



Decision and Reasons for Decision

Citation:	<i>O2JA2P and Cairns and Hinterland Hospital and Health Service [2019] QICmr 25 (28 June 2019)</i>
Application Number:	314251
Applicant:	O2JA2P
Respondent:	Cairns and Hinterland Hospital and Health Service
Decision Date:	28 June 2019
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - HEALTHCARE INFORMATION - applicant sought access to records about applicant's physical and mental health held by the respondent - whether disclosure of the records might be prejudicial to the physical or mental health or wellbeing of the applicant - whether disclosure of the records is contrary to the applicant's best interests under section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and section 47(3)(d) and section 51 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Cairns and Hinterland Hospital and Health Service (**Health Service**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to 'all records pertaining to my physical and mental health' (**Health Record**).¹
2. The Health Service failed to decide the application within the requisite timeframe. The Health Service advised the applicant that it was deemed to have refused access to the Health Record, 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.² The applicant lodged an external review application on 3 November 2018.
3. OIC sought the Health Service's views on release of the applicant's Health Record. The Health Service objected to disclosure on the basis that the Health Record comprised the applicant's healthcare information, and its disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant.
4. Having considered the Health Record, and the submissions made by the applicant and the Health Service, I am satisfied that the Health Record comprises the applicant's relevant healthcare information, and that there is a real and tangible possibility that its disclosure might prejudice the applicant's physical or mental health or wellbeing.

¹ Access application dated 4 September 2018.

² By notice dated 30 October 2018.

5. Accordingly, I find that access to the Health Record may be refused under section 67(1) of the IP Act and sections 47(3)(d) and 51 of the *Right to Information Act 2009* (Qld) (RTI Act).

Background

6. Significant procedural steps relating to the application and external review application are set out in the appendix to this decision.

Reviewable decision

7. The decision under review is the Health Service's deemed refusal of access dated 30 October 2018.

Evidence considered

8. The evidence, submissions, legislation, and other material I have considered in reaching my decision are disclosed in these reasons, including footnotes and appendix.

Preliminary issue

9. In the external review application, the applicant stated that they³ were an employee of the Health Service for a number of years and had experienced a lack of response to requests made internally. In this regard, the applicant stated that a *'previous application many years ago took a lot longer than it should have and the material provided was scant'*.⁴
10. There is no material before me to suggest that these previous processes are relevant to the present access application. In terms of the present matter, the Health Service attributes its failure to make a decision within the time frame required by the IP Act to the large number of documents in the Health Record, and I note that the Health Service promptly provided the applicant with a notice advising the applicant of the deemed decision and entitlement to seek external review.

Information in issue

11. The information in issue is the applicant's Health Record. It consists of the Health Service's records about the applicant's health over a period of about 25 years.
12. The information provided to OIC by the Health Service included a small amount of information concerning the applicant's past employment with the Health Service. As this information does not comprise information about the applicant's health, it falls outside the scope of the access application and has not been considered in this review.

Issue for determination

13. The issue for determination in this review is whether access to the applicant's Health Record may be refused under section 47(3)(d) of the RTI Act on the ground that its disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant under section 51 of the RTI Act.

³ So as to avoid inclusion of information that could possibly connect the applicant with sensitive personal information, this decision uses 'they' and 'their' rather than gendered pronouns for the applicant.

⁴ External review application dated 3 November 2018.

Relevant law

14. Under the IP Act an applicant has a right to be given access to documents of an agency to the extent those documents contain the individual's personal information. However, this right is subject to other provisions of the IP and RTI Act, including the grounds on which an agency may refuse access to documents. Under section 67(1) of the IP Act, an agency may refuse access to a document in the same way and to the same extent the agency could refuse access under section 47 of the RTI Act, had the document been the subject of an access application under the RTI Act. Accordingly, an 'appropriately qualified healthcare professional' appointed by the agency⁵ may decide to refuse access to a document under the IP Act if:⁶
 - 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.
15. 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:⁷
 - a doctor, including a psychiatrist
 - a psychologist
 - a social worker; or
 - a registered nurse.
16. *Appropriately qualified* means having the qualifications and experience appropriate to assess relevant healthcare information in a document.⁸
17. *Relevant healthcare information* is healthcare information given by a healthcare professional.⁹
18. Section 92 of the IP Act 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.
19. Under section 118(1)(b) of the IP Act, 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 sections 47(3)(d) and 51 of the RTI Act and under section 92(2) of the IP Act.

⁵ Section 50(5)(b) of the IP Act.

⁶ Sections 47(3)(d) and 51 of the RTI Act.

⁷ See definition in schedule 5 of the IP Act.

⁸ See definition in schedule 5 of the IP Act.

⁹ See definition in schedule 5 of the IP Act.

Submissions of the Health Service

20. In support of its submission that access to the applicant's Health Record should be refused under sections 47(3)(d) and 51 of the RTI Act,¹⁰ the Health Service advised¹¹ that the applicant's Health Record had been provided to the Clinical Director of the Health Service's Integrated Mental Health Service Health (**Clinical Director**) who had formed the view that disclosing it directly to the applicant may be prejudicial to the applicant's physical or mental health or wellbeing. The Health Service noted that the Health Record contains information about medical diagnoses and treatment, and significant life events arising or considered in the course of the diagnoses and treatment. Accordingly, the Clinical Director considered that providing the Health Record to an appropriately qualified health professional nominated by the applicant and approved by the Health Service would be in the applicant's best interests, as it would provide the applicant with the opportunity to:¹²
- *discuss the contents of the documents in a therapeutic and supportive environment; and*
 - *ask questions about information the applicant may find difficult to read given their complex post-traumatic stress disorder.*

Submissions of the applicant

21. During the external review, in response to a preliminary view that access to the Health Record may be refused, however access could instead be given to an appropriately qualified healthcare professional nominated by the applicant and approved by the agency, the applicant submitted:¹³

The reason you have stated is in the public interest and for concerns for my mental and physical health. I still have no clear idea why that is a risk, or what leads you to make that preliminary determination.

22. The applicant declined to nominate a health professional to whom the Health Record could be provided under section 92 of the IP Act, stating that:¹⁴

... you have referred me to another psychiatrist to be approved by the psychiatrist in charge of the district I am seeking to view the records of. My health records are not visible to me unless I have the person in charge of the people who wrote them decide upon their fellow psychiatrist to decide what I am privy to.

23. Instead, the applicant again requested direct access to the Health Record and offered:¹⁵

the assurance that I will seek assistance if my health is impacted in any way through accessing the information that has led to my concerns and the need to amend [it] in the first instance.

Findings

Does the Health Record comprise the applicant's relevant healthcare information?

24. Yes.
25. Under the IP Act, *relevant healthcare information* is healthcare information given by a

¹⁰ Letter from Health Service to OIC dated 14 December 2018.

¹¹ Letter from Health Service to OIC dated 4 February 2019.

¹² Letter from Health Service to OIC dated 4 February 2019.

¹³ Email from the applicant to OIC dated 26 April 2019.

¹⁴ Email from the applicant to OIC dated 26 April 2019.

¹⁵ Email from the applicant to OIC dated 26 April 2019.

healthcare professional.¹⁶ The Health Record contains information about the applicant's physical and mental state, diagnoses and treatments, and was prepared by medical staff of the Health Service, including a psychiatrist. Accordingly, I am satisfied that this element is established.

Might disclosing the Health Record prejudice the applicant's physical or mental health or wellbeing?

26. Yes.
27. In this context, the prejudice to the applicant's physical or mental health or wellbeing must be a real and tangible possibility, as opposed to a fanciful, remote or far-fetched possibility.¹⁷
28. Having carefully examined the submissions provided by the applicant and the Health Service, and relying upon the submission and professional medical opinion provided by the Clinical Director, as set out at paragraph 20 above, I am satisfied that there is a real and tangible possibility that disclosure of the Health Record might be prejudicial to the applicant's physical or mental health or wellbeing.
29. I acknowledge the applicant's submission that *'I still have no clear idea why that is a risk, or what leads you to make that ... determination'*. Given the applicant's medical treatment by the Health Service has extended over many years, the Health Record covers a period of about 25 years. The applicant's knowledge of their medical diagnoses, treatments and significant life events during this period may give them some understanding of information within the Health Record. In turn, this understanding may provide the applicant with some idea of the Health Service's concerns regarding direct, unsupported disclosure of the Health Record. Beyond this, I am unable to provide greater detail regarding the information I have considered, and why it has satisfied me that disclosure of the Health Record might be prejudicial to the applicant's health or wellbeing. I am unable to do so, because I am satisfied that to provide greater detail in this decision would involve including information of the same nature as the information which is the subject of the Health Service's concerns, which I am satisfied might be prejudicial to the applicant's health or wellbeing.

Conclusion – can the applicant be refused access to the Health Record?

30. Having carefully considered all material before me, for the reasons set out above, I am satisfied that the Health Record comprises the applicant's relevant healthcare information and that its disclosure would, on balance, be contrary to the public interest because its disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant. Consequently, I consider that the Health Record may be refused under section 47(3)(d) of the RTI Act.

Can a healthcare professional be given access to the Health Record instead?

31. I note the applicant's proposal to be given access to the Health Record on the basis of *'the assurance that I will seek assistance if my health is impacted in any way through*

¹⁶ As noted above at paragraph [15], the definition of *healthcare professional* in schedule 5 of the IP Act includes psychiatrists and psychologists.

¹⁷ 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* (Qld) (**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 remains relevant.

accessing the information'. I acknowledge the applicant's intention in this regard. However, section 92 of the IP Act contains a specific provision which applies if, as here, access may be refused under section 47(3)(d) of the RTI Act. Section 92 of the IP Act provides that, in such circumstances, a direction may be made to give access to an appropriately qualified healthcare professional nominated by the applicant and approved by the agency. The nominated and approved healthcare professional may then 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. Given the IP Act establishes this specific process, and also noting the absence of any means to ensure that, if the applicant's health was impacted, they did in fact seek assistance in accordance with their assurance, I am unable to entertain the alternative course proposed by the applicant.

32. I turn now to consider whether I should make a direction under section 92(2) of the IP Act. Under this provision, the appropriately qualified healthcare professional to whom healthcare information may be released is nominated by the applicant, and approved by the agency. In this external review, however, the applicant has declined to nominate an appropriately qualified healthcare professional. I acknowledge that, in the absence of a nomination by the applicant, a direction under section 92(2) can be of no practical effect.
33. Nevertheless, I also note the Clinical Director's submission that it would be in the applicant's best interests for the Health Record to be provided to an appropriately qualified health professional, as this would provide the applicant with the opportunity to discuss the Health Record in a therapeutic and supportive environment, and ask questions about information that may be challenging for the applicant to read, given their post-traumatic stress disorder. Relying on this submission, and noting that the applicant may, after receiving this decision, still elect to nominate an appropriately qualified healthcare professional who can then be approved by the Health Service's principal officer or appointed healthcare professional,¹⁸ I consider it appropriate to make a direction allowing for the Health Record to be given to an appropriately qualified healthcare professional in accordance with section 92 of the IP Act.

DECISION

34. I vary the Health Service's deemed refusal of access to the Health Record and find that access to it may be refused under section 67(1) of the IP Act and sections 47(3)(d) and 51 of the RTI Act.
35. I direct, under section 92(2) of the IP Act, that the Health Service give the Health Record to an appropriately qualified healthcare professional nominated by the applicant to the Health Service and approved by the Health Service's principal officer or appointed healthcare professional.
36. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

A Rickard
Assistant Information Commissioner

Date: 28 June 2019

¹⁸ In accordance with section 50(5) of the IP Act.

APPENDIX

Significant procedural steps

Date	Event
3 November 2018	OIC received the external review application.
22 November 2018	OIC advised the applicant and the Health Service that it had accepted the external review application. OIC requested that the Health Service provide a copy of the documents responding to the access application, together with its submission on access.
14 December 2018	The Health Service provided OIC with the Health Record and a submission contending that a decision to release this information should be made by a qualified healthcare professional.
19 December 2018	OIC requested that the Health Service provide a submission on access including, in respect of any information comprising the applicant's healthcare information, the view of an appropriately qualified healthcare professional.
4 February 2019	OIC received a submission from the Health Service, setting out the view of the Clinical Director of the Health Service's Integrated Mental Health Service that access to the Health Record should be refused under section 47(3)(d) of the RTI Act, and recommending that this information instead be released to a health professional nominated by the applicant and approved by the Health Service.
12 April 2019	OIC conveyed a preliminary view to the applicant that access to the Health Record may be refused under section 47(3)(d) of the RTI Act, and advising that it could instead be released to a health professional nominated by the applicant and approved by the Health Service.
26 April 2019	OIC received an email from the applicant rejecting the preliminary view and declining to nominate a health professional to whom the Health Record may be released.
3 June 2019	OIC advised the applicant that, having carefully considered their submissions, OIC's view remained the same and the next step would be a formal decision.