



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>X19 and Metro South Hospital and Health Service [2020] QICmr 12 (26 February 2020)</i></b>
<b>Application Number:</b>	<b>314483</b>
<b>Applicant:</b>	<b>X19</b>
<b>Respondent:</b>	<b>Metro South Hospital and Health Service</b>
<b>Decision Date:</b>	<b>26 February 2020</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - medical records of deceased parent - personal information and privacy - whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)</b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied<sup>1</sup> to the Metro South Hospital and Health Service (**MSHHS**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to her late mother's medical records held by the Princess Alexandra Hospital.
2. MSHHS located 3700 pages and decided<sup>2</sup> to refuse access to all pages on the basis that disclosure would be contrary to the public interest.
3. The applicant applied<sup>3</sup> to the Office of the Information Commissioner (**OIC**) for external review of MSHHS' decision.
4. I have decided to affirm MSHHS' decision.

#### Background

5. The applicant's mother passed away in July 2017 while admitted at the Princess Alexandra Hospital.

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<sup>1</sup> Access application dated 12 January 2019.

<sup>2</sup> Decision dated 20 February 2019.

<sup>3</sup> External review application dated 27 February 2019.

6. The applicant stated that she is seeking access to her mother's medical records in order to understand if and how any health conditions of her mother may affect her and her family.<sup>4</sup>

### Reviewable decision

7. The decision under review is MSHHS' decision dated 20 February 2019.

### Evidence considered

8. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and Appendix). I have also had regard to the *Human Rights Act 2019* (Qld),<sup>5</sup> particularly the right to seek, receive and impart information.<sup>6</sup> 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.<sup>7</sup> I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act.<sup>8</sup>

### Information in issue

9. The information in issue (**Information in Issue**) consists of 3700 pages of medical records of the deceased.

### Issue for determination

10. The issue for determination is whether, on balance, disclosure of the Information in Issue would be contrary to the public interest under sections 47(3)(b) and 49 of the RTI Act.

### Relevant law

11. The RTI Act gives a person the right to be given access to documents of an agency.<sup>9</sup> However, this right of access is subject to other provisions of the RTI Act, including the grounds on which an agency may refuse access to documents.<sup>10</sup> Relevantly, an agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.<sup>11</sup>
12. The term 'public interest' refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.
13. The RTI Act identifies various factors that may be relevant to deciding the balance of the

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<sup>4</sup> In her email applying for external review dated 27 February 2019 at 3:54pm; email from applicant to OIC dated 10 March 2019 8:22am; and in a telephone conversation with OIC on 28 May 2019 following which the applicant provided a copy of a letter from her psychiatrist and a Centrelink medical certificate.

<sup>5</sup> Referred to in these reasons as the **HR Act**, and which came into force on 1 January 2020.

<sup>6</sup> Section 21 of the HR Act.

<sup>7</sup> *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 [11].

<sup>8</sup> I also note the observations made by Bell J in *XYZ* at [573] on the interaction the *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) that '*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>9</sup> Section 23 of the RTI Act.

<sup>10</sup> Set out in section 47 of the RTI Act.

<sup>11</sup> Under sections 47(3)(b) and 49 of the RTI Act.

public interest<sup>12</sup> and explains the steps that a decision-maker must take<sup>13</sup> in deciding the public interest as follows:

- 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 in Issue would, on balance, be contrary to the public interest.

## Findings

### *Irrelevant factors*

14. No irrelevant factors apply in the circumstances of this matter and I have consequently taken no irrelevant factors into account in considering whether, on balance, disclosure of the Information in Issue would be contrary to the public interest.

### *Factors favouring disclosure*

#### **Family Medical History Information**

15. The applicant submitted<sup>14</sup> that accessing information about her late mother's diagnoses and treatment may assist and benefit the ongoing management of her and her family's health affairs.
16. I have considered whether these submissions give rise to any public interest in favour of disclosure of the Information in Issue. There may be a public interest in ensuring, where there is a familial health issue, that historical medical information is not lost, and therefore the best and most efficient health care is provided to patients in successive generations. However, there are provisions under other legislation that facilitate access to relevant health information in certain circumstances.<sup>15</sup> Such provisions would allow the applicant's medical practitioner to obtain pertinent family medical history information from MSHHS and thus ensure efficient and appropriate care of the applicant and her family.
17. Consequently, I consider that the public interest raised by the applicant's submissions in this regard has low weight in the circumstances of this matter.

#### **Personal information factors**

18. The RTI Act identifies two public interest factors relevant in this case which favour the disclosure of information where the information is 'personal information', namely:
- schedule 4, part 2, item 7 of the RTI Act which provides that it will be in the public interest to disclose personal information where the information is the applicant's personal information (**Applicant's Information Factor**): and
  - schedule 4, part 2, item 9 of the RTI Act which provides that it will be in the public interest to disclose personal information where the information relates to a person who has died and both of the following apply—
    - (a) the information would, if the person were alive, be personal information of the person;

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<sup>12</sup> Schedule 4 of the RTI Act lists factors that may be relevant when deciding whether disclosure of information would, on balance, be contrary to the public interest. This list is not exhaustive and therefore, other factors may also be relevant in a particular case.

<sup>13</sup> Section 49(3) of the RTI Act.

<sup>14</sup> See footnote 4.

<sup>15</sup> Under the *Hospital and Health Boards Act 2011* (Qld), specifically part 7.

- (b) the applicant is an eligible family member of the person (**Eligible Family Member Factor**).

19. Section 12 of the *Information Privacy Act 2009* (Qld) (**IP Act**) defines ‘personal information’ for the purpose of the RTI Act 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.

*Applicant’s Information Factor*

20. I have carefully read the Information in Issue. This public interest factor only has application to a very small amount of the Information in Issue. The applicant’s personal information (her name) appears in the medical record in a number of places where the deceased’s relationship with the applicant is noted. The personal information of the applicant is intertwined with the personal information of the deceased to such an extent that it cannot be disclosed without also disclosing the personal information of the deceased and its excision would be of little utility. Accordingly, I afford low weight to the Applicant’s Information Factor.

*Eligible Family Member Factor*

21. Apart from the small amount of information that is the personal information of persons other than the deceased and the applicant (addressed later in this decision), the balance of the Information in Issue is the personal information of the applicant’s deceased mother. As noted at paragraph 18, the RTI Act recognises that there is a public interest in favour of disclosure of a deceased individual’s personal information in circumstances where the applicant is an eligible family member of the deceased.
22. To be satisfied that the Eligible Family Member Factor applies in favour of disclosure of the Information in Issue, I must determine; firstly, whether the information would, if the deceased were alive, be their personal information; and, secondly, whether the applicant is an eligible family member of the deceased.
23. Medical records of the nature of the Information in Issue in this review have long been held by the Information Commissioner to be personal information for the purpose of the RTI and IP Acts.<sup>16</sup> Having reviewed the Information in Issue I am satisfied that it would, given that it is the medical record of the deceased, if the deceased were alive, be their personal information, as it meets the definition of personal information in the IP Act. Thus, what remains is to determine if the applicant is an eligible family member for the purpose of the Eligible Family Member Factor.
24. Schedule 5 of the RTI Act defines an eligible family member in a hierarchical way as follows:
- 1. **eligible family member, of a deceased person, means—**
    - (a) a spouse of the deceased person; or
    - (b) if a spouse is not reasonably available—an adult child of the deceased person; or
    - (c) if a spouse or adult child is not reasonably available—a parent of the deceased person; or
    - (d) if a spouse, adult child or parent is not reasonably available—an adult sibling of the deceased person; or

<sup>16</sup> See for example, *Keogh and Department of Health* (Unreported, Queensland Information Commissioner, 31 August 2010).

- (e) *if a spouse, adult child, parent or adult sibling is not reasonably available and the deceased person was not an Aboriginal person or Torres Strait Islander—the next nearest adult relative of the deceased person who is reasonably available; or*
  - (f) *if a spouse, adult child, parent or adult sibling is not reasonably available and the deceased person was an Aboriginal person or Torres Strait Islander—a person who is an appropriate person according to the tradition or custom of the Aboriginal or Torres Strait Islander community to which the deceased person belonged and who is reasonably available.*
2. A person described in item 1 is not **reasonably available** if—
- (a) a person of that description does not exist or is deceased; or
  - (b) a person of that description can not be reasonably contacted; or
  - (c) a person of that description is unable or unwilling to act as the eligible family member of the deceased person for the purposes of this Act.
25. In the course of the external review I obtained a copy of the Death Certificate of the deceased.<sup>17</sup> The Death Certificate shows that the deceased was widowed at the date of her death. Thus, the person noted at Item 1(a) above is *'not reasonably available'* by virtue of item 2(a) of the above definition.
26. In terms of item (1)(b), the Death Certificate shows that the applicant is an adult child of the deceased. I am therefore satisfied on the evidence before me that: the applicant is an adult child of the deceased; that item (1)(b) of the eligible family member definition is satisfied; and that, the Eligible Family Member Factor in favour of disclosure is enlivened for consideration.
27. Based on the evidence available to me,<sup>18</sup> it is clear that the applicant was living interstate and therefore, by virtue of her lack of proximity, was not closely involved with the deceased's health care prior to her death. This is not to say that the applicant was disinterested in her mother's care. Indeed, it is evident from the applicant's submissions that she had telephone contact with her mother and siblings. However, the applicant was not involved in a sufficiently detailed way in the day to day health care decisions concerning her mother to reduce the prejudice to the deceased's privacy in disclosure of the Information in Issue. Additionally, certain entries in the deceased's medical record lend weight to the conclusion that this public interest factor should be given low weight.<sup>19</sup> In these circumstances I give low weight to the Eligible Family Member Factor.

### **Other factors favouring disclosure**

28. I have carefully considered all other public interest factors favouring disclosure listed in schedule 4, part 2 of the RTI Act and can identify no other factors that apply in the circumstances of this review.

### **Factors favouring nondisclosure**

#### **Personal information factors**

29. The RTI Act contains three factors favouring nondisclosure which are enlivened in the circumstances of this review:

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<sup>17</sup> Provided by MSHHS by email on 6 March 2019 together with a copy of the applicant's application for access and MSHHS' decision.

<sup>18</sup> The applicant's written submission dated 28 July 2019 and oral submissions in telephone discussions on 28 May 2019 and 15 October 2019 and the Information in Issue.

<sup>19</sup> I am precluded by the operation of section 108 of the RTI Act from disclosing the content of the entries as to do so would reveal the Information in Issue.

- firstly, where disclosure of information could reasonably be expected to cause a public interest harm if disclosure would disclose personal information of a person, whether living or dead (**Harm Factor**);<sup>20</sup>
- secondly, where disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy (**Protection of Right to Privacy Factor**);<sup>21</sup> and
- finally, where the information is about a person who has died and all of the following apply—
  - the information would, if the person were alive, be personal information of the person;
  - the applicant is an eligible family member of the person;
  - the disclosure of the information could reasonably be expected, if the person were alive, to impact on the person's privacy (**Eligible Family Member Privacy Factor**).<sup>22</sup>

#### *Harm Factor*

30. The Information in Issue contains sensitive personal information of the deceased.
31. Disclosing the sensitive personal information of the deceased could reasonably be expected to result in a public interest harm, namely, a reduction in public confidence in the health system and a reduction in the ability of public hospitals to provide health care effectively and efficiently. The effective delivery of health care services and the efficient operation of health services rely upon full and frank disclosure by patients. The risk in disclosing personal information of the type in issue in this review is that patients would no longer engage in an open and frank relationship with health care providers if they felt that information they provided would be disclosed to others. This lack of candour may compromise their own health and the ability of the health care system to provide proper care effectively and efficiently.<sup>23</sup>
32. Given the sensitive and private nature of the Information in Issue, and health records generally, the public interest harm to the efficient and effective delivery of public health care that could reasonably be expected to result from disclosure of the Information in Issue would be substantial. Therefore, this Harm Factor is deserving of significant weight in circumstances such as those present in this review.

#### *Protection of Right to Privacy Factor*

33. A public interest favouring nondisclosure will apply if disclosure of the Information in Issue is likely to prejudice the protection of an individual's right to privacy.<sup>24</sup> The concept of 'privacy' is not defined in either the IP Act or the RTI Act. However, it can be regarded as the right of an individual to preserve their personal sphere free from interference from others.<sup>25</sup>

<sup>20</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>21</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>22</sup> Schedule 4, part 3, item 5 of the RTI Act.

<sup>23</sup> I note in this regard that the Health Service clearly conveys to patients an expectation that medical records are confidential and that patient privacy is maintained: 'We know you need to trust your health provider before you give them sensitive personal information. You can expect that we will deal with all personal information in an ethical, lawful and confidential way.

Your health information will only be discussed or made available to those who are involved in your care.' <https://metrosouth.health.qld.gov.au/patients-and-visitors/your-time-in-hospital/medical-records-and-confidentiality>. See also: <https://publications.qld.gov.au/dataset/health-information-privacy>.

<sup>24</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>25</sup> See *OP5BNI and Department of National Parks, Recreation, Sport and Racing* (Unreported, Queensland Information Commissioner, 12 September 2013); *Marshall and Department of Police* (Unreported, Queensland Information Commissioner, 25 February 2011) at [27] paraphrasing the Australian Law Reform Commission's definition of the concept in 'For your information:

34. A small amount of the Information in Issue is the personal information of individuals other than the applicant and the deceased, such as relatives and acquaintances, including their identities, contact details and residential circumstances. Most of this information is personal information which the individuals themselves did not volunteer. Moreover, even where information was volunteered by these persons, circumstances indicate that it was provided in the expectation of it being used by medical staff to assist with the care and treatment of the deceased and would not otherwise be disclosed.
35. I consider that disclosure of the small amount of the Information in Issue which concerns persons other than the applicant and the deceased, would be to interfere with the right of those persons to keep their personal sphere free from interference by others.
36. Accordingly, I consider that the public interest factor in favour of nondisclosure to protect an individual's right to privacy applies in the circumstances of this matter to the small amount of information about individuals other than the applicant and the deceased, and given the personal nature of the information this factor carries significant weight.

*Eligible Family Member Privacy Factor*

37. This factor favouring nondisclosure applies where:
  - the personal information is of a deceased individual
  - the applicant is an eligible family member of the deceased person; and
  - the disclosure of the information could reasonably be expected to impact on the deceased person's privacy if the deceased person were alive.
38. Relevantly, this factor is worded almost identically to the factor favouring disclosure discussed above at paragraph 21, the only difference being the last element. It is the presence of this last element that polarises this public interest against disclosure, and requires an assessment of the impact on the deceased's privacy as if they were alive.
39. As has already been established in this decision:
  - the applicant is an eligible family member of the deceased according to the definition of eligible family member as set out in schedule 5 of the RTI Act; and
  - the Information in Issue is the personal information of the deceased, being medical records which by their very nature contain sensitive, private information about individuals' personal circumstances, care and health.
40. Therefore, what remains to be considered for this factor favouring nondisclosure to apply is whether disclosure of the Information in Issue could reasonably be expected, if the deceased were alive, to impact on her privacy.
41. The Information in Issue has not been disclosed and remains private. Given my observations on the nature of the familial connection between the applicant and deceased, the applicant's involvement in the deceased's health care and the wishes of the deceased above, I consider that disclosing the Information in Issue in the circumstances of this review would be to allow a significant level of intrusion into a private aspect of the deceased's personal sphere and would amount to a significant impact on the privacy of the deceased, were she alive.

42. Consequently, I conclude that due to the nature and sensitivity of the Information in Issue and the prejudice to the privacy of the deceased, were she alive, the Eligible Family Member Privacy Factor favouring nondisclosure carries significant weight.

***Balancing the public interest***

43. For the reasons explained, I give:
- low weight to the public interest in favour of disclosure to ensure the best and most efficient intergenerational health care;
  - low weight to the public interest factor favouring disclosure of the small amounts of Information in Issue that are the applicant's personal information;
  - low weight to the public interest factor favouring disclosure to the applicant as an eligible family member; and
  - significant weight to each of the three public interest factors favouring nondisclosure of the Information in Issue.
44. Thus, on balance, the significant weight of the public interest factors which favour nondisclosure of the Information in Issue in this case outweigh the public interest factors favouring disclosure. Therefore, I find that disclosure of the Information in Issue would, on balance, be contrary to the public interest under section 49 of the RTI Act.

**DECISION**

45. I affirm the decision under review. I find that access to the Information in Issue may be refused under section 47(3)(b) and section 49 of the RTI Act as its disclosure would, on balance, be contrary to the public interest.
46. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**Assistant Information Commissioner Corby**

**Date: 26 February 2020**

**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
27 February 2019	OIC received the application for external review.
1 March 2019	OIC notified MSHHS and the applicant that the application for external review had been received and requested procedural documents from MSHHS.
6 March 2019	OIC received the requested documents from MSHHS.
10 March 2019	OIC received submissions from the applicant.
2 April 2019	OIC notified MSHHS and the applicant that the application for external review had been accepted.
28 May 2019	OIC called the applicant and gave an oral preliminary view that she may be refused access to her mother's medical records. The applicant provided OIC with her submissions via email.
22 July 2019	OIC conveyed a written preliminary view to the applicant, advising that access to her mother's medical records may be refused on the basis that disclosure would be contrary to the public interest. The applicant advised OIC that she rejected the preliminary view.
23 July 2019	OIC notified MSHHS that the applicant rejected the preliminary view and requested that MSHHS provide the Information in Issue.
24 July 2019	MSHHS provided the Information in Issue to OIC by courier.
26 July 2019	OIC called the applicant to clarify issues and concerns that she had raised.
28 July 2019	OIC received further submissions from the applicant in support of her status as an 'eligible family member'.
15 October 2019	OIC received a call from the applicant, advising of her objection and requesting that OIC issue a decision.
7 November 2019	The applicant forwarded a medical letter to OIC.