



## Decision and Reasons for Decision

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Citation:	<b><i>TFN20S and Gold Coast Hospital and Health Service</i> [2018] QICmr 37 (20 August 2018)</b>
Application Number:	313506
Applicant:	<b><i>TFN20S</i></b>
Respondent:	Gold Coast Hospital and Health Service
Decision Date:	20 August 2018
Catchwords:	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - medical record of deceased sibling - 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> under the *Right to Information Act 2009* (Qld) (**RTI Act**) to the Gold Coast Hospital and Health Service (**Health Service**) for access to medical records and the death certificate of her deceased sister.
2. The Health Service refused access to some of the requested documents.<sup>2</sup> The applicant applied to the Health Service for internal review of that decision.
3. In its internal review decision<sup>3</sup> the Health Service affirmed its initial decision.
4. The applicant applied<sup>4</sup> to the Office of the Information Commissioner (**OIC**) for external review of the Health Service's internal review decision.
5. I have decided to affirm the internal review decision of the Health Service. I find that disclosure of the Information in Issue<sup>5</sup> would, on balance, be contrary to the public interest. Access to it, may therefore be refused under sections 47(3)(b) and 49 of the RTI Act.

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<sup>1</sup> By undated application received by the Gold Coast Hospital and Health Service on 27 June 2017.

<sup>2</sup> Under sections 47(3)(b) and 49 of the RTI Act, in its original decision dated 18 July 2017.

<sup>3</sup> Decision dated 6 September 2017.

<sup>4</sup> By undated letter received by the Office of the Information Commissioner on 22 September 2017.

<sup>5</sup> Described at paragraph 14.

## Background

6. The applicant's adult sister died at the Gold Coast Hospital in May 2017.
7. The applicant sought access under the RTI Act to her deceased sister's medical records and death certificate.
8. As a result of the release of information to the applicant by the Health Service, the applicant became aware that the Health Service had obtained legal advice concerning the wishes of the deceased. The applicant subsequently sought access to a copy of the legal advice.
9. On external review, OIC confirmed with the applicant that the Health Service did not hold a copy of the death certificate and that the legal advice was not captured by the terms of her access application. The applicant was advised that a fresh access application would need to be made to seek access the advice.
10. The only issue for determination in this review is whether the Information in Issue should be disclosed to the applicant under the RTI Act.

## Reviewable decision

11. The decision under review is the internal review decision of the Health Service dated 6 September 2017.

## Evidence considered

12. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).
13. The applicant provided written and oral submissions to OIC supporting her case.<sup>6</sup>

## Information in Issue

14. The information in issue in this review (**Information in Issue**) consists of the deceased's medical records. It is comprised of seven part pages and 241 full pages, containing clinical assessments, progress notes and observations, treatment and management plans, medication records, test reports, social worker notes, notes recording the deceased's comments about her health and emotions, observations of her health and living circumstances and relationships with family and friends, and personal details of those individuals including their names and mobile telephone numbers.

## Relevant law

15. Under the RTI Act, a person has a right to be given access to documents of an agency.<sup>7</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>8</sup> Relevantly, an agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.<sup>9</sup>

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<sup>6</sup> The applicant's submissions were provided: in the undated external review application received on 22 September 2017; by telephone on 11 October 2017, 15 November 2017 and 3 July 2018; and by email dated 11 December 2017.

<sup>7</sup> Section 23 of the RTI Act.

<sup>8</sup> Set out in section 47 of the RTI Act.

<sup>9</sup> Under sections 47(3)(b) and 49 of the RTI Act.

16. 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.
17. The RTI Act identifies various factors that may be relevant to deciding the balance of the public interest<sup>10</sup> and explains the steps that a decision-maker must take<sup>11</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

18. No irrelevant factors arise in the circumstances of this review.

### Factors favouring disclosure

#### *Personal information factors*

19. The RTI Act identifies two public interest factors 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;
    - (b) the applicant is an eligible family member of the person (**Eligible Family Member Factor**).
20. Section 12 of the *Information Privacy Act 2009* (Qld) (**IP Act**) defines 'personal information' for the purpose of the RTI Act as, 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.

<sup>10</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>11</sup> Section 49(3) of the RTI Act.

*Applicant's Information Factor*

21. I have carefully read the Information in Issue and cannot identify any personal information of the applicant. While some personal information of the applicant had been recorded in the medical record, the pages which contain that information were disclosed to the applicant by the Health Service and do not form part of the Information in Issue in this review. Accordingly the Applicant's Information Factor is not enlivened in this review.

*Eligible Family Member Factor*

22. Apart from the small amount of information that is the personal information of persons other than the applicant and the deceased, the balance of the Information in Issue is the personal information of the applicant's deceased sister. As noted at paragraph 19, 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.
23. 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.
24. Medical records of the nature of the Information in Issue have long been held to be personal information by this Office.<sup>12</sup> Having reviewed the Information in Issue I am satisfied that it would, 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.
25. 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
    - (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.

<sup>12</sup> See *Keogh and Department of Health* (Unreported, Queensland Information Commissioner, 31 August 2010).

26. On the information available to me, it appears that the deceased did not have a spouse or adult child as at the date of her death. Thus the persons noted at Items 1(a) and (b) above are considered to be 'not reasonably available'.
27. In terms of item (1)(c), the biological mother and father of the deceased had predeceased her<sup>13</sup> but her step-father is still living.
28. The RTI Act does not contain a definition of 'parent' for the purpose of the definition of eligible family member. The only definition of parent appears in the context of section 25 of the RTI Act which deals with the making of access applications on behalf of children who are minors. In that specific context the RTI Act provides that a person who 'exercises parental responsibility for a child' is a parent for the purpose of making an application under the RTI Act on that child's behalf. Thus, a step-parent, may be considered a parent for the purpose of making an application for access to documents on behalf of a child, depending on the circumstances of the relationship.
29. I am not satisfied that the definition of parent for the purposes of section 25 of the RTI Act can be applied to determine whether a step parent is a parent for the purposes of the Eligible Family Member Factor. In my view, the section 25 definition is designed to deal with circumstances in which the child is a minor, whereas the eligible family member criteria has no such restriction.
30. Given this conclusion, I have reviewed the standing of step-parents in other areas of law. Much of the law on the step-child and step-parent relationship is found in family law matters or succession law. Generally, family law is concerned with circumstances where the child is a minor and succession law is concerned with circumstances where the child is a claimant in the estate of a deceased step-parent. Therefore it has limited application in circumstances such as those presented in this particular case. However, there is some guidance on the nature of the relationship.
31. Generally, in family law matters a step-parent does not have any legal rights with respect to parental responsibility and must take some positive step to obtain legal rights and responsibilities, such as adoption or a parenting order.<sup>14</sup> In succession law, where a step-child makes an eligible claim on the estate of a step-parent, the court will look at the nature of the relationship between step-parent and step-child in determining whether to make provision out of the estate.<sup>15</sup>
32. In light of the above, I consider that, in circumstances where the deceased is an adult, whether a step-parent can be considered a parent for the purposes of the eligible family member definition, will turn on the nature of the relationship between step-parent and adult child. In particular, the extent of the familial connection and involvement.
33. I note that the applicant has asserted that she is the next of kin of the deceased. She has also asserted that their step-father is not a relative and further did not have contact with the deceased up until her death. The applicant stated that her sister, in relation to their step-father, "hated and actively and aggressively up until the day she died wanted nothing to do with him".<sup>16</sup>
34. Given the applicant's assertions and evidence available to me in the Information in Issue, I have concluded that there was little or no familial connection or involvement between the deceased and her step-father, and this had been the case for many years prior to

<sup>13</sup> File note of telephone conversation with the applicant on 11 October 2017.

<sup>14</sup> See the *Family Law Act 1975* (Cth).

<sup>15</sup> See the *Succession Act 1981* (Qld) and *Re John* [2000] Qd R 322.

<sup>16</sup> Email submission dated 11 December 2017.

the death of the deceased. Nor was the deceased financially dependent upon her step-father. Additionally, I am satisfied on the evidence before me that the deceased was an adult. Accordingly, I consider that in those circumstances the step-father is not an eligible family member for the purpose of determining the hierarchy of eligibility established in the eligible family member definition. Thus, I must determine if the applicant, being an adult sibling of the deceased, is an eligible family member.

35. I refer to the applicant's assertions noted at paragraph 33 above. The RTI Act does not identify 'next of kin' status as a specific factor favouring disclosure, such that being 'next of kin', does not, in its own right, give rise to the activation of a pro-disclosure factor. However, being a sibling of the deceased may enliven the eligible family member factor. The applicant provided a number of documents verifying her identity and her relationship as the sibling of the deceased. I am satisfied on the evidence before me that: the applicant is an adult sibling of the deceased; that item (1)(d) of the eligible family member definition is satisfied; and that, the Eligible Family Member Factor in favour of disclosure is enlivened for consideration.
36. Based on the evidence available to me<sup>17</sup>, I have concluded that the applicant: was not in contact with the deceased during her admission nor in the preceding period; had not been involved in the medical care of the deceased prior to her death; and, was apparently estranged from the deceased for some time prior to her death. Additionally, the deceased expressly requested the Health Service not to disclose her presence in the hospital and the nature and extent of her illness to any family member and not to notify her family in the event of her death. As a consequence of this evident estrangement and the express wishes of the deceased, I give low weight to the Eligible Family Member Factor.

***Allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official<sup>18</sup>***

37. The applicant submitted that the Health Service inappropriately contacted the step-father of the deceased upon her death and released her body to him in circumstances where he had been estranged from the deceased.<sup>19</sup> In light of these submissions I have considered whether disclosing the Information in Issue could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of the Health Service or one of its employees, which is a public interest factor in favour of disclosure.
38. The pages and part pages disclosed to the applicant by the Health Service contain information about the limited communication between the deceased and her step-father, and the Health Service and the step-father, and also document the actions taken and decisions made by the Health Service in relation to the deceased's wishes before and in the event of her death.
39. Given the nature of the information disclosed to the applicant by the Health Service and the nature of the Information in Issue (which to a large extent is purely clinical information) I consider that disclosure of the Information in Issue could not reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official. This is particularly so in circumstances where the information already disclosed to the applicant shows the deceased's wishes and the

<sup>17</sup> Evidence available to me from the applicant's submissions, the Information in Issue and the information disclosed to the applicant by the Health Service.

<sup>18</sup> Schedule 4, part 2, item 5 of the RTI Act.

<sup>19</sup> Telephone conversation on 15 November 2017, email submission dated 11 December 2017 and telephone conversation 3 July 2018.

actions of the Health Service in that regard. Accordingly, I am satisfied that this factor in favour of disclosure does not apply in the circumstances of this review.

***Reveal the reason for a government decision and any background or contextual information that informed the decision***<sup>20</sup>

40. The same submissions noted at paragraph 37 give rise to the question of whether disclosing the information in issue could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.
41. For the same reasons identified at paragraphs 38 and 39 above concerning the nature of the information already disclosed to the applicant and that which remains in issue, I consider that disclosure of the Information in Issue could not reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision. Therefore, I am satisfied that this factor in favour of disclosure does not apply in the circumstances of this review.

***Contribution to the administration of justice for a person***<sup>21</sup>

42. The applicant submitted that the deceased's step-father dealt with the deceased's estate when, in her opinion, he had no legal right to do so.<sup>22</sup>
43. Accordingly, consideration must be given to whether there is a public interest factor in favour of disclosure because the Information in Issue could reasonably be expected to contribute to a claim by the applicant, either against the estate of the deceased or against the step-father, and therefore contribute to the administration of justice for a person, namely, the applicant.
44. As already noted, the Information in Issue is essentially clinical medical records of the deceased. I consider there is no utility in disclosing the Information in Issue for the purpose of assisting the applicant to pursue a legal remedy. The Information in Issue does not shed light on either the applicant's entitlement to seek provision from the deceased's estate, or the step-father's entitlements.
45. Thus I consider that disclosing the Information in Issue could not reasonably be expected to contribute to the administration of justice for a person. This factor therefore does not apply in the circumstances of this review.

***Other factors favouring disclosure***

46. 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.

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<sup>20</sup> Schedule 4, part 2, item 11 of the RTI Act.

<sup>21</sup> Schedule 4, part 2, item 17 of the RTI Act.

<sup>22</sup> Telephone conversation on 15 November 2017, email submission dated 11 December 2017 and telephone conversation 3 July 2018.

## Factors favouring non-disclosure

### *Personal information factors*

47. The RTI Act contains three factors favouring non-disclosure which are enlivened in the circumstances of this review:
- 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>23</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>24</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>25</sup>

### *Harm Factor*

48. The Information in Issue contains sensitive personal information of the deceased.
49. 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>26</sup>
50. 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*

51. A public interest favouring non-disclosure will apply if disclosure of the information in issue is likely to prejudice the protection of an individual's right to privacy.<sup>27</sup> The concept

<sup>23</sup> Schedule 4, part 4, section 6 of the RTI Act.

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

<sup>25</sup> Schedule 4, part 3, item 5 of the RTI Act.

<sup>26</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 will keep confidential medical records of your condition and treatment including test results, x-rays and scans.", and "We're committed to ensuring the privacy and confidentiality of your sensitive information is secure." <https://www.goldcoast.health.qld.gov.au/patients-and-visitors/your-time-hospital/medical-records-and-confidentiality>.

<sup>27</sup> Schedule 4, part 3, item 3 of the RTI Act.



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>28</sup>

52. 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.
53. 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.
54. Accordingly, I consider that the public interest factor in favour of non-disclosure 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*

55. 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.
56. 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. Therefore, what remains to be considered in order for this factor favouring non-disclosure to apply is whether disclosure of the Information in Issue could reasonably be expected, if the deceased were alive, to impact on her privacy.
57. 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 in paragraph 33, I consider that disclosing the Information in Issue in the circumstances of this review (where the deceased's wishes concerning contact with family members were documented) would be to allow a significant level of intrusion into a private aspect of the deceased's personal sphere. I consider this amounts to a significant impact on the privacy of the deceased.
58. I conclude that, due to the nature and sensitivity of the Information in Issue, the Eligible Family Member Privacy Factor favouring non-disclosure carries significant weight.

<sup>28</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: Australian Privacy Law and Practice' Australian Law Reform Commission Report No. 108 released 11 August 2008, at paragraph 1.56.

### **Balancing the public interest**

59. For the reasons explained, I give:

- low weight to the public interest factor favouring disclosure of the Information in Issue to the applicant as an eligible family member; and
- significant weight to each of the three public interest factors favouring non-disclosure of the Information in Issue.

60. Thus, the public interest factors which favour non-disclosure of the Information in Issue outweigh the public interest factor favouring disclosure. Disclosure of the Information in Issue would therefore, on balance, be contrary to the public interest.

### **DECISION**

61. 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.

62. 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:** 20 August 2018

## APPENDIX

### Significant procedural steps

Date	Event
22 September 2017	OIC received the external review application.
25 September 2017	OIC notified the applicant and the Health Service that it had received the external review application. OIC asked the Health Service to provide a copy of relevant procedural documents.
26 September 2017	OIC received both the procedural documents and the information in issue from the Health Service.
27 September 2017	OIC received further procedural documents from the Health Service.
6 October 2017	OIC notified the applicant and the Health Service that it had accepted the external review application.
11 October 2017	OIC received submissions from the applicant by telephone.
15 November 2017	OIC conveyed a preliminary view by telephone to the applicant that access may be refused to the information in issue on the basis that disclosure would, on balance, be contrary to the public interest. OIC received oral submissions from the applicant.
1 December 2017	OIC wrote to the applicant confirming the preliminary view that access may be refused to the information in issue. OIC invited the applicant, if she did not accept the preliminary view, to provide any submissions by 15 December 2017.
11 December 2017	OIC received submissions from the applicant by email.
12 December 2017	By telephone, OIC informed the applicant that, having examined her submissions, OIC maintained the preliminary view that access may be refused to the information in issue. The applicant did not accept the preliminary view and requested a formal written decision.
3 July 2018	OIC received submissions from the applicant by telephone.