



Decision and Reasons for Decision

Citation:	<i>3ZA9CH and Cairns and Hinterland Hospital and Health Service [2017] QICmr 51 (26 October 2017)</i>
Application Number:	313131
Applicant:	3ZA9CH
Respondent:	Cairns and Hinterland Hospital and Health Service
Decision Date:	26 October 2017
Catchwords:	<p>ADMINISTRATIVE LAW – INFORMATION PRIVACY ACT – REFUSAL OF ACCESS – an agency may refuse access to a document of an agency in the same way and to the same extent the agency could refuse access to the document under section 47 of the <i>Right to Information Act 2009</i> (Qld) were the document to be the subject of an access application under that Act – section 67(1) of the <i>Information Privacy Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW – RIGHT TO INFORMATION ACT – REFUSAL OF ACCESS – HEALTHCARE INFORMATION – applicant sought access to a report about him by a mental health service – whether report comprises the applicant’s healthcare information – whether disclosure of the report might be prejudicial to the physical or mental health or wellbeing of the applicant – whether disclosure of the report is contrary to the applicant’s best interests under section 47(3)(d) and section 51 of the <i>Right to Information Act 2009</i> (Qld)</p>

REASONS FOR DECISION

Summary

1. The applicant was a client of the respondent’s mental health service for a period of time.
2. During 2016, the respondent (**Health Service**) became concerned about the nature of the applicant’s interactions with a mental health clinician who was treating him. The applicant was referred to the Community Forensic Outreach Service (a division of Queensland Forensic Mental Health Service (FNQ)) for assessment. Following an interview with the applicant, a report was prepared (**Forensic Report**).
3. In late 2016 and early 2017, the applicant made multiple access applications to the Health Service under the *Information Privacy Act 2009* (Qld) (**IP Act**) seeking access to a wide range of documents concerning his treatment by the Health Service and his interactions with the Health Service. By application dated 16 October 2016, he applied

for access to a number of documents, including “*all records and notes internal and external regarding myself from Mental Health including ACT, DD, ATODS, Forensics, Clinical Review Project 8/7/16 – 16/10/16*”. The Forensic Report was captured by the terms of this application.

4. The Health Service failed to decide the application within the requisite timeframe. By letter dated 15 December 2016, the Health Service advised the applicant that it was deemed to have refused access to the requested documents, and that the applicant was entitled to apply to the Office of the Information Commissioner (**OIC**) for external review of the Health Service’s deemed refusal. The applicant lodged his external review application on 18 December 2016.
5. OIC sought the Health Service’s views on release of the Forensic Report. The Health Service objected to its disclosure on the basis that the Forensic Report comprised the applicant’s healthcare information, and its disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant. It also claimed that the Forensic Report comprised exempt matter under schedule 3, section 10(1)(c) and (d) of the *Right to Information Act 2009* (Qld) (**RTI Act**).¹
6. Having considered the submissions of both parties, I am satisfied that the Forensic Report comprises the applicant’s healthcare information and that there is a real and tangible possibility that its disclosure might prejudice the applicant’s mental health or wellbeing. Accordingly, access to the Forensic Report may be refused under section 67(1) of the IP Act and sections 47(3)(d) and 51 of the RTI Act. Given my finding in that regard, there is no need to consider the Health’s Service’s alternate claims for exemption under schedule 3, section 10(1)(c) and (d) of the RTI Act.

Background

7. Significant procedural steps taken during the external review are set out in the Appendix to this decision.

Reviewable decision

8. The decision under review is the Health Service’s deemed refusal of access dated 15 December 2016.

Evidence considered

9. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).

Information in issue

10. The Information in issue comprises the 12 page Forensic Report dated 28 July 2016 and signed by the author of the Report on 3 August 2016.²

Relevant law

11. Under the IP Act, an individual has a right to be given access to documents of an agency to the extent those documents contain the individual’s personal information. However,

¹ Information that could reasonably be expected to endanger a person’s life or physical safety; or result in a person being subjected to a serious act of harassment or intimidation.

² In my letter to the applicant dated 22 August 2017, I confirmed that the only information in issue in this review to which he wished to continue to pursue access was the Forensic Report.

this right is subject to other provisions of the IP Act and RTI Act, including the grounds on which an agency may refuse access to documents.³ An agency may refuse access to a document under the RTI Act if:⁴

- the decision to refuse access is made by an appropriately qualified healthcare professional appointed by the agency
- the information comprises the applicant's relevant healthcare information; and
- disclosing the information might be prejudicial to the physical or mental health or wellbeing of the applicant.

12. A *healthcare professional* is a person who carries on, and is entitled to carry on, an occupation involving the provision of care for a person's physical or mental health or wellbeing, including, for example:⁵

- a doctor, including a psychiatrist
- a psychologist
- a social worker; or
- a registered nurse.

13. *Appropriately qualified* means having the qualifications and experience appropriate to assess relevant healthcare information in a document.⁶

14. *Relevant healthcare information* is healthcare information given by a healthcare professional.⁷

15. Section 77 of the RTI Act⁸ provides that, despite an agency refusing access to the healthcare information, the agency may direct that access to the information is to be given instead to an appropriately qualified healthcare professional nominated by the applicant and approved by the agency. The nominated and approved healthcare professional may decide whether or not to disclose all or part of the information to the applicant, as well as the way in which to disclose the information to the applicant.

16. Under section 105(1)(b) of the RTI Act,⁹ the Information Commissioner has the power to decide any matter in relation to an access application that could have been decided by an agency. Accordingly, I have the power, as an authorised delegate of the Information Commissioner, to make the same decision that an appropriately qualified healthcare professional appointed by the Health Service could have made under section 47(3)(d) and section 51 of the RTI Act.

Submissions of the Health Service

17. In support of its submission that access to the Forensic Report should be refused under section 47(3)(d) and section 51 of the RTI Act, the Health Service provided a letter from the Acting Clinical Director of the Health Service's Mental Health Senior Management Team.¹⁰ The A/Clinical Director stated that, in his opinion, the Forensic Report contained healthcare information that might be prejudicial to the applicant's physical or mental health or wellbeing, were it to be released to him. The A/Clinical Director referred to

³ Section 67(1) of the IP Act allows an agency to refuse access to documents on the grounds set out in section 47 of the RTI Act.

⁴ Section 50(5)(b) of the IP Act and sections 47(3)(d) and 51 of the RTI Act.

⁵ Schedule 5 of the IP Act.

⁶ Schedule 5 of the IP Act.

⁷ Schedule 5 of the IP Act.

⁸ Section 92 of the IP Act.

⁹ Section 118(1)(b) of the IP Act.

¹⁰ Letter dated 25 July 2017.

specific aspects of the applicant's mental health which he considered might be prejudiced by release of the Forensic Report, particularly, the applicant's suicidal ideation behaviours and his alcohol/substance addiction, and also noted recent concerning behaviour of the applicant that had been reported in the media that indicated that the applicant's state of mental health was unstable.

18. The A/Clinical Director stated that he was concerned about the applicant's ability to accept the information contained in the Forensic Report without provoking in him an unwanted response, namely, a deterioration in his state of mental health including to re-enliven or exacerbate his suicidal ideation behaviours, and engaging in episodes of harmful alcohol and substance abuse, with potentially serious physical and mental health consequences.
19. The A/Clinical Director also stated that, in his opinion, it would not be appropriate to consider releasing the Forensic Report to the applicant's nominated healthcare provider under section 77 of the RTI Act because when that had occurred previously (in respect of other of the applicant's healthcare information), such information was provided directly to the applicant by his psychiatrist without any contact with the Health Service to discuss a plan to release the information under appropriate therapeutic conditions. Later in the review, the Health Service re-iterated its objection to this indirect form of release of the applicant's healthcare information, submitting that given what had happened previously, it did not consider it would be appropriate or prudent to release the Forensic Report through a healthcare professional nominated by the applicant.¹¹

Submissions of the applicant

20. By letter dated 27 July 2017, OIC advised the applicant of the information provided by the Health Service in support of its position, and conveyed to the applicant the preliminary view that access to the Forensic Report may be refused under section 47(3)(d) and section 51 of the RTI Act. The operation of section 51 was explained to the applicant who was invited to provide submissions in response. The applicant did not coherently respond to the submissions of the Health Service in any of the many emails he subsequently sent to OIC, nor did he attempt to address the requirements of section 51. He simply continued to demand access to the Forensic Report. The thrust of his emails may be summarised as follows:
 - he believes the Forensic Report contains evidence of the Health Service's mistreatment of him
 - the Health Service is covering up their negligent behaviour by refusing to give him access to the Report
 - he wishes to prosecute the Health Service for the way they have treated him and the Forensic Report is 'crucial evidence' which he is 'desperate' to obtain
 - his complaints about the Health Service triggered the Forensic Report
 - the Forensic Report was written following a lengthy interview with him and he has a right to see it because it is his document
 - he is entitled to justice
 - his health interests would be best served by closure of his dealings with the Health Service, which means disclosure of the Forensic Report
 - he is angry with the Health Service and they have 'wronged [him] huge time'; and
 - OIC does not know the extent to which the Health Service has wronged him.

¹¹ Letter dated 12 September 2017.

21. The basis for the applicant's belief that the Health Service has 'wronged him' is not entirely clear from his emails.

Findings

Does the Forensic Report comprise the applicant's relevant healthcare information?

22. Yes. I am satisfied that the Forensic Report contains the applicant's relevant healthcare information. It contains information about the applicant's state of mental health provided by a social worker from the Community Forensic Outreach Service who interviewed the applicant on 4 May 2016.

Might disclosing the Forensic Report prejudice the applicant's physical or mental health or wellbeing?

23. Yes.
24. The prejudice contemplated in this context is whether there is a real and tangible possibility, as distinct from a fanciful, remote or far-fetched possibility, of prejudice to the physical or mental health or wellbeing of the applicant.¹²
25. Having considered the information contained in the Forensic Report, and relying upon the submission and professional medical opinion provided by the A/Clinical Director of the Health Service's Mental Health Senior Management Team (as set out above), I am satisfied that there is a real and tangible possibility that disclosure of the Forensic Report might prejudice the applicant's physical or mental health or wellbeing.
26. I acknowledge that the applicant is unhappy with the treatment he received from the Health Service and that he believes the Forensic Report will corroborate his view that the Health Service has 'wronged him'. As noted above, the basis for his concerns about his treatment by the Health Service is not clear. However, in any event, it is necessary to balance those concerns against the professional opinion of a psychiatrist who considers there is a real and tangible possibility that release of the Forensic Report might prejudice the applicant's physical or mental health or wellbeing. Having reviewed the Forensic Report, I am unable to identify anything within it that would support the applicant's contention that the Health Service is attempting to cover up inadequacies in its treatment of him by objecting to its disclosure.
27. As noted, I sought the Health Service's views regarding whether or not they considered that the Health Report could be released to the applicant's nominated healthcare professional under section 77 of the RTI Act. The Health Service objected to this course of action for the reasons stated. I accept the importance of disclosing sensitive mental health information under appropriate therapeutic conditions. As there can be no certainty of this occurring were the Forensic Report to be released to the applicant's nominated healthcare professional (section 77 provides that the way in which healthcare information is disclosed to an applicant is the decision of the nominated healthcare professional), I decline to exercise the discretion contained in section 77 of the RTI Act.

¹² This meaning of the term "might be prejudicial" was adopted by the Commonwealth Administrative Appeals Tribunal for the purposes of a similar provision in the *Freedom of Information Act 1982* (Cth) in *Re K and Director-General of Social Security* (1984) 6 ALD 354 at 356-7 and endorsed by the Information Commissioner in *S and Medical Board of Queensland* (1994) 2 QAR 249 when considering section 44(3) of the repealed *Freedom of Information Act 1992* (FOI Act). Section 51(2) of the RTI Act is the equivalent provision to section 44(3) of the repealed FOI Act. As this section also contains the phrase "might be prejudicial", this interpretation is still relevant.

DECISION

28. I vary the Health Service's deemed refusal of access to the Forensic Report by finding that access to the Forensic Report may be refused under section 67(1) of the IP Act and sections 47(3)(d) and 51 of the RTI Act. I am satisfied that the Forensic Report comprises the applicant's relevant healthcare information and that its disclosure would, on balance, be contrary to the public interest because it might be prejudicial to the physical or mental health or wellbeing of the applicant.
29. I have made this decision as a delegate of the Information Commissioner under section 139 of the IP Act.

J Mead
Right to Information Commissioner

Date: 26 October 2017

APPENDIX

Significant procedural steps

Date	Event
18 December 2016	OIC received the external review application.
19 January 2017	OIC advised the applicant and the Health Service that it had accepted the external review application.
29 March 2017	Health Service advised that it had located a copy of the Forensic Report and that it responded to the terms of the applicant's access application.
20 April 2017	Health Service advised that it objected to disclosure of the Forensic Report under section 47(3)(d) and section 51 of the RTI Act, and under schedule 3, section 10(1)(d) of the RTI Act.
22 May 2017	OIC requested that the Health Service provide submissions in support of its objection to disclosure of the Forensic Report. OIC asked the Health Service to advise whether it would agree to release of the Forensic Report under section 77 of the RTI Act.
30 May 2017	Health Service advised that it also objected to disclosure of the Forensic Report under schedule 3, section 10(1)(c) of the RTI Act.
31 May 2017	OIC advised the applicant under section 107 of the IP Act that OIC would process only that part of his application that requested access to the Forensic Report and the contents of his medical records between 8/7/16 and 16/10/16.
1 June 2017	OIC requested that the Health Service provide a statement from a healthcare professional in support of the application of section 51 of the RTI Act to the Forensic Report.
7 June 2017	OIC requested that the Health Service provide copies of the applicant's medical records between 8/7/16 and 16/10/16.
7 July 2017	Health Service requested an extension of time due to staff absences.
21 July 2017	Health Service provided information in support of its objection to disclosure of all responsive information.
24 July 2017	OIC requested that the Health Service provide copies of the responsive medical records, as previously requested, and a statement from an appropriate healthcare professional in support of the application of section 51 of the RTI Act to all responsive information.
25 July 2017	Health Service provided a copy of the applicant's medical records between 8/7/16 and 16/10/16.
25 July 2017	Health Service provided a letter from the A/Clinical Director of the Mental Health Senior Management Team in support of the application of section 51 of the RTI Act to all responsive information.

Date	Event
27 July 2017	OIC conveyed its preliminary view to the applicant that access to the responsive information could be refused under section 51 of the RTI Act and invited the applicant to provide submissions by 25 August 2017.
31 July 2017	Applicant requested access to the Forensic Report.
16 August 2017	Applicant sent six emails requesting access to the Forensic Report.
22 August 2017	OIC advised the applicant that OIC would proceed on the basis that he wished to pursue access only to the Forensic Report unless he advised to the contrary by 25 August 2017.
26 August 2017	Applicant requested access to the Forensic Report.
5 September 2017	Applicant requested access to the Forensic Report.
12 September 2017	OIC confirmed to the applicant that the only information in issue consisted of the Forensic Report and that OIC would prepare a decision regarding access.
12 September 2017	Health Service confirmed that it objected to disclosure of the Forensic Report to a health professional nominated by the applicant under section 77 of the RTI Act.
Various dates between January 2017 and October 2017	Applicant sent multiple emails requesting access to the Forensic Report.