



## Decision and Reasons for Decision

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Citation:	<i>D45 and Wide Bay Hospital and Health Service [2021] QICmr 63 (30 November 2021)</i>
Application Number:	315969
Applicant:	D45
Respondent:	Wide Bay Hospital and Health Service
Decision Date:	30 November 2021
Catchwords:	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - HEALTHCARE INFORMATION - parent seeking access to child's mental health records on behalf of child - healthcare information - whether disclosure prejudicial to physical or mental wellbeing of the applicant child - whether disclosure contrary to applicant's best interests - 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<sup>1</sup> applied<sup>2</sup> to Wide Bay Hospital and Health Service (**the Health Service**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to the child's medical records, including mental health records.
2. The Health Service located 101 pages relevant to the access application and granted full access to 15 pages and partial access to 30 pages. In respect of the remaining information, the Health Service decided<sup>3</sup> to refuse access to:
  - the remaining parts of 30 pages on the basis that the disclosure of the refused information in these pages would be contrary to the public interest;<sup>4</sup> and
  - mental health records<sup>5</sup> on the basis that it comprised healthcare information which would be prejudicial to the applicant child's physical or mental health or wellbeing to disclose.<sup>6</sup>

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<sup>1</sup> The access application was made on behalf of a child by a parent of the child under section 45 of the IP Act. In this decision, references to the applicant include references to the child's parent when acting on behalf of the child in relation to the access application. The IP Act also makes clear that in such circumstances the applicant is taken to be the child rather than the parent (see section 45 of the IP Act and the definition of 'applicant' in schedule 5 of the IP Act).

<sup>2</sup> Application dated 1 February 2021.

<sup>3</sup> Decision dated 15 March 2021.

<sup>4</sup> Section 67(1) of the IP Act and section 47(3)(b) of the *Right to Information Act 2009* (Qld) (**RTI Act**).

<sup>5</sup> 56 pages.

<sup>6</sup> Section 67(1) of the IP Act and section 47(3)(d) and section 51 of the RTI Act.

3. The applicant applied<sup>7</sup> to the Office of the Information Commissioner (**OIC**) for external review of the decision to refuse access to the mental health records.
4. For the reasons set out below, I affirm the Health Service's decision to refuse access to the mental health records, under section 67(1) of the IP Act and section 47(3)(d) of the RTI Act.

## Background

5. The decision under review is the Health Service's decision dated 15 March 2021 to refuse access to the mental health records under section 67(1) of the IP Act and section 47(3)(d) of the RTI Act.<sup>8</sup>
6. Significant procedural steps taken during the external review are set out in the Appendix to this decision.
7. Evidence, submissions legislation and other material I have considered in reaching this decision are identified in these reasons, including the Appendix.
8. During the review,<sup>9</sup> OIC communicated with the Health Service to ascertain whether it would consider providing the parent with contact details of a health practitioner, as part of an informal resolution proposal.<sup>10</sup> These negotiations with the Health Service were ultimately not successful in informally resolving the review.
9. I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**),<sup>11</sup> particularly the right to seek and receive information.<sup>12</sup> A decision maker will be '*respecting, and acting compatibly with*' that right and others prescribed in the HR Act when applying the law prescribed in the IP Act and the RTI Act.<sup>13</sup> I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:<sup>14</sup> '*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>15</sup>

## Information in issue

10. The information in issue appears in 56 pages of the applicant child's mental health records held by the Health Service.<sup>16</sup>

## Issue for determination

11. The issue for determination is whether access to the mental health records may be refused under section 67(1) of the IP Act and section 47(3)(d) of the RTI Act on the ground that disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant child under section 51 of the RTI Act.

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<sup>7</sup> Application dated 20 March 2021 and received by OIC on 25 March 2021.

<sup>8</sup> The Health Service's decision incorporated the decision of the Clinical Director of Mental Health, as the appointed healthcare professional to make a decision on the mental health records.

<sup>9</sup> From 17 June until 6 September 2021.

<sup>10</sup> In accordance with OIC's obligations under section 103(1) of the IP Act.

<sup>11</sup> Relevant provisions of which commenced on 1 January 2020.

<sup>12</sup> Section 21(2) of the HR Act.

<sup>13</sup> *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> *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>15</sup> *XYZ* at [573].

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

## Relevant law

12. 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>17</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.<sup>18</sup>
13. Relevantly, access may be refused to an applicant's relevant healthcare information the disclosure of which might be prejudicial to the physical or mental health or wellbeing of the applicant under section 51 of the RTI Act.
14. '*Relevant healthcare information*' means healthcare information given by a healthcare professional.<sup>19</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>20</sup>
15. The Information Commissioner<sup>21</sup> has the power to decide any matter in relation to an access application that could have been decided by an agency.<sup>22</sup>

## Analysis and findings

16. The mental health records contain information relating to clinical assessments of the applicant child undertaken within the Health Service. I am satisfied the mental health records comprise healthcare information provided by healthcare professionals and are therefore, the applicant child's relevant healthcare information.
17. The parent made submissions in support of disclosure of the mental health records.<sup>23</sup> In their submissions, the parent focused on their desire to obtain a better understanding of the applicant child's health and wellbeing and stated that they were seeking to check the content of the records against what they had been told by other sources.<sup>24</sup> The parent emphasised that they should have an entitlement to their child's records in these circumstances. The parent also referred to past Family Court and custody issues and submitted that obtaining access to the records could help to inform decisions relating to a parenting plan.
18. In addition to its decision refusing access to the mental health records, the Health Service also provided more extensive submissions to OIC setting out the evidence it relied on to make its decision.<sup>25</sup> I am limited in the amount of detail that I can disclose about those submissions.<sup>26</sup> The Health Service submitted that in the circumstances, it had concerns that disclosure of the information would '*influence the mental health of the child*'<sup>27</sup> and that that '*the best interests of the child are at the forefront of any decision made by the Child and Youth Mental Health Team*'.<sup>28</sup>

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<sup>17</sup> Section 40 of the IP Act.

<sup>18</sup> Section 67(1) of the IP Act allows an agency to refuse access to documents on the grounds set out in section 47 of the RTI Act.

<sup>19</sup> Schedule 5 of the IP Act.

<sup>20</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>21</sup> Or her delegate under section 139 of the IP Act.

<sup>22</sup> Section 118(1)(b) of the IP Act. As such, I have the power to make a decision on the mental health records, under section 47(3)(d) of the RTI Act.

<sup>23</sup> External review application dated 20 March 2021 and submissions received by OIC via email dated 20 July 2021 and via telephone on 22 July 2021.

<sup>24</sup> Ibid.

<sup>25</sup> Submissions dated 18 May 2021 and 3 September 2021.

<sup>26</sup> Section 121 of the IP Act.

<sup>27</sup> Submission to OIC 18 May 2021.

<sup>28</sup> Submission to OIC 3 September 2021.

19. The Health Service acknowledged a parent's right of access to a child's records but concluded that it is *'very unlikely in this case that the interests of the child are enhanced by information being made available ... especially as the child is no longer in treatment in this service.'*<sup>29</sup>
20. In considering whether the applicant child's health or wellbeing might be prejudiced by the disclosure of the mental health records, I must consider whether the prejudice is real and tangible as opposed to a fanciful, remote or far-fetched possibility.<sup>30</sup> Based on the evidence available to me, including the content of the mental health records and information provided by the Health Service and appropriately qualified healthcare professional, I find that there is a real and tangible risk that disclosing the mental health records might prejudice the applicant child's health or wellbeing.
21. For the reasons set out above, I am satisfied that the mental health records comprise the applicant child's healthcare information and that disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant child.<sup>31</sup>

## DECISION

22. I affirm the decision of the Health Service and find that access to the mental health records may be refused under section 67(1) of the IP Act and section 47(3)(d) of the RTI Act.
23. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

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K Shepherd  
**Acting Right to Information Commissioner**

**Date: 30 November 2021**

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<sup>29</sup> Submission to OIC 3 September 2021.

<sup>30</sup> 88OQAO and Wide Bay Hospital and Health Service [2019] QICmr 14 (1 May 2019) at [18].

<sup>31</sup> Section 51 of the RTI Act.

## APPENDIX

### Significant procedural steps

Date	Event
25 March 2021	OIC received the external review application.
26 March 2021	OIC notified the Health Service that it had received the application for external review and requested preliminary documents from the Health Service.
30 March 2021	OIC received the preliminary documents from the Health Service.
7 April 2021	OIC notified the applicant that it had received the application for external review and requested that the applicant provide certified evidence of a child-parent relationship.
30 April 2021	OIC received the applicant's further evidence of a child-parent relationship.
6 May 2021	OIC notified the applicant and the Health Service that the external review application had been accepted. OIC requested the mental health records from the Health Service.
18 May 2021	OIC received the mental health records and submissions from the Health Service.
17 June 2021	OIC conveyed to the applicant a preliminary view that access to the mental health records may be refused on the basis that they contain relevant healthcare information and that disclosure might be prejudicial to the applicant child's physical or mental wellbeing. OIC asked the Health Service if it would agree to provide contact details of a healthcare practitioner to the child's parent, as part of the informal resolution process.
29 June 2021	The Health Service advised that it was considering options for informal resolution.
20 July 2021	OIC discussed the preliminary view with the applicant via telephone. OIC received submissions from the applicant via email.
22 July 2021	OIC spoke to the applicant about the external review process and concerns raised in the applicant's submissions. OIC contacted the Health Service regarding options for informal resolution.
23 July, 5 August, 2 and 6 September 2021	The Health Service communicated with OIC regarding options for informal resolution.
6 September 2021	OIC advised the applicant that informal resolution negotiations with the Health Service had not succeeded and reiterated the preliminary view that access to the mental health records could be refused.
20 September 2021	The applicant confirmed to OIC that they wished to proceed to a formal decision and provided further oral submissions.