



Decision and Reasons for Decision

Citation:	<i>P62 and Sunshine Coast Hospital and Health Service</i> [2024] QICmr 17 (2 May 2024)
Application Number:	317702
Applicant:	P62
Respondent:	Sunshine Coast Hospital and Health Service
Decision Date:	2 May 2024
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - HEALTHCARE INFORMATION - applicant seeks access to inpatient notes made by doctor - whether disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant - 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)

REASONS FOR DECISION

Summary

1. The applicant applied to Sunshine Coast Hospital and Health Service (**Health Service**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for a copy of any notes made by a particular doctor about her.¹
2. The Health Service decided to refuse access to the Doctor's Notes on the basis that disclosure might be prejudicial to the applicant's physical or mental health or wellbeing.
3. The applicant applied² to the Information Commissioner for external review of the Health Service's decision.
4. For the reasons set out below, I affirm the decision of the Health Service. I find that access to the Doctor's Notes may be refused under section 67(1) of the IP Act and section 47(3)(d) of the *Right to Information Act 2009* (Qld) (**RTI Act**).

Reviewable decision

5. The decision under review is the Health Service's decision dated 29 November 2023.

¹ Administrative access application received on 3 August 2023, and later confirmed as an application under the IP Act on 13 August 2023.

² Application dated 3 December 2023.

Evidence considered

6. Significant procedural steps relating to the external review are set out in the Appendix.
7. Where possible, the evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix). However, the Information Commissioner must not, in a decision on an external review or in reasons for a decision on an external review, include information that is claimed to be exempt information or contrary to the public interest information.³ I am unable to discuss in detail the Health Service's submissions as the Health Service has claimed that doing so would be contrary to the public interest as it would pose a similar risk of prejudice to the applicant's physical or mental health or wellbeing as would disclosure of the Doctor's Notes.
8. On review, submissions were requested from the applicant to support her application for external review.⁴ The applicant requested clarification about the type of information she could provide, and it was explained that she could provide any submission or evidence and it would be considered.⁵ It was further explained that alternative evidence from a healthcare provider may result in a healthcare decision being overturned, failing this, she may wish to provide evidence from a person with knowledge of and involvement in her healthcare.⁶ The applicant's submissions have been considered, and taken into account.⁷
9. I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁸ I consider 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 RTI Act and the IP Act.⁹ 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:¹⁰ '*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.*'¹¹

Information in issue

10. The information in issue in this review is notes made by a specified doctor between April 2020 and July 2023 concerning the applicant (**Doctor's Notes**).¹²

³ Section 121(3) of the IP Act; section 51(2) of the RTI Act provides that Parliament considers it would, on balance, *be contrary to the public interest* to give access to a document to the extent it comprises relevant healthcare information of the applicant if the disclosure of the information might be prejudicial to the physical or mental health or wellbeing of the applicant. [my emphasis]

⁴ Letter to applicant dated 9 February 2024.

⁵ Email to applicant dated 14 February 2024.

⁶ Email to applicant dated 16 February 2024.

⁷ As contained in the external review application and in a submission dated 23 February 2024.

⁸ Section 21(2) of the HR Act.

⁹ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

¹⁰ *Freedom of Information Act 1982* (Vic) and *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹¹ *XYZ* at [573]. This approach, in the context of the IP Act and RTI Act, was endorsed by McGill J in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23], observing that the Information Commissioner '*was conscious* [of the right to seek and receive information] *and considered that the application of the Act gave effect to the requirements of the Human Rights Act. I see no reason to differ from that conclusion.*'

¹² The applicant originally applied for inpatient notes but agreed to narrow her request to a specific doctor's notes by email dated 11 September 2023.

Issue for determination

11. The issue for determination is whether access to the Doctor's Notes may be refused on the ground that disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant.¹³

Relevant law

12. Under the IP Act, an applicant has a right to be given access to documents of an agency to the extent those documents contain the individual's personal information.¹⁴ However, this right is subject to other provisions of the IP Act, including the grounds on which an agency may refuse access to documents. Under section 67(1) of the IP Act, an agency may refuse access to a document in the same way and to the same extent the agency could refuse access under section 47 of the RTI Act, had the document been the subject of an access application under the RTI Act.
13. Access to '*relevant healthcare information*' may be refused under the RTI Act if disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant.¹⁵
14. '*Relevant healthcare information*' is defined as '*healthcare information given by a healthcare professional*'.¹⁶ A '*healthcare professional*' is 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, including, for example:¹⁷
 - a doctor, including a psychiatrist
 - a psychologist
 - a social worker; or
 - a registered nurse.
15. The Information Commissioner has the power to decide any matter in relation to an access application that could have been decided by an agency.¹⁸

Submissions of the Health Service

16. As set out at paragraph 7 above, I cannot fully recount the detail of the submissions made by the Health Service as this information is claimed to be contrary to the public interest.¹⁹ I will note that the Health Service provided a submission in support of its decision, including the opinion of a psychiatrist, outlining the applicant's relevant medical history and explaining how this demonstrates a risk to the applicant's physical or mental health or wellbeing if the Doctor's Notes were released.

Submissions of the applicant

17. In summary, the applicant submits that she has a right to access her medical records and requires this information to understand the reasons behind her treatment, to ascertain its accuracy, to inform future treatment and support a complaint about the treatment she received. The applicant also explained that she believes the Health

¹³ Section 67(1) of the IP Act and sections 47(3)(d) and 51 of the RTI Act

¹⁴ Section 40(1)(a) of the IP Act.

¹⁵ Sections 47(3)(d) and 51 of the RTI Act.

¹⁶ See definition in schedule 5 of the RTI Act.

¹⁷ See definition in schedule 5 of the RTI Act.

¹⁸ Section 118(1)(b) of the IP Act.

¹⁹ Health Service's submissions dated 12 January 2024.

Service's decision maker is biased against her, and she cannot provide supporting evidence from a healthcare professional to counter that of the Health Service, as none have appropriate knowledge and understanding of her background.²⁰

Findings

Do the Doctor's Notes comprise the applicant's relevant healthcare information?

18. Yes, for the reasons that follow.
19. Under the IP Act, '*relevant healthcare information*' is healthcare information given by a healthcare professional.²¹ There is no definition of the word '*healthcare*' in the RTI Act, however, the ordinary and natural meaning of the word is '*the organized provision of medical care to individuals or a community*'.²²
20. As set out in paragraph 14 above, the definition of '*healthcare professional*' includes psychiatrists as a specific example. The Doctor's Notes are written by a psychiatrist and concern the applicant's care while a patient of the hospital. Therefore, I am satisfied that the Doctor's Notes are the applicant's relevant healthcare information.

Might disclosing the Doctor's Notes prejudice the applicant's physical or mental health or wellbeing?

21. Yes, for the reasons that follow.
22. It is important to note that this ground to refuse access is phrased differently to other provisions, where the likelihood of prejudice must be '*reasonably expected*' to occur. In this case, if disclosure of the requested information '*might*' be prejudicial to the applicant's physical or mental health or wellbeing, I must refuse access,²³ keeping in mind that the grounds on which access may be refused are to be interpreted narrowly.²⁴ To meet this burden, the Health Service must establish²⁵ that the prejudice contemplated to the applicant's physical or mental health or wellbeing must be a real and tangible possibility, as opposed to a fanciful, remote or far-fetched possibility.²⁶
23. I recognise that it is very important to the applicant that she obtain this information, and I acknowledge the reasons she is seeking access. To the extent the applicant's submissions relate to her ability to access quality healthcare and treatment, such as ensuring that information is accurate and available to her so that she may ensure her doctors are informed, I acknowledge that this may have positive implications for her health and well-being and is relevant to assessing any risk to her. However, weighing against the applicant's submission is the Health Service's submission (which includes an opinion from a psychiatrist that disclosure might be prejudicial to her physical or mental health and wellbeing). Taking both submissions into account, as well as the

²⁰ Application for external review dated 3 December 2023 and submission dated 23 February 2024.

²¹ Schedule 5 of the RTI Act.

²² *Oxford Dictionary of English* (online at 19 April 2024) '*healthcare*'. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 129 at 162.

²³ Noting that, under section 67(2)(b) of the IP Act, the Health Service has a discretion to release information even if a ground on which access may be refused applies, however, the Information Commissioner has no such discretion in accordance with section 118(2) of the IP Act.

²⁴ Section 67(2) of the IP Act.

²⁵ Noting that the Health Service bears the onus in this external review, in accordance with section 100(1) of the IP Act.

²⁶ This meaning of the term '*might be prejudicial*' was adopted by the Commonwealth Administrative Appeals Tribunal for the purposes of a similar provision in the *Freedom of Information Act 1982* (Cth) in *Re K and Director-General of Social Security* (1984) 6 ALD 354 at 356-7 and endorsed by the Information Commissioner in *S and Medical Board of Queensland* (1994) 2 QAR 249 when considering section 44(3) of the repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**). Section 51(2) of the RTI Act is similar to section 44(3) of the repealed FOI Act. As this section also contains the phrase '*might be prejudicial*', this interpretation remains relevant.

Doctor's Notes, I am satisfied that there is a real and tangible possibility of prejudice to the applicant's physical or mental health or wellbeing if the Doctor's Notes are disclosed to her.

Conclusion – can access to the Doctor's Notes be refused?

24. Having carefully considered all material before me, including the applicant's submissions, the Health Service's submissions and the Doctor's Notes, for the reasons set out above, I am satisfied that the Doctor's Notes are the applicant's relevant healthcare information and disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant. Consequently, I consider that access to the Doctor's Notes may be refused under section 47(3)(d) of the RTI Act.

DECISION

25. I affirm the Health Service's decision to refuse access to the Doctor's Notes under section 67(1) of the IP Act and sections 47(3)(d) and 51 of the RTI Act.
26. I have made this decision under section 123 of the IP Act, as a delegate of the Information Commissioner under section 139 of the IP Act.

Jane Williams
Acting Assistant Information Commissioner

Date: 2 May 2024

APPENDIX

Significant procedural steps

Date	Event
3 December 2023	OIC received the external review application.
4 December 2023	OIC requested relevant procedural documents from the Health Service.
5 December 2023	OIC received the requested procedural documents from the Health Service.
21 December 2023	<p>OIC advised the applicant and the Health Service that it had accepted the external review application. OIC requested information from the Health Service about possible opportunities to resolve the review as well as:</p> <ul style="list-style-type: none"> • a copy of the Doctor's Notes; and • a submission explaining why releasing the Doctor's Notes might be prejudicial to the applicant's physical or mental health or wellbeing.
12 January 2024	OIC received a copy of the Doctor's Notes and submissions from the Health Service.
9 February 2024	<p>OIC advised the applicant of the issue for determination and invited the applicant to make submissions on the ground of refusal.</p> <p>The applicant emailed OIC seeking clarification about the request for submissions.</p>
14 February 2024	OIC responded to the applicant's questions by email.
15 February 2024	OIC had a telephone discussion with the applicant.
16 February 2024	OIC responded to the applicant's questions by email.
23 February 2024	OIC received a submission from the applicant.
2 May 2024	OIC emailed and telephoned the applicant to confirm the decision would be issued.