



Decision and Reasons for Decision

Citation: *Wooding and Gold Coast Hospital and Health Service*
[2014] QICmr 50 (16 December 2014)

Application Number: 312014

Applicant: Wooding

Respondent: Gold Coast Hospital and Health Service

Decision Date: 16 December 2014

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - INFORMATION PRIVACY ACT - REFUSAL OF ACCESS - EXEMPT INFORMATION - BREACH OF CONFIDENCE - medical records - information provided by other individuals during applicant's medical treatment - whether disclosure would found an action for breach of confidence - whether information exempt under schedule 3, section 8(1) of the *Right to Information Act 2009* (Qld) - whether access to information may be refused under section 67 of the *Information Privacy Act 2009* (Qld) and sections 47(3)(a) and 48 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - INFORMATION PRIVACY ACT - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - medical records - information about individuals other than the applicant - accountability of health service provider - personal information and privacy - whether disclosure would, on balance, be contrary to the public interest - whether access to information may be refused under section 67 of the *Information Privacy Act 2009* (Qld) and sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to her medical records held by Gold Coast Hospital, within a specified period.
2. Gold Coast Hospital and Health Service (**GCHHS**) granted the applicant full access to 784 pages, but decided to refuse access to:

- three full pages and parts of four pages on the basis that the information was exempt;¹ and
 - one full page and parts of 15 pages on the basis that the information would, on balance, be contrary to the public interest to disclose.²
3. On internal review, GCHHS affirmed its original decision to refuse access to the information, on the same grounds.
 4. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of GCHHS's internal review decision. In her external review application, the applicant questioned why she was being refused access to information in her medical records and also raised concerns about the relevance of public interest factors to disclosure of her medical records. Following negotiations with OIC on external review, GCHHS agreed to release some further information to the applicant.
 5. For the reasons set out below, I affirm GCHHS's decision to refuse access to information under section 67(1) of the IP Act and sections 47(3)(a) and 47(3)(b) of the RTI Act.

Background

6. Significant procedural steps are set out in the Appendix.

Reviewable decision

7. The decision under review is GCHHS's internal review decision dated 31 March 2014, refusing access to information under section 67(1) of the IP Act and sections 47(3)(a) and 47(3)(b) of the RTI Act.

Evidence considered

8. The evidence, submissions, legislation and other material considered in reaching this decision is disclosed in these reasons (including footnotes and Appendix).

Information in issue

9. Following the release of some information by GCHHS during this review,³ two full pages and parts of nine pages of the applicant's medical records remain in issue, as set out below:

Category	Description	Page numbers
A	Information other individuals provided to GCHHS	512, 520, 523 (parts) 521, 522 (full)
B	Information about the applicant and other individuals, eg. their opinions and actions	233, 234, 376, 377, 469 and 519 (parts)

¹ Under section 67 of **IP Act** and section 47(3)(a) and (b) of the *Right to Information Act 2009* (Qld) (**RTI Act**). Section 67 of the IP Act provides that an agency may refuse access to information on the same grounds as set out in section 47 of the RTI Act.

² Under section 47(3)(b) of the RTI Act.

³ Being part of page 523; and in addition, page 225 and parts of pages 393, 394, 433, 456, 467, 468, 471, 477, 478, 479 and 490 that GCHHS has agreed should be disclosed to the applicant and, on 16 December 2014, OIC requested GCHHS to release to the applicant.

10. I am prevented by section 121 of the IP Act from describing the particular nature of the information in issue in any further detail.

Issues for determination

11. The issues for determination in this external review are:
- whether the Category A Information constitutes exempt information under schedule 3, section 8(1) of the RTI Act; and
 - whether the disclosure of the Category B Information would, on balance, be contrary to the public interest.

Right to access information

12. Section 40 of the IP Act provides that an individual has a right to be given documents of an agency to the extent that they contain the individual's personal information. However, this right of access is subject to some limitations, including the grounds for refusal of access in section 47 of the RTI Act.⁴ Relevantly, an agency may refuse access to information that is exempt,⁵ or information the disclosure of which would, on balance, be contrary to the public interest.⁶

Is the Category A Information exempt?

Relevant law

13. Schedule 3, section 8(1) of the RTI Act operates to exempt information, the disclosure of which would found an action for breach of confidence. The words of the section refer to an action based in equity for breach of an equitable obligation of confidence.⁷
14. This exemption will apply if each of the following criteria are satisfied:⁸
- a) the information must be capable of being specifically identifiable as information that is secret, rather than generally available⁹
 - b) the information must possess the necessary quality of confidence¹⁰
 - c) circumstances of the communication must create an equitable obligation of confidence¹¹
 - d) disclosure to the applicant for access must constitute an unauthorised use of the information¹²
 - e) disclosure of the information would result in detriment to the plaintiff, such as embarrassment, loss of privacy, fear or an indirect detriment, for example, disclosure of the confidential information may injure some relative or friend.¹³ For a non-government plaintiff, it will be a sufficient detriment to the confider that the

⁴ Section 67(1) of the IP Act.

⁵ Sections 47(3)(a) and 48 and schedule 3 of the RTI Act. Schedule 3 of the RTI Act sets out the types of information the disclosure of which the Parliament has considered would, on balance, be contrary to the public interest: see section 48(2) of the RTI Act.

⁶ Sections 47(3)(b) and 49 of the RTI Act.

⁷ In cases concerning disclosure of information that is claimed to be confidential, the facts may give rise to both an action for breach of contract, and in equity, for breach of confidence. At general law, these are separate and distinct causes of action. An action for breach of confidence will only be established where the requirements at [14] of these reasons are present.

⁸ The Information Commissioner analysed the requirements of this exemption in *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (*B and BNRHA*), in the context of the equivalent section 46(1)(a) of the repealed *Freedom of Information Act 1992* (Qld). The Right to Information Commissioner analysed the exemption under the RTI Act in *TRO08G and Department of Health* [2011] QICmr 46 (13 December 2011) (*TRO08G*).

⁹ *B and BNRHA* at [60] to [63].

¹⁰ *B and BNRHA* at [43].

¹¹ *B and BNRHA* at [84].

¹² *B and BNRHA* at [103] to [106].

¹³ Dean, R., (1990) *The Law of Trade Secrets*, Law Book Company, pp. 177-8, cited in *TRO08G* at [14].

information given in confidence is to be disclosed to persons to whom the confider would prefer not to know of it, even though disclosure would not be harmful to the confider in any positive way.¹⁴

Findings

15. I have carefully considered the Category A Information. For the reasons that follow, I am satisfied that the Category A information satisfies each of the five criteria set out above, and disclosure of the Category A Information would found an action for breach of an equitable obligation of confidence.

Applicant's submissions about the Category A Information

16. I have carefully considered the information provided by the applicant in her external review application dated 4 May 2014, and submissions the applicant provided to OIC dated 28 August 2014.
17. Some of the applicant's submissions about the Category A Information relate to issues which OIC has no jurisdiction to consider or investigate on external review. Additionally, some of the applicant's submissions about the Category A Information relate to public interest grounds favouring disclosure of the information. Schedule 3 of the RTI Act sets out the types of information the disclosure of which Parliament has considered would, on balance, be contrary to the public interest.¹⁵ Therefore, where information is found to be exempt, the RTI Act does not provide for further consideration of public interest factors favouring disclosure.
18. Where they are relevant, I refer to the applicant's submissions about the Category A Information below.

a) Specifically identifiable information

19. The Category A Information is contained within five pages of the applicant's medical records, and comprises communications between health professionals and other individuals. On this basis, I find that the Category A Information is specifically identifiable as information that is secret, rather than generally available.

b) Necessary quality of confidence

20. As the applicant's medical records are not publicly available, the Category A Information is not generally known. Further, a person's medical records are of an important character and therefore, I do not consider the information to be useless or trivial. Accordingly, I find that the Category A Information has the necessary quality of confidence.

c) Circumstances of communication

21. The applicant has submitted that it is standard practice for health care professionals to record discussions they have with other medical professionals and other individuals about a patient. The applicant has submitted the relevant medical professionals and individuals involved in such conversations about her would have been aware that the

¹⁴ *B and BNRNA* at [111], citing *Attorney-General v Guardian Newspapers (No. 2)* [1990] 1 AC 109 (Lord Keith of Kinkel at page 256).

¹⁵ Section 48(2) of the RTI Act.

medical professionals would make notes in her hospital record as a result of the relevant discussions, and that these notes may be provided to her, as the patient.

22. The Category A Information comprises the highly personal, sensitive information of other individuals. Due to the sensitive nature of the Category A Information, I am satisfied that the individuals who supplied it to GCHHS did not expect that it would be disclosed to others. For this reason, I am also satisfied that the Category A Information was communicated to the relevant health care professionals on the mutual understanding that it would not be communicated to other individuals. I therefore find that the Category A Information was communicated in circumstances which give rise to an equitable obligation of confidence.

d) Unauthorised use

23. I have found above that the individuals who supplied the Category A Information to GCHHS did not intend for it to be further disseminated. Therefore, I find that disclosure of the Category A Information under the IP Act would constitute an unauthorised use of that information.

e) Detriment

24. I have found¹⁶ that the Category A Information was communicated confidentially to health professionals at Gold Coast Hospital while the applicant was receiving medical treatment from that facility. On this basis, and given the sensitive nature of the Category A Information, I consider that the individuals who communicated the information would be concerned about its disclosure to the applicant. I therefore find that disclosure of the Category A Information under the IP Act would cause detriment to those individuals who supplied it.

Breach of confidence - conclusion

25. On the basis of the findings set out above, I am satisfied that schedule 3, section 8(1) of the RTI Act applies to the Category A Information, and it is therefore exempt information. Accordingly, I am satisfied that access to the Category A Information may be refused under section 67(1) of the IP Act and section 47(3)(a) of the RTI Act.

Would the disclosure of the Category B Information, on balance, be contrary to the public interest?

Relevant law

26. Access to information may be refused if its disclosure would, on balance, be contrary to the public interest.¹⁷
27. 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 that 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.

¹⁶ At [22] of this decision.

¹⁷ Sections 47(3)(b) and 49 of the RTI Act.

28. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest,¹⁸ and explains the steps that a decision-maker must take in deciding the public interest as follows:¹⁹
- identify any irrelevant factors and disregard them
 - identify any relevant public interest factors favouring disclosure and nondisclosure
 - balance the relevant factors favouring disclosure and nondisclosure; and
 - decide whether disclosure of the Category B Information would, on balance, be contrary to the public interest.

Findings

29. I have carefully considered the Category B Information. For the reasons that follow, I consider that the disclosure of the Category B Information would, on balance, be contrary to the public interest.

Irrelevant factors

30. I do not consider that any irrelevant factors arise for consideration in this external review.

Factors favouring disclosure

31. I have carefully considered the applicant's submissions about disclosure of the Category B Information. In summary, the applicant has submitted that she is entitled to access to the Category B Information for the following reasons:
- the applicant is suffering from a debilitating illness, and wants to ensure that the information GCHHS holds about her is accurate, and that she received appropriate treatment at Gold Coast Hospital for her illness; and
 - the public interest in honesty and transparency favours disclosure of the information in issue in this review.
32. The applicant's submissions raise the following public interest factors favouring disclosure of the Category B Information:
- the disclosure of the Category B Information could reasonably be expected to enhance the accountability of government²⁰
 - the Category B Information is the applicant's personal information;²¹ and
 - the disclosure of the Category B Information could reasonably be expected to reveal background and contextual information for government decisions, for example, medical treatment of a patient at a public hospital.²²
33. I accept that there is a strong public interest in individuals accessing information that government agencies hold about them generally, and in members of the community being given ways to ensure the accuracy of their personal information²³ held by

¹⁸ Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would on balance, be contrary to the public interest. This list is not exhaustive, and a decision maker may consider factors not listed in schedule 4 in assessing that balance of the public interest.

¹⁹ Section 49(3) of the RTI Act.

²⁰ Schedule 4, part 2, item 1 of the RTI Act.

²¹ Schedule 4, part 2, item 7 of the RTI Act.

²² Schedule 4, part 2, item 11 of the RTI Act.

²³ Section 12 of the IP Act defines 'personal information' as information, 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.

government agencies. It follows that, in the circumstances of this review, I am satisfied that there is a strong public interest in the applicant being able to access the Category B Information.

34. To date, GCHHS has released 809 full pages²⁴ of the applicant's medical records to her, which has gone a significant way to discharging these public interest factors in favour of disclosure. Accordingly, I am satisfied the weight of these public interest factors are somewhat reduced, and I afford them moderate weight in favour of disclosure.

Factors favouring nondisclosure

35. While the Category B Information is the applicant's personal information, it also comprises the personal information of other individuals who could be identified if the Category B Information was disclosed, for example their opinions and actions. I therefore find that the Category B Information is the shared personal information of the applicant and other individuals. In the context of the Category B Information, it is not possible to separate the applicant's personal information from other individuals' personal information.
36. Given that the Category B Information comprises information about other individuals, its disclosure could reasonably be expected to:
- cause a public interest harm by disclosing other individuals' personal information;²⁵ and
 - prejudice the protection of the right to privacy of other individuals.²⁶
37. The Category B Information appears in the context of the applicant's medical records. Having examined the Category B Information, I find that it is at the higher end of the spectrum in terms of sensitivity, and therefore, if released, it could reasonably be expected to cause a significant public interest harm.
38. On the basis that the Category B Information comprises the sensitive personal information of other individuals, I also consider that its disclosure could reasonably be expected to significantly prejudice the right to privacy of other individuals.

Balancing the public interest

39. In the circumstances of this review, I have found that the public interest in the applicant accessing her medical records, and in enhancing Gold Coast Hospital's accountability regarding the treatment it provided to the applicant, carry moderate weight in favour of disclosure. Weighed against this is the significant public interest harm that could reasonably be expected to be caused by disclosure of the Category B Information, and the significant prejudice to the right to privacy of other individuals that could reasonably be expected to be caused by disclosure of the Category B Information.
40. On the basis of the above, I find that the disclosure of the Category B Information would, on balance, be contrary to the public interest, and therefore access to it may be refused under section 67 of the IP Act and section 47(3)(b) of the RTI Act.

²⁴ In addition, GCHHS has agreed with OIC's view that a one full page and parts of 11 pages of the applicant's medical records should be disclosed to her.

²⁵ Schedule 4, part 4, item 6 of the RTI Act.

²⁶ Schedule 4, part 3 item 3 of the RTI Act.

DECISION

41. I affirm GCHHS's decision and find that the disclosure of the:

- Category A Information would found an action for breach of confidence,²⁷ and it is exempt;²⁸ and
- Category B Information would, on balance, be contrary to the public interest.²⁹

42. I have made this decision as a delegate of the Information Commissioner, under section 139 of the *Information Privacy Act 2009* (Qld).

Assistant Information Commissioner Corby

Date: 16 December 2014

²⁷ Schedule 3, section 8(1) of the RTI Act.

²⁸ Sections 47(3)(a) and 48 of the RTI Act.

²⁹ Sections 47(3)(b) and 49 of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
12 August 2013	Queensland Health received the access application.
14 November 2013	The access application became compliant.
25 November 2013	Queensland Health transferred the access application to GCHHS.
6 February 2014	GCHHS issued its decision on the access application.
4 March 2014	GCHHS received the applicant's application for internal review.
31 March 2014	GCHHS issued its internal review decision.
4 May 2014	The applicant applied to OIC for external review.
20 May 2014	OIC advised the applicant and GCHHS that the application had been accepted for review.
18 June 2014	GCHHS provided OIC with a copy of the information to which access was refused.
14 July 2014	OIC conveyed a preliminary view to GCHHS that some information in issue was not exempt on the basis that its disclosure would found an action for breach of confidence.
28 July 2014	GCHHS informed OIC that it accepted OIC's preliminary view, and that it would release the relevant information to the applicant.
15 August 2014	OIC conveyed a written preliminary view to the applicant.
29 August 2014	The applicant advised OIC that she contested the preliminary view and provided submissions in support of her case.
8 September 2014	OIC provided the applicant with a written update on the status of the external review.
2 October 2014	OIC conveyed a second preliminary view to GCHHS that some information in issue was not exempt on the basis that its disclosure would found an action for breach of confidence and that some information in issue would not, on balance, be contrary to public interest to disclose.
14 October 2014	OIC provided the applicant with a written update on the status of the external review.
24 October 2104	GCHHS informed OIC that it accepted OIC's preliminary view.
16 December 2014	OIC requested GCHHS to release additional information to the applicant.