



Decision and Reasons for Decision

Citation:	<i>E94 and Cairns and Hinterland Hospital and Health Service [2023] QICmr 65 (7 December 2023)</i>
Application Number:	317372
Applicant:	E94
Respondent:	Cairns and Hinterland Hospital and Health Service
Decision Date:	7 December 2023
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - HEALTHCARE INFORMATION - application for medical records - whether disclosure might be prejudicial to the physical or mental health of wellbeing of the applicant - whether disclosure is contrary to the applicant's best interests under section 67(1) of the <i>Information Privacy Act 2009 (Qld)</i> and sections 47(3)(d) and 51 of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied to Cairns and Hinterland Hospital and Health Service (**Health Service**) under the *Information Privacy Act 2009 (Qld)* (**IP Act**) for access to his 'mental health file - December 2020 and January 2021'.¹
2. The Health Service located 265 pages in response to the application. Direct access to this information was refused by the Health Service's appointed healthcare professional (referred to in these reasons as '**Dr A**') on the basis that disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant.² However, the applicant nominated a healthcare professional under section 92(2) of the IP Act, and the Health Service released the documents to that nominated healthcare professional.³
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Health Service's decision to refuse him direct access to his medical records.⁴ On external review, the applicant submitted that the nominated healthcare

¹ Access application dated 19 April 2023.

² Decision dated 26 May 2023. Of the 265 pages, 10 pages were removed as they comprised duplicates and parts of 4 pages were refused as they comprised exempt information in accordance with schedule 3, section 10 of the *Right to Information Act 2009 (Qld)* and contrary to public interest information.

³ In submissions received 24 July 2023 the Health Service confirmed that documents had been sent to the nominated medical practitioner on 26 May 2023, the same date of the decision.

⁴ Application for external review received 9 June 2023. The applicant did not contest the removal of duplicates or the part refusals in 4 pages.

professional was not suitable to determine what was in his best interests and therefore withdrew his nomination.⁵

4. For the reasons set out below, I affirm the Health Service's decision to refuse access to the requested information under section 67(1) of the IP Act and sections 47(3)(d) and 51 of the *Right to Information Act 2009* (Qld) (**RTI Act**) on the grounds that disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant.

Background

5. The decision under review is the Health Service's decision dated 26 May 2023.
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. I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**),⁶ particularly the right to seek and receive information.⁷ 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.⁸ 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:⁹ '*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*'.¹⁰
9. The applicant raised a number of concerns about the Health Service and local government agencies which are outside the Information Commissioner's external review jurisdiction under the IP Act.¹¹ In making my decision in this external review, I have considered the applicant's submissions to the extent they are relevant to the issues for determination in the context of the information in issue.

Information in issue

10. The information in issue is 265 pages comprising the applicant's medical records (**Information in Issue**).

Issue for determination

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

⁵ Submissions received 29 August 2023.

⁶ Relevant provisions of which commenced on 1 January 2020.

⁷ Section 21(2) of the HR Act.

⁸ *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].

⁹ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁰ **XYZ** at [573].

¹¹ In External review application received 9 June 2023, submissions received 29 August 2023 and 24 November 2023 and telephone conversation on 1 December 2023.

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.¹² 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.¹³
13. Relevantly, access may be refused to an applicant's relevant healthcare information where disclosure 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.¹⁴ 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.¹⁵
15. Despite an agency refusing access to the healthcare information, the agency may direct that access to the information is to be given instead to an appropriately qualified healthcare professional nominated by the applicant and approved by the agency.¹⁶ The nominated and approved healthcare professional may decide whether or not to disclose all or part of the information to the applicant, as well as the way in which to disclose the information to the applicant.¹⁷
16. The Information Commissioner¹⁸ has the power to decide any matter in relation to an access application that could have been decided by an agency.¹⁹

The applicant's submissions

17. During the external review, the applicant made the following submissions:²⁰
 - He has not been treated by Dr A and Dr A is therefore not well positioned to determine that allowing access will have any prejudicial effect on the applicant's physical or mental health or wellbeing.
 - Disclosure will help him to contest the content of the medical records because previous information written about him is not correct.
 - The applicant accused the Health Service and other government agencies of malpractice and refusing access to the records to cover this up.
 - The Health Service has relied on false and misleading information in making decisions relating to him and his treatment.
 - The applicant submitted that the healthcare professional that he had nominated was not suitable to determine what was in his best interests and he therefore had withdrawn that nomination.

¹² Section 40 of the IP Act.

¹³ 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.

¹⁴ Schedule 5 of the IP Act.

¹⁵ Schedule 5 of the IP Act provides examples such as a doctor, including a psychiatrist or a psychologist, social worker or registered nurse.

¹⁶ Section 92(2) of the IP Act.

¹⁷ Section 92(3) of the IP Act.

¹⁸ Or her delegate under section 139 of the IP Act.

¹⁹ Section 118(1)(b) of the IP Act.

²⁰ External review application received 9 June 2023, submissions received on 29 August 2023 and 24 November 2023, and a telephone discussion on 1 December 2023.

The Health Service's submissions

18. The Health Service submitted that the Information in Issue is healthcare information.²¹ The Health Service also explained that the Information in Issue was provided to Dr A, Clinical Director of the Health Service's Integrated Mental Health Service, who was a qualified medical practitioner appointed under section 50(5)(b) of the IP Act to make healthcare decisions.²²
19. Following an assessment of the Information in Issue, Dr A formed the opinion that disclosure of the Information in Issue directly to the applicant might be prejudicial to his health and wellbeing. Dr A therefore made a healthcare decision to refuse access to the documents.²³ Dr A directed that access to the Information in Issue should be given through an appropriately qualified healthcare professional, nominated by the applicant and approved by the Health Service. Dr A was of the opinion that it was in the applicant's best interests that access be given in this form so as to provide the applicant with the opportunity to discuss the contents of the documents in a therapeutic and supportive environment, and to ask questions about the information.²⁴
20. The Health Service confirmed that the medical records were sent to the applicant's nominated healthcare professional. However, on external review, the applicant withdrew this nomination.²⁵

Analysis and findings

21. Dr A is a registered psychiatrist,²⁶ the Clinical Director of a Mental Health Service, and a person appointed by the Director-General of Health under the IP Act to make healthcare decisions. Therefore, I am satisfied that Dr A possesses qualifications and experience appropriate to assess relevant healthcare information, and that the decision to refuse access was made by an appropriately qualified healthcare professional.
22. Having reviewed the Information in Issue, I am satisfied that it is relevant healthcare information.²⁷
23. It is Dr A's opinion that disclosure of the Information in Issue directly to the applicant might have a negative impact on the applicant's health and wellbeing.
24. I accept the applicant's submission that Dr A is not his treating doctor. However, Dr A has had an opportunity to review the Information in Issue and consider the contents. I also note that Dr A is the Clinical Director of the Health Service's Mental Health Service and a specialist in this field.
25. I also acknowledge the allegations made by the applicant regarding his medical treatment. However, the adequacy of his medical treatment by the Health Service is not an issue that I have jurisdiction to assess or to make a finding about under the IP Act. The only issue for my determination is whether the Health Service's decision to refuse the applicant direct access to his medical records should be affirmed on external review. Having reviewed the submissions of both parties, I am not satisfied that the

²¹ Decision dated 26 May 2023, attachment 1 (statement of reasons), page 1.

²² Decision dated 26 May 2023, attachment 1 (statement of reasons), page 2.

²³ As outlined in the decision dated 26 May 2023.

²⁴ Decision dated 26 May 2023 attachment 1 (statement of reasons), page 2.

²⁵ Submission received 29 August 2023.

²⁶ Registered in the specialty of Psychiatry, according to details obtained from the Australian Health Practitioner Regulation Agency's Register of Practitioners, available at <<https://www.ahpra.gov.au/Registration/Registers-of-Practitioners.aspx>>, accessed on 5 December 2023.

²⁷ As defined in schedule 5 of the IP Act.

applicant has provided evidence to contradict the Health Service's submissions and Dr A's opinion that giving direct access to the Information in Issue might be prejudicial to the applicant's mental health and wellbeing.

26. On that basis, I am satisfied that access may be refused to the Information in Issue as its disclosure might be prejudicial to the applicant's physical or mental health or wellbeing.²⁸
27. As an alternative to direct access, a direction was made by the Health Service that the Information in Issue could be disclosed to the applicant through an appropriately qualified healthcare professional nominated by the applicant and approved by the Health Service.²⁹ The applicant nominated a medical practitioner but later withdrew his nomination and has not pursued this alternative access avenue on external review. Rather, he seeks direct access to his records.³⁰ As such, I have not addressed this issue further in this decision. Should the applicant seek to pursue this avenue in the future, it is a matter for discussion between himself and the Health Service.

DECISION

28. Pursuant to section 123 of the IP Act, I decide³¹ to affirm the Health Service's decision to refuse access to the Information in Issue under section 67(1) of the IP Act and sections 47(3)(d) and 51 of the RTI Act on the ground that disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant.

R Moss
Principal Review Officer

Date 7 December 2023

²⁸ Section 47(3)(d) of the RTI Act.

²⁹ In the Health Service's decision dated 26 May 2023.

³⁰ Telephone discussion with the applicant on 1 December 2023.

³¹ As a delegate of the Information Commissioner under section 139 of the IP Act.

APPENDIX

Significant procedural steps

Date	Event
9 June 2023	OIC received the external review application.
9 June 2023	OIC requested initial documents and preliminary information from the Health Service.
24 July 2023	The Health Service provided the initial documents and preliminary information and confirmed that release of the Information in Issue to the healthcare professional nominated by the applicant was made on 26 May 2023.
7 August 2023	OIC notified the applicant and the Health Service that the external review application had been accepted and requested information from the Health Service.
29 August 2023	The applicant provided submissions by post and withdrew his nomination of appointed medical practitioner.
31 August 2023	The Health Service provided the requested information.
12 October 2023	OIC conveyed a preliminary view to the applicant and the Health Service. OIC invited the applicant to provide submissions in response by 3 November 2023.
24 October 2023	The applicant sought an extension of time to provide submissions.
24 November 2023	The applicant provided submissions by post.
1 December 2023	OIC conducted a telephone conference with the applicant.