



Decision and Reasons for Decision

Application Number: 220018

Applicant: Foster

Respondent: Department of Health

Decision Date: 27 September 2010

Catchwords: **RIGHT TO INFORMATION ACT – Grounds on which access may be refused - section 47 of the *Right to Information Act 2009* (Qld) – whether disclosure of the information would not be in the child’s best interests – whether disclosure of the information would, on balance, be contrary to the public interest under section 49 of the *Right to Information Act 2009* (Qld)**

RIGHT TO INFORMATION ACT – Onus – section 87 of the *Right to Information Act 2009* (Qld) – whether agency has established that the decision under review is justified

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REASONS FOR DECISION

Summary

1. The Applicant applied to the Department Health¹ (QH) to access his infant son's medical records.
2. In reviewing QH's decision to refuse access to all of the documents, the Information Commissioner set aside QH's decision finding that the agency should give access to the information in issue on the basis that disclosure would not, on balance be contrary to the public interest.

Background

3. Significant procedural steps are set out in the Appendix.

Reviewable decision

4. The decision under review is the decision by QH to refuse access to the Applicant's son's medical records on the basis that disclosure would, on balance, be contrary to the public interest.

Evidence relied upon

5. In making my decision in this matter, I have taken the following into consideration:
 - the Access Application, decision under review and application for external review
 - file notes of telephone conversations with the applicant during the course of this review
 - written correspondence received from QH during the course of this review
 - the third party consultation undertaken by the Office
 - the information in issue
 - relevant sections of the *Right to Information Act 2009* (Qld) (RTI Act)
 - previous decisions of the Information Commissioner of Queensland and decisions and case law from other Australian jurisdictions or courts as identified in this decision.

Information in issue

6. The information in issue comprises the medical records of the applicant's son (95 pages).
7. As confirmed with the applicant during the course of the review, the Access Application only seeks access to information about the applicant's son. Accordingly, the information in issue will exclude information about the applicant's ex-partner and other persons, to the extent that such information can be practically severed from information about the applicant's son.²

¹ Commonly known as Queensland Health.

² Although the applicant's ex-partner shares a Medicare number with her son and these details appear within the documents, the applicant has indicated that he does not require this information.

Findings

8. In the decision under review, QH claim that pursuant to section 67 of the *Information Privacy Act 2009* (Qld), the information in issue should not be provided to the applicant because, under section 47(3)(c) of the RTI Act, its disclosure would be contrary to the child's best interests.

Section 47(3)(c) of the RTI Act

9. Section 47(3)(c) of the RTI Act provides:

47 Grounds on which access may be refused

(3) On an application, an agency may refuse access to a document of the agency and a Minister may refuse access to a document of a Minister —

*...
(c) to the extent the document is sought under an application by or for a child and comprises the child's personal information the disclosure of which would not be in the child's best interests under section 50; or...*

10. As communicated to QH,³ for section 47(3)(c) of the RTI Act to apply, an application must have been made by or for a child. However, as the applicant had indicated in his Access Application that he was not making the application on someone's behalf it was Assistant Information Commissioner Corby's preliminary view that section 47(3)(c) of the RTI Act did not apply in the circumstances.
11. In response to the above preliminary view QH stated that although the applicant had indicated he was not seeking access to the information on someone's behalf, as:
- he had selected that he was seeking access to documents that contain personal information only either in relation to himself or on behalf of another person;
 - his Access Application was not accompanied by an application fee; and
 - the information sought pertained to his child's medical treatment:

...the only logical assumption appeared to us to be that Mr Foster intended his application to be considered to be made in a representative capacity for his child. If he was not making the application in that capacity, then it would have to be processed under the RTI Act and require payment of the prescribed application fee.

12. The applicant has clarified in communications with this Office that he did not make the application on his child's behalf, meaning his Access Application was processed incorrectly by QH, an error which could have been avoided had QH taken the opportunity to clarify the Access Application with the applicant.⁴
13. On external review the onus is on agencies to establish that access would, on balance be contrary to the public interest. Section 87 of the RTI Act provides:

87 Onus

(1) On an external review, the agency or Minister who made the decision under review has the onus of establishing that the decision was justified or that the information commissioner should give a decision adverse to the applicant.

³ by letter dated 25 May 2010.

⁴ As provided for under division 2 of the IP Act.

14. QH has not identified (either in the decision under review, or subsequent correspondence to this Office) why disclosure of the information in issue would be contrary to the child's best interests. By failing to identify why disclosure of the information in issue would be contrary to the child's best interests, QH has not discharged its onus under section 87 of the RTI Act in demonstrating that its decision to refuse the applicant access to the information in issue under section 47(3)(c) of the RTI Act is justified. Accordingly, section 47(3)(c) of the RTI Act does not apply in the circumstances.

Section 47(3)(b) of the RTI Act

15. I note that as an alternative to the above claim, QH has indicated, subsequent to the decision under review, that disclosure of the information in issue would be contrary to the public interest under section 47(3)(b) of the RTI Act.
16. Section 47(3)(b) of the RTI Act provides that an agency may refuse access to information if its disclosure would, on balance be contrary to the public interest under section 49 of the RTI Act.⁵

47 Grounds on which access may be refused

(3) On an application, an agency may refuse access to a document of the agency and a Minister may refuse access to a document of a Minister —

...

(b) to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest under section 49; or...

17. The term 'public interest' is not defined in the RTI Act. Instead the RTI Act recognises that many factors can be relevant to the concept of the public interest. The public interest refers to considerations affecting the good order and functioning of the community and governmental affairs for the well-being of citizens. The notion of the public interest is usually treated as separate from matters of purely private or personal interest. Usually, a public interest consideration is one that is available to all members or a substantial segment of the community should they choose to access it. Although, in some circumstances public interest considerations can apply for the benefit of particular individuals.
18. Section 49 of the RTI Act sets out the steps which must be taken when deciding whether disclosure of information would, on balance, be contrary to the public interest. This section must be read in conjunction with the public interest factors listed in schedule 4 of the RTI Act.

Public interest

19. To decide whether disclosure of the Information in issue would be contrary to the public interest, I must:⁶
- identify any irrelevant factors that apply in relation to the information and disregard them

⁵ As stated in section 47(2)(b) of the RTI Act, it is Parliament's intention that these grounds be interpreted narrowly.

⁶ Section 47(3)(b) of the RTI Act.

- identify public interest factors favouring disclosure and nondisclosure that apply in relation to the information
- balance the relevant factors favouring disclosure and nondisclosure
- decide whether disclosure of the information, on balance, would be contrary to the public interest.

Irrelevant Factors

20. I have examined the irrelevant factors in schedule 4 of the RTI Act and do not consider that any irrelevant factors arise here.

Factors in favour of disclosure

21. The applicant has indicated that due to his son's past health problems he is concerned about the child's general well being. Further, as he is no longer in a relationship with the child's mother, he submits that the information in issue is necessary in order for him to fulfil his son's needs.
22. Having regard to the applicant's submissions above and in addition to the pro-disclosure bias in deciding access to documents,⁷ I consider that the following factor may favour disclosure of the information in issue in the public interest:
- the public interest in ensuring a parent is able to discharge their parental responsibility in respect of decisions affecting their child
 - disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability.

Factors in favour of non-disclosure

23. QH submits that disclosure of the information in issue is contrary to the public interest because:
- much of the information relates to the child's neonatal care plan and hearing assessments, initial failure to thrive and feeding problems - QH is unable to identify any nexus between those categories of information and decisions regarding the child's health care that the parents need to take from this point on
 - release of information concerning feeding difficulties experienced by the applicant's son as an infant would be unduly invasive of the child's mothers' privacy.

Balancing the public interest

Parental responsibility

24. It is well-accepted that parents assume decision-making responsibilities for the maintenance, protection and education of their child in circumstances where the child is not yet competent to make these decisions. A parent's responsibility for the upbringing and development of their child is recognised in Article 18 of the United Nations

⁷ Section 44 of the RTI Act.

Convention on the Rights of the Child, as is the requirement that others render appropriate assistance to parents in the discharge of those duties.

25. I disagree with QH's submission that historical information concerning a child's health would not assist a parent in the future care of their child. Infants, due to their age and immaturity are clearly dependent on their parents to make decisions for them, particularly where these relate to the child's health. To that end, parents need to be armed with adequate knowledge of their child's past health concerns so that they can provide appropriate background information to medical practitioners in future consults, particularly in circumstances where the child's medical records are not readily accessible by the practitioner. Whether particular health information will make a material difference to a future decision concerning a child is not a matter which requires consideration at this point in time, particularly as the significance and/or impact of prior health conditions or difficulties may not be appreciated until a later time when related symptoms become apparent.

Privacy interests of the mother

26. I do not consider that release of information concerning the feeding difficulties experienced by the applicant's son would compromise the mother's privacy in this case because:
- personal information relating to the mother and feeding is not comprised within the information in issue⁸
 - the information in issue does no more than identify reasons why the applicant's son failed to thrive initially and steps which were taken by staff of QH to remedy these difficulties.
27. Additionally, on 14 September 2010 I consulted with the child's mother and provided her an opportunity to raise any objection she might have to disclosure of the information in issue. The child's mother raised no objection to the disclosure.

Accountability of government

28. In terms of enhancing Government accountability, I now consider it appropriate to adopt a lower threshold for an accountability argument than that which has previously been applied in decisions of this Office.⁹ Accordingly, I now accept that in addition to evidence of wrongdoing, a public interest in improving public confidence in a government department may now be used to mount a public interest argument in favour of accountability.
29. It is my view that in the absence of any court orders to the contrary, both parents have equal decision-making responsibility in relation to the child's health care. Accordingly, to make informed choices for his child, the applicant is entitled to know and have confidence in the diagnostic assessments and treatment plans made by QH in relation to his son, particularly where circumstances have prevented him from being present at the relevant hospital admissions¹⁰ or being otherwise informed. As parents are reliant

⁸ This type of information was removed from the information in issue on the basis that it falls outside the scope of the information sought by the applicant.

⁹ In particular, *Re Summers and Cairns District Health Service* (1997) 3 QAR 479.

¹⁰ I note that the applicant is listed as next of kin each time his child was admitted to hospital, except for one occasion where his involvement in his son's care remains apparent by the fact that he signed the patient election form on his son's behalf.

on the expertise of health professionals, QH has an obligation to ensure that it makes accurate assessments and develops appropriate treatment regimes for children in its care.

30. I am therefore satisfied that the public interest in ensuring that QH has fulfilled its obligations in the manner described above carries significant weight in these circumstances because the information concerns the health care of an infant child who remains wholly dependent on his parents to make appropriate decisions on his behalf.

Conclusion on public interest

31. In accordance with section 44(1) of the RTI Act, information should be released by an agency unless giving access to the document would, on balance, be contrary to the public interest.
32. Having regard to the above public interest factors, I am satisfied that release of the information in issue would not be contrary to the public interest under section 47(3)(b) of the RTI Act because:
- neither of the factors favouring non-disclosure of the information in issue put forward by QH carry any weight in the present circumstances
 - the public interest in enhancing government accountability is significant given the facts of this case.
33. Accordingly, pursuant to section 44(1) of the RTI Act, the information in issue should be released to the applicant.

DECISION

34. I set aside the decision under review by finding that:
- section 47(3)(c) of the RTI Act does not apply in the circumstances
 - release of the information in issue would not be contrary to the public interest under section 49 of the RTI Act.

Julie Kinross
Information Commissioner

Date: 27 September 2010

Appendix
Significant procedural steps

1. By application dated 7 August 2009, the applicant applied to QH for access to the medical records of his son (**Access Application**).
2. In its letter dated 21 September 2009, QH identified 95 pages responding to the applicant's request. QH decided to refuse access to all 95 pages under section 47(3)(c) of the RTI Act on the basis that any disclosure would be contrary to the child's best interests.
3. By email received by this Office on 25 September 2009, the applicant applied to the Office of the Information Commissioner (**the Office**) for an external review of QH's decision.
4. By email dated 22 December 2009, the Office invited QH to "...consider whether the medical record could be released with a small amount of third party information deleted."
5. QH requested, and were provided with an extension of time until 15 February 2010 in which to provide its response to the above email.
6. By email dated 16 February 2010, QH requested a further extension of time. The Office agreed to extend the due date until 26 February 2010.
7. By email dated 2 March 2010, QH indicated that it would have a response to the Office very soon.
8. As no response was received from QH, by letter dated 25 May 2010 the Office provided QH with a preliminary view in respect of QH's claim for exemption over the information in issue.
9. By letter dated 7 June 2010, QH indicated that it did not accept the preliminary view and provided submissions in support of its position.
10. The preliminary view was relayed to the applicant in a telephone conversation on 19 July 2010. The applicant accepted this preliminary view and confirmed in this conversation and a later discussion with a staff member of the Office on 2 August 2010 that he was only seeking access to information about his son and did not require access to his ex-partner's Medicare details.
11. By letter dated 14 September 2010 the child's mother was invited to apply to participate in the external review and/or raise any objection to disclosure of the information in issue. The child's mother did not apply to participate in the external review nor raise any objection to the disclosure of the information in issue.