QCAT

Queensland **Civil and Administrative Tribunal**

CITATION:	*Marshall-Holst v Office of the Information Commissioner and Queensland Health (Metro North Hospital and Health Service)* [2017] QCATA 28
PARTIES:	Christine Marshall-Holst (Applicant) v Office of the Information Commissioner (First Respondent) and Queensland Health (Metro North Hospital and Health Service) (Second Respondent)
APPLICATION NUMBER:	APL393-15
MATTER TYPE:	Appeals
HEARING DATE:	29 July 2016
HEARD AT:	Brisbane
DECISION OF:	**Justice D.G. Thomas, President**
DELIVERED ON:	15 March 2017
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. The appeal on Grounds 1, 2, 3, 4 and 6 is not upheld.** **2. The appeal on Ground 5 is upheld.** **3. The Decision of the Information Commissioner, dated 27 August 2015, be set aside and the matter returned to the Information Commissioner for reconsideration taking the factors outlined in the *Right to Information Act* 2009 (Qld) Schedule 4, Part 2, Item 12 into account with the factors already considered by the Information Commissioner.** **4. The parties are to file any submissions on which they intend to rely in relation to costs by:**

4:00pm on 15 April 2017.

5. Unless either party requests an oral hearing, the matter of costs will be determined on the papers at 10:00am on 24 April 2017.

CATCHWORDS: APPEAL – QUESTION OF LAW – RIGHT TO INFORMATION – DISCLOSURE – where Metro North Hospital and Health Service allowed access to some documents in relation to workplace grievance, but refused access in part and in full to some other documents – where application to apply for external review of the decision to the Office of the Information Commissioner – where application to appeal the Office of the Information Commissioner's decision on external review – whether the Office of the Information Commissioner erred in law – whether disclosure could reasonably be expected to contribute to the administration of justice – whether disclosure could reasonably be expected to reveal the reason for a government decision – whether disclosure of the information could reasonably be expected to reveal that the information was irrelevant – whether disclosure of the information could reasonably be expected to prejudice an agency's ability to obtain confidential information

Hospital and Health Boards Act 2011 (Qld) s 142
Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 32
Right to Information Act 2009 (Qld) ss 3, 44, 49, 119, 132, Sch 4

Azzopardi v Tasman UEB Industries Ltd (1985) NSWLR 139
Coco v AN Clark (Engineers) Ltd (1969) RPC 41
Federal Commissioner of Taxation v Crown Insurance Services Limited (2012) 207 FCR 247
House v The King (1936) 55 CLR 499
Laro-Bashford & Ors v Mihos [2016] VSC 77
LIU v The Age Company Limited [2016] NSWCA 115
Minister for Aboriginal Affairs v Peko-Wallsend

Limited (1985) 162 CLR 24
Sharp Corporation of Australia Pty Ltd v Collector of Customs (1995) 59 FCR 6
SJHV v The Minister for Immigration and Border Protection [2016] FCA 173
Wright v Gasweld Pty Ltd (1991) 22 NSWLR 317

APPEARANCES:

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

REPRESENTATIVES:

APPLICANT:	M White instructed by Butler McDermott Lawyers
RESPONDENT:	T Lake for the Office of the Information Commissioner P Telford for Queensland Health

REASONS FOR DECISION

[1] Ms Marshall-Holst applied to the Metro North Hospital and Health Service ('Queensland Health') for access to information regarding a workplace grievance. A specific request was made for documents submitted against Ms Marshall-Holst by another person.

[2] Of 573 pages located by Queensland Health, the Health Service released 227 pages and refused access in part to 102 pages and in full to 244 pages.

[3] The Information Commissioner identifies the documents to which access is sought as being as follows:

- Information identifying other individuals who were the subject of allegations;
- Information provided to the Health Service by other individuals in the course of the investigation including transcripts of interview and correspondence; and
- Information about the action taken against other individuals as a result of allegations and in dealing with the relevant investigation including correspondence sent to the subject officers.[1]

---

1 Decision and Reason for Decision of the Information Commissioner, 27 August 2015, paragraph 10.

Grounds

[4] The Application for Appeal sets out several grounds.[2] The grounds in Ms Marshall-Holst's written submissions and those reflected in submissions made by counsel at the hearing were different from the grounds in the Application for Appeal. Ground 2 to the Application for Appeal was deleted and a ground based on procedural fairness was included.

[5] In the written submissions, Ms Marshall-Holst describes the appeal grounds as follows:[3]

1) Natural justice;

2) Procedural fairness;

3) Failure to give any weight to a relevant factor favouring disclosure, Schedule 4, part 2, item 16;

4) Failure to give appropriate weight to a relevant factor favouring disclosure, Schedule 4, part 2, item 11;

5) Failure to give consideration to a relevant factor favouring disclosure, Schedule 4, part 2, item 12; and

6) Erred in finding that the information was confidential.

[6] Before turning to the specific grounds, I will deal with some general issues which arise out of the submissions made by the parties at the hearing.

Identification of the issue

[7] Ms Marshall-Holst asserts that there was an error of law in that the Information Commissioner incorrectly identified the issue for determination on external review when the Information Commissioner stated "the issue for my determination is whether access can be refused to the Information in Issue under the provisions of the *Right to Information Act* 2009 (Qld)"[4] ('RTI Act').

[8] Ms Marshall-Holst submits that the primary object of the RTI Act is to give a right of access to information in the Government's possession or under the Government's control unless on balance it is contrary to the public interest to give access,[5] and that there is a pro-disclosure bias to be applied in respect of access to documents.[6]

---

2 Application for Leave to Appeal, 24 September 2015, Attachment A.
3 Applicant's Written Submissions, 29 January 2016, paragraph 15.
4 Decision and Reason for Decision of the Information Commissioner, 27 August 2015, paragraph 14; referred to in Applicant's Written Submissions, 29 January 2016, paragraph 22.
5 Applicant's Written Submissions, 29 January 2016, paragraph 23.
6 Ibid, paragraph 24.

[9] Ms Marshall-Holst submits that the formulation of the issue for determination supposes a contrary test, seeking to use the RTI Act to locate a reason to refuse access to the information from a starting point of a refusal, which led the Information Commissioner into error in applying the test of balancing relevant factors for and against disclosure.[7]

[10] Queensland Health accepts that incorrect identification of the issue would give rise to a question of law.[8]

[11] Queensland Health refers to other parts of the decision which, it is submitted, make it clear that the Information Commissioner followed the requirements of the legislation.[9]

[12] The relevant passage to which Ms Marshall-Holst makes reference is contained in paragraph 14.[10] Paragraphs 11-14 of the decision are included under the heading "Issue for Determination".

[13] Immediately following the reference which has been extracted by Ms Marshall-Holst, is a section headed "Relevant Law" where the requirements are correctly set out.

[14] The reference in paragraph 14 to determining whether access can be refused to the Information in Issue follows a description of the events which had taken place, including that Queensland Health had refused access. It was the case that the dispute between Ms Marshall-Holst and Queensland Health was whether Queensland Health had correctly refused access. The description of the outstanding issue as it appears in paragraph 14 is responsive to this history and to the issues which were, at that time, the subject of the dispute.

[15] In context, the reference does not purport to define the way in which the RTI Act operates or the way in which the Information Commissioner approached the analysis which was being undertaken.

[16] The principles are referred to in the three paragraphs of the decision following paragraph 14, in which the extract is contained.

[17] Those paragraphs set out a summary of the way in which the legislation operates. The summary follows the requirements of the legislation.

[18] There is no error of law evidenced by the words which have been extracted by Ms Marshall-Holst.

Matters not raised with the Information Commissioner

---

7 Applicant's Written Submissions, 29 January 2016, paragraph 25.
8 Transcript of Hearing, 29 July 2016, T1-35, L 10.
9 Ibid, T1-35, ll 15-39.
10 Decision and Reason for Decision of the Information Commissioner, 27 August 2015, paragraph 14.

[19] The Information Commissioner submits that no question of law arises on appeal where an applicant seeks to rely on additional factors which were not raised by the applicant prior to the Information Commissioner's decision.[11]

[20] The Information Commissioner referred to the fact that the Information Commissioner provided a preliminary view to Ms Marshall-Holst. Ms Marshall-Holst was allowed the opportunity to provide submissions in support of a grant of access to the information but did not, at that time, raise some of the factors which were raised in the oral submissions.[12]

[21] I do not accept the arguments advanced by the Information Commissioner in that respect.

[22] The conclusion which is urged by the Information Commissioner was not put forward by reference to any particular section of the RTI Act.

[23] As a matter of practice, it is evident that the Information Commissioner consults with persons whose interests might be affected by the decision of the Information Commissioner as to access to documents.

[24] Whilst that approach is taken by the Information Commissioner, it ultimately falls on the Information Commissioner to consider the provisions of the RTI Act, balance the various factors and make the decision based on the legislative requirements.

[25] Nothing in the legislation requires a member of the public to participate in the process undertaken by the Information Commissioner. There is no provision to the effect that if the member of the public does not participate, or if the member of the public does not correctly identify relevant issues, the duty of the Information Commissioner is altered. If the parliament had intended to narrow the grounds of appeal from what is described in section 119(2) it would undoubtedly have done so.

[26] The Information Commissioner will often be dealing with members of the public, without legal representation, whose knowledge of the requirements of the legislation will be at a lesser level than that of the Information Commissioner. It would seem quite incongruous for there to be a limitation on the rights of appeal by reference to the knowledge and participation of the member of the public in the process.

[27] In this particular case, it is also to be noted that all of the information which gave rise to the grounds of appeal was before the Information Commissioner. Ms Marshall-Holst has not sought to call any additional evidence. The broad nature of the issues were also before the Information Commissioner.

[28] In this case, the proposition put by the Information Commissioner would therefore seem to be that an error of law cannot arise where the factor is

---

11 Transcript of Hearing, 29 July 2016, T1-40, ll 25-29.

12 Ibid, T1-41, ll 11-16.

not raised specifically by the applicant, but all relevant information from which it would be possible to identify the factor is before the Information Commissioner.

[29] I do not believe that this follows. Whether there is an error of law is considered by reference to the decision of the Information Commissioner, not by reference to what was, or was not, raised by members of the public who are seeking access to documents.

[30] I will deal with whether that was an error of law in any aspect of the decision later in these reasons.

Question of law and fact

[31] An appeal to the Appeal Tribunal may only be on a question of law.[13]

[32] Strangely, against the requirement that the appeal is only a question of law, section 119(5) RTI Act provides that "the appeal may only be way of a rehearing."

[33] I do not believe that section 119(5) alters the nature of the appeal which may only be on a question of law.

[34] The RTI Act requires the recipient of a request for information to consider and balance a large number of factors relevant to public interest in disclosure or nondisclosure. This discretion is of significant breadth, and is inevitably "an evaluated decision of a subject matter, upon which reasonable minds may differ.[14]

[35] Before such a discretionary decision can be disturbed for error of law, it must be demonstrated that the decision maker acted upon a wrong legal principle, or mistook essential facts, or disregarded an essential fact, or acted upon information that was irrelevant, so as to reach a result that was plainly unreasonable or unjust.[15]

[36] As to review of administrative discretion, Mason J observed:

> "the limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.[16]

[37] I am of the view that the same principles apply to the appeal to this Appeal Tribunal, in which the appeal may only be on a question of law.

---

13 RTI Act, s 119(2).

14 *LIU v The Age Company Limited* [2016] NSWCA 115 at [163].

15 *House v The King* (1936) 55 CLR 499 at [505] per Dixon, Evatt and McTiernan JJ; *Laro-Bashford & Ors v Mihos* [2016] VSC 77 at [10]; *SJHV v The Minister for Immigration and Border Protection* [2016] FCA 173 at [17].

16 *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1985) 162 CLR 24 at [40]-[41].

[38] Mr Telford, Counsel for Queensland Health, referred to a number of authorities relating to questions of law and questions of fact.[17] In *Federal Commissioner of Taxation v Crown Insurance Services Ltd*[18] the court considered that no question of law arose when the decision "will generally involve weight being given to one or other element of the facts and so involve matters of degree." To put it another way, a choice between two conclusions open on a consideration of the facts is a question of fact not a question of law.

[39] Some of the grounds make it clear that the challenge made by Ms Marshall-Holst is to the way in which the Commissioner dealt with the allocation of weight to the factors. Conclusions reached by the Information Commissioner as to those issues (outlined in the RTI Act) are conclusions of fact. Grounds which challenge those issues concern questions of fact, not questions of law.

[40] Of course, the position is different where the Information Commissioner acts upon an incorrect approach in relation to the way in which the legislation operates or completely disregards a factor which must be taken into account so that it does not form any part of the consideration leading to the decision.

[41] In response to the authorities relied on regarding questions of law and questions of fact, Counsel for Ms Marshall-Holst, Mr White, submitted that the appeal before the Tribunal is not in respect of the finding of fact, insofar as whether or not a particular act or circumstance did not happen. Rather, he submitted that the appeal relates to what Ms Marshall-Holst submits was a misinterpretation or misapplication of the appropriate legal test to be applied in determining whether or not a document can be released under the RTI Act having regard to the public interest considerations.[19] Mr White submitted that not all factors were properly considered, and had they been, the documents in issue ought to have been disclosed.[20] On that basis, in his submission, the question was whether or not the appropriate legal test was applied.

[42] Mr White conceded that weighting factors could be considered a question of fact provided that the factors that ought to be considered as part of that weighting exercise were considered.[21]

[43] The legal test to which reference was made, was that outlined in the next section regarding pro-disclosure bias and the procedures to be followed under the RTI Act.

Pro-disclosure bias and the procedures to be followed

---

17 *Federal Commissioner of Taxation v Crown Insurance Services Limited* (2012) 207 FCR 247; *Sharp Corporation of Australia Pty Ltd v Collector of Customs* (1995) 59 FCR 6; *Azzopardi v Tasman UEB Industries Ltd* (1985) NSWLR 139.

18 (2012) 207 FCR 247 at [39].

19 Transcript of Hearing, 29 July 2016, T1-41, ll 36-41.

20 Ibid, T1-41, ll 44-45.

21 Ibid, T1-42, ll 7-9.

[44] Ms Marshall-Holst submitted that the Information Commissioner was in error in applying the test of balancing relevant factors for and against disclosure.[22]

[45] Submissions with respect to the pro-disclosure bias and the way in which the test should be applied were made with respect to each of the grounds.[23] The correctness of the test was a central issue of the submissions on each ground.

[46] Rather than considering this argument in a piecemeal fashion, repetitively with respect to each ground, I will consider the issues raised in this section.

[47] Mr White postulated two limbs to the test with respect to public interest.[24]

[48] Mr White submitted that because of the pro-disclosure bias which is provided for in the RTI Act, the presumption would be that the information should be released if the information fell within one of the factors favouring disclosure (contained in Schedule 4, part 2). This would satisfy the first limb of the test.[25]

[49] Mr White submitted that if there were elements that could be weighed against disclosure (e.g. personal information or confidentiality) this is the second step in the analysis.[26]

[50] Ms Marshall-Holst's assertion as to the way in which the factors should be dealt with was that the starting position, if any of the pro-disclosure factors were identified, was that they would weigh in favour of disclosure, particularly given the bias towards disclosure. This would have the result that 100% of the documents would be provided. From that starting point (of access to all of the documents) the factors would be weighted against the matters that favoured nondisclosure.[27]

[51] Mr Telford referred to the submissions regarding the pro-disclosure bias and submitted that the provisions of the RTI Act make it clear that the obligation to provide access to documents is limited. He referred in particular to the provisions of section 44(1), which make reference to the pro-disclosure bias, and the words which immediately follow, namely, "unless giving access would, on balance, be contrary to the public interest".[28]

---

22 Applicant's Written Submissions, 29 January 2016, paragraph 25.
23 Transcript of Hearing, 29 July 2016, T1-4, ll 26-46; T1-6, ll 26-42; T1-10, ll 36-45; T1-11, ll8-14; T1-15, ll20-42.
24 Ibid, T1-6, ll 26-34.
25 Ibid, T1-5, ll 15-16; T1-5, ll 23-24; T1-6, ll 26-28.
26 Ibid, T1-5, ll 17-19; T1-6, ll 29-34.
27 Ibid, T1-11, ll 8-14.
28 Ibid, T1-24, ll 25-36.

[52] Mr Telford submitted that Queensland Health, and on review the Information Commissioner, took into account and weighted the competing interests as required under the legislation.[29]

[53] If the Information Commissioner failed to comply with the requirements of the legislation by applying an incorrect test, this would raise a question of law.

[54] The way in which the Information Commissioner must deal with requests (taking into account the purpose of the RTI Act and its requirements regarding disclosure) is set out in the legislation.

[55] Section 3(1) RTI Act provides "the primary object of this Act is to give a right of access to information in the Government's possession or under the Government's control unless, on balance, it is contrary to the public interest to give the access".

[56] Section 44 RTI Act refers to the pro-disclosure bias. The heading of this section is "Pro-disclosure bias in deciding access to documents".

[57] Section 44 provides:

> (1) It is the Parliament's intention that if an access application is made to an agency or Minister for a document, the agency or Minister should decide to give access to the document unless giving access would, on balance, be contrary to the public interest.

[58] Section 49(1) states that access to a document should be provided unless on balance it would be contrary to the public interest.

[59] In sections 44 and 49, the requirement to give access has equal prominence with the public interest considerations which may favour access not being given. This follows from the structure of sections 44 and 49(1).

[60] In the context of the pro-disclosure requirement, section 44 continues that the purpose of Part 5 (which has the title "Decision") is to assist the agency or the Minister to decide whether giving access would, on balance, be contrary to public interest.[30]

[61] Section 44 provides that Part 5 does this by:

> (a) setting out in schedule 3 types of information the disclosure of which the Parliament has considered would, on balance, be contrary to the public interest; and
>
> (b) setting out in section 49 the steps, and, in schedule 4, factors, for deciding, for other types of information,

---

29 Transcript of Hearing, 29 July 2016, T1-24, ll 37-40.

30 RTI Act, s 44(2).

> whether disclosure would, on balance, be contrary to the public interest.

[62] Section 49 sets out the steps which the parliament considers appropriate for deciding whether disclosure would, on balance, be contrary to public interest.[31]

[63] Section 49 also refers to Schedule 4 which, it says, sets out factors considered appropriate for deciding whether disclosure would, on balance, be contrary to public interest. The schedule sets out factors which must be considered both favouring disclosure (part 2) and favouring non-disclosure (parts 3 and 4).

[64] Section 49(3) provides that, in deciding whether, on balance, disclosure of information would be contrary to public interest, certain steps must be undertaken. The language is prescriptive.

[65] As required by section 49(3) the steps include:

a) Identification of any factor that is irrelevant (including any factor mentioned in Schedule 4, part 1);

b) Identification of any factor favouring disclosure (including any factor mentioned in Schedule 4, part 2);

c) Identification of any factor favouring nondisclosure (including any factor mentioned in Schedule 4, part 3 or 4);

d) Disregarding any irrelevant factor;

e) Balancing any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure;

f) Deciding whether on balance disclosure of the information would be contrary to public interest; and

g) Unless on balance disclosure of information would be contrary to public interest allowing access to the information subject to the Act.

[66] Ms Marshall-Holst refers to these steps in the written submissions under the heading “the decision”.[32]

[67] The decision by the Information Commissioner under the heading “relevant law”[33] correctly identifies the relevant sections of the RTI Act as well as the steps which must be taken in considering the question of public interest.

[68] The pro-disclosure bias, which is required by the RTI Act, seems to be reflected in step g.

---

31 RTI Act, s 49(2).

32 Applicant’s Written Submissions, 29 January 2016, paragraph 9.

33 Decision and Reasons for Decision of the Information Commissioner, 27 August 2015, paragraphs 15-17.

[69] In determining whether there has been an error of law, it is necessary to consider the steps taken by the Information Commissioner to decide whether those steps comply with the requirements of the legislation.

[70] The structure of the decision and reasons by the Information Commissioner demonstrate that:

1. There is a finding that no irrelevant factors arise.

2. There is consideration of a number of factors favouring disclosure and non-disclosure. Examples include accountability and transparency, personal information of the applicant, personal information and privacy of other individuals, prejudice management function and flow of information.

3. Under each of the headings, factors are generally identified by reference to items in Schedule 4.

4. Under each heading, the factor is discussed and the decision attributes a weight to the individual factor, e.g. “I have attributed a low weight”, or “I afford this identified factor significant weight.”

5. After considering the factors and attributing weight to each factor, the decision undertakes the task of balancing the relevant factors (in favour of disclosure and nondisclosure), making reference to the weighting considered relevant by the Information Commissioner.[34] The decision records that, in view of the pro-disclosure bias required by the RTI Act, access should be granted unless giving access would, on balance, be contrary to the public interest. The decision records that the pro-disclosure bias in balancing the relevant factors has been taken into account.[35]

[71] The process, which has been adopted, very clearly follows the required process outlined in section 49(3) RTI Act.

[72] For that reason, I do not believe (as is advanced by Ms Marshall-Holst) that the Information Commissioner was in error in applying the test of balancing relevant factors for and against disclosure.

[73] The provisions of the RTI Act impose the pro-disclosure bias and, against the background of that requirement, the RTI Act defines the process (the steps) which must be followed by the Information Commissioner. The pro-disclosure bias is applied as part of the process.

[74] The process outlined in the RTI Act which was followed by the Information Commissioner, requires the balancing of any relevant factor or factors favouring disclosure against any relevant factor or factors favouring non-disclosure. That is achieved by weighting the various factors so each can

---

34 Decision and Reasons for Decision of the Information Commissioner, 27 August 2015, paragraphs 35-39.

35 Ibid, paragraph 35.

be balanced against the others. The weighting allows the allocation of importance of the factors on a case-by-case basis. This must be essential to the process as the facts of no two cases are likely to be the same. The weighting adjusts for these differences. An example can be seen in this case where the weighting of a factor is decided based upon the nature of the information already provided. Lack of proper attention to weighting ignores the relative significance of the particular factor in the context of the matrix of the information. The proposition which is apparently advanced by Ms Marshall-Holst would seem to ignore that requirement to weight all factors including the pro-disclosure factors.

Grounds 1 & 2 – Natural Justice and Procedural Fairness

Ground 3 – Failure to provide weight to a relevant factor – Item 16

[75] In the written submissions, Ms Marshall-Holst deals with grounds 1 & 2 together.

[76] Ms Marshall-Holst submits, "a denial of the principles of natural justice or rules of procedural fairness in making this decision will lead to an injustice to the applicant."[36]

[77] Ms Marshall-Holst refers to the fact that the nature of the documents which exist concerned a workplace investigation as to her conduct,[37] and submits that the refusal to provide full access to information held by Queensland Health prevents her from understanding the content, context and nature of the investigation or the allegations and complaints that have been made against her.[38]

[78] Ms Marshall-Holst relied upon the pro-disclosure bias (dealt with earlier in these reasons) as to the way in which the factors should be considered.

[79] Ms Marshall-Holst concludes that "for the reasons stated herein, the applicant has been subjected to an injustice and the appeal should be allowed."[39]

[80] Queensland Health admits that certain parts of the information contained in the documents not disclosed to Ms Marshall-Holst would touch upon her employment and reputation, but submits that this is not, in itself, sufficient to compel disclosure. It is asserted that the disclosure of such personal information is a factor favouring disclosure but does not provide an absolute right to access.[40]

[81] Mr Telford submitted that the ground was largely incompetent insofar as it sought to attack the decisions of the employer rather than the Information

---

36 Decision and Reasons for Decision of the Information Commissioner, 27 August 2015, paragraph 18.
37 Ibid, paragraph 19.
38 Ibid, paragraph 20.
39 Applicant's Written Submissions, 29 January 2016, paragraph 29.
40 Written Submissions of the Second Respondent, 4 December 2015, paragraphs 2 & 3.

Commissioner and moreover the challenge related to findings of fact, not raising questions of law.[41]

[82] Mr Telford submitted that grounds 1 & 2 (as set out in the written submissions, as opposed to the Application for Appeal) were largely the same ground and related to a decision of the employer not the Information Commissioner.[42] He submitted that this of itself did not identify a ground of appeal to the Tribunal and certainly did not identify a question of law.[43]

[83] Mr Telford further submitted that the Information Commissioner had, as a matter of fact, determined that the contention concerning lack of natural justice was not made out on the material and had in the context of the investigation provided full detail of the conclusions to Ms Marshall-Holst.[44]

[84] At the hearing, Mr White was asked whether the asserted lack of natural justice was by the Information Commissioner or by the Metro North Health Service.[45] He clarified that in his submission, a consideration that ought to have been made by the Information Commissioner was whether or not it furthered the administration of justice, specifically procedural fairness, for the documents to be disclosed to the applicant.[46]

[85] Mr White submitted that the issues concerning procedural fairness and the interests of justice were not identified in the decision as factors favouring disclosure.[47] He submitted that this would go towards identifying an error of law by the Information Commissioner insofar as procedural fairness constitutes an element of item 16 in Schedule 4 part 2,[48] and consideration of item 16 did not form one of the items that was considered in the decision of the Information Commissioner.[49]

[86] Ultimately, Mr White summarised his submission as being that no consideration had been given in the decision to the applicability of item 16.[50]

[87] Item 16, Schedule 4, part 2 reads:

> "Disclosure of the information could reasonably be expected to contribute to the administration of justice generally, including procedural fairness."

[88] Essentially, this amounts to an assertion that the Information Commissioner failed to take into account a relevant consideration, namely

---

41 Transcript of Hearing, 29 July 2016, T1-23, ll 9-14.
42 Ibid, T1-23, ll 24-25.
43 Ibid, T1-23, ll 26-27.
44 Ibid, T1-28, ll 9-11, ll 31-41.
45 Ibid, T1-3, ll 24-26.
46 Ibid, T1-4, ll 1-5.
47 Ibid, T1-5, ll 36-38.
48 Ibid, T1-3, ll 34-42.
49 Ibid, T1-4, ll 17,18.
50 Ibid, T1-4, ll 15-18; T1-5, ll 30-33.

an item favouring disclosure in the public interest being item 16, Schedule 4, part 2.

[89] It seems that those submissions also concerned ground 3 which, in the written submissions, was described as "failure to give any weight to a relevant factor favouring disclosure, Schedule 4, part 2, item 16."

[90] A question of law can arise if the Information Commissioner completely fails to identify, and disregards, a factor as is required by section 49.

[91] For the purpose of ground 3 (which based upon the oral submissions incorporates grounds 1 & 2 as well), it is necessary to identify whether the Information Commissioner failed to consider the factor outlined in item 16.

[92] In the discussion regarding accountability and transparency, the decision rejects contentions by Ms Marshall-Holst that she was not afforded an opportunity throughout the investigation to respond to any allegations or accusations and that she remained unaware of any counter-allegations.[51]

[93] The Information Commissioner concluded that the information already provided to Ms Marshall-Holst revealed that the allegations against her were conveyed to her and she was afforded the opportunity to respond to them at the relevant time and that the outcome of the investigation into allegations both against Ms Marshall-Holst and made by her were also conveyed to her.[52]

[94] There is a reference to item 16 in the section of the decision headed "Balancing the Relevant Factors".[53]

[95] The conclusion is "the information which the Health Service has already provided to the applicant furthers the applicant's understanding of how the investigation was conducted and the outcome. This information also provided Ms Marshall-Holst with natural justice, in terms of being able to respond to the allegations made against her".[54]

[96] These observations demonstrate that the Information Commissioner did not ignore this factor. In this context, there was no failure to take into account a relevant consideration. The contention advanced by Ms Marshall-Holst is not made out.

[97] The question of the weight afforded to this factor is a question of fact, not law, and so is not the subject of an appeal under section 119 RTI Act.

[98] Because of the extent of information which had been provided to Ms Marshall-Holst, the Information Commissioner concluded that the weight of

---

51 Decision and Reasons for Decision of the Information Commissioner, 27 August 2015, paragraph 21.

52 Ibid, paragraph 22.

53 Ibid, paragraph 36.

54 Ibid.

these factors in favour of disclosure (outlined in item 16) was reduced with the result that the factors were afforded low weight.

[99] The approach taken by the Information Commissioner was consistent with the requirements of the statute and the decision made was within the boundaries of the appropriate limits for the exercise of discretion by the Information Commissioner and so should not be impugned based on this ground.

Ground 4

[100] The assertion in relation to ground 4 was that there was a failure of the relevant factor "to have been considered sufficiently…a failure to give appropriate weight to item 11 of schedule 4 of part 2."[55]

[101] Under the heading "accountability and transparency" the decision deals with issues which include those contemplated in item 11.

[102] The decision concludes that factors such as those listed in item 1 and 11 are relevant.

[103] As seems to have been conceded, the factor was considered by the Information Commissioner. However, Ms Marshall-Holst asserts it was not afforded sufficient weight.

[104] The question of the weight afforded to this factor is a question of fact not law and so is not the subject of an appeal under section 119 RTI Act.

[105] Relevant to this ground, the decision does not accept contentions by Ms Marshall-Holst that she had only partially been provided with information about how Queensland Health handled the investigation.[56]

[106] The decision also notes that the information revealed that the outcome of the investigation into allegations both against Ms Marshall-Holst and made by Ms Marshall-Holst was conveyed to her and information about Queensland Health's handling of the investigation has been provided.[57]

[107] As a result of the findings, the Information Commissioner attributed low weight to the factors favouring disclosure.

[108] The approach taken by the Information Commissioner was consistent with the requirements of the statute and the decision made was within the boundaries of the appropriate limits for the exercise of discretion by the Information Commissioner and so should not be impugned based on this ground.

Ground 5

---

55 Transcript of Hearing, 29 July 2016, T1-6, ll 6-10.

56 Decision and Reasons for Decision of the Information Commissioner, 27 August 2015, paragraphs 20 and 21.

57 Ibid, paragraph 23.

[109] The ground of appeal is described as "failure to give consideration to a relevant factor favouring disclosure, Schedule 4, part 2, item 12.

[110] This item provides that a factor favouring disclosure in the public interest is:

> Disclosure of the information could reasonably be expected to reveal that the information was –
>
> (a) Incorrect; or
>
> (b) out of date; or
>
> (c) misleading; or
>
> (d) gratuitous; or
>
> (e) unfairly subjective; or
>
> (f) irrelevant.

[111] In contrast to the submission concerning item 11, the assertion is that there is a total failure to give consideration to this factor.[58]

[112] Ms Marshall-Holst submits that this is a very relevant factor favouring disclosure and should have been included and given significant weight in the balancing of relevant factors for the purpose of making the decision.[59]

[113] Ground 5, as with the other grounds, relied on the approach asserted by Ms Marshall-Holst regarding the pro-disclosure bias. As outlined earlier in these reasons, I do not believe that the pro-disclosure bias operates in the way asserted.

[114] Queensland Health asserted that all factors contained within Schedule 4 were considered including those that counter-balance against disclosure.[60] After balancing all factors for and against disclosure, it was concluded that access to the information would not, on balance, be in the public interest.[61]

[115] At the hearing, in relation to grounds 3, 4 and 5, Mr Telford asserted that having regard to the authorities, the process of weighting competing factors and reaching a conclusion as a result of that process does not of itself give rise to a question of law.[62]

[116] That is correct. However, where there is a total failure to take a relevant consideration into account this can amount to an error of law.

[117] Item 12 is not mentioned anywhere in the decision. The factors outlined in Item 12 are not dealt with at all.

---

58 Applicant's Written Submissions, 29 January 2016, paragraph 37.
59 Ibid, paragraph 42.
60 Written Submissions of the Second Respondent, 4 December 2015, paragraph 41.
61 Ibid, paragraph 42.
62 Transcript of Hearing, 29 July 2016, T1-35, ll 10-16.

[118] It also seems that these factors are not referred to in any of the information relied upon by the Information Commissioner which was filed in these proceedings.

[119] In short, there is no evidence that Item 12 was considered.

[120] This is an error of law on the basis of which the decision should be set aside. The Information Commissioner should reconsider the decision taking the factors outlined in Item 12 into account, with the other factors already considered by the Information Commissioner.

Ground 6

[121] The decision identifies the following factors:[63]

- The Information in Issue relates to the applicant and comprises her personal information. This gives rise to a factor favouring disclosure namely Schedule 4, part 2 item 7. The Information Commissioner attributed significant weight to this factor;
- The Information in Issue is also the personal information of other individuals, and this personal information cannot be separated from the applicant's personal information because of the way it appears in the documents. This gives rise to factors favouring nondisclosure namely Schedule 4, part 3, item 3 and Schedule 4, part 4, item 6 (1). The Information Commissioner afforded both of these factors significant weight.
- Granting access to the information could reasonably be expected to make staff reluctant to fully participate in future investigations and prejudice the future flow of information to investigators. This could reasonably be expected to adversely impact Queensland Health's ability to conduct workplace investigations and manage staff. This gives rise to factors favouring nondisclosure being Schedule 4, part 3, item 19 and Schedule 4, part 3, item 16. The Information Commissioner afforded these factors significant weight in the circumstances.

[122] The Application for Appeal describes ground 6 as "the First Respondent and Second Respondent have failed to establish that the information provided by the other individual was communicated in confidence and/or that it would be a breach of confidence to disclose this information".[64]

[123] In Ms Marshall-Holst's written submissions, ground 6 is described as "erred in finding that the information was confidential".[65]

---

63 Decision and Reasons for Decision of the Information Commissioner, 27 August 2015, paragraphs 28 – 34.

64 Application for Leave to Appeal, 24 September 2015, Attachment A, appeal ground 6.

65 Applicant's Written Submissions, 29 January 2016, paragraph 15.

[124] Mr White submitted at the hearing that ground 6 was "with regards to personal information and confidentiality".[66] He continued "it's failed to establish that the information provided by the other employee was communicated in confidence and/or that it would be a breach of confidence to reveal this information."

[125] Mr White identified competing factors.[67] Personal information was provided by the other party which, Ms Marshall-Holst accepted, needs to be protected with respect to her privacy. It was submitted that a competing factor was that the information was provided in the context of a workplace grievance. Within that context, it ought reasonably be considered that the allegations and opinions would be provided to the party against whom they were directed (in this case, Ms Marshall-Holst) in order to enable that party to respond to the allegations.[68]

[126] Ms Marshall-Holst accepted that there is an implied understanding of an obligation of confidentiality when information is provided in the context of workplace grievances. However, Mr White submitted that it does not extend to the point where opinions and allegations expressed which form that personal information are unable to be disclosed to the person against whom they relate.[69]

[127] Mr White again asserted that Ms Marshall-Holst's submission relates to the way in which consideration is given to the protection of personal information and confidential information in the scope of the test applied by reference to the pro-disclosure bias (which has been the subject of the earlier discussion in these reasons).[70]

[128] Mr White submitted that the risk of prejudice to future investigations should have a very low weighting.[71] It was submitted that in the balancing of factors, greater consideration should be given to the fact that the information was not being supplied to the public at large but rather to the person to whom the information relates.[72]

[129] Ms Marshall-Holst disputed the findings made by the Information Commissioner that staff usually supply information to workplace investigations on the understanding that it will only be used for the investigation or any subsequent disciplinary action. Mr White put the contrary position that people who provide information ought reasonably expect that it will be provided to the particular individual it concerns.[73]

[130] There is no assertion that the Information Commissioner ignored a relevant consideration.

---

66 Transcript of Hearing, 29 July 2016, T1-11, ll 18,19.
67 Ibid, T1-12, ll19.
68 Ibid, T1-12, ll20-25.
69 Ibid, T1-13, ll20-26
70 Ibid, T1-15, ll11-25.
71 Ibid, T1-19, ll4-9.
72 Ibid, T1-19, ll25-28.
73 Ibid, T1-21, ll30-33.

[131] Mr Telford submitted that a finding that the Information in Issue was confidential was a question of fact, not law. The Tribunal was referred to *Wright v Gasweld Pty Ltd*,[74] where the New South Wales Court of Appeal concluded that a determination of whether information is confidential is a question of fact, not a question of law.[75]

[132] As to the issues concerning confidentiality, Queensland Health submitted that the Information in Issue was collected under a mutual understanding between the parties to the workplace investigations that it would remain confidential.[76] Queensland Health submitted that this obligation of confidence was communicated by verbal assurances and as evidenced through various letters exchanged with staff in the course of investigations which directed them to maintain confidentiality as far as possible.[77] These papers were amongst those relied on by the Information Commissioner.

[133] Queensland Health referred the Tribunal to the decision in *Coco v AN Clark (Engineers) Ltd*.[78] Queensland Health submitted that based upon the information which was before the Information Commissioner, including the verbal assurances and letters exchanged as well as the circumstances of the investigatory process, it was clear that the information was imparted in confidence and was to remain strictly confidential. Mr Telford submitted that the factual underpinning in relation to the circumstances of confidentiality, were clearly matters of fact and not law.[79]

[134] Apart from the issue concerning the test to be applied arising as a result of the pro-disclosure bias, the issues raised by Ms Marshall-Holst relate to findings such as the expectations of staff in supplying information relating to work place investigations, the balancing of the various factors and the appropriate weight which should be given to the factors.

[135] These are not questions of law, but are questions of fact and so are not the subject of an appeal under section 119 RTI Act.

[136] As to the process involved, the Information Commissioner identified the relevant factors, applied a weighting to those factors, and then balanced the relevant factors as is required by the legislation.

[137] The approach taken by the Information Commissioner was consistent with the requirements of the statute and the decision made was within the boundaries of the appropriate limits for the exercise of discretion by the Information Commissioner and so should not be impugned based on this ground.

---

74 *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317.
75 Ibid at 334.
76 Submissions of the Second Respondent, 4 December 2015, paragraph 66.
77 Ibid, paragraphs 72.3 to 72.5; Second Respondent's Appeal Book, Vol 1, pages 9, 37 and 200.
78 (1969) RPC 41.
79 Transcript of Hearing, 29 July 2016, T1-43, ll 6-10.

Other Confidentiality Matters

[138] Queensland Health submitted that parts of the Information in Issue were confidential by operation of section 142 *Hospital and Health Boards Act* 2011 (Qld), which attracts a penalty for disclosure. However, Mr White submitted that the information protected by section 142 must be information acquired by a person in that person's capacity as a designated person, from which a person who is receiving or has received a public sector health service could be identified.[80] Mr White submitted that it was unlikely the Information in Issue would relate to a person receiving a public sector health service, as the Information in Issue was about Ms Marshall-Holst's workplace investigation.[81] As to this issue, it does not seem that section 142 was relied on (or even considered) by the Information Commissioner. It is not relevant to the decision or the consideration by the Appeal Tribunal.

Information Sheet/Guidelines

[139] Ms Marshall-Holst referred to an Information Sheet issued by the Information Commissioner regarding workplace investigations. It was asserted that the information contained within the Information Sheet is informative of a bias that the Information Commissioner has in refusing access to a class of documents involving workplace investigations.[82]

[140] The submissions make what are essentially bare assertions with no reference to authority or arguments supporting the assertions.

[141] The matter was not addressed by Mr White at the hearing.

[142] Mr Telford described the submission as "frankly offensive".[83] Mr Telford referred to section 132 RTI Act, which provides that the Information Commissioner has power to issue a guideline about a matter for or in connection with any of the Information Commissioner's functions.[84]

[143] The assertion made by Ms Marshall-Holst is not made out.

Order

[144] It is ordered that:

a) The appeal on Grounds 1, 2, 3, 4 and 6 is not upheld.

b) The appeal on Ground 5 is upheld.

c) The Decision of the Information Commissioner, dated 27 August 2015, be set aside and the matter returned to the Information Commissioner for reconsideration taking the factors outlined in the

---

80 *Hospital and Health Boards Act* 2011 (Qld) s 139; Applicant's Written Submissions, 29 January 2016, paragraphs 55 and 56.

81 Applicant's Written Submissions, 29 January 2016, paragraph 57.

82 Applicant's Written Submissions, 1 February 2016, paragraphs 44 & 45.

83 Transcript of Hearing, 29 July 2016, T1-36, L 31.

84 RTI Act, section 132(1)

Right to Information Act 2009 (Qld) Schedule 4, Part 2, Item 12 into account with the factors already considered by the Information Commissioner.

Costs

[145] Ms Marshall-Holst sought an order for costs.

[146] The parties raised the question of costs towards the conclusion of the hearing when it was indicated that further submissions would be made following the decision being handed down.

[147] It is ordered that the parties file any submissions on which they intend to rely in relation to costs, by:

4:00pm on 15 April 2017.

[148] Unless either party requests an oral hearing, the matter of costs will be determined on the papers at 10:00am on 24 April 2017.