal action (relevant to External Review No. 317685, for records between 1989-1991).

39. The Health Service's searches located the applicant's personal information in the Admissions Register showing he was admitted to the relevant Hospital on 6 April 1979 and discharged on 9 April 1979. This was the only information relevant to the applicant (proximate to the date range of the applications) that the Health Service located through its searches. The Health Service noted the following in the course of its searches:[67]

> *Unfortunately, we do not have any emergency registers which cover the dates specified below. To my knowledge these records are destroyed and our emergency records on hand only date back to early 2000's.*
>
> *I have checked all admission and discharge registers and have found one record entry. See attached. However, documentation is very basic as it is a register not a medical record.*
>
> *Furthermore, I have also reviewed patient's current medical record and there are no presentations that could potentially relate or be in reference to past incidences/presentations within the timeframe specified. His current record commences from 25/11/13.*
>
> *Historically our medical charts were very basic prior to 1990's and patient presentations were recorded on a "card" in a ledger format. Post 1990's and onwards, patients records consisted of a manilla patient chart which generated a broader and more in-depth medical record. (Similar to today's charts). Such details recorded included emergency presentations to ED, admissions and outpatient medical presentations as* [the relevant] *Health Service does operate GP alike appointments to community and allied health outpatient appointments including physio, OT, Primary Health Care etc.*

40. As set out above, the Health Service observed that the Admissions Register was not considered to be a medical record,[68] but agreed to disclose this information to the applicant to assist with informal resolution.[69]

Findings

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[66] 35 pages provided to OIC on 5 December 2023. The extracts from the Health Service database containing the applicant's personal information are on pages 4-9 of 35.
[67] Email from the Administration Team Leader on 7 November 2023.
[68] Ibid.
[69] Section 103(1) of the IP Act. The Health Service disclosed the Search Records and Admissions Register to the applicant by registered post on 15 April 2024. The dates of the Admissions Register also fall outside the dates of the access application.

41. The applicant asserts that he presented to the relevant Hospital for particular injuries during the relevant date ranges. The Health Service did not make any submissions to the contrary and its records show that the applicant has, over the years, been a patient at the relevant Hospital. The Admissions Register largely accords with the applicant's recollection about his admission in 1979 and, while there is no evidence corroborating the applicant's recollection about his other admission in 1989-1991, there is also no evidence to the contrary. For these reasons, I am satisfied, on the balance of probabilities, that the applicant's requested medical records were previously held by the Health Service.

42. Having considered the applicant's submissions[70] and the information provided by the Health Service,[71] I am satisfied that the Health Service has taken reasonable steps to locate the requested medical records. In reaching this conclusion, I have taken into account the historical nature of the requested records, the locations that were searched on both applications, the thorough inquiries undertaken by the Health Service, responses provided by hospital staff, the information available in the Disposal Records and the requirements of the Health Sector (Clinical Records) RDS.

43. I do not accept the applicant's submission that the Health Service took indiscriminate or haphazard steps to locate his records. Notwithstanding what is established by the Disposal Records, the Health Service still proceeded to conduct searches of relevant locations, and make inquiries with relevant units of the relevant Hospital, despite the retention and disposal period having expired in 2001.[72] The response extracted at paragraph 39 demonstrates, to my mind, that Health Service staff carefully considered the particular circumstances of this matter and turned their mind to the various locations where historical records may be kept. I am satisfied those searches and inquiries amount to reasonable steps in the circumstances of these reviews.

44. I am further satisfied the Disposal Records confirm that in 2013 medical records held the Health Service, including those within the date ranges of 1974-1979 and 1989-1991, were destroyed in accordance with the Health Sector (Clinical Records) RDS as approved by the State Archivist. While I acknowledge the applicant's submission that the Disposal Records are of a general nature and do not explicitly refer to the destruction of *his* medical records, I am satisfied that *any* medical records from those date ranges, including any of the applicant's, would have been captured in those disposal processes and destroyed in 2013.

45. I acknowledge the applicant is disappointed that medical records have not been located and I have considered his submission that, due to their sensitive nature, medical records should be treated differently and retained longer than routine government records.[73] Relevantly, the Health Sector (Clinical Records) RDS requires retention of health records for longer than other types of records.[74] However, as set out above, I have found there are reasonable grounds on which to be satisfied that the requested records have been destroyed in accordance with that RDS.

[70] Including those set out in paragraph 35 above.
[71] At paragraphs 36 to 40.
[72] Proceeding on the basis that the applicant attained 18 years of age in 1987 (confirmed in the identity documents the applicant provided to the Health Service), I identified that the Health Sector (Clinical Records) RDS authorised disposal of his childhood medical records from 1997 onwards, and authorised disposal of his adult medical records from 1989-1991 after 2001.
[73] As set out in paragraph 35 above.
[74] For example, records relating to infringements for offences or breaches of legislation or a local law where legal action results, including investigations, complaints and inspections (such as a dog attack) must be retained for 7 years after the last action (reference 19.4.1, Local Government Sector Retention and Disposal Schedule : QDAN 480v.4) whereas the clinical records of minors are retained until the individual attains 28 years of age (disposal authorisation 2655, Health Sector (Clinical Records) Retention and Disposal Schedule).

46. Lastly, I am satisfied that the Health Service is not required to search its backup systems in the circumstances of this matter. The RTI Act only requires a Minister or agency to search its backup system for a 'prescribed document'[75] that does not exist and only if the Minister or agency considers the document has been kept in, and is retrievable from, the backup system.[76] As set out above, these reviews have been conducted on the basis that the requested medical records were previously held by the Health Service but that they are unlocatable because they have been destroyed. This is not a case examining the issue of nonexistent documents under section 52(1)(a) of the RTI Act and accordingly, I find backup searches are not required.[77]

Conclusion

47. In the circumstances and on the material before me I make the following findings:

    a) there is a reasonable basis to be satisfied that the medical records sought by the applicant have previously been in the possession of the Health Service
    b) the Health Service has taken all reasonable steps to locate the requested medical records but they cannot be found
    c) there is a reasonable basis to be satisfied that the Health Service would have disposed of any medical records pertaining to the applicant (from 1974-1979 and 1989-1991) in 2013, in accordance with the Health Sector (Clinical Records) RDS;[78] and
    d) the Health Service may refuse access to the medical records requested in both access applications (including metadata) on the basis the documents are unlocatable.[79]

DECISION

48. In External Review No. 317685, I affirm the Health Service's internal review decision[80] and find that the Health Service may refuse access to the documents on the basis they are unlocatable, under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(b) of the RTI Act.

49. In External Review No. 317700, I vary the Health Service's deemed decision[81] and find that the Health Service may refuse access to the documents on the basis they are unlocatable, under section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(b) of the RTI Act.

50. I have made these decisions as a delegate of the Information Commissioner, under section 139 of the IP Act.

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[75] As defined in section 52(4) of the RTI Act.
[76] Section 52(2) of the RTI Act which states *'*[b]*efore an agency or Minister may be satisfied under subsection (1)(a) that a prescribed document does not exist, a search for the document from a backup system is required, but only if the agency or Minister considers the document has been kept in, and is retrievable from, the backup system.'* Subsection (1)(a) in section 52 states '[f]*or section 47(3)(e), a document is nonexistent or unlocatable if—(a)the agency or Minister dealing with the application for access is satisfied the document does not exist*'.
[77] Although the applicant requested the metadata in both of his access applications, I am satisfied there is no ability to search for the metadata of a document that has been destroyed by an agency. Further, metadata only applies to documents created electronically and there is evidence to suggest the requested medical records were hard copy or paper records, especially noting their presumed creation in 1974-1979 and 1989-1991 (and noting the Health Service's submissions set out at paragraph 39 of this decision). Accordingly, I have not made any findings on this aspect of the access applications.
[78] RDS authorised in 2012 by the State Archivist.
[79] Sections 67(1) of the IP Act and sections 47(3)(e) and 52(1)(b) of the RTI Act.
[80] Section 123(1)(a) of the IP Act.
[81] Section 123(1)(b) of the IP Act.

Katie Shepherd
Assistant Information Commissioner

Date: 7 November 2024

APPENDIX

Significant procedural steps

External Review No. 317685	
Date	**Event**
28 November 2023	OIC received the external review application. OIC confirmed receipt of the external review application with the applicant. OIC requested preliminary documents and information from the Health Service.
30 November 2023	OIC received correspondence from the applicant.
4 December 2023	OIC received preliminary documents and information from the Health Service.
13 December 2023	OIC received correspondence from the applicant.
21 December 2023	OIC notified the applicant and the Health Service it had accepted the external review application.
3 January 2024	OIC received correspondence from the applicant.
5 January 2024	OIC received correspondence from the applicant.
18 March 2024	OIC sought the view of the Health Service on releasing out of scope documents to the applicant. OIC received agreement from the Health Service to release out of scope documents to the applicant.
27 March 2024	OIC received correspondence from the applicant.
28 March 2024	OIC advised the applicant of the consideration of his correspondence.
9 April 2024	OIC sought the view of the Health Service on releasing search records to the applicant.
15 April 2024	OIC received agreement from the Health Service to release search records to the applicant. OIC asked the Health Service to release out of scope documents and search records to the applicant. OIC received confirmation from the Health Service that the out of scope documents and search records had been released to the applicant. OIC conveyed a preliminary view to the applicant.
20 May 2024	OIC received written submissions from the applicant contesting the preliminary view and requesting mediation with the Health Service.
31 May 2024	OIC requested permission from the applicant to provide his submissions to the Health Service alongside his mediation request.
10 June 2024	OIC received written correspondence from the applicant that he did not agree with his submissions being provided to the Health Service.

External Review No. 317685	
Date	**Event**
13 June 2024	OIC confirmed with the applicant his declination to share his submissions and request for mediation with the Health Service.
28 June 2024	OIC advised the Health Service of the applicant's request to engage in mediation.
19 July 2024	OIC received confirmation from the Health Service that they declined to engage in mediation.
23 July 2024	OIC advised the applicant the Health Service declined to engage in mediation.
12 August 2024	OIC received correspondence from the applicant.

External Review No. 317700	
Date	**Event**
30 November 2023	OIC received the external review application.
1 December 2023	OIC confirmed receipt of the external review application with the applicant. OIC requested preliminary documents from the Health Service.
5 December 2023	OIC received preliminary documents from the Health Service.
21 December 2023	OIC notified the applicant and the Health Service it had accepted the external review application.
3 January 2024	OIC received correspondence from the applicant.
5 January 2024	OIC received correspondence from the applicant.
18 March 2024	OIC sought the view of the Health Service on releasing out of scope documents to the applicant. OIC received agreement from the Health Service to release out of scope documents to the applicant.
27 March 2024	OIC received correspondence from the applicant.
28 March 2024	OIC advised the applicant of the consideration of his correspondence.
9 April 2024	OIC sought the view of the Health Service on releasing search records to the applicant.
15 April 2024	OIC received agreement from the Health Service to release search records to the applicant. OIC asked the Health Service to release out of scope documents and search records to the applicant. OIC received confirmation from the Health Service that the out of scope documents and search records had been released to the applicant. OIC conveyed a preliminary view to the applicant.

External Review No. 317700	
Date	**Event**
20 May 2024	OIC received written submissions from the applicant contesting the preliminary view and requesting mediation with the Health Service.
31 May 2024	OIC requested permission from the applicant to provide his submissions to the Health Service alongside his mediation request.
10 June 2024	OIC received written correspondence from the applicant that he did not agree with his submissions being provided to the Health Service.
13 June 2024	OIC confirmed with the applicant his declination to share his submissions and request for mediation with the Health Service.
28 June 2024	OIC advised the Health Service of the applicant's request to engage in mediation.
19 July 2024	OIC received confirmation from the Health Service that they declined to engage in mediation.
23 July 2024	OIC advised the applicant the Health Service declined to engage in mediation.
12 August 2024	OIC received correspondence from the applicant.