



Decision and Reasons for Decision

Citation:	<i>N45 and Metro North Hospital and Health Service [2022] QICmr 17 (30 March 2022)</i>
Application Number:	316292
Applicant:	N45
Respondent:	Metro North Hospital and Health Service
Decision Date:	30 March 2022
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - HEALTHCARE INFORMATION - applicant seeking access to health records - healthcare information - whether disclosure prejudicial to physical or mental wellbeing of the applicant - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(d) and 51 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant sought access under the *Information Privacy Act 2009* (Qld) (**IP Act**) to '*[all] documents, memos [and] emails regarding [the applicant] including official health records*' as held by Inner North Brisbane Mental Health Services and Royal Brisbane and Women's Hospital (**RBWH**) from June 2018 to April 2019.
2. Metro North Hospital and Health Service (**Health Service**) located 201 pages of the applicant's health records (**Health Records**) and refused access¹ on the basis that disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant.² The decision was made by the Director of Mental Health/Consultation Liaison (**Director**), as the delegated healthcare professional under section 50(5)(b) of the IP Act.³
3. The Director also decided that access to the refused information may be given to an appropriately qualified healthcare professional, nominated by the applicant under section 92 of the IP Act. However, access in this manner would be subject to the redaction of certain information, that the Director considered to be exempt⁴ or the disclosure of which would, on balance, be contrary to the public interest (**Redacted Information**).⁵

¹ By decision dated 4 August 2021.

² Section 67(1) of the IP Act and sections 47(3)(d) and 51 of the *Right to Information Act 2009* (Qld) (**RTI Act**).

³ See section 50(6) of the IP Act and section 30 of the RTI Act.

⁴ Section 48 and schedule 3, section 12(1) of the RTI Act.

⁵ Section 47(3)(b) and 49 of the RTI Act.

4. The applicant applied⁶ to the Office of the Information Commissioner (**OIC**) for external review of the Health Service's decision. On external review, the applicant stated that the Redacted Information was not vital to enable them to commence legal proceedings and⁷ therefore the applicant only contests the Health Service's decision with respect to the remainder of the Health Records.
5. For the reasons set out below, I affirm the Health Service's decision to refuse access to the remainder of the Health Records under s 67(1) of the IP Act and section 47(3)(d) of the RTI Act.

Background

6. The decision under review is the Health Service's decision dated 4 August 2021 to refuse access to the Health Records under section 67(1) of the IP Act and section 47(3)(d) of the RTI Act.⁸
7. Significant procedural steps relating to the external review are set out in the Appendix.
8. Evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix). I have taken account of the applicant's submissions to the extent that they are relevant to the issues for determination in this review.
9. During the review, the Health Service provided further submissions⁹ explaining the basis of the opinion formed by the Director in consultation with one of the applicant's treating doctors.
10. I have had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.¹⁰ I consider a decision-maker will be '*respecting, and acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the IP Act and the RTI Act.¹¹ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:¹² '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.*'¹³

Information in issue

11. The information in issue appears in 201 pages of the applicant's health records held by RBWH.¹⁴

⁶ Application received 1 September 2021.

⁷ External review application dated 1 September 2021 and letter dated 13 October 2021.

⁸ The Health Service's decision incorporated the decision of the Director, as the delegated healthcare professional to make a decision on the Health Records, under section 50(5)(b) of the IP Act.

⁹ Email dated 11 October 2021.

¹⁰ Section 21(2) of the HR Act.

¹¹ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

¹² *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹³ *XYZ* at [573].

¹⁴ Section 121(3) of the IP Act prohibits me from further describing this information.

Issue for determination

12. On external review, the applicant stated that the exempt and contrary to public interest information was not vital to commence legal proceedings and they were willing to receive the files with this information redacted.¹⁵
13. The applicant effectively seeks to contest the Health Service's decision in relation to the remainder of the information. Accordingly, the issue for determination in this external review is whether access to the Health Records may be refused under section 67(1) of the IP Act and section 47(3)(d) of the RTI Act on the ground that disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant under section 51 of the RTI Act.
14. The direction by the Health Service that access to the Health Records be given to the applicant's treating healthcare practitioner is not a reviewable decision and cannot be considered in this external review.¹⁶ Notwithstanding this, I confirm that the applicant is seeking to directly access copies of the Health Records.

Relevant law

15. Under the IP Act, an individual has a right to be given access to documents of an agency to the extent they contain the individual's personal information.¹⁷ However, this right is subject to other provisions of the IP Act and the RTI Act, including the grounds on which an agency may refuse access to documents.¹⁸
16. Relevantly, access may be refused to an applicant's relevant healthcare information if the disclosure of which might be prejudicial to the physical or mental health or wellbeing of the applicant under section 51 of the RTI Act.
17. '*Relevant healthcare information*' means healthcare information provided by a healthcare professional.¹⁹ A healthcare professional means 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.²⁰
18. The Information Commissioner²¹ has the power to decide any matter in relation to an access application that could have been decided by an agency.

Analysis and findings

19. The Health Records contain information relating to clinical assessments of the applicant undertaken within the Health Service. I am satisfied the Health Records comprise healthcare information provided by healthcare professionals and is, therefore, the applicant's relevant healthcare information.
20. The decision-maker at the Health Service (the Director) made the healthcare decision based on the opinion of, and in consultation with, one of the applicant's treating doctors at the Health Service (**Consulted Doctor**).²² In addition to its decision refusing access

¹⁵ External review application dated 1 September 2021.

¹⁶ This is because a direction under section 92(2) of the IP Act is not a '*reviewable decision*' according to schedule 5 of the IP Act.

¹⁷ Section 40 of the IP Act.

¹⁸ 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.

¹⁹ Schedule 5 of the IP Act (definition of '*relevant healthcare information*').

²⁰ Schedule 5 of the IP Act provides examples such as a doctor, including a psychiatrist or a psychologist, social worker or registered nurse.

²¹ Or her delegate under section 139 of the IP Act.

²² Health Service's submissions dated 11 October 2021.

to the Health Records, the Health Service also provided submissions to OIC setting out the evidence it relied on to make its healthcare decision.²³ I am limited in the amount of detail that I can disclose about those submissions.²⁴ The Health Service submitted that, in the circumstances, it was *'of the view that a health care decision is the safest way to disclose sensitive documents so that timely and appropriate support can be provided in line with the Queensland Health duty of care'*.²⁵ For this reason, the Director decided that access to the refused information may be given to an appropriately qualified healthcare professional, nominated by the applicant under section 92 of the IP Act.

21. The applicant disputes that direct disclosure of the information in issue would be prejudicial to his mental health.²⁶ The applicant submits that certain findings made by the Consulted Doctor with respect to his mental health were incorrect,²⁷ and suggests that the Health Records would support this submission.²⁸ The applicant identifies that he is bringing medical negligence proceedings against Queensland Health and the Consulted Doctor,²⁹ and submits that, as a result, there is a conflict of interest and the opinion of the Consulted Doctor should *'have little to no value'*.³⁰ I have carefully considered the Health Records and, while I am limited in the amount of detail I can provide about this material,³¹ the Health Records show the applicant received treatment from multiple healthcare practitioners, and there is no evidence before me that these healthcare practitioners disagreed with the findings of the Consulted Doctor.

22. The applicant also submits that *'the associated costs of seeking a court order will add to the financial hardship and additional stress that [the applicant is] already experiencing as a result of [the Health Service's] actions'*.³² The applicant made other submissions in support of disclosure of the Health Records.³³ Some of these submissions are outside the issues I can consider in this external review, particularly those relating to the applicant's discontent with the Health Service.³⁴ Additionally, the applicant submits that:
 - the Health Service's refusal to release the Health Records *'does NOT promote QLD Health and by extension QLD State Gov as being open and accountable'*;³⁵
 - that refusal of the Health Records would cause more harm than disclosure, as it will *'continue to cast doubt regarding [the applicant's] credibility'*;³⁶ and
 - having been *'locked up and involuntarily drugged in a Mental health ward...'* was an *'abuse of [the applicant's] civil and human rights'*.³⁷

23. While the applicant's reasons for seeking the Health Records are understandable and raise public interest considerations, I cannot take these into account for the purposes of the Health Records. There is no scope for me to consider public interest arguments in the context of making a healthcare decision under section 47(3)(d) of the RTI Act. This

²³ Submissions dated 27 September 2021.

²⁴ Section 121 of the IP Act.

²⁵ Submissions dated 27 September 2021.

²⁶ External review application dated 1 September 2021.

²⁷ To this end, the applicant relies on the fact that the treating doctor *'abruptly dropped the "involuntary treatment authority"'* and submits that other treating practitioners disagreed with the findings of this treating doctor (see submissions dated 26 October 2021 and 11 November 2021).

²⁸ Submissions dated 11 November 2021.

²⁹ With whom the decision-maker at the Health Service consulted in forming its healthcare decision.

³⁰ Submissions dated 26 October 2021 and 11 November 2021.

³¹ Section 121 of the IP Act.

³² Submissions dated 11 November 2021.

³³ External review application dated 1 September 2021 and submissions dated 26 October 2021 and 11 November 2021.

³⁴ OIC's role in conducting an external review under the IP Act is confined to determining whether access to information can be refused under the relevant provisions of the IP and RTI Acts. OIC does not have the jurisdiction to investigate the actions of officers or agencies or review the complaint handling or investigation processes of other entities. For these reasons, to the extent the applicant's submissions raise concerns of this nature, I have not considered them in reaching this decision.

³⁵ External review application dated 1 September 2021.

³⁶ Submissions dated 11 November 2021.

³⁷ Submissions dated 26 October 2021.

is because Parliament has determined that the disclosure of healthcare information, where disclosure might be prejudicial to the applicant's health or wellbeing, is contrary to the public interest, and access may be refused on this basis.³⁸

24. In considering whether the applicant's health or wellbeing might be prejudiced by the disclosure of the Health Records, I must consider whether the prejudice is real and tangible as opposed to a fanciful, remote or far-fetched possibility.³⁹ Having considered the evidence available to me, including the applicant's submissions, the content of the Health Records and information provided by the Health Service, I have preferred the evidence provided by the Health Service in finding that there is a real and tangible risk that disclosing the Health Records might prejudice the applicant's health or wellbeing.
25. Accordingly, for the reasons set out above, I find that the Health Service was entitled to refuse access to the Health Records under section 67(1) of the IP Act and sections 47(3)(d) and 51 of the RTI Act.

DECISION

26. I affirm the decision of the Health Service and find that access to the Health Records may be refused under section 67(1) of the IP Act and section 47(3)(d) of the RTI Act.
27. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

Shiv Martin
Assistant Information Commissioner

Date: 30 March 2022

³⁸ Section 51(2) of the RTI Act.

³⁹ *88OQAO and Wide Bay Hospital and Health Service* [2019] QICmr 14 (1 May 2019) at [18]; cited in *D45 and Wide Bay Hospital and Health Service* [2021] QICmr 63 (30 November 2021) at [20].

APPENDIX**Significant procedural steps**

Date	Event
1 September 2021	OIC received the applicant's application for external review. OIC requested preliminary documents from the Health Service.
2 September 2021	OIC confirmed receipt of the applicant's application for external review.
7 September 2021	OIC received the preliminary documents from the Health Service, as requested.
16 September 2021	OIC accepted the applicant's application for external review and requested the information in issue from the Health Service.
17 September 2021	OIC received an update from the Health Service. OIC discussed the external review with the Health Service via telephone.
27 September 2021	OIC received the information in issue from the Health Service, as requested.
8 October 2021	OIC discussed submissions made by the Health Service via telephone call with the Health Service.
11 October 2021	The Health Service confirmed with OIC the outcome of correspondence had with the applicant's treating doctor.
13 October 2021	OIC conveyed a preliminary view to the applicant and provided an update to the Health Service.
26 October 2021	The applicant provided submissions to OIC in response to OIC's preliminary view.
27 October 2021	OIC accepted the applicant's submissions and requested further submissions prior to a formal decision being made.
11 November 2021	The applicant provided submissions to OIC.