



## Decision and Reasons for Decision

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**Application Number:** 210914

**Applicant:** Mr E Novak

**Respondent:** Department of Health

**Decision Date:** 30 June 2010

**Catchwords:** **FREEDOM OF INFORMATION – section 44(1) of the *Freedom of Information Act 1992* – matter affecting personal affairs – whether disclosure of the matter in issue would disclose information concerning the personal affairs of a person, whether living or dead – whether disclosure of the matter in issue, would, on balance, be in the public interest – close family member seeking access to the patient care records of a deceased person**

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## REASONS FOR DECISION

### Summary

1. The applicant applied under the *Freedom of Information Act 1992 (Qld)* (**FOI Act**) to the Department of Health (commonly known as Queensland Health) (**QH**) for access to documents relating to his deceased father (the **Deceased**).
2. For the reasons set out below, I find that the matter in issue does not qualify for exemption from disclosure under section 44(1) of the FOI Act and should be released to the applicant.

### Background

3. By application dated 19 May 2009 (**FOI Application**), the applicant requested access to various documents held by the Princess Alexandra Hospital, Redland Hospital and Redland Residential Care (**RRC**) relating to the Deceased.
4. By letters dated 3 July 2009 (**Initial Decisions**), QH issued two independent decisions in response to the FOI Application advising that:
  - it had located various documents which were relevant to the FOI Application
  - it had decided to refuse access to all of the relevant documents in their entirety on the basis that they were exempt from disclosure under section 44(1) of the FOI Act.
5. By letters dated 12 July 2009, the applicant requested internal review of the Initial Decisions.
6. By letter dated 5 August 2009 (**Internal Review Decision**), QH issued an internal review decision which dealt with both Initial Decisions and advised the applicant that it had decided to affirm the Initial Decisions in so far as they related to information about the Deceased.
7. On 12 August 2009, the applicant's representative applied to the Office of the Information Commissioner (**OIC**) on the applicant's behalf for external review of the Internal Review Decision.

### Decision under review

8. The decision under review is the Internal Review Decision referred to at paragraph 6 above.

### Steps taken in the external review process

9. By email on 17 August 2009, the OIC asked QH to provide copies of a number of documents relevant to the review. By letter dated 17 August 2009, QH provided the requested documents.
10. On 18 August 2009, a staff member of the OIC discussed matters relevant to the review with the applicant's representative. On 24 August 2009, the OIC received a letter from the applicant's representative and various attachments which the applicant considered were relevant to the review.

11. By letter dated 28 August 2009, the OIC advised QH that the external review application had been accepted and requested a copy of further documents relevant to the review, including the matter claimed to be exempt.
12. By letter dated 28 August 2009, the OIC advised the applicant's representative that the external review application had been accepted and invited the applicant to provide any further submissions in support of his case by 11 September 2009.
13. By letter dated 30 August 2009, the applicant provided submissions in support of his case.
14. On 30 September 2009 and 8 October 2009, a staff member of the OIC spoke with the applicant's representative by telephone in relation to the review.
15. By letter dated 8 October 2009, QH provided the OIC with a copy of the matter claimed to be exempt.
16. On 14 January 2010, a staff member of the OIC telephoned QH to request that further matter claimed to be exempt be forwarded to the OIC for consideration.
17. By letter dated 14 January 2010, QH provided the OIC with this information.
18. By letters dated 3 February 2010, I conveyed to QH and the applicant my preliminary view that:
  - a small part of the matter in issue (comprising certain information relating to third parties which is unrelated to the care provided to the Deceased) qualified for exemption from disclosure under section 44(1) of the FOI Act
  - the remainder of the matter in issue should be released to the applicant.

Both parties were invited to provide submissions in support of their case by 18 February 2010 if the preliminary view was not accepted.

19. By email on 16 February 2010, QH requested further time to provide submissions in response to my preliminary view.
20. By email on 17 February 2010, I advised QH that I had agreed to extend the time for it to provide submissions in response to the preliminary view until 16 March 2010.
21. On 18 February 2010, the applicant's representative advised the OIC that it had not received the preliminary view letter.
22. By email on 18 February 2010, a further copy of the preliminary view letter was sent to the applicant's representative. I agreed to allow the applicant's representative until 16 March 2010 to provide a response to the preliminary view.
23. By fax on 24 February 2010, the applicant's representative indicated that the applicant accepted the preliminary view in relation to the matter in issue which I considered was exempt from disclosure under section 44(1) of the FOI Act. This was confirmed on 25 February 2010 in a telephone conversation with the applicant's representative and in an email from the applicant's representative on 28 February 2010.
24. On 17 March 2010, QH requested an additional period of time to provide submissions in response to the preliminary view.

25. By email on 17 March 2010, I advised QH that I had agreed to extend the time for QH to respond to the preliminary view letter until 24 March 2010.
26. On 24 March 2010, QH requested a further extension of time to provide a response to the preliminary view letter. I agreed to grant QH a final extension of time until 25 March 2010.
27. By letter dated 25 March 2010, QH indicated that it did not accept the preliminary view and provided submissions in support of its case.
28. In making my decision in this matter, I have taken the following into consideration:
  - the applicant's FOI Application, internal review applications dated 12 July 2009 and external review application dated 12 August 2009
  - the Initial Decisions and Internal Review Decision
  - information provided by the applicant's representative by letters dated 24 August 2009, 30 August 2009, 24 February 2010 and 28 February 2010
  - file notes of telephone conversations between a staff member of the OIC and the applicant's representative dated 18 August 2009, 30 September 2009, 8 October 2009 and 25 February 2010
  - QH's submissions dated 25 March 2010
  - the matter in issue
  - the relevant provisions of the FOI Act
  - previous decisions of the Information Commissioner as identified below.

### **Matter in issue**

29. The matter in issue which is the subject of this decision (**Matter in Issue**) comprises patient care records<sup>1</sup> from the Princess Alexandra Hospital, Redland Hospital and RRC which relate to the Deceased.
30. As noted above, both parties accept the preliminary view that certain information relating to third parties qualifies for exemption from disclosure under section 44(1) of the FOI Act. Accordingly, this information does not form part of the Matter in Issue and will not be considered in this decision.<sup>2</sup>

### **The applicant's submissions**

31. I have summarised the applicant's relevant submissions in the following manner:
  - The applicant held an Enduring Power of Attorney (**EPOA**) for the Deceased and believes he is entitled to information surrounding the Deceased's welfare and treatment whilst in the care of QH.
  - The matter surrounding the Deceased's fall, his subsequent deterioration in health, his treatment in various QH facilities and his eventual death were the subject of an open and frank expose on the ABC program, Four Corners.

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<sup>1</sup> Comprising approximately 1665 folios.

<sup>2</sup> I have provided QH with a copy of the Matter in Issue marked up in accordance with this decision which highlights the information which I consider is exempt from disclosure under section 44(1) of the FOI Act.

- It is in the public interest to release all the information that is available so that the family and the general public understand the full nature of the treatment of the Deceased whilst in the care of QH.
- There are considerable differences between what was decided (under the EPOA) and what actually occurred including that, instructions which were to be written into the progress notes, were not followed. Without access to these notes, along with other information, it is impossible for the applicant, his family and the public at large to know what happened to the Deceased.
- The Commonwealth Department of Health and Ageing (**DHA**) investigated the circumstances surrounding the deceased's fall and although there was no evidence found to support a breach of the legislation by Redland Residential Care, the investigation has been reopened.

### QH's submissions

32. By letter dated 25 March 2010, QH provided the following relevant submissions in support of its case:

*I concede that the applicant, by virtue of his status as holder of an EPOA and statutory health attorney in relation to the deceased, had direct knowledge of matters concerning the deceased's medical treatment, and that the privacy interest in relation to that particular type of information is somewhat reduced in the circumstances.*

*However, I submit that a critical distinction must be drawn between medical information of the type already known to the applicant through his involvement in decision-making regarding medical treatment, and non-medical information recording the details of the deceased's day-to-day activities, behaviour and interactions with other patients and staff. The matter in issue ... consists to a very large extent of such non-medical information ... the disclosure of which would not have been necessary in order for the applicant to fulfil his responsibilities as attorney, and which is neither necessary nor appropriate now.*

...

*While the public interest in preserving the deceased's right to privacy may well have been reduced in relation to the medical information recorded in the documents in issue, I submit that there is an extremely strong public interest in preserving the deceased's right to privacy and dignity in relation to such non-medical matters which is in no way diminished by the accountability/openness considerations identified as favouring disclosure.*

*As I have indicated above, [some of the Matter in Issue is] replete with references to particular incidents and behaviour, the disclosure of which I submit would be a completely unwarranted invasion of the deceased's privacy.*

...

*It is not simply whether there is a question of accountability to be served, but rather whether that accountability interest is sufficiently strong, and whether it is appropriately served by disclosure of the matter in issue.*

*I would argue that in the particular circumstances of the present case it does not meet either of those requirements, and that in the result, the considerations identified as favouring release are not sufficient to outweigh the deceased's privacy interest.*

*It is accepted that there is a public interest in the accountability of public hospitals for the provision of public sector health services. As you indicate, the applicant is dissatisfied with the level of care provided to the deceased, as evidenced by the lodgement of a complaint with the Commonwealth Department of Health and Ageing (DoHA).*

*The applicant did not require the documents in issue in order to assess whether to lodge a complaint, and the Department of Health and Ageing has full statutory rights of access to all relevant records held by Queensland Health (as does the relevant Queensland body to which complaints regarding medical treatment can be lodged, the Health Quality and Complaints Commission). Even if the applicant's concerns go further than previously investigated by the DoHA, and even if that agency may have reopened its investigation, either on its own initiative or at the urging of the applicant, disclosure of the documents in issue to the applicant is not necessary in order to permit that accountability mechanism to operate properly.*

*I further submit that the general public interests in promoting the open discussion of public affairs and in keeping the public informed of government operations are not sufficiently strong to warrant the disclosure of detailed highly personal and sensitive information of the type in issue in the present case.*

*In the result, I submit that the public interest in preserving the deceased's right to privacy and dignity remains paramount, and must continue to be respected.*

## Relevant law

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

### **44 Matter affecting personal affairs**

- (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.*

...

34. Section 44(1) therefore requires me to consider the following questions in relation to the Matter in Issue:

- Firstly, does the matter in issue concern the personal affairs of person/s (other than the applicant)? (**Personal Affairs Question**) If so, a public interest consideration favouring non-disclosure of the matter in issue is established.
- Secondly, are there public interest considerations favouring disclosure of the matter in issue which outweigh all public interest considerations favouring non-disclosure of the matter in issue? (**Public Interest Question**)

### **Personal Affairs Question**

35. In *Stewart and Department of Transport (Stewart)*<sup>3</sup> the Information Commissioner discussed in detail the meaning of the phrase 'personal affairs of a person' (and relevant variations) as it appears in the FOI Act. In particular, he said that information concerns the 'personal affairs of a person' if it concerns 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
- domestic responsibilities or financial obligations.

36. 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

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<sup>3</sup> (1993) 1 QAR 227. See in particular paragraphs 79 – 114.

to the proper characterisation of the information in question.

### **Public Interest Question**

37. The words 'public interest' are not specifically defined and generally refer to considerations affecting the good order and functioning of community and the well-being of citizens. In general, a public interest consideration is one which is common to all members of the community, or a substantial segment of them, and for their benefit. The public interest is usually treated as distinct from matters of purely private or personal interest. However, some recognised public interest considerations may apply for the benefit of individuals in a particular case.
38. As to what constitutes the public interest, Beazley J of the Federal Court of Australia stated:<sup>4</sup>

***The question of what constitutes the public interest is not a static or circumscribed notion. As was said in D v National Society for the Prevention of Cruelty to Children [1997] UKHL 1; (1978) AC 171 at 230, per Hailsham LJ "the categories of public interest are not closed...". See also Sankey v Whitlam per Stephen J at 60.***

[my emphasis]

39. In *Fox and Department of Police*,<sup>5</sup> the Information Commissioner indicated that:

*Because of the way that section 44(1) of the FOI Act is worded and structured, the mere finding that information concerns the personal affairs of a person other than the applicant for access must always tip the scales against disclosure of that information (to an extent that will vary from case to case according to the relative weight of the privacy interests attaching to the particular information in issue in the particular circumstances of any given case), and must decisively tip the scales if there are no public interest considerations which tell in favour of disclosure of the information in issue. It therefore becomes necessary to examine whether there are public interest considerations favouring disclosure, and if so, whether they outweigh all public interest considerations favouring non-disclosure.*

### **Findings**

40. I will now consider whether the requirements of section 44(1) of the FOI Act are satisfied in the circumstances.

### **Personal Affairs Question**

41. I am satisfied that the Matter in Issue clearly falls within the core meaning of the phrase 'personal affairs of a person' as it is information relating to an individual's health and personal care. Accordingly, the Matter in Issue is *prima facie* exempt from disclosure under section 44(1) of the FOI Act.

### **Public Interest Question**

42. I note the Information Commissioner's comments in *Summers and Cairns District Health Service*<sup>6</sup> (**Summers**) that:

- Under the terms of section 44(1) of the FOI Act, the mere finding that information

<sup>4</sup> *Australian Doctors' Fund Limited v Commonwealth of Australia* [1994] FCA 1053 at paragraph 34.

<sup>5</sup> (2001) 6 QAR 1 at paragraph 19.

<sup>6</sup> (1997) 3 QAR 479 at paragraph 20.

concerns the personal affairs of a person other than the applicant for access is enough to raise a public interest consideration in favour of non disclosure.

- The weight to be accorded to that public interest consideration will vary according to the nature of the information and the circumstances of each case.
- In the absence of identifiable public interest considerations favouring disclosure, the fact that information concerns another person's personal affairs will be determinative in favour of non disclosure.

43. Accordingly, I must consider whether the public interest considerations favouring disclosure of the Matter in Issue outweigh the public interest considerations favouring non disclosure of the Matter in Issue.

### **Protecting an individual's privacy**

44. While I acknowledge that a patient's care records often contain information of a very sensitive nature, the Information Commissioner has previously recognised that in certain circumstances the privacy interest of the relevant individual may be reduced.

45. In *Summers* the Information Commissioner recognised that the following points may be relevant in determining the extent to which the privacy interest in a person's medical records may be diminished:<sup>7</sup>

- evidence of involvement in care
- extent of knowledge of medical history/incident
- evidence of special dependence/relationship.

46. Having regard to the commentary in *Summers*, I am satisfied that the following points<sup>8</sup> are relevant in this case:

- The applicant is the Deceased's son and held an EPOA for his father.
- The applicant was in regular contact with his father's caregivers in relation to his father's care.
- The applicant was responsible for making critical decisions in respect of the Deceased's care pursuant to the EPOA on account of the Deceased's lack of capacity.
- It is clear from the above and from the content of the Matter in Issue that the applicant was closely involved in matters concerning the Deceased's care and had detailed knowledge of these matters.

47. Based on the above and my review of the Matter in Issue, I am satisfied that in the circumstances of this case, there is clear evidence of the applicant's:

- close involvement in the Deceased's care
- knowledge of issues related to the Deceased's care including his medical status and history
- special relationship with the Deceased (including the Deceased's dependence on the applicant on account of the Deceased's lack of capacity).

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<sup>7</sup> At paragraph 19.

<sup>8</sup> I note that section 87(3) of the FOI Act prevents me from revealing matter claimed to be exempt in this decision and accordingly, the matters set out in the following list are necessarily general in nature.



48. I have carefully considered QH's submission that:

- *'... a critical distinction must be drawn between medical information of the type already known to the applicant through his involvement in decision-making regarding medical treatment, and non-medical information recording the details of the deceased's day-to-day activities, behaviour and interactions with other patients and staff.'*
- The disclosure of non medical matter *'... would not have been necessary in order for the applicant to fulfil his responsibilities as attorney, and which is neither necessary nor appropriate now.'*
- *'While the public interest in preserving the deceased's right to privacy may well have been reduced in relation to the medical information recorded in the documents in issue, ... there is an extremely strong public interest in preserving the deceased's right to privacy and dignity in relation to such non-medical matters ...'*

49. In this respect and on the evidence before me, I am satisfied that:

- The Matter in Issue concerns records relating to the time the Deceased spent in the care of two public hospitals and RRC.
- The applicant specifically seeks the records relating to care given to his father, the Deceased.
- The evidence before me establishes that the applicant was:
  - aware of information which QH calls '*non-medical matter*' including many aspects of the Deceased's '*day-to-day activities, behaviour and interactions with other patients and staff*'; and
  - closely involved in decisions relating to his father's care.

50. On the basis of the matters set out above, I find that the public interest in protecting the Deceased's privacy interests in relation to the Matter in Issue is substantially diminished in the circumstances.

### **Accountability of government**

51. The applicant has concerns relating to:

- the timeliness and quality of care provided to his father, the Deceased
- differences between decisions made under the EPOA and the actual care provided to his father.

52. Specifically, the applicant submits that:

- There are considerable differences between what was decided (under the EPOA) and what actually occurred including that, instructions which were to be written into the progress notes, were not followed.
- Without access to these notes, along with other information, it is impossible for the applicant, his family and the public to know what happened to the Deceased.

53. While this Office has no jurisdiction to investigate the applicant's concerns, the applicant's submissions are relevant to the public interest consideration relating to government accountability.

54. QH submits that:

- *'It is accepted that there is a public interest in the accountability of public hospitals for the provision of public sector health services.'* However *'... [i]t is not simply whether there is a question of accountability to be served, but rather whether that accountability interest is sufficiently strong, and whether it is appropriately served by disclosure of the matter in issue.'*
- *'The applicant did not require the documents in issue in order to assess whether to lodge a complaint, and the [DHA] has full statutory rights of access to all relevant records held by [QH] (as does the relevant Queensland body to which complaints regarding medical treatment can be lodged, the Health Quality and Complaints Commission). Even if the applicant's concerns go further than previously investigated by the [DHA], and even if that agency may have reopened its investigation, either on its own initiative or at the urging of the applicant, disclosure of the documents in issue to the applicant is not necessary in order to permit that accountability mechanism to operate properly.'*

55. In *Summers*, the Information Commissioner said:<sup>9</sup>

27. *... 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*

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<sup>9</sup> At paragraphs 27 – 29.

*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. ...*
56. In an appropriate circumstance, I am satisfied that it may be in the public interest for close relatives of patients in care to be provided with adequate information to allow them to assess whether the level and standard of care provided to their family member is appropriate in the circumstances.
57. I agree with QH's submission that it is necessary to consider on the facts of each case whether the relevant accountability interest is sufficiently strong and whether it is appropriately served by disclosure of the matter in issue.
58. On the facts of this case, I note that the applicant:
- has raised specific concerns with the media and the relevant Commonwealth government department relating to:
    - the timeliness and quality of care provided to his father, the Deceased
    - differences between decisions made under the EPOA and the actual care provided to his father
  - remains dissatisfied with the level and quality of care provided to his father, the Deceased, whilst in the care of public sector entities.
59. On the information available to me and in the circumstances of this case, I am satisfied that:
- the applicant is the Deceased's son
  - the applicant was responsible for making critical decisions on behalf of the Deceased in relation to his care and treatment (pursuant to the EPOA)
  - the applicant, as the decision maker, would have relied heavily on the information provided by doctors and other health care professionals in order to discharge his responsibility under the EPOA, and also as the Deceased's son
  - the applicant believes there are considerable differences between what was decided under the EPOA and what actually occurred including that, instructions which were to be written into the progress notes, were not followed
  - without access to these notes, along with other information, it is impossible for the applicant, his family and the public at large to know what happened to the Deceased
  - the public interest in the accountability of public hospitals and entities such as RRC is significant as disclosure of the Matter in Issue will provide the applicant with an accurate and complete picture of relevant events and allow him to assess both:
    - the level and quality of care provided to his father (the Deceased) and
    - whether his concerns are warranted and may require further investigation.
60. I do not accept QH's submission that disclosure of the Matter in Issue to the applicant is not necessary in order to permit the accountability mechanism to operate properly.

In my view, disclosure of the Matter in Issue to the applicant directly furthers this interest and the fact that the relevant government department may be entitled to access the information by their own means, does not render this public interest any less compelling in these particular circumstances.

61. In summary, and for the reasons set out above, I find that the public interest in government accountability is particularly strong in the circumstances of this case and disclosure of the Matter in Issue to the applicant will further this public interest consideration.

### **Balancing the public interest considerations**

62. For the reasons set out above, I find that:

- The public interest in maintaining the Deceased's privacy is significantly reduced in the circumstances of this case given the applicant's:
  - close involvement in the Deceased's care (as his son and holder of a relevant EPOA)
  - knowledge of issues related to the Deceased's care including his medical status and history
  - special relationship with the Deceased (including the Deceased's dependence on the applicant on account of the Deceased's lack of capacity).
- The public interest in government accountability is particularly strong in the circumstances of this case.
- On balance and in the particular circumstances of this case, the public interest in enhancing the accountability of government is sufficiently strong to outweigh the Deceased's reduced privacy interest.
- Disclosure of the Matter in Issue is, on balance, in the public interest.

### **DECISION**

63. For the reasons set out above, I set aside the decision under review and find that the Matter in Issue does not qualify for exemption from disclosure under section 44(1) of the FOI Act.

64. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

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**F Henry**  
**Assistant Commissioner**

**Date: 30 June 2010**