



Decision and Reasons for Decision

Application Number: 310359

Applicant: 13NJIH

Respondent: Department of Health

Decision Date: 28 January 2011

Catchwords: **ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - applicant sought access to medical records of her deceased adult son - son's death did not occur while in hospital or in proximity to hospital treatment - whether evidence of family relationship reduces the privacy interest in medical records - whether disclosure of information would, on balance, be contrary to the public interest - whether access to information can be refused under sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)**

Contents

REASONS FOR DECISION.....	2
Summary	2
Background.....	2
Reviewable decision.....	2
Information in issue.....	2
Evidence considered	2
Applicant's submissions.....	3
Relevant law	3
Findings	4
Personal information of the deceased and protecting the deceased's right to privacy	4
Accountability of QH	5
Social and economic well-being of the community.....	6
Balancing the relevant public interest factors.....	6
DECISION	7
APPENDIX	8
Significant procedural steps.....	8

REASONS FOR DECISION

Summary

1. In 2007, the applicant's adult son was admitted to hospital and treated in the intensive care unit. In 2009, the applicant's son passed away while overseas. The applicant seeks access to a copy of her late son's medical records from the Department of Health (QH)¹ from his admission in 2007.
2. QH refused the applicant access to the medical records under section 47(3)(b) of the *Right to Information Act 2009* (Qld) (**RTI Act**) on the basis that their disclosure would, on balance, be contrary to the public interest under section 49 of the RTI Act.
3. The applicant explains that she was very close to her son and provided him with assistance in many ways, including financially, and that during his admission, her son lacked capacity and she was deeply involved in decisions about his medical care.
4. For the reasons set out below, I affirm QH's decision and find that disclosure of the medical records would, on balance, be contrary to the public interest under section 49 of the RTI Act.

Background

5. Significant procedural steps relating to the application are set out in the Appendix.

Reviewable decision

6. The decision under review is QH's decision to refuse access to the requested information on the basis that disclosure would, on balance, be contrary to the public interest under section 49 of the RTI Act.

Information in issue

7. The information in issue in this review is 184 folios which comprise the medical records of the applicant's late son.

Evidence considered

8. In making this decision, I have considered the following:
 - applicant's access application to QH and external review application to the Office of the Information Commissioner (**OIC**)
 - QH's decision
 - applicant's submissions to OIC dated 30 December 2010 including a letter the applicant provided to QH from her psychologist dated 22 June 2010
 - information in issue
 - file notes of telephone conversations held between OIC staff members and the applicant and QH officers during the external review
 - relevant sections of the RTI Act; and
 - previous decisions of the Information Commissioner as set out in this decision.

¹ The Department of Health is commonly known as Queensland Health.

Applicant's submissions

9. The applicant has made detailed submissions in support of her case which can be summarised as follows:
- She was very close to the deceased and was closely involved in his personal, financial and health affairs. There were never any privacy issues or secrets within the family.
 - She discovered the deceased unconscious in his home in 2007 and arranged for emergency transport to hospital where he was treated in the intensive care unit. During his treatment, the deceased lacked capacity and she was deeply involved in decisions about his medical care.
 - The Medical Registrar at the hospital advised her that the deceased was suffering from severe depression and pneumonia and had attempted to take his own life.
 - At the time of his admission to hospital in 2007, the applicant and her daughter were financially supporting the deceased. After his discharge from hospital, they provided assistance to the deceased in various ways including financial assistance and actively encouraged his rehabilitation.
 - The deceased passed away in 2009 under suspicious circumstances while he was overseas and there are many unanswered questions surrounding his death. An autopsy identified the cause of death as asphyxia due to drowning although she does not accept these findings.
 - She seeks access to the medical records for the following reasons:
 - to verify that the medical records reflect the true nature and extent of his medical condition at the time
 - to give her a proper understanding of his condition and to establish whether there is any relationship between his medical history at the time of his attempted suicide in 2007 and his death in 2009
 - to use as material evidence in any action she may take in disputing and/or establishing the true cause of death
 - to establish whether the treatment given at the time was adequate and proper in the circumstances and whether the deceased should have had additional or other treatment and medical advice
 - to ascertain if the deceased was suffering from the same condition as her and to check for any genetic vulnerability that could affect her daughter; and
 - for closure and to assist in the ongoing psychological treatment of her and her daughter as a result of the death.

Relevant law

10. Access must be given to a document unless it contains exempt information or its disclosure would, on balance, be contrary to the public interest.²
11. To decide whether disclosure of the medical records would be contrary to the public interest, I must:

² Sections 44, 48 and 49 of the RTI Act.

- identify any irrelevant factors and disregard them
- identify relevant public interest factors favouring disclosure and nondisclosure
- balance the relevant factors favouring disclosure and nondisclosure; and
- decide whether disclosure of the information, on balance, would be contrary to the public interest.³

Findings

12. No irrelevant factors arise in this case.
13. I will now consider the relevant public interest factors which favour disclosure and nondisclosure of the medical records.

Personal information and privacy

14. The RTI Act recognises that where the information is the personal information⁴ of an individual who is deceased and the applicant is an eligible family member of the deceased person,⁵ this will establish a public interest factor favouring disclosure.⁶
15. In this case, I am satisfied that this factor favouring disclosure is raised on the basis that:
 - the medical records comprise the personal information of the deceased; and
 - the applicant is the deceased's mother and is an eligible family member of the deceased.
16. However, where disclosure of the information could reasonably be expected to impact on the deceased person's privacy if the deceased person were alive, this will give also rise to a factor favouring nondisclosure.⁷
17. An individual's medical records contain sensitive information. There is generally a very strong public interest in protecting an individual's right to privacy by not disclosing their medical records under the RTI Act.⁸ In this case, I am satisfied that:
 - disclosure of the medical records to the applicant could reasonably be expected to impact on the deceased's privacy if he were alive; and
 - this is a relevant factor favouring nondisclosure of the medical records.
18. The Information Commissioner has previously recognised that in certain circumstances the privacy interest of the relevant individual may be reduced. In *Summers and Department of Health; Hintz (Third Party) (Summers)*⁹ the Information Commissioner decided that the following considerations may be relevant in determining the extent to which the privacy interest in a person's medical records may be diminished:

³ Section 49(3) of the RTI Act.

⁴ Section 12 of the *Information Privacy Act 2009* (Qld) defines 'personal information' as "information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion".

⁵ 'Eligible family member' is defined in schedule 6 of the RTI Act.

⁶ Schedule 4, part 2, item 9 of the RTI Act.

⁷ Schedule 4, part 3, item 5 of the RTI Act.

⁸ See also schedule 4, part 3, item 3 and schedule 4 part 4 section 6 of the RTI Act.

⁹ (1997) 3 QAR 479 at paragraph 19.

- evidence of involvement in care
 - extent of knowledge of medical history/incident; and
 - evidence of special dependence/relationship.
19. In *Keogh and Department of Health (Keogh)*¹⁰ the applicant applied to QH to access the medical records of her son who had been admitted to hospital and passed away as a result of a car accident. The applicant was involved in the medical treatment decisions made by the doctors, including the decision to cease life support and for organ donation. In that case, the Information Commissioner decided:¹¹
- for the duration of his admission, the applicant's son was incapacitated and solely reliant on his parents to make health care decisions on his behalf
 - the applicant's presence during her son's admission and involvement in the care of her son meant she was in a position to have detailed knowledge of her son's ill health and prognosis
 - the applicant, along with her ex-husband, gave consent for the medical practitioner to decide to cease her son's life support and donate his organs; and
 - as a result, the applicant's son's privacy interests were substantially diminished in relation to information which was:
 - relevant to the applicant's son's period of incapacity; and
 - necessary to inform the applicant so that she could make health care decisions on his behalf.
20. I have carefully considered the medical records and the applicant's submissions in this review. I have particularly considered whether, on the face of the documents, there is sufficient evidence of the factors identified in *Summers* to reduce the privacy interest attaching to the deceased's medical records.
21. In this case, I am satisfied that:
- the public interest in protecting the deceased's privacy is a relevant public interest factor favouring nondisclosure of the medical records
 - the medical records do not disclose sufficient evidence of the factors identified in *Summers* to establish that the privacy interest is reduced in this instance; and
 - the public interest in protecting the deceased's privacy by not disclosing the medical records is strong.

Accountability of QH

22. In some cases it may be in the public interest for close relatives of patients in care to be provided with adequate information to allow them to assess whether the level and standard of care provided to their family member is appropriate in the circumstances. However, it is necessary to consider the facts of each case to decide whether the relevant accountability interest is sufficiently strong and whether it is appropriately served by disclosure of the information.¹²
23. In this case, the applicant's son passed away in 2009 while overseas. I am satisfied that the fact that he passed away approximately two years after his treatment by QH reduces the potential weight of this public interest factor.

¹⁰ (Unreported, Queensland Information Commissioner, 31 August 2010).

¹¹ At paragraph 29.

¹² *Novak and Department of Health* (Unreported, Queensland Information Commissioner, 30 June 2010) at paragraphs 56 – 57; *Lowe and Department of Health* (Unreported, Queensland Information Commissioner, 25 November 2010) at paragraphs 16 and 17; and *Keogh* at paragraph 24.

Social and economic well-being of the community

24. The Information Commissioner has previously recognised the existence of a public interest in the social and economic well-being of the community.¹³ In *Keogh*, the applicant's solicitors provided medical opinion evidence confirming:
- their client had endured a protracted grieving period following the sudden death of her son, which affected her ability to return to work; and
 - that disclosure of the information in issue would assist the applicant to accept the circumstances surrounding her son's death.
25. In that case, the Information Commissioner decided that:¹⁴
- it was more probable than not that disclosure of most of the information would assist in the applicant's rehabilitation, thereby bringing her prolonged state of bereavement and associated low productivity to an end; and
 - some of the information would not assist the applicant in any meaningful way because it comprised information which had no relevance to the decisions made by the applicant on behalf of her son.
26. I have carefully considered the applicant's submissions as summarised above and the supporting letter from her psychologist. I consider the circumstances surrounding the deceased's admission to hospital in 2007 can be distinguished from the facts of *Keogh* in that:
- while I accept the applicant spent time with the deceased during his admission and provided some information to QH about the deceased, there is no evidence on the face of the medical records to indicate that the applicant made decisions of a medical nature on behalf of the deceased during this time as a result of the deceased being incapacitated; and
 - the deceased did not pass away while being treated by QH.
27. While I understand that the applicant has been profoundly affected by her son's tragic death and believes that finding out about her son's admission in 2007 may assist in bringing her closure, I am not satisfied that disclosing the medical records in this case would further the public interest in promoting the social and economic well-being of the community.

Balancing the relevant public interest factors

24. In summary, I find that:
- There is a very strong public interest in protecting the deceased's right to privacy by not disclosing his medical records under the RTI Act.
 - The public interest in promoting QH's accountability should be given minimal weight in this instance given that the deceased did not pass away while being treated by QH.
 - On balance, disclosure of the medical records would be contrary to the public interest and access may therefore, be refused under section 47(3)(b) of the RTI Act.

¹³ *OKP and Department of Communities* (Unreported, Queensland Information Commissioner, 9 July 2009) at page 17 and *Keogh* at paragraph 14.

¹⁴ At paragraphs 20 – 21.

DECISION

28. For the reasons set out above, I affirm QH's decision to refuse the applicant access to the medical records under section 47(3)(b) of the RTI Act.
29. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Jenny Mead
Right to Information Commissioner

Date: 28 January 2011

APPENDIX**Significant procedural steps**

Date	Event
9 June 2010	The applicant applies to QH for access to her late son's medical records under the RTI Act.
16 August 2010	QH decides to refuse access to the medical records on the basis that their disclosure would, on balance, be contrary to the public interest under section 49 of the RTI Act.
6 September 2010	The applicant applies to OIC for external review.
23 September 2010	OIC informs QH and the applicant that the external review application has been accepted for review.
23 September 2010	QH provides OIC with a copy of the medical records.
15 November 2010	OIC telephones the applicant to convey the preliminary view that disclosure of the medical records would, on balance, be contrary to the public interest under section 49 of the RTI Act.
19 November 2010	OIC confirms the preliminary view in writing and asks the applicant to provide submissions in support of her case if she does not accept the preliminary view.
30 December 2010	The applicant advises OIC that she does not accept the preliminary view and provides submissions in support of her case.