

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Marzini v Health Ombudsman (No 3)* [2019] QCAT 112

PARTIES: **ANDREAS MARZINI**  
(applicant)  
v  
**HEALTH OMBUDSMAN**  
(respondent)

APPLICATION NO/S: OCR006-18

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 3 May 2019

AMENDED ON: 17 May 2019

HEARING DATE: On the papers and, after reopening, on 17 May 2019

HEARD AT: Brisbane

DECISION OF: Judge Allen QC, Deputy President

- ORDERS:
1. **The following information may be redacted from the documents produced by the respondent in compliance with Order 1 of Judge Sheridan, Deputy President, made on 27 November 2018:**
    - (a) **private information, including telephone numbers, email and physical addresses of witnesses and employees of the Office of the Health Ombudsman and relevant agencies; and**
    - (b) **any information that relates to other practitioners and is unrelated to the applicant.**
  2. ~~The respondent's application for information be redacted from the documents produced by the respondent in compliance with Order 1 of Judge Sheridan, Deputy President, made on 27 November 2018 is otherwise refused.~~
  3. ~~The respondent is to produce to the Tribunal registry copies of any documents that it was required to produce pursuant to Order 1 of Judge Sheridan, Deputy President, made on 27 November 2018, that the respondent has purported to redact on the grounds of relevance, without such redactions, forthwith but no later than 4.00 pm on Monday 13 May 2019.~~
  4. **The respondent's application that the following documents in the possession of the respondent be**

**exempt from the requirements of Orders 1 and 2 of Judge Sheridan, Deputy President, made on 27 November 2018, that they be produced to the Tribunal registry for inspection by the applicant:**

- (a) Investigation Plan prepared by Danni Williams and Steve Martin, dated 17 November 2017; and**
- (b) Memorandum to Andrew Brown, Acting health Ombudsman from Meg Tucker, Principal Legal Officer, Immediate Action, dated 21 November 2017 and an enclosed draft section 58 Notice, dated 21 November 2017;**

**is refused.**

**CATCHWORDS:**

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DISCOVERY AND INTERROGATORIES – PRODUCTION AND INSPECTION OF DOCUMENTS – OTHER MATTERS – where the applicant applied to the Tribunal for orders requiring the respondent to produce certain documents – where the respondent opposed such application and was subsequently ordered by the Tribunal to produce certain documents – where the respondent applied for two documents to be exempt from the order to produce on the bases that they contained information that was not relevant and that both documents were subject to public interest privilege – whether the documents are relevant – whether the documents are subject to the public interest privilege – whether the documents ought to be exempt from the order to produce made by the Tribunal

*Health Ombudsman Act 2013 (Qld)*, s 3, s 4, s 13, s 36, s 58, s 59, s 232, s 272, s 274

*Health Practitioner Regulation National Law (Queensland)*, s 141

*Queensland Civil and Administrative Tribunal Act 2009 (Qld)*, s 62

*Marzini v Health Ombudsman* [2018] QCAT 393

*Marzini v Health Ombudsman (No 2)* [2019] QCAT 111

**REPRESENTATION**

on 3 May 2019:

Applicant: Self-represented

Respondent: Mr GR Cooper, Crown Solicitor

This matter was first heard and determined on the papers on 3 May 2019 pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*.

APPEARANCES AND  
REPRESENTATION  
on 17 May 2019:

Applicant: Self-represented  
Respondent Ms D Whitehouse, instructed by Crown Law

## REASONS FOR DECISION

### Background

- [1] On 30 October 2017, the respondent received a notification pursuant to s 141(1)(a) and (2) of the *Health Practitioner Regulation National Law* concerning the applicant, a registered Chinese Medicine Practitioner.<sup>1</sup> Sections 13(2) and 36 of the *Health Ombudsman Act 2013* (Qld) (*HO Act*) provide for such a notification to be dealt with by the respondent as a “health service complaint” pursuant to the *HO Act*.
- [2] On 21 November 2017, the respondent decided to take immediate registration action pursuant to s 58 of the *HO Act* by imposing conditions on the applicant’s registration as a Chinese Medicine Practitioner. Acting pursuant to s 59(4) of the *HO Act*, the respondent took such action without first undertaking the show cause process otherwise required by s 59(1)-(3) of the *HO Act*. Instead, pursuant to s 61 of the *HO Act*, the respondent invited a submission from the applicant about the action taken after it had been taken.<sup>2</sup>
- [3] The applicant, through his lawyers, provided written submissions challenging the decision of the respondent and seeking a meeting for the purpose of discussions to resolve the dispute, failing which certain actions might be taken, including seeking a review of the decision by this Tribunal.<sup>3</sup>
- [4] On 19 December 2017, the applicant filed an application to review the decision of the respondent made on 21 November 2017.
- [5] On 24 May 2018, the respondent’s legal representative advised the applicant that the respondent’s decision made on 21 November 2017 had been revoked.<sup>4</sup> The respondent’s legal representative invited the applicant to withdraw his application for review on the basis that the proceedings lacked utility in light of the revocation of the decision.<sup>5</sup> The applicant declined such invitation and instead has sought costs and/or compensation from the respondent and/or the State of Queensland.

---

<sup>1</sup> Although not relevant to this decision, I note that the applicant contends that the health service giving rise to the notification was provided by him, not in his capacity as a registered Chinese Medicine Practitioner, but as a health service not related to his registration: see, for example, the letter from the applicant’s lawyers to the respondent dated 15 December 2017 at page 5.

<sup>2</sup> Letter from the respondent to the applicant dated 21 November 2017.

<sup>3</sup> Letter from the applicant’s lawyers to the respondent dated 15 December 2017.

<sup>4</sup> Presumably by removal of the conditions on the applicant’s registration pursuant to s 65 of the *HO Act*.

<sup>5</sup> Email from the respondent’s legal representative to the applicant’s solicitor and counsel dated 24 May 2018.

- [6] The Tribunal has refused leave for the applicant to amend his claim to seek compensation from the respondent and/or the State of Queensland pursuant to s 232 of the *HO Act*.<sup>6</sup>
- [7] The applicant's application for costs remains to be heard and determined at a later date. In the meantime, issues regarding disclosure of documents require determination. This is not the first occasion in the course of the litigation between the parties that the time of the parties and the Tribunal and limited public resources have been expended on disputes as to production of documents by the respondent for the purposes of the ultimate determination of issues of costs. Such expenditure on issues of disclosure of documents in this matter is out of all proportion to the subject matter of the costs of the proceedings.
- [8] On 27 November 2018, Judge Sheridan, Deputy President, made orders for production of documents by the respondent,<sup>7</sup> including the following orders:
- "1. The respondent is to produce to the tribunal registry, in sealed envelopes, any documents in its possession answering the description of the documents referred to in paragraph 6 of the tribunal's reasons by 4.00 pm on Monday, 3 December 2018.
  2. The documents produced in accordance with order 1 of these orders may be inspected by the applicant at a time to be agreed with the tribunal registry at any time after 9.00 am on Tuesday, 4 December 2018."
- [9] Paragraph [6] of the Tribunal's reasons<sup>8</sup> detailed the documents the production of which was sought by the applicant. They included:
- "1. 9th Nov 2017.** Copies of all materials available to the Delegate, such as all documents, notes, records and transcripts of any interviews with Dr Schwindack or other witnesses which evidence what due diligent action was conducted before the decision was made.
  - 2. 21 November 2017** copies of all material including notes and memos, correspondence between the Health Ombudsman and the staff of the OHO prior to making the decision of immediate registration action."
- [10] The respondent had opposed the production of any of the documents, disputing their relevance.<sup>9</sup> The Deputy President ruled that the documents were clearly relevant to issues regarding the costs of proceedings and that they should be produced.<sup>10</sup>

---

<sup>6</sup> *Marzini v Health Ombudsman (No 2)* [2019] QCAT 111.

<sup>7</sup> *Marzini v Health Ombudsman* [2018] QCAT 393.

<sup>8</sup> *Marzini v Health Ombudsman* [2018] QCAT 393 at [6].

<sup>9</sup> *Marzini v Health Ombudsman* [2018] QCAT 393 at [8]-[11].

<sup>10</sup> *Marzini v Health Ombudsman* [2018] QCAT 393 at [15]-[16].

- [11] By way of partial compliance with the directions of the Tribunal, on 3 December 2018 Crown Law, for the respondent, produced documents to the Tribunal registry under cover of a letter signed by a Principal Lawyer for the Crown Solicitor stating:

“Dear Registrar

**Marzini v The Health Ombudsman – QCAT Application  
OCR006-18**

I refer to the above matter and to order 1 of Judge Sheridan, Deputy President, dated 27 November 2018.

In compliance with the said order, I **enclose** in sealed envelopes the documents in the possession of the Health Ombudsman answering the description of the documents referred to in paragraph 6 of the Tribunal’s reasons.

Some of the information contained in the records produced have been redacted on the basis such information is either not relevant to this proceeding or is confidential information and not required to be disclosed under the Health Ombudsman Act 2013. A Form 40 Application for miscellaneous matters seeking a direction that such information be redacted has been filed.

Yours sincerely

(etc)”

- [12] By an Application for miscellaneous matters filed on 3 December 2018 the respondent sought orders for redaction in terms of paragraph 1 of the later Amended application for miscellaneous matters that will be detailed later in these reasons.
- [13] Despite the assertion in the letter from Crown Law of 3 December 2018 as to production in “compliance with the said order” of “the documents in the possession of the Health Ombudsman answering the description of the documents referred to in paragraph 6 of the Tribunal’s reasons”, the respondent did not in fact produce all documents answering that description. On 14 December 2018, the Principal Lawyer emailed the Tribunal advising that two documents had not been produced because they were subject to a claim for privilege.

**Applications for determination**

- [14] On 15 February 2019 the respondent filed an Amended application for miscellaneous matters seeking directions as follows:

“These directions are sought in addition to the directions sought in the Health Ombudsman’s existing application for Miscellaneous Matters filed in this proceeding on 3 December 2018.

...

1. That the following information be redacted from the documents produced by the Applicant in compliance with Order 1 of Judge

Sheridan, Deputy President of the Tribunal dated 27 November 2018:

- (a) private information, including telephone numbers, email and physical addresses of witnesses and employees of the Office of the Health Ombudsman and relevant agencies;
  - (b) and information that is not relevant to this proceeding and to the information sought by the respondent in the categories of records outlined in paragraph 6 of the Tribunal's reasons for decision.
2. That the following documents in the possession of the Applicant be exempt from the requirements of Orders 1 and 2 of Judge Sheridan, Deputy President, dated 27 November 2018, that they be produced to the Tribunal Registry for inspection by the Respondent:
- (a) Investigation Plan prepared by Danni Williams and Steven Martin, dated 17 November 2017 ('the Investigation Plan').
  - (b) Memorandum to Andrew Brown, Acting Health Ombudsman from Meg Tucker, Principal Legal Officer, Immediate Action, dated 21 November 2017 and an enclosed draft section 58 Notice, dated 21 November 2017 ('the Memorandum').

The reasons I seek these directions are:

- 1. The information sought to be redacted is information that is not relevant or is 'confidential information' within the meaning of section 272(8) of the Health Ombudsman Act 2019 ('the Act').
- 2. Under section 272(1) and (2) of the Act, the health Ombudsman and his staff must not disclose confidential information to anyone else except to the extent the disclosure is permitted under that section.
- 3. Under section 274 of the Act, the Health Ombudsman and his staff are not required to disclose confidential information to the Tribunal unless it is necessary to do so for the purpose of the Act. In this case, disclosure of the redacted confidential information is not necessary under the Act.
- 4. The Investigation Plan and the Memorandum are protected by Public Interest Privilege for the reasons outlined in the Applicant's Submissions and in the Affidavits filed in support of this application.
- 5. Under sub-section 62(5) of the *Queensland Civil and Administrative Tribunal Act 2009*, the Health Ombudsman is not required to produce a document to the Tribunal and to the Applicant in respect of which there is a valid claim to privilege from disclosure."

[15] The application is supported by affidavits from two employees of the Office of the Health Ombudsman ("OHO").

[16] The parties have subsequently filed written submissions.

### **Application 1(a) – redaction of private information**

[17] The documents produced to the Tribunal registry on 3 December 2018 had been redacted to remove personal details such as telephone numbers, email and physical addresses of witnesses and employees of the OHO and other agencies. Whilst the applicant has queried the utility of such redactions, he has not voiced strong opposition to them. I have examined the redacted documents and do not consider that the redactions deprive the applicant of relevant information. Whilst it would have been preferable that the respondent seek permission to redact the documents prior to their production, in the circumstances, the Tribunal is prepared to retrospectively approve the redaction as sought in para 1(a) of the application and the Tribunal will order accordingly.

[18] As I understand the reasons stated in the application at paragraphs 1, 2 and 3 of those reasons, the claim with respect to “confidential information” relates only to the claim for redaction of private information in para 1(a) of the application. Given the decision of the Tribunal to allow redaction as sought in para 1(a) of the application, it is not necessary to examine the operation of sections 272(1) and (2) and 274 of the *HO Act*.

### **Application 1(b) – redaction of information on the ground of relevance**

[19] Upon an application for reopening of this proceeding on 17 May 2019, it was made clear that this part of the application is directed only at those documents and those parts of documents which contained information relating to other practitioners and of no relevance to the applicant. The respondent sought an amendment of the terms of the orders of 3 May 2019 to permit redaction of those documents to preserve the confidentiality of that information. The applicant did not oppose that. Indeed, he had initially brought the disclosure of the confidential information to the attention of the Tribunal and the respondent soon after the production of documents on 3 December 2018.

[20] The Tribunal has amended the orders of 3 May 2019 accordingly.

### **Application 2 – public interest privilege claim**

[21] The respondent claims public interest privilege in respect to the Investigation Plan and the Memorandum identified in paragraphs 2(a) and (b) respectively of the application.

[22] It is immediately apparent that the two documents answer the description of documents referred to in paragraph [6] of the Tribunal’s reasons of 27 November 2018. They should have been produced to the Tribunal registry in accordance with Order 1 of the Tribunal of 27 November 2018 by 4.00pm on Monday, 3 December 2018. In accordance with the usual practice, they should have been produced in a sealed envelope along with a claim for public interest privilege and any evidence and submissions in support of such a claim. They were not. There was no indication in the covering letter that there were other documents meeting the description of those documents ordered to be produced which had not been produced, but would be the subject of a public interest privilege claim. The contents of affidavits read by the respondent in the application for reopening of this proceeding on 17 May 2019 satisfy me that the omission of reference in the letter to the documents was inadvertent and not deliberately misleading. As noted earlier, the Tribunal and the applicant were

advised of the existence of the documents in an email on 14 December 2018. Any concern I have about the way the respondent has gone about asserting the claim for public interest privilege has not factored in my consideration of the claim itself.

- [23] Steven Martin deposes that he is employed as a Principal Investigations Officer in the OHO, acting in the role of Director, Investigations. In November 2017, he was Team Leader, Investigations. He deposes that the Investigation Plan was prepared by Senior Investigation Officer, Danni Williams, and that he reviewed and approved the Investigation Plan as Team Leader, Investigations and signed it on 17 December 2017. Mr Martin deposes as follows:

- “9. Investigation plans are internal investigative documents, in most circumstances prepared by investigators with carriage of the investigation, for the purpose of assisting the investigator with performing their functions under *Health Ombudsman Act* 2013.
10. Investigation plans assist in formulating the scope of the investigation and initial actions to progress the investigation. Investigation plans support investigation planning, direction, identify potential avenues of inquiry and evidence the Investigator may source, to prove or disprove the allegations. Investigation plans may at times contain confidential information, information that may identify confidential sources and investigative methodology.
11. Although the OHO’s investigation in relation to the Applicant is now finalised, I believe that disclosure of the Investigation Plan and the information contained in it would prejudice the effectiveness of the methods of investigation employed by the OHO, that are subject of investigations under section 80 of the *Health Ombudsman Act* 2013.
12. Disclosure of methodology in Investigation Plans places a high probability of prejudice to the integrity of current and future investigations and places at risk the health and safety of the public by potentially disclosing and/or identifying:
  - (a) Confidential sources of information including but not limited to complainants, witnesses, human sources and practitioners
  - (b) Information that may lead to the identification of confidential sources of information
  - (c) Investigative methodology
  - (d) Covert investigative methodology
  - (e) Information protected under other legislation
13. There is a public interest in protecting from disclosure a document that is an essential investigative tool for the OHO to aid investigating under section 80 of the *Health Ombudsman Act* 2013 and which may affect public health and safety.”

- [24] Megan Tucker deposes that she is employed as a Principal Legal Officer, Immediate Action in the OHO. She deposes that she is the author of the Memorandum. Ms Tucker deposes as follows:



- “8. Immediate Action is a division of the OHO, headed by the Director, Immediate Action. The Immediate Action division provides recommendations to the Health Ombudsman regarding the exercise of statutory powers under the Act, in particular whether or not to take immediate action against a health practitioner under Part 7 of the Act, and if so the most appropriate form of action indicated.
9. The Immediate Action division also provides support to the Health Ombudsman by coordinating the immediate action process and preparing immediate action notices and other relevant documentation for the Health Ombudsman’s consideration.
10. Officers within Immediate Action regularly prepare memoranda, in the nature of the Memorandum, after discussions with the Health Ombudsman regarding a decision to take immediate action. The purpose of the Memorandum is to formalise the recommendations made to the Health Ombudsman and forms part of the record of the Health Ombudsman’s decision making process.
11. The memoranda prepared by Immediate Action, including the Memorandum itself, reveal the internal methodology implemented by the OHO in responding to serious health service complaints under the Act.
12. I believe that if the Memorandum was to be disclosed to the Applicant, it may prejudice the effectiveness of the internal response process implemented in the OHO in addressing serious health service complaints and may create an adverse precedent for disclosure of this class of documents in other, similar matters in the future.”
- [25] The respondent makes both a “class claim” for privilege on the basis of public interest in respect of both classes of documents (Investigation Plan and Memorandum) and a “content claim” in respect of the information contained in each of the documents on the basis of public interest.
- [26] As regards the Investigation Plan, the respondent refers to the provisions of Part 8 of the *HO Act* dealing with investigations by the Health Ombudsman. The respondent relies upon the contents of the affidavit of Steven Martin in asserting that disclosure of the Investigation Plan, as a class, would prejudice the lawful methodology of investigating a health service complaint because investigation plans outline the evidence which investigation officers plan to obtain to substantiate or disprove a health service complaint and the methodology, sometimes including covert methodology, used in doing so. The respondent submits that should the Investigation Plan be disclosed to the applicant in this proceeding, it is likely to:
- (a) undermine or reduce the effectiveness of the methodology used by the OHO to carry out its investigations into health service complaints of a potentially serious nature;
  - (b) undermine public confidence in the confidentiality of information provided to investigators by members of the public, including, importantly, complainants who may be deterred from making complaints; and
  - (c) set an undesirable precedent for the OHO being compelled to disclose its investigation plans in future, similar matters.

- [27] The respondent submits that there is nothing to indicate that the document would assist the applicant's case, that any prejudice that might be suffered by the applicant in not having access to the document is outweighed by the public interest in maintaining its confidentiality and that the Tribunal ought to find that the public interest best favours refusal of production of the Investigation Plan.
- [28] As regards the Memorandum, the respondent refers to the provisions of Part 7 of the *HO Act* empowering the Health Ombudsman to take immediate registration action in relation to a registered health practitioner. The respondent relies upon the affidavit of Megan Tucker and the nature and purpose of the Memorandum and submits that memoranda prepared by the Immediate Action division within the OHO, including the Memorandum itself, reveal the internal methodology employed by the OHO in responding to serious health service complaints under the *HO Act*. The respondent submits that disclosure of the memorandum to the applicant:
- (a) may prejudice the effectiveness of the internal response process of the OHO in addressing serious health service complaints; and
  - (b) is likely to create an adverse precedent for disclosure of this class of documents in other similar matters in the future.
- [29] The respondent submits that the same considerations as those outlined in respect of the Investigation Plan, which weigh against disclosure of that document, have equal application in respect of the Memorandum.
- [30] In reasons delivered on 27 November 2018, the Deputy President stated:
- “In determining the application for costs, by reference to the submissions already filed, it is clear that the applicant is challenging whether the Health Ombudsman, at the time of making its original decision, found a reasonable belief as required by s 58 of the *HO Act*. Further, it is clear that the applicant wishes to challenge the manner in which the Health Ombudsman conducted the investigation that followed, including whether the Health Ombudsman should have revoked the immediate action decision at an earlier point in time.”<sup>11</sup>
- [31] I consider the contents of the Memorandum and the Investigation Plan to be not only relevant but potentially important in considering the issues identified by the Deputy President as relevant to the costs proceedings. I do not accept the submissions on behalf of the respondent that the documents apparently will not assist the applicant's case. Further, I do not accept the submission that any prejudice that might be suffered by the applicant in not having access to the documents is outweighed by the public interest in maintaining their confidentiality.
- [32] The contents of neither document in fact discloses any covert methodology or, in my view, any other methodology the disclosure of which might prejudice future investigations. I do not accept that the disclosure of the contents of the two documents would prejudice the effectiveness of the internal response process of the OHO in addressing health service complaints or undermine or reduce the effectiveness of the methodology used by the OHO to carry out its investigations of health service complaints. Neither do I accept the submission that disclosure of the contents of either document would undermine public confidence in confidential information provided

---

<sup>11</sup> *Marzini v Health Ombudsman* [2018] QCAT 393 at [15].

to investigators by members of the public, including complainants who might therefore be deterred from making complaints. The complainant and witnesses named in the documents are all identified in detail in other documents that have been disclosed and in correspondence sent by the respondent to the applicant. I reject the “contents claim” made by the respondent with respect to both documents.

- [33] With respect to the “class claim”, I do not consider that disclosure of these two type of documents in these proceedings would, because of the nature of the type of documents, result in any of the adverse consequences asserted by the respondent. I reject the submission that disclosure of the documents would set an undesirable precedent for the OHO being compelled to disclose documents of such a nature in future matters. My determination in this matter has been based upon a weighing of the competing public interests in the context of the issues in dispute in these particular proceedings and in light of the contents of the two particular documents. I do not accept that my decision could reasonably be regarded as setting a precedent that these types of documents must be produced in future matters. It may well be that documents of such a nature containing, for example, details of covert methodology or confidential informants, might properly be the subject of a claim of public interest privilege. Any claim for public interest privilege regarding similar documents in future proceedings would be determined upon its merits in light of the issues in the proceedings and the particular contents of such documents.
- [34] In weighing up the competing public interests in this matter I have had regard to the objects of the *HO Act*. The main objects of the *HO Act* include the protection of the health and safety of the public, the promotion of professional, safe and competent practice by health practitioners and maintenance of public confidence in the management of complaints and other matters relating to the provision of health services.<sup>12</sup> The objects are to be achieved mainly by establishing a transparent, accountable and fair system for effectively and expeditiously dealing with complaints and other matters relating to the provision of health services, including by establishing the health ombudsman.<sup>13</sup> The main principle for administering the *HO Act* is that the health and safety of the public are paramount.<sup>14</sup> The health and safety of the public is the main consideration for this Tribunal when deciding a matter referred to it under the *HO Act*.<sup>15</sup>
- [35] Bearing in mind such matters, I am of the view that any public interest favouring confidentiality of the documents is clearly outweighed by the interests of the applicant in having access to such documents and the public interest in maintenance of a transparent, accountable and fair system for effectively and expeditiously dealing with complaints relating to the provision of health services.
- [36] Accordingly, the application that the Investigation Plan and the Memorandum be exempt from the requirements of orders 1 and 2 of the Deputy President made 27 November 2018 is refused. The applicant will be entitled to inspect and request copies of such documents in accordance with the orders made on 27 November 2018.

---

<sup>12</sup> *HO Act*, s 3(1).

<sup>13</sup> *HO Act*, s 3(2).

<sup>14</sup> *HO Act*, s 4(1).

<sup>15</sup> *HO Act*, s 4(2)(c).