

# OFFICE OF THE INFORMATION COMMISSIONER (QLD)

**Decision No. 97005**  
**Application S 197/95**

## **Participants:**

GWENDA SUMMERS

**Applicant**

CAIRNS DISTRICT HEALTH SERVICE

**Respondent**

MICHAEL HINTZ

**Third Party**

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - medical records of the applicant's deceased adult daughter - whether information concerning the personal affairs of a person - whether disclosure would, on balance, be in the public interest - application of s.44(1) of the *Freedom of Information Act 1992 Qld.*

*Freedom of Information Act 1992 Qld* s.28(1), s.44(1), s.51, s.78, s.79  
*Freedom of Information Act 1992 Vic* s.50(4)

*Fotheringham and Queensland Health, Re* (Information Commissioner Qld,  
Decision No. 95024, 19 October 1995, unreported)

*Graham and Frankston Community Hospital, Re* (1986) 1 VAR 255

*McPhedran and Minister for Health, Re* (Australian Capital Territory Administrative  
Appeals

Tribunal, Professor L J Curtis (President) and Mr N J Atwood (Member), No. C92/103,  
2 June 1994, unreported)

*Norman and Mulgrave Shire Council, Re* (1994) 1 QAR 574

*Stewart and Department of Transport, Re* (1993) 1 QAR 227

*Willsford and Brisbane City Council, Re* (Information Commissioner Qld,  
Decision No. 96017, 27 August 1996, unreported)

## DECISION

1. I set aside the decision under review, being the decision which the respondent is deemed to have made, in accordance with s.79(1) of the *Freedom of Information Act 1992 Qld*, refusing access to the documents requested in the applicant's FOI access application dated 21 June 1995.
  
2. In substitution for it, I decide that the documents to which the applicant still seeks access comprise exempt matter under s.44(1) of the *Freedom of Information Act 1992 Qld*.

Date of decision: 27 March 1997

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F N ALBIETZ  
**INFORMATION COMMISSIONER**

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## **REASONS FOR DECISION**

### **Background**

1. The applicant seeks review of the respondent's deemed refusal, under s.79(1) of the *Freedom of Information Act 1992 Qld* (the FOI Act), to give her access to medical records concerning her deceased adult daughter. The third party was the husband of the deceased at the time of her death, and is the father of the deceased's surviving child. The third party opposes disclosure to the applicant of the deceased's medical records.
2. In a letter dated 21 June 1995, the applicant wrote to the Peninsula and Torres Strait Regional Health Authority (the predecessor of the respondent) saying that she had been given to understand that, as executrix of her daughter's will, she was able to apply for information under the FOI Act. (I note, however, that, during the course of this review, I was provided with a copy of the deceased's will, as admitted to probate. It clearly establishes that the third party was the executor appointed in the deceased's will). The applicant framed her application for access to information in the following terms:

*The information required is the details of my daughter's hospitalisation at Cairns Base Hospital on the following known dates:-*

- (1) ... 28.3.91 to 3.4.91 (approx) birth of baby
- (2) ... May 1991 - overnight (lancing of breast abscess)
- (3) ... 14.6.92 - 25.6.92 [this admission culminated in the death of the applicant's daughter]
- (4) any other hospitalisation dates.

3. Having received no decision in response to her letter, the applicant applied to me, by letter dated 16 November 1995, seeking "help for external review". It is clear that I have jurisdiction to review the respondent's deemed refusal of access to the information requested by the applicant, in accordance with s.79(1) of the FOI Act.

### **External review process**

4. By letter dated 1 December 1995, I asked the respondent to supply me with copies of documents falling within the terms of the applicant's FOI access application, to indicate which parts, if any, of the matter in issue it was prepared to disclose to the applicant, and to particularise the basis on which the balance of the matter in issue was claimed to be exempt matter under the FOI Act.
5. In a letter dated 14 December 1995, the respondent indicated that it considered all of the documents in issue to be *prima facie* exempt under s.44(1) of the FOI Act (the terms of which are set out at paragraph 15 below), but that it had not yet been able to reach a decision on whether disclosure of the documents to the applicant would, on balance, be in the public interest. The respondent indicated that it had been its intention (before it became *functus officio* by the lodging of a valid application for review by the Information Commissioner) to establish whether the applicant was able to provide details of any further public interest considerations in favour of disclosure, and to consult with the husband of the deceased under s.51 of the FOI Act.
6. After examining the matter in issue, I wrote to the applicant explaining my preliminary view that the matter in issue was *prima facie* exempt from disclosure to her under s.44(1) of the FOI Act, since it was information concerning the personal affairs of another person, and that the reasons she had given to the respondent for seeking access to the matter in issue did not afford adequate public interest considerations to warrant the exercise, in her favour, of the public interest balancing test incorporated in s.44(1) of the FOI Act. In the event that she wished to pursue access to the matter in issue, I invited the applicant to lodge a written submission in support of her case.
7. The applicant lodged a written submission, dated 23 January 1996, in support of her case. The applicant also arranged for a copy of her submission to be forwarded to the third party. I subsequently received a letter from solicitors acting for the third party, stating that the third party opposed disclosure to the applicant of the deceased's medical records.
8. On 20 February 1996, I wrote to the solicitors acting for the third party, providing a copy of the applicant's written submissions, and inviting the third party to apply to be a participant in my review (in accordance with s.78 of the FOI Act) and to lodge a formal submission explaining why the documents in issue were asserted to be exempt from disclosure to the applicant under the FOI Act. The applicant did so, and has been granted status as a participant in this review.
9. The third party indicated that he had already provided the applicant with copies of reports given to him by Cairns Base Hospital detailing the deceased's illness, her treatment and progress on a day by day basis, and the cause and circumstances of her death. The applicant acknowledged that this was correct, and provided me with copies of those reports. The applicant subsequently agreed that she only wished to pursue access to documents concerning the admissions of her late daughter to the Cairns Base Hospital prior to her

daughter's final admission, and that the terms of her FOI access application should be refined accordingly. The following is a chronology of relevant admissions:

|                 |   |
|-----------------|---|
| 6 June 1988     | admission for day surgery   |
| 31 October 1988 | admission for day surgery   |
| 28 March 1991   | admission for child birth (discharged 3 April 1991)   |
| 30 April 1991   | admission for drainage of breast abscess (overnight stay)   |
| 14 June 1992    | admission to Cairns Base Hospital (transferred from Calvary Private Hospital with acute pneumonia - died 25 June 1992). |

Medical records concerning the first four admissions listed above constitute the matter remaining in issue in this review.

10. My staff attempted to mediate a result that would be acceptable to both the applicant and the third party. The third party, however, maintained his objection to the disclosure of the matter in issue.
11. The respondent, after considering the applicant's first written submission, wrote to me indicating that it was prepared to disclose to the applicant the medical records in issue. Subsequently, after considering all submissions lodged by the applicant and the third party, the respondent indicated that it did not wish to change its position, but it has not sought to take an active part in the review. The respondent has not indicated whether it is prepared to disclose the medical records in issue to the applicant on the basis that it does not consider the medical records to be exempt from disclosure to the applicant, or on the basis that it is prepared to exercise the discretion, which it possesses under s.28(1) of the FOI Act, to disclose matter under the FOI Act even though it may be exempt matter (see *Re Norman and Mulgrave Shire Council* (1994) 1 QAR 574 at p.577, paragraph 13).
12. Since there is a participant in the review who contends that the matter in issue is exempt matter under the FOI Act, I am obliged to make a formal determination on that issue. A finding by me that the matter in issue is exempt matter under the FOI Act would not deprive the respondent of its discretion, under s.28(1) of the FOI Act, to decide to disclose the matter in issue to the applicant in any event, though no doubt the respondent would be obliged to take my finding into account, and probably also the objections expressed by the third party, before reaching a decision on whether or not to exercise the discretion conferred by s.28(1), in a manner favourable to the applicant.
13. Submissions received from the applicant and the third party have been exchanged, with the opportunity given for replies. The applicant has lodged the following material in support of her case:
  - submission dated 24 January 1996
  - further submission dated 19 February 1996
  - submission in reply dated 1 May 1996.
14. The third party has lodged the following material in support of his case:
  - letter of objection to release dated 14 February 1996
  - submission dated 11 March 1996
  - letter dated 1 April 1996 enclosing a copy of the deceased's will
  - letter dated 16 April 1996.

### **Application of s.44(1) of the FOI Act**

15. Section 44(1) of the FOI Act provides:

*44.(1) Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*

This provision clearly extends the scope of its protection to information concerning the personal affairs of deceased persons.

16. In applying s.44(1) of the FOI Act, one must first consider whether disclosure of the matter in issue would disclose information that is properly to be characterised as information concerning the personal affairs of a person. If that requirement is satisfied, a *prima facie* public interest favouring non-disclosure is established, and the matter in issue will be exempt, unless there exist public interest considerations favouring disclosure which outweigh all identifiable public interest considerations favouring non-disclosure, so as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.
17. In my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227, I identified the various provisions of the FOI Act which employ the term "personal affairs", and discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations thereof) as it appears in the FOI Act. In particular, I said that information concerns the "personal affairs of a person" if it relates to the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:
- family and marital relationships;
  - health or ill-health;
  - relationships and emotional ties with other people; and
  - domestic responsibilities or financial obligations.

Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, to be determined according to the proper characterisation of the information in question.

18. The matter in issue falls within the core meaning described above; it clearly comprises information concerning the personal affairs of the deceased, and this is conceded by the applicant (paragraph 2 of her submission dated 24 January 1996). Moreover, the public interest in respecting the privacy of an individual's medical records is a strong one, which will ordinarily be deserving of considerable weight in the application of a public interest balancing test, as has been recognised in previous decisions by myself (see, for example, *Re Fotheringham and Queensland Health* (Information Commissioner Qld, Decision No. 95024, 19 October 1995, unreported) at paragraphs 11, 24-25, 33) and other tribunals (see, for example, *Re McPhedran and Minister for Health* (Australian Capital Territory Administrative Appeals Tribunal, Professor L J Curtis (President) and Mr N J Atwood (Member), No. C92/103, 2 June 1994, unreported) at paragraph 8).

19. The substantial weight which the privacy interest in a person's medical records ordinarily carries (as against the world at large) may be reduced, however, in the case of a close relative of a deceased person (or of a living person who, because of some disability, is not capable of indicating consent or opposition to disclosure of his or her medical records), where there is satisfactory evidence that that close relative has been privy to medical information of the kind covered in the particular matter in issue. It is a part of human nature that people may seek solace in confiding in someone close to them, or may simply feel that it is proper to share with people who are close to them and concerned for their welfare, information about certain kinds of medical treatment. On the other hand, it is not difficult to envisage certain kinds of medical information that an individual may not wish to share with, or ever have disclosed to, a close relative. (There will also be situations in which treating medical practitioners must disclose medical information about a person to a close relative of that person, e.g., in the case of a child of tender years, or a person in a coma, or a person so seriously injured that he or she is unable to give informed consent to medical treatment). Although it is largely a question of degree, and would be dependent on the existence of satisfactory evidence, the extent of the knowledge which a close relative has about particular medical information concerning a deceased person (or a living person who, because of some disability, is not capable of indicating consent or opposition to disclosure of his or her medical records) could be sufficient to reduce the weight of the privacy interest in that medical information (where disclosure to that close relative is in contemplation) to such an extent that a strong public interest consideration favouring disclosure could, in the application of a public interest balancing test, tip the scales in favour of disclosure.
20. However, under the terms of s.44(1) of the FOI Act, the mere finding that the matter in issue comprises information concerning the personal affairs of a person other than the applicant for access is enough to raise a public interest consideration telling in favour of non-disclosure of the matter in issue. While the weight to be accorded to that public interest consideration will vary according to the nature of the matter in issue and the circumstances of each case, the fact that the matter in issue comprises information concerning another person's personal affairs will nevertheless be determinative (in favour of non-disclosure of the matter in issue) in the absence of identifiable public interest considerations favouring disclosure of the matter in issue, which have sufficient weight to justify a finding that disclosure of the matter in issue would, on balance, be in the public interest.
21. In the present case, the applicant has submitted (at paragraphs 7-16 of her written submission dated 24 January 1996) that her late daughter discussed with her medical information concerning the third and fourth admissions referred to in paragraph 9 above, plus other medical information not related to the matter in issue. It is credible that a reasonably close mother and daughter would discuss medical information of that kind. The third party has not disputed the applicant's statements in this regard.
22. The applicant, however, is on more difficult ground in trying to persuade me of the existence of *bona fide* public interest considerations, which carry any substantial weight, in favour of disclosure of the matter in issue to the applicant. The applicant's arguments in respect of the application of the public interest balancing test in s.44(1) of the FOI Act can be summarised as follows:-
  - (a) Disclosure of the matter in issue would satisfy an emotional need of the applicant, as the deceased's mother. It would give her peace of mind to understand the treatment by the Cairns Base Hospital prior to the admission during which her daughter died (paragraph 20 of the applicant's submission dated 24 January 1996).

Disclosure of the matter in issue would help her come to terms with her daughter's death. The applicant submits that there is a public interest in provision of such information as this to a mother with respect to her deceased daughter, in circumstances such as are present in this case (i.e., where the death was sudden, and unexpected, and the deceased had apparently been healthy). The applicant also submitted that disclosure of the matter in issue would assist the daughter of the deceased (i.e., the applicant's grand-daughter) at the appropriate time. The applicant said that any disclosure to the grand-daughter would be handled with care, and in consultation with the third party (paragraph 25 of the applicant's submission dated 24 January 1996).

- (b) The accountability of the hospital for the provision of medical services would be enhanced. The applicant stated in her written submission dated 19 February 1996 (at paragraph 12), that she was concerned about the possibility of a "cover-up" by the Cairns Base Hospital, in that although she had been given information about her daughter's treatment during the admission which culminated in her death, she wanted to know if there had been any lingering effects from earlier treatment. It appears that the applicant wishes to know whether, as a result of the admissions prior to the admission which culminated in her daughter's death, her daughter had contracted some sort of infection that persisted, and finally caused the condition which resulted in her daughter's death. (The applicant's daughter died some ten days after being admitted to the Cairns Base Hospital with acute pneumonia.)
- (c) The applicant submitted that no detriment would result from disclosure of the matter in issue. There would be no unwarranted invasion of privacy which would result from disclosure of the matter in issue.

23. The third party's grounds of objection can be summarised as follows:

- (a) Disclosure of the matter in issue would cause the circumstances of his late wife's death to be the subject of ongoing consideration and concern which would inevitably cause the third party and his daughter considerable emotional and personal distress. While the matter of the deceased's death continues to be examined and re-examined, through the applicant's interest in pursuing the matter in issue, the third party and his daughter would be unable to put the loss of his wife, and the child's mother, behind them.
- (b) The third party submitted that the applicant's interest in obtaining access is not a public interest, but merely a personal interest of the applicant. Conversely, the third party submitted that, if it was held that the applicant's concerns were a matter of public interest, then similarly the concerns expressed by the third party in objecting to disclosure ought to be characterised as matters relating to the public interest.

24. While I have considerable sympathy for the position of the applicant, I consider that the matters set out in subparagraph 22(a) above can only be properly characterised as a personal interest of the applicant, rather than a genuine public interest consideration which could afford a legitimate basis for a finding that disclosure of the matter in issue would, on balance, be in the public interest.

25. I note that in *Re Graham and Frankston Community Hospital* (1986) 1 VAR 255, Rowlands J (President) of the Victorian Administrative Appeals Tribunal, in considering the



application of the public interest balancing test in s.50(4) of the *Freedom of Information Act 1982* Vic said (at p.257) that the applicant had a continuing and legitimate concern in the welfare of her son, and that this was a public interest consideration favouring disclosure of the medical report in issue in that case. However, those remarks must be understood in the context of the facts of that case, in which the applicant's 17 year old son had sustained severe brain damage in a motor vehicle accident. I consider that there was, in that case, a legitimate public interest in the applicant obtaining access to medical information concerning her son that would allow her to continue to monitor her son's welfare with respect to his health and continued medical treatment. That case was materially different, on several counts, from the present case.

26. I note, too, that s.6 of the FOI Act cannot afford any assistance to the applicant, with respect to the application of the public interest balancing test in s.44(1), because the matter in issue does not relate to the personal affairs of the applicant.
27. With respect to the matters referred to in subparagraph 22(b) above, I accept that there is a legitimate public interest in the accountability of public hospitals for the provision of medical services in accordance with proper professional standards, and for timely and cost-effective service delivery. This was recognised by Rowlands J in *Re Graham* where he said (at pp.257-258):

*The public has a legitimate and continuing interest in the extent and capacity of hospitals ... to provide proper and adequate medical care for [the applicant's son] and others. ... The nature of a hospital and medical treatment is such that information concerning treatment regimes is peculiarly within the knowledge of the hospital rather than, in any detail, within the knowledge of the patient or the patient's family. While a hospital has an interest in protecting its reputation and assets which may encourage it not to provide voluntarily all the information available to it concerning patient treatment there is a public interest in balancing the state of knowledge between such an institution and properly interested people.*

*It is impossible to ignore the vital role hospitals play in human affairs, the desirability of high performance within them and the substantial funds they receive directly and indirectly from the public purse in considering the competing public interest criteria.*

28. If one were considering, in the absence of any competing considerations, the public interest in accountability of public hospitals for the provision of medical services, one could argue that it favoured the disclosure of any information that would enhance accountability - whether it disclosed performance that was good, bad or indifferent. However, when one attempts to apply the public interest in accountability of public hospitals for the provision of medical services, as a consideration favouring disclosure of the medical records of a particular individual (other than the applicant for access), there is an immediate collision with the public interest in protecting the privacy and confidentiality of an individual's medical records. In my opinion, the former would not ordinarily outweigh the latter unless there were a particularly strong public interest in accountability to be served by disclosure, for example, by exposing unsatisfactory or negligent performance and enabling remedial and/or compensatory action to be taken.

29. If disclosure of a deceased's medical records would provide information to support the existence of a proper basis for complaint to the Health Rights Commission, or the Medical Board of Queensland, concerning medical treatment of the deceased person, disclosure to a close relative, or executor, in the interests of accountability might outweigh the public interest in protecting the privacy of the deceased's medical records. Similarly, applying the principles which I stated in *Re Willsford and Brisbane City Council* (Information Commissioner Qld, Decision No. 96017, 27 August 1996, unreported) at paragraphs 16-18, if an executor wishing to sue on behalf of the estate of a deceased, or a dependent of the deceased wishing to pursue an action for damages for wrongful death, could demonstrate a reasonable basis for seeking to pursue the remedy, and disclosure of the deceased's medical records would assist the pursuit of the remedy (or the evaluation of whether a remedy is available, or worth pursuing), this could constitute a public interest consideration favouring disclosure which might outweigh the public interest in protecting the privacy of the deceased's medical records.
30. However, there is nothing evident in the medical records in issue the disclosure of which might further public interest considerations of that kind. The applicant appears to be saying, in paragraphs 10 and 12 of her submission dated 19 February 1996, that she wants to know whether, as a result of her daughter's admissions to Cairns Base Hospital prior to the final admission, her daughter contracted the infection that ultimately caused her death. That might be considered improbable given that the deceased's third and fourth admissions to the Cairns Base Hospital were approximately 14 months prior to her final admission. Assuming the possibility, the applicant has not indicated how she proposed to obtain assistance in interpreting the medical records to satisfy her concerns, given the inherent improbability of the medical charts containing a record of the presence of infection that was left untreated. In any event, I am satisfied, from my examination of the medical records in issue, that they contain no information which would assist the applicant in respect of her stated concerns. I am also satisfied that they contain no information the disclosure of which would further the public interest in accountability of the Cairns Base Hospital, for the provision of medical services in accordance with proper professional standards, to such an extent as to outweigh the public interest in protecting the privacy of the deceased's medical records.
31. I am not satisfied of the existence of any public interest considerations favouring disclosure of the matter in issue which are of sufficient weight to justify a finding that disclosure of the matter in issue would, on balance, be in the public interest. I find that the matter in issue is exempt matter under s.44(1) of the FOI Act.

### **Decision**

32. I set aside the decision under review, being the decision which the respondent is deemed to have made, in accordance with s.79(1) of the FOI Act, refusing access to the documents requested in the applicant's FOI access application dated 21 June 1995.
33. In substitution for it, I decide that the documents to which the applicant still seeks access comprise exempt matter under s.44(1) of the FOI Act.