



Decision and Reasons for Decision

Citation:	<i>WEU27L and Darling Downs Hospital and Health Service [2017] QICmr 45 (11 September 2017)</i>
Application Number:	313012
Applicant:	WEU27L
Respondent:	Darling Downs Hospital and Health Service
Decision Date:	11 September 2017
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - medical record of deceased adult child - personal information of deceased and third parties - whether disclosure would, on balance, be contrary to the public interest - whether access to information may be refused under section 47(3)(b) of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied under the *Right to Information Act 2009* (Qld) (**RTI Act**) to the Darling Downs Hospital and Health Service (**Health Service**)¹ for access to medical records of his deceased adult child.
2. The Health Service did not make a decision within the prescribed processing period and was deemed under section 46(1)(a) of the RTI Act to have made a decision² refusing access to the requested medical records. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Health Service's decision.³
3. I have decided to vary the Health Service's decision, and find that disclosure of the relevant medical records would, on balance, be contrary to the public interest and therefore, access to them is refused under section 47(3)(b) of the RTI Act.

Background

4. The applicant's child, a parent of three young children, died suddenly in July 2015. The applicant states that the deceased had stopped residing with the applicant when an infant, however, at the time of the deceased's death, the applicant and the deceased had recently renewed contact and were establishing a close relationship.

¹ The applicant's undated access application, received by the Health Service on 20 June 2016, became compliant under section 33(4) of the RTI Act on 7 July 2016.

² On 25 August 2016.

³ In the circumstances, OIC exercised its discretion under section 88(1)(d) of the RTI Act to extend the period within which the external review application could be made until the date it was lodged with OIC on 13 October 2016.

5. The applicant seeks information about the deceased's health and living circumstances, in order to know more about the deceased, and so as to be able, when his grandchildren are older, to provide them with information about their parent. He also wishes to provide the grandchildren with information about themselves, recorded in the Information in Issue.
6. Additionally, the applicant asserts that the deceased reported having experienced familial ill treatment as a child. The applicant considers information in the medical record will support this assertion and assist him in presenting his concerns,⁴ that one of the deceased's children may be experiencing abuse similar to that which the deceased reported, to appropriate welfare agencies.
7. Significant procedural steps taken by OIC in conducting the external review are set out in the Appendix to these reasons.

Reviewable decision

8. The decision under review is the Health Service's deemed refusal of access to the deceased's medical records under section 46(1)(a) of the RTI Act.

Evidence considered

9. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).⁵
10. The applicant provided written and oral submissions to OIC supporting his case.⁶

Information in issue

11. The access application seeks access to medical files of the deceased. The Health Service located 349 relevant pages, containing the deceased's medical records from Dalby and Toowoomba Health Services in the period from November 2014 to July 2015.
12. On external review, the applicant narrowed the scope of the access application by electing not to seek access to information about the deceased's mental health diagnosis, nor some information about third parties, such as their telephone numbers.⁷
13. The remaining information (**Information in Issue**) consists of information from the deceased's medical records. It comprises personal details of the applicant, the deceased, and individuals other than the applicant or the deceased, including other family members of the deceased.

Consent form

14. On external review, the applicant provided OIC⁸ with a consent form (**Consent**)⁹ which the applicant submits has legal force entitling him to access to the deceased's medical records.
15. The Consent contains two signatures, which the applicant asserts are those of himself and the deceased. The Consent states that the deceased gives consent to the applicant

⁴ The applicant explained this concern to OIC in a telephone conversation on 15 November 2016.

⁵ OIC has treated the Health Service's purported decision dated 29 September 2016 as a submission in the review.

⁶ The applicant's submissions were provided by telephone on 18 January 2017 and 14 February 2017, and emails dated 14 February 2017, and 1 and 8 March 2017. The submissions were made in respect of both this review and a separate external review, 312094, in which the applicant seeks review of a decision of the Mackay Hospital and Health Service refusing him access to the deceased's records held by that Health Service.

⁷ Telephone conversation with OIC on 27 October 2016.

⁸ By email dated 14 February 2017.

⁹ Dated 27 April 2015.

to access and discuss, including with law firms, the deceased's records held by police, schools, guidance counsellor, child services and youth services. The Consent does not indicate that it applies to any other Government agencies. Given that the specific entities listed in the Consent have, primarily, a welfare function, and the Consent does not mention any agencies having a health or medical function, such as the Health Service, I find that the Consent does not apply to agencies having a health or medical function, such as the Health Service.

16. On its face, the Consent indicates that the signatories agreed to the applicant accessing sensitive personal information of the deceased from welfare agencies. It does not indicate if it was intended to continue to be effective in the event of the deceased's death, and there is no independent evidence before me to verify that the other signature is the deceased's. Nevertheless, the Consent is consistent with the applicant's contention that he and the deceased were establishing a cooperative and trusting relationship. On that limited basis, I have included it in my consideration¹⁰ in assessing relevant pro-disclosure and nondisclosure public interest factors relating to whether disclosure of the Information in Issue would, on balance, be contrary to the public interest.

Relevant law

17. Under the RTI Act, a person has a right to be given access to documents of an agency.¹¹ However, this right of access is subject to other provisions of the RTI Act, including the grounds on which an agency may refuse access to documents.¹² Relevantly, an agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.¹³
18. The term 'public interest' refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.
19. The RTI Act identifies various factors that may be relevant to deciding the balance of the public interest¹⁴ and explains the steps that a decision-maker must take¹⁵ in deciding the public interest as follows:
 - identify any irrelevant factors and disregard them
 - identify relevant public interest factors favouring disclosure and nondisclosure
 - balance the relevant factors favouring disclosure and nondisclosure; and
 - decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.

Analysis

20. No irrelevant factors arise in the circumstances of this review.

Factors favouring disclosure

21. I recognise the general public interest in advancing access to government-held

¹⁰ *Fleming and Queensland Police Service* (Unreported, Queensland Information Commissioner, 1998 S0069, 24 April 1998) (*Fleming*). Although *Fleming* concerns a review under the now repealed *Freedom of Information Act 1992* (Qld), the principles are nonetheless applicable in this matter.

¹¹ Section 23 of the RTI Act.

¹² Set out in section 47 of the RTI Act.

¹³ Under sections 47(3)(b) and 49 of the RTI Act.

¹⁴ Schedule 4 of the RTI Act lists factors that may be relevant when deciding whether disclosure of information would, on balance, be contrary to the public interest. This list is not exhaustive and therefore, other factors may also be relevant in a particular case.

¹⁵ Section 49(3) of the RTI Act.

information, that is, the pro-disclosure bias.¹⁶

Personal information

22. In circumstances where information is:

- the applicant's personal information;¹⁷ and
- the personal information of a deceased individual and the applicant is an eligible family member of the deceased,¹⁸

this will enliven two public interest factors in favour of disclosure enunciated in the RTI Act.

23. In this matter, a very small amount of the Information in Issue is the personal information of the applicant. Ordinarily the factor favouring disclosure to the applicant of his personal information would attract significant weight, however, in this case the nature of the Information in Issue is such that it is not possible to separate the applicant's personal information from the personal information of the deceased and another individual. In other words, disclosing to the applicant the small amount of Information in Issue that comprises his personal information would disclose to him personal information of other individuals, which would result in the adverse public interest consequences discussed below,¹⁹ thus lessening the weight to be attributed to the public interest in favour of disclosure of the applicant's personal information. Accordingly, the otherwise significant weight of this factor is reduced to a moderate weight.
24. As the father of the deceased, the applicant is an eligible family member of the deceased person, giving rise to the public interest factor favouring disclosure of the deceased's personal information. The Information in Issue consists of information about the deceased, the deceased's health and the deceased's personal relationships. It therefore comprises personal information of the deceased. Accordingly, this factor applies regarding the entirety of the Information in Issue. Disclosing the Information in Issue would enhance the public interest in the applicant being provided with information about the deceased's health and well being.
25. As noted above,²⁰ the Consent supports the applicant's contention that he had been reconnecting with the deceased prior to the deceased's death. The Consent identifies several welfare services whose documents the applicant may access. However, there is no evidence before OIC indicating that the Consent extends to the deceased's sensitive private health and medical information such as is contained in medical records.²¹ I am therefore unable to regard the Consent as indicating agreement by the deceased to the applicant accessing their sensitive medical and health information.
26. It appears that the applicant's contact with the deceased, as an adult, was for several months²² prior to the deceased's death at the age of 23. Having considered the degree to which the applicant was in contact with the deceased, I attribute only moderate weight to the factor favouring disclosure of a deceased's personal information to an eligible family member of the deceased person.

¹⁶ Section 44 of the RTI Act.

¹⁷ Schedule 4, part 2, item 7 of the RTI Act. Section 12 of the IP Act defines 'personal information' as '*information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*'

¹⁸ Schedule 4, part 2, item 9 of the RTI Act.

¹⁹ Paragraphs [34] and [40].

²⁰ Paragraph [16].

²¹ The Information in Issue includes information about medical procedures and tests undergone by the deceased, test results, medical practitioners' observations of the deceased's health, and medication and medical treatment provided to the deceased.

²² From approximately March 2015 until the deceased's death in July 2015.

27. The applicant submits that disclosing information about the deceased will assist in preventing one of his grandchildren from experiencing abuse similar to that which the deceased reported having experienced. This submission gives rise to a consideration of whether disclosure of the Information in Issue could reasonably be expected to contribute to the enforcement of the criminal law.
28. I consider that the nature of the applicant's concerns are such that a report may be made to the appropriate authorities at any time without access to the Information in Issue. Disclosing the Information in Issue could not reasonably be expected to contribute to any ensuing enforcement action as the nature of the Information in Issue is such that it may be obtained independently by an investigating body such as the Queensland Police Service in the course of an investigation. Accordingly, the public interest in disclosing information to contribute to the enforcement of the criminal law has no weight.
29. Additionally, I note that portions of the Information in Issue concerning the applicant's grandchildren, which the applicant wishes to provide to them, is the personal information of each grandchild, and each grandchild may themselves apply for access to that information under the *Information Privacy Act 2009 (IP Act)*.
30. I can, in this review, identify no other public interest considerations telling in favour of disclosure of the Information in Issue than those discussed above. I cannot see how disclosure of the Information in Issue could, for example, reveal that the information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant²³ or contribute to the administration of justice generally.²⁴

Factors favouring nondisclosure

31. The RTI Act gives rise to factors favouring non-disclosure in circumstances where:
 - disclosing information could reasonably be expected to:
 - cause a public interest harm by disclosing the personal information of other individuals;²⁵ or
 - prejudice the protection of an individual's right to privacy;²⁶ or
 - the information is personal information of a deceased individual, the applicant is an eligible family member of the deceased person and the disclosure of the information could reasonably be expected to impact on the deceased person's privacy if the deceased person were alive.²⁷

Personal information of others

32. Disclosing the Information in Issue would reveal sensitive private information about the deceased's health and medical care and the personal information of individuals other than the deceased, such as relatives and acquaintances.
33. The personal information of the deceased concerns information about medical procedures and tests undergone by the deceased, test results, medical practitioners' observations of the deceased's health, and medication and medical treatment provided to the deceased. The personal information of individuals other than the deceased concerns sensitive information about those persons' identities, relationships, living circumstances and emotions. I find that disclosing sensitive personal information of the nature described, of the deceased and others, would cause a significant public interest harm.²⁸

²³ Schedule 4, part 2, item 12 of the RTI Act.

²⁴ Schedule 4, part 2, item 16 of the RTI Act.

²⁵ Schedule 4, part 4, section 6 of the RTI Act.

²⁶ Schedule 4, part 3, item 3 of the RTI Act.

²⁷ Schedule 4, part 3, item 5 of the RTI Act.

²⁸ Schedule 4, part 4, section 6 of the RTI Act.

Protection of an individual's right to privacy

34. The Information in Issue concerns sensitive private information about the deceased's health and medical care and also contains sensitive private information about individuals other than the deceased. It has not been disclosed to the applicant and remains private. In such circumstances, the privacy interests of the deceased and other individuals remain high and may be adversely affected by disclosing the Information in Issue.
35. I have considered whether these privacy interests have been reduced. Where information is already known to an applicant, this reduces, to an extent, the privacy interest attaching to the information. Previous decisions of OIC have established that in some circumstances the weight to be applied to these nondisclosure factors may be greatly diminished, due to the nature of the relationship between the applicant and the deceased.²⁹ The applicant submits that he had reconnected with the deceased approximately four months before the deceased's death and that he had always sought to be in the deceased's life, having, during the deceased's childhood, made child support payments and two Family Court applications to seek access to the deceased. He submits that the deceased was intending to move residence to live with the applicant³⁰ and had signed the Consent for the applicant to be able to obtain information about the deceased, and that doctors had noted the applicant as next of kin. The deceased's privacy interest in the Information in Issue is arguably somewhat reduced, commensurate with the applicant's renewed relationship with the deceased.
36. While the applicant was in contact with the deceased for some of the period covered by the Information in Issue, there is no information before me, and no indication in the Information in Issue, that the applicant had any knowledge of, or involvement in, the medical care provided to the deceased. The applicant acknowledges his lack of involvement in the deceased's life and medical care. Indeed, he submits that this is a factor prompting his access application. Disclosure of the Information in Issue would therefore reveal to the applicant and others³¹ previously unknown information about the deceased, regarding medical and other sensitive personal issues.
37. There is no suggestion, either in the applicant's submissions or in the Information in Issue, that the deceased wished, or had intended, to disclose to the applicant any information about their medical care. While the nature of the information to which the Consent purports to authorise access is likely to concern some sensitive private aspects of the deceased's life regarding their emotional development and residential circumstances, the Consent does not indicate an intention or authorisation on the deceased's part for the applicant to access the very sensitive private information that is contained in medical records. I consider it does not reduce the deceased's privacy interest in their medical records.
38. Based on the above, I find that:
 - the public interest in protecting a person's right to privacy would be only minimally reduced by the applicant's renewed relationship with the deceased; and
 - the weight attributed to this nondisclosure factor remains high in relation to the Information in Issue in the deceased's medical records.
39. Some portions of the Information in Issue concern the private personal information of

²⁹ See for example *Keogh and Department of Health* (Unreported, Queensland Information Commissioner, 31 August 2010), *44ZNEO and Department of Health* (Unreported, Queensland Information Commissioner, 31 March 2010), and *Novak and Department of Health* (Unreported, Queensland Information Commissioner, 30 June 2010) which decisions acknowledged that an applicant's familiarity with a deceased person's medical treatment may diminish the high privacy interest noted in *Summers and Department of Health; Hintz (Third Party)* (1997) 3 QAR 479.

³⁰ This would have taken place a week after the deceased's death.

³¹ The applicant has indicated he intends to provide the information to children of the deceased and law enforcement authorities.

individuals other than the deceased who did not themselves volunteer the information. The information about these persons has not been disclosed and remains private. In these circumstances, I consider that the privacy interests of these individuals are significant.

40. I am satisfied that disclosure of private information about the deceased and other individuals, to the applicant, could reasonably be expected to prejudice the protection of their right to privacy, by intruding into the 'personal sphere' of the lives of those individuals. The applicant has indicated he intends to further disseminate the Information in Issue by providing it to others. I therefore allocate significant weight to the non-disclosure factor protecting from prejudice the right to privacy of the deceased and other individuals.³²

Eligible family member

41. As noted above:
- the applicant is an eligible family member of the deceased³³
 - disclosing the Information in Issue would disclose personal information of the deceased such as the medical tests and treatment provided to the deceased and medical practitioners' views on the deceased's health, of which the applicant is not aware;³⁴ and
 - I am unable to regard the Consent as extending to the Information in Issue.³⁵
42. Based on this, I find that disclosing the Information in Issue could reasonably be expected to impact significantly on the deceased's privacy. I allocate significant weight to the factor favouring nondisclosure of a deceased's personal information to an eligible family member of the deceased person.³⁶

Public interest balancing

43. In relation to the public interest factors that apply, I give:
- moderate weight to the public interest factor favouring disclosure of the small amount of the applicant's personal information and moderate weight to the public interest factor favouring disclosure of the deceased's personal information to the applicant as an eligible family member; and
 - significant weight to the public interest factors favouring non-disclosure relating to the protection of personal information and the privacy of the deceased and other individuals; and significant weight to the factor favouring nondisclosure of a deceased person's personal information to an eligible family member.
44. On balance, I am satisfied that the significant weight of the nondisclosure factors in this case outweigh the pro-disclosure factors and therefore, I find that disclosure of the Information in Issue would, on balance, be contrary to the public interest under section 49 of the RTI Act.

DECISION

45. I vary the decision the Health Service is deemed to have made refusing access to the Information in Issue under section 46(1)(a) of the RTI Act, and find that access to the Information in Issue may be refused under section 47(3)(b) of the RTI Act as its

³² Schedule 4, part 3, item 3 of the RTI Act.

³³ Paragraph [24].

³⁴ Paragraph [34].

³⁵ Paragraph [25].

³⁶ Schedule 4, part 3, item 5 of the RTI Act.

disclosure would, on balance, be contrary to the public interest.

46. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act

Assistant Information Commissioner Corby

Date: 11 September 2017

APPENDIX

Significant procedural steps

Date	Event
13 October 2016	OIC received the external review application.
14 October 2016	OIC notified the applicant and the Health Service that it had received the external review application. OIC asked the Health Service to provide a copy of relevant procedural documents.
21 October 2016	OIC received the procedural documents from the Health Service.
27 October 2016.	The applicant narrowed the scope of the access application, informing OIC by telephone that he did not to seek access to information about the deceased's mental health diagnosis, nor some information about third parties.
3 November 2016	OIC notified the applicant and the Health Service that it had accepted the external review application. OIC asked the Health Service to provide a copy of the information in issue by 17 November 2016.
8 November 2016	OIC received the information in issue from the Health Service.
15 November 2016	In review 312974, in which the applicant seeks review of a decision of the Mackay Hospital and Health Service refusing him access to the deceased's records held by that Health Service, OIC conveyed a preliminary view by telephone to the applicant that access may be refused to the information in issue in review 312974, on the basis that disclosure would, on balance, be contrary to the public interest; and received oral submissions from the applicant.
18 January 2017	OIC received further submissions from the applicant by telephone.
2 February 2017	OIC wrote to the applicant explaining that the preliminary view OIC conveyed to the applicant by telephone on 15 November 2017 in review 312974, that access may be refused to the information in issue in review 312974 on the basis that disclosure would, on balance, be contrary to the public interest, also applied to the medical records sought by the applicant in this review.
14 February 2017	The applicant informed OIC by telephone that he did not accept the preliminary view and he provided further oral submissions. OIC received an email from the applicant providing further written submissions and the Consent.
17 February 2017	OIC wrote to the applicant acknowledging OIC's receipt of the Consent and confirming OIC's view, conveyed by telephone on 14 February 2017, that the applicant was able now to report concerns about his grandchild's welfare to appropriate authorities.
1 March 2017	OIC wrote to the applicant confirming that, having examined the Consent, OIC maintained the preliminary that access may be refused to the information in issue. OIC received an email from the applicant requesting information about the process to appeal OIC's decision.
8 March 2017	OIC wrote to the applicant clarifying that OIC's letter dated 1 March 2017 was not a final decision and that that letter advised the applicant that, after considering his letter dated 14 February 2017, OIC's preliminary view had remained the same. OIC invited the applicant to provide any submissions by 15 March 2017. OIC received an email from the applicant stating that the applicant did not agree with OIC's decision.

Date	Event
10 May 2017	OIC wrote to the applicant noting that he did not accept the preliminary view and informing him that the next step in the review process would be to issue a formal written decision to finalise the review.