



Decision and Reasons for Decision

Citation:	<i>W83 and Cairns and Hinterland Hospital and Health Service [2021] QICmr 8 (5 March 2021)</i>
Application Number:	315220
Applicant:	W83
Respondent:	Cairns and Hinterland Hospital and Health Service
Decision Date:	5 March 2021
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 (**the Health Service**) under the *Information Privacy Act 2009 (Qld)* (**IP Act**) for 'All files contained in Queensland Health Service's records on any subject [related] to my health'.¹
2. The Health Service located 886 pages in response to the application. 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
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Health Service's decision. The applicant submits that the appointed healthcare professional is not his treating doctor and therefore is not able to determine what is in his best interests. Further, the applicant submits disclosure of his medical records would not be harmful to his health, but instead, improve his mental health.³
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**) as disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant.

¹ Access application dated 21 January 2020.

² Decision dated 26 February 2020.

³ Application for external review dated 28 February 2020.

Background

5. The decision under review is the Health Service's decision dated 26 February 2020.
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 also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**),⁴ particularly the right to seek and receive information as recognised in section 21 of the HR Act. I consider that a decision maker will, when observing and applying the law prescribed in the IP and RTI Acts, be '*respecting*' and '*acting compatibly with*' this right and others prescribed in the HR Act.⁵ I further consider that, having done so when reaching my decision, I have acted compatibly with and given proper consideration to relevant human rights, as required under section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between the Victorian equivalents of Queensland's IP and RTI Acts and HR Act: '*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.*'⁶

Information in issue

9. The information in issue is 886 pages⁷ comprising the applicant's medical records (**Information in Issue**).

Issue for determination

10. 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.

Relevant law

11. The IP Act provides an individual with the right to access documents of an agency to the extent they contain the individual's personal information.⁸ However, this right of access is subject to certain limitations, including grounds for refusing access.⁹
12. An '*appropriately qualified healthcare professional*' appointed by the agency¹⁰ may decide to refuse access to a document under the IP Act if:
 - the information comprises the applicant's '*relevant healthcare information*'; and
 - disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant.¹¹

⁴ Relevant provisions of which commenced on 1 January 2020.

⁵ See *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].

⁶ **XYZ** at [573].

⁷ The Health Service provided 885 pages to OIC and explained, in writing, that this discrepancy was due to removing one blank page from the file before sending to OIC.

⁸ Section 40 of the IP Act.

⁹ Section 67(1) of the IP Act states that 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.

¹⁰ Under section 50(5)(b) of the IP Act. See also section 50(6) of the IP Act which defines healthcare decision as including decisions under sections 47(3)(d) and 51 of the RTI Act, as applied under the IP Act.

¹¹ Sections 47(3)(d) and 51 of the RTI Act.

13. 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, including, for example:
 - a doctor, including a psychiatrist
 - a psychologist
 - a social worker; or
 - a registered nurse.¹²
14. *'Appropriately qualified'*, in relation to a healthcare professional, means having the qualifications and experience appropriate to assess relevant healthcare information.¹³
15. *'Relevant healthcare information'* means healthcare information given by a healthcare professional.¹⁴
16. 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.¹⁵ 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.¹⁶
17. The Information Commissioner¹⁷ has the power to decide any matter in relation to an access application that could have been decided by an agency.¹⁸

The applicant's submissions

18. During the external review, the applicant made the following submissions:
 - He has not been treated by Dr A and is not currently treated by Queensland Health, therefore, they are not well positioned to determine that allowing access will have any prejudicial effect on his physical or mental health or wellbeing.¹⁹
 - He asserted that he was engaged in *'mediation before court action'* with the Health Service and the opinions of the Health Service employees were therefore not reliable.²⁰
 - Refusing access to the Information in Issue will prejudice his health, whereas, there will be no harm to his health by releasing the Information in Issue. Disclosure will help him to understand that period of time better and improve his mental health.²¹
 - The Health Service has relied on false and misleading information in making decisions relating to him and his treatment.²²
 - The applicant accused the Health Service of malpractice²³ and refusing access to the records to cover this up.²⁴

¹² See definition in schedule 5 of the IP Act.

¹³ See definition in schedule 5 of the IP Act.

¹⁴ See definition in schedule 5 of the IP Act.

¹⁵ Section 92(2) of the IP Act.

¹⁶ Section 92(3) of the IP Act.

¹⁷ Or her delegate under section 139 of the IP Act.

¹⁸ Section 118(1)(b) of the IP Act.

¹⁹ External review application dated 28 February 2020, telephone discussion on 23 April 2020, and emailed submissions received 13 August 2020, 13 November 2020 and 23 November 2020.

²⁰ Applicant's emailed submissions dated 13 November 2020.

²¹ External review application dated 28 February 2020 and emailed submission dated 29 October 2020.

²² Applicant's emailed submissions dated 25 July 2020 (received by OIC on 19 August 2020), 13 August 2020, 29 October 2020, 23 November 2020, and 9 February 2021.

²³ Applicant's emailed submissions dated 25 July 2020 (received by OIC on 19 August 2020), 13 August 2020, 29 October 2020, 13 November 2020 and 23 November 2020.

²⁴ Applicant's emailed submissions dated 29 October 2020 and 13 November 2020.

19. In support of his submissions, the applicant provided a letter from his own doctor, (referred to in these reasons as **Dr B**) simply stating that the applicant attends his practice and disclosure of his hospital medical records to him would not be prejudicial to his mental or physical health.²⁵

The Health Service's submissions

20. The Health Service submits the Information in Issue is healthcare information.²⁶ A healthcare provider, other than Dr A, from the Health Service who has been directly involved in the applicant's treatment expressed concerns regarding the applicant's mental health²⁷ and is of the view that direct disclosure would be prejudicial to his health and wellbeing.²⁸
21. The Health Service also explained that the Information in Issue was provided to Dr A, Clinical Director of the Integrated Mental Health Service, a qualified medical practitioner appointed by the Director-General of Health to assess.²⁹
22. Following an assessment of the Information in Issue, Dr A formed the opinion that disclosure of the Information in Issue directly to the applicant would be prejudicial to his health and wellbeing and made a healthcare decision to refuse access to the documents.³⁰ 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. This is because it is in the applicant's best interests that access be given via an appropriately qualified healthcare professional to provide the applicant with the opportunity to discuss the contents of the documents in a therapeutic and supportive environment and ask questions about the information.³¹
23. On external review, the Health Service also confirmed that the applicant's doctor can obtain information directly from the Health Service under the *Hospital and Health Boards Act 2011* (Qld).³²

Analysis and findings

24. Dr A is a registered Psychiatrist,³³ the Clinical Director of a Mental Health Service, and appointed by the Director-General of Health to make healthcare decisions. Therefore, I am satisfied that Dr A possesses qualifications and experience appropriate to assess relevant healthcare information and the decision to refuse access was made by an appropriately qualified healthcare professional appointed by the Health Service.
25. Having reviewed the Information in Issue, and taking into account the Health Service's submission that the applicant's health records comprise healthcare information provided by healthcare professionals, I am satisfied that the information is relevant healthcare information.³⁴

²⁵ Letter dated 25 May 2020, submitted by the applicant by email on 26 May 2020.

²⁶ Decision dated 26 February 2020, attachment 1 (statement of reasons), page 1.

²⁷ Submissions dated 15 April 2020.

²⁸ Submission dated 2 July 2020. It is my view that describing this evidence in any greater detail is likely to impact the applicant's willingness to engage with essential health services.

²⁹ Decision dated 26 February 2020, attachment 1 (statement of reasons), page 2.

³⁰ Submissions dated 15 April 2020 and 2 July 2020 and as outlined in the decision dated 26 February 2020.

³¹ Decision dated 26 February 2020, attachment 1 (statement of reasons), page 2.

³² Health Service's submissions in a phone call on 22 April 2020 and confirmed by OIC's email to the Health Service dated 28 October 2020.

³³ 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 February 2021.

³⁴ As defined in schedule 5 of the IP Act.

26. It is Dr A's opinion that disclosure of the Information in Issue directly to the applicant would have a negative impact on the applicant's health and wellbeing. Contradicting this position is the evidence from Dr B, provided by the applicant, stating that disclosure of the applicant's medical records would not be prejudicial to his mental and physical health.
27. I accept that Dr B has explained that the applicant attends his practice and I also accept the applicant's submission that Dr A is not his treating doctor. However, there is nothing before me to indicate that Dr B has reviewed the Information in Issue, whereas Dr A has had an opportunity to review it 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 while it is unclear whether Dr B specialises in mental health. Finally, I note the Health Service's submission that a healthcare provider who has had direct care of the applicant also felt that disclosure would be prejudicial to his health and wellbeing and this supports Dr A's opinion.
28. I also acknowledge the allegations made by the applicant regarding his treatment and related court action, however, he has not provided any evidence to support his assertions or undermine the Health Service's submissions and Dr A's opinion that giving direct access to the documents would be prejudicial to his mental health and wellbeing.
29. Having weighed up the considerations set out above, I consider that the evidence of the Health Service's Dr A is to be given greater weight than the evidence of the applicant's doctor, Dr B. 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.³⁵
30. A direction was made 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.³⁶ The applicant declined this opportunity and did not pursue this avenue on external review, and rather, maintained that he sought direct access to the Information in Issue.³⁷ As such, I have not addressed this issue further. Should the applicant seek to pursue this avenue in the future, I consider that the direction made by the Health Service's appointed healthcare professional,³⁸ remains an option available to the applicant.

DECISION

31. Pursuant to section 123 of the IP Act, I affirm³⁹ 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 RTI Act as disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant.

S Martin
Assistant Information Commissioner

Date: 5 March 2021

³⁵ Section 47(3)(d) of the RTI Act.

³⁶ In the Health Service's decision dated 26 February 2020.

³⁷ Telephone discussion with the applicant on 23 April 2020.

³⁸ Directing that the Health Service give the Information in Issue to an appropriately qualified healthcare professional nominated by the applicant and approved by the Health Service pursuant to section 92(2) of the IP Act.

³⁹ As a delegate of the Information Commissioner under section 139 of the IP Act.

APPENDIX

Significant procedural steps

Date	Event
28 February 2020	OIC received the external review application.
4 March 2020	OIC requested initial documents and preliminary information from the Cairns Hinterland Hospital and Health Service (the Health Service).
13 March 2020	The Health Service provided the initial documents and preliminary information.
30 March 2020	The Health Service confirmed it would release the Information in Issue to a healthcare professional nominated by the applicant and approved by the Health Service.
1 April 2020	OIC notified the applicant and the Health Service that the external review application had been accepted and requested information from the Health Service.
15 April 2020	The Health Service provided the requested information and confirmed it would be agreeable to informal resolution by way of releasing the documents to a health care professional nominated by the applicant and approved by the Health Service.
16 April 2020	The applicant provided submissions by telephone.
22 April 2020	The Health Service provided information requested by OIC and also provided submissions by telephone.
23 April 2020	OIC contacted the applicant by telephone to propose informal resolution by releasing the documents to a healthcare professional nominated by the applicant and approved by the Health Service. The applicant refused. The applicant also provided submissions by telephone.
20 May 2020	The Health Service provided the Information in Issue to OIC.
26 May 2020	The applicant provided a letter from his doctor in support of his access application.
10 June 2020	OIC requested the Health Service's submission in response to the applicant's submission.
2 July 2020	The Health Service provided submissions in response to the applicant's submission.
22 July 2020	OIC conveyed a preliminary view to the applicant and the Health Service. OIC invited the applicant to provide submissions in response by 5 August 2020.
13 August 2020	OIC notified the parties of the completion of the external review on the basis that the applicant had not responded to the preliminary view. The applicant asserted that he had responded to the preliminary view prior to the due date and also provided a short submission.
19 August 2020	The applicant forwarded his email to OIC, dated 25 July 2020, containing submissions in response to the preliminary view.

Date	Event
26 August 2020	OIC notified the applicant the external review had been re-opened.
31 August 2020	OIC notified the agency the external review had been re-opened.
28 October 2020	OIC confirmed the preliminary view to the applicant and the Health Service. OIC also confirmed the Health Service's submission provided by telephone.
29 October 2020	The applicant provided an emailed submission.
12 November 2020	OIC advised the applicant that OIC will not request assessment or a report from an independent doctor and invited any further submissions by 26 November 2020.
13 November 2020	The applicant provided an emailed submission, indicating that he intended to provide further submissions and evidence.
20 November 2020	OIC advised the applicant by email that further submissions in support of his application should be provided by 22 January 2021, after which date OIC would proceed to a formal written decision.
23 November 2020	The applicant provided an emailed submission and indicated he would provide further scanned information the following week.
5 February 2021	OIC contacted the applicant by email to advise that no further submissions had been received. The applicant was advised that further submissions should be provided by 12 February 2021, after which date OIC would proceed to a formal written decision.
9 February 2021	The applicant provided an emailed submission.