



## Decision and Reasons for Decision

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<b>Citation:</b>	<b>B86 and Metro South Hospital and Health Service [2024] QICmr 23 (4 June 2024)</b>
<b>Application Number:</b>	<b>317131</b>
<b>Applicant:</b>	<b>B86</b>
<b>Respondent:</b>	<b>Metro South Hospital and Health Service</b>
<b>Decision Date:</b>	<b>4 June 2024</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - HEALTHCARE INFORMATION - application for medical records - whether disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant - whether disclosure is contrary to the applicant's best interests under section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(d) and 51 of the <i>Right to Information Act 2009</i> (Qld)</b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied to Metro South Hospital and Health Service (**MSHHS**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to medical records in relation to an incident that occurred in August 2022, including CCTV footage, associated audio, documents and reports.<sup>1</sup>
2. MSHHS did not make a decision within the statutory timeframe and therefore was deemed to have made a decision refusing access to the requested documents.<sup>2</sup> The applicant applied to the Office of the Information Commissioner (**OIC**) for external review and provided written consent authorising his parent to act on his behalf.<sup>3</sup>
3. As part of this external review, the applicant's parent agreed<sup>4</sup> to narrow the scope of this review to a request for footage only (either CCTV or Body Worn Camera (**BWC**) footage) relating to the incident of August 2022.<sup>5</sup> During the external review, MSHHS conducted searches and located one BWC recording captured by a member of MSHHS's security staff that was relevant to the narrowed scope of the application.

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<sup>1</sup> Access application dated 21 December 2022.

<sup>2</sup> Deemed decision taken to have been made on 30 January 2023. MSHHS advised that it did not log this application or assign an application number as MSHHS was already progressing a previous application from the applicant and was attempting to assist with the matter informally. Despite this, the applicant made a valid access application which was required to be dealt with under the IP Act. As no decision was issued within the required timeframe, MSHHS is deemed to have refused access to all documents under section 66 of the IP Act.

<sup>3</sup> External review application dated 16 February 2023.

<sup>4</sup> By telephone call on 29 November 2023 followed by written confirmation in our letter of 13 December 2023.

<sup>5</sup> The remaining documents were already captured in a separate access application concurrently subject to external review with the OIC at the time.

4. Whether this BWC recording may be disclosed is the only issue remaining for determination. For the reasons set out below, I vary MSHHS's deemed refusal of access decision and find that access to the BWC recording can be refused under section 67(1) of the IP Act and section 47(3)(d) of the *Right to Information Act 2009* (Qld) (**RTI Act**).<sup>6</sup>

## Background

5. The decision under review is MSHHS's deemed decision taken to have been made on 30 January 2023.
6. During the external review, MSHHS submitted that access to the BWC recording should be refused on the basis that disclosure might be prejudicial to the mental health or wellbeing of the applicant.<sup>7</sup> MSHHS also provided submissions indicating that CCTV footage was non-existent and/or unlocatable. OIC conveyed a view to the applicant regarding these issues.<sup>8</sup>
7. The applicant's parent accepted OIC's view in relation to the nonexistence of the CCTV footage<sup>9</sup> and therefore this issue is not further being considered in this external review. However, the applicant's parent contested the refusal of the BWC recording on the ground that disclosure might be prejudicial to the mental health or wellbeing of the applicant.
8. OIC also communicated with MSHHS<sup>10</sup> to ascertain whether it would consider partial release via inspection as an informal resolution proposal.<sup>11</sup> These negotiations with MSHHS were not successful in informally resolving the review.
9. Significant procedural steps taken during the external review are set out in the Appendix to this decision.
10. Evidence, submissions, legislation and other material I have considered in reaching this decision are identified in these reasons, including the Appendix.
11. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**),<sup>12</sup> particularly the right to seek and receive information as recognised in section 21 of the HR Act. I consider that a decision maker will, when observing and applying the law prescribed in the IP Act, be '*respecting*' and '*acting compatibly with*' this right and others prescribed in the HR Act.<sup>13</sup> I further consider that, having done so when reaching my decision, I have acted compatibly with and given proper consideration to relevant human rights, as required under section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between the Victorian equivalents of Queensland's IP and RTI Acts and HR Act: '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.*'<sup>14</sup>

<sup>6</sup> Section 67(1) of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent it could refuse access to the document under section 47 of the RTI Act.

<sup>7</sup> Submissions dated 17 August 2023 and 8 December 2023.

<sup>8</sup> Letter dated 13 December 2023.

<sup>9</sup> By telephone conversation of 12 February 2024, the applicant's parent accepted this preliminary view. This was confirmed in further telephone call on 29 April 2024.

<sup>10</sup> Letter dated 22 November 2023.

<sup>11</sup> In accordance with OIC's obligations under section 103(1) of the IP Act.

<sup>12</sup> Relevant provisions of which commenced on 1 January 2020.

<sup>13</sup> See *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; and *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

<sup>14</sup> **XYZ** at [573].

12. The applicant's parent raised a number of concerns about MSHHS which are outside the Information Commissioner's external review jurisdiction under the IP Act.<sup>15</sup> In making my decision in this external review, I have considered the applicant's submissions to the extent they are relevant to the issues for determination in the context of the information in issue.

### Information in issue

13. The information in issue is comprised of one BWC recording held by MSHHS.<sup>16</sup>

### Issue for determination

14. As outlined above, some issues were resolved during the external review process.<sup>17</sup> Therefore, the only remaining issue for determination in this external review is whether access to the BWC recording may be refused on the ground that disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant under section 67(1) of the IP Act and sections 47(3)(d) and 51 of the RTI Act.

### Relevant law

15. Under 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.<sup>18</sup> However, this right is subject to other provisions of the IP Act and the RTI Act, including the grounds on which an agency may refuse access to documents.
16. Relevantly, access may be refused to an applicant's relevant healthcare information if disclosure of the information might be prejudicial to the physical or mental health or wellbeing of the applicant.<sup>19</sup>
17. '*Relevant healthcare information*' means healthcare information given by a healthcare professional.<sup>20</sup> A '*healthcare professional*' means a person who carries on, and is entitled to carry on, an occupation involving the provision of care for a person's physical or mental health or wellbeing.<sup>21</sup>
18. The Information Commissioner<sup>22</sup> has the power to decide any matter in relation to an access application that could have been decided by an agency.<sup>23</sup>

### MSHHS's submissions

19. During the external review, OIC requested that MSHHS conduct searches. In response, MSHHS located one BWC recording that was captured by a member of MSHHS's security staff. It records a medical procedure undertaken by MSHHS health practitioners on the applicant.

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<sup>15</sup> By phone call with this Office on 13 June 2023 and letter dated 7 May 2024.

<sup>16</sup> Section 121(3) of the IP Act prohibits me from further describing this information.

<sup>17</sup> By telephone conversation of 12 February 2024, followed by a further phone call on 29 April 2024 the applicant's parent accepted OIC's preliminary view that the CCTV footage was nonexistent and/or unlocatable.

<sup>18</sup> Section 40 of the IP Act.

<sup>19</sup> Under section 51 of the RTI Act.

<sup>20</sup> Schedule 5 of the IP Act.

<sup>21</sup> Schedule 5 of the IP Act provides examples such as a doctor, including a psychiatrist or a psychologist, social worker or registered nurse.

<sup>22</sup> Or her delegate under section 139 of the IP Act.

<sup>23</sup> Section 118(1)(b) of the IP Act. As such, I have the power to make a decision on the relevant healthcare information, under section 47(3)(d) of the RTI Act.

20. MSHHS submitted<sup>24</sup> that the BWC recording comprises the applicant's healthcare information, the disclosure of which might be prejudicial to his mental health or wellbeing.<sup>25</sup>
21. Having reviewed the BWC recording, it was OIC's view that it comprised relevant healthcare information held by MSHHS relating to the applicant. OIC sought additional information from MSHHS in support of their submissions regarding prejudice.<sup>26</sup>
22. In response,<sup>27</sup> MSHHS provided more extensive submissions setting out the evidence it relied on to reach its position. While I am limited in the amount of detail that I can disclose about those submissions,<sup>28</sup> I can confirm that MSHHS sought advice from the applicant's treating team, in relation to the impact that viewing the BWC recording may have on the applicant, and further stated:
- [The applicant's] treating team does not support release of the body worn camera footage due to his status under the Mental Health Act 2016 and potential for prejudice to his mental health and wellbeing.*<sup>29</sup>
23. MSHHS also provided OIC with advice from an appropriately qualified healthcare professional.<sup>30</sup>
24. OIC conveyed this view to the applicant.<sup>31</sup> The applicant's parent contested this view and made submissions in support of disclosure of the BWC recording.<sup>32</sup>

### Applicant's parent's submissions

25. In summary, the applicant's parent submitted:<sup>33</sup>
- invoking the applicant's status under the *Mental Health Act 2016* as a sufficient reason to withhold access to the BWC recording is unlawful direct discrimination
  - more than 700 medical documents have already been released to the applicant including references to the medical procedure captured on the BWC, and these references would have been redacted if the BWC recording really posed the claimed potential for prejudice
  - the routine administration of the medical procedure to the applicant has been experienced by him personally and directly, and if viewing the BWC recording of the procedure would be prejudicial to the applicant's health or wellbeing, it follows that the procedure itself would have a comparable effect
  - if security staff did not lay hands on the applicant, then there should be no legitimate reason to withhold the BWC recording, and its release would serve to corroborate the security staff's account of events; and
  - withholding this crucial evidence perpetuates further feelings of powerlessness and distrust, and undermines principles of transparency and accountability, which are essential components of any healthcare system.

<sup>24</sup> On 17 August 2023.

<sup>25</sup> Under section 51 of the RTI Act.

<sup>26</sup> Letter dated 22 November 2023.

<sup>27</sup> Letter dated 8 December 2023.

<sup>28</sup> Section 121 of the IP Act.

<sup>29</sup> This information was provided to OIC by MSHHS Principal Officer (Chief Executive)—refer to section 51(2) of the RTI Act.

<sup>30</sup> Schedule 5 of the IP Act defines who is a healthcare professional and states **appropriately qualified**, for a healthcare professional, means having the qualifications and experience appropriate to assess relevant healthcare information.

<sup>31</sup> Letter dated 13 December 2023.

<sup>32</sup> Letter received 7 May 2024.

<sup>33</sup> Letter dated 7 May 2024. The applicant's parent sought numerous extensions of time to provide a response to OIC's letter of 13 December 2023. OIC granted the requested extensions.

26. In their submissions, the applicant's parent focused on the lack of accountability, transparency and thorough explanations to articulate *how* and *why* the disclosure of this specific information to the applicant would cause the potential for prejudice.<sup>34</sup> They emphasised that, in their view, there is no valid evidential explanation to suggest that allowing the applicant access to this information would harm his physical or mental well-being.

### Analysis and findings

27. There is an undeniable public interest in the disclosure of government held information to promote openness and transparency in government and to enhance the government's accountability. In terms of the applicant's parent's submission about corroboration of the security staff's account of events I must note, however, that the issue for determination is not whether disclosure of the BWC recording would, or would not, be contrary to the public interest. In this matter, the issue for determination relates to the potential prejudice to the applicant's health. I acknowledge that, in some instances, accountability and transparency of a health service will enhance not only community trust, but also patient trust – and that this could possibly tell against a potential for prejudice to that patient's health and wellbeing.
28. However, I also note the advice provided to OIC from an appropriately qualified healthcare professional by MSHHS in this matter. The MSHHS's Principal Officer (Chief Executive) supported the view of this professional and submitted that release and viewing of the BWC recording might have a detrimental effect on the mental health and wellbeing of the applicant and therefore access should be refused.<sup>35</sup>
29. In this decision, I am limited in what I can say about these submissions, as discussing them risks disclosing the content of the BWC recording.<sup>36</sup> I can confirm that the mental condition and state of the applicant, the applicant's medication and treatment, and the risk of reversion and deterioration that might occur followed by the viewing of the BWC recording were taken into account. However, to provide further detail would not only risk disclosing information that subverts the very purpose of the review; it would also be contrary to the IP Act, which prevents me from including information that is claimed to be contrary to the public interest information in a decision.<sup>37</sup>
30. I acknowledge the applicant's parent's concerns about the extent of the information regarding MSHHS's submissions provided to them. The parent questioned how they could be given a fair opportunity to respond to OIC's preliminary view, which has considered these submissions, without being given more detail about them.<sup>38</sup> The parent also contended that OIC '*regurgitated*' legislative text which raised serious concerns about transparency, accountability and the protection of individual rights.<sup>39</sup> While I acknowledge that it was difficult for the applicant's parent to make meaningful submissions interrogating MSHHS's submissions, again the IP Act,<sup>40</sup> as well as the practical need to avoid disclosing information in issue and obviating the purpose of the review,<sup>41</sup> prevented me from providing the applicant with further details.

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<sup>34</sup> Ibid.

<sup>35</sup> Submissions dated 8 December 2023.

<sup>36</sup> Or similar information that, although not part of the information in issue, is of the same nature and therefore could reasonably be expected to give rise to the same concerns. It would be paradoxical to include such information in this decision to explain why other information of the same nature may be refused.

<sup>37</sup> Section 121(3) of the IP Act

<sup>38</sup> By telephone on 12 February 2024 and 29 April 2024.

<sup>39</sup> Written submission received by OIC on 7 May 2024.

<sup>40</sup> Section 118(2) of the IP Act.

<sup>41</sup> Or conveying information akin to the content of the BWC recording to explain nondisclosure of that recording, as mentioned at footnote 36 above.

31. In short, while I acknowledge the applicant's parent's concerns, I am satisfied that the level of detail provided to them regarding MSHHS's submissions was both reasonable and necessary, notwithstanding obligations of fairness in the IP Act<sup>42</sup> and at common law. I am satisfied that I 'adopt[ed] procedures that are fair, having regard to the obligations of the commissioner under this Act',<sup>43</sup> as is within my discretion as a delegate of the Information Commissioner.<sup>44</sup>
32. I turn to the applicant's parent's submission that reference to the applicant's status under the *Mental Health Act 2016* is unlawful direct discrimination. In fact, the very intent of the ground of refusal contained in 67(1) of the IP Act and sections 47(3)(d) and 51 of the RTI Act is intrinsically related to the health of the applicant and the potential implications that might occur following disclosure. In this context, the applicant's mental health status under the *Mental Health Act 2016* at the time of the BWC recording, as noted in MSHHS's Principal Officer's submission, is a relevant consideration in determining whether disclosure might be prejudicial to the applicant's mental health or wellbeing.
33. In response to the applicant's parent's submission that in excess of 700 medical documents have been previously released to the applicant, some of which includes references to the incident captured on the BWC recording, I disagree with the parent's contention that, if the BWC recording really posed the claimed potential for prejudice, these references would have been redacted. I do not accept that release of these references raises any question or inconsistency regarding whether the BWC recording itself poses the potential for prejudice. Here, I note that the particular format of the BWC recording (which captures voices, images, and physical actions) differs to the type of documents raised by the applicant's parent, and therefore its disclosure impact on the applicant cannot be equated with the references in those types of documents.
34. I have also considered the applicant's parent's submission about MSHHS's routine administration of the medical procedure being experienced by the applicant personally and directly. The parent submitted that, if viewing the BWC recording of the procedure would be prejudicial to the applicant's health or wellbeing, it follows that the procedure itself would have a comparable effect.
35. I find, however, that it is misconceived to draw any equivalence between MSHHS's provision of the medical procedure to the applicant and disclosure of the BWC recording of that procedure to the applicant. I do not agree that, because MSHHS considered the procedure to be appropriate, MSHHS must also (despite its submissions to the contrary) actually consider disclosure of the BWC recording of the procedure to be appropriate. Further, I do not agree that the impact of the procedure on the applicant can be equated with the impact of viewing footage of the procedure. I am satisfied that MSHHS's administration of the procedure itself in no way calls into question MSHHS's submissions about the BWC recording. More generally, I note that the adequacy of the applicant's medical treatment by MSHHS is not an issue that I have jurisdiction to assess or to make a finding about under the IP Act.
36. In conclusion, in considering whether the applicant's mental health or wellbeing might be prejudiced by the disclosure of the relevant healthcare information, I must consider whether the prejudice is real and tangible as opposed to a fanciful, remote or far-fetched possibility.<sup>45</sup> Based on the evidence available to me, including the content and specific format of the BWC recording and information provided by MSHHS and

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<sup>42</sup> Section 110(2)(a) of the IP Act.

<sup>43</sup> Section 110(2)(a) of the IP Act.

<sup>44</sup> Section 108(1)(a) of the IP Act.

<sup>45</sup> *88OQAO and Wide Bay Hospital and Health Service* [2019] QICmr 14 (1 May 2019) at [18].

appropriately qualified healthcare professional, I find that there is a real and tangible risk that disclosing the relevant healthcare information in question might prejudice the applicant's mental health or wellbeing.

37. On that basis, I am satisfied that access may be refused to the BWC recording as its disclosure might be prejudicial to the applicant's mental health or wellbeing.<sup>46</sup>

## **DECISION**

38. Pursuant to section 123 of the IP Act, I decide<sup>47</sup> to vary MSHHS's deemed refusal of access decision and find that access to the BWC recording may be refused under section 67(1) of the IP Act and sections 47(3)(d) and 51 of the RTI Act on the ground that disclosure might be prejudicial to the mental health or wellbeing of the applicant.

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**A Rickard**  
**Assistant Information Commissioner**

**Date: 4 June 2024**

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<sup>46</sup> Section 47(3)(d) of the RTI Act.

<sup>47</sup> As a delegate of the Information Commissioner under section 139 of the IP Act.

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

<b>Date</b>	<b>Event</b>
16 February 2023	OIC received the external review application.
16 February 2023	OIC requested initial documents and preliminary information from MSHHS.
14 March 2023	MSHHS provided preliminary information.
24 March 2023	OIC notified the applicant and MSHHS that the external review application had been accepted and requested information from MSHHS.
5 May 2023	MSHHS provided the requested information.
13 June 2023	The applicant's parent contacted OIC by phone to discuss the issues in this review.
17 August 2023	MSHHS provided submissions.
22 November 2023	OIC requested MSHHS to provide further information in support of their submissions.
29 November 2023	The applicant's parent agreed to narrow the scope of the application to only footage recordings (CCTV and BWC).
8 December 2023	MSHHS provided further submissions.
13 December 2023	OIC conveyed a preliminary view to the applicant. OIC invited the applicant to provide submissions in response by 12 January 2024.
12 February 2024	By telephone conversation the applicant's parent accepted of OIC's preliminary view regarding the nonexistence of the CCTV footage and sought extension of time to provide submissions on the remaining issue.
15 April 2024	The applicant's parent sought additional extension of time to provide submissions.
29 April 2024	OIC contacted the applicant's parent to discuss the issues in this review.
7 May 2024	The applicant's parent provided submissions.