



Decision and Reasons for Decision

Application Number: 310328

Applicant: Lowe

Respondent: Department of Health

Decision Date: 25 November 2010

Catchwords: **ADMINISTRATIVE LAW - RIGHT TO INFORMATION - application by a wife for access to her deceased husband's medical records - whether disclosure of information would, on balance, be contrary to the public interest - section 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)**

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REASONS FOR DECISION

Summary

1. The applicant seeks access to a copy of her late husband's medical records from the Department of Health (**QH**).¹ QH refused the applicant access to the medical records under section 47(3)(b) of the *Right to Information Act 2009* (Qld) (**RTI Act**) on the basis that disclosure would, on balance, be contrary to the public interest under section 49 of the RTI Act.
2. During the external review, the Office of the Information Commissioner (**OIC**) conveyed to QH a preliminary view² that disclosure of the information in issue would not, on balance, be contrary to the public interest under section 49 of the RTI Act and that it should therefore, be released (in full) to the applicant. OIC invited QH to provide submissions if it contested the preliminary view. As at the date of this decision, QH has not:
 - lodged submissions with OIC contesting the preliminary view; or
 - accepted the preliminary view and released documents to the applicant.³
3. In the absence of any submissions from QH in response to the preliminary view, the external review was unable to be informally resolved under section 90 of the RTI Act and accordingly, this decision was required to finalise the review.
4. For the reasons set out below, I set aside QH's decision and find that disclosure of the information in issue to the applicant would not, on balance, be contrary to the public interest under section 49 of the RTI Act.

Background

5. Significant procedural steps relating to the application are set out in the Appendix.

Reviewable decision

6. The decision under review is QH's decision to refuse access to the requested information on the basis that disclosure would, on balance, be contrary to the public interest under section 49 of the RTI Act.

Information in issue

7. The information in issue in this review is 86 folios which comprise the medical records of the applicant's late husband (**Information in Issue**).

Evidence considered

8. In making this decision, I have considered the following:
 - applicant's access application to QH and external review application to the Office of the Information Commissioner (**OIC**)
 - QH's decision
 - Information in Issue

¹ The Department of Health is commonly known as Queensland Health.

² A preliminary view is one of the processes used by OIC to promote settlement of external review applications pursuant to section 90 of the RTI Act.

³ In accordance with the principles set out in *Moon and Department of Health* (Unreported, Queensland Information Commissioner, 12 August 2010) at paragraphs 19 to 31.

- file notes of telephone conversations held between OIC staff members and the applicant and QH officers during the external review
- relevant sections of the RTI Act
- previous decisions of the Information Commissioner as set out in this decision.

The law

9. Access must be given to a document unless it contains exempt information or its disclosure would, on balance, be contrary to the public interest.⁴ In making this decision, I have considered whether disclosure of the Information in Issue would, on balance, be contrary to the public interest under section 49 of the RTI Act.
10. To decide whether disclosure of the Information in Issue would be contrary to the public interest, I must:⁵
 - identify any irrelevant factors and disregard them
 - identify relevant public interest factors favouring disclosure and nondisclosure
 - balance the relevant factors favouring disclosure and nondisclosure
 - decide whether disclosure of the information, on balance, would be contrary to the public interest.

Findings

11. No irrelevant factors arise in this case.
12. I will now consider the relevant public interest factors which favour disclosure and nondisclosure of the Information in Issue.

Protecting the deceased's right to privacy

13. An individual's medical records contain personal information that is sensitive in nature and there is a public interest in protecting an individual's right to privacy by not disclosing their medical records under the RTI Act.⁶ However the Information Commissioner has previously recognised that in certain circumstances the privacy interest of the relevant individual may be reduced.
14. In *Summers and Department of Health; Hintz (Third Party) (Summers)*⁷ the Information Commissioner decided that the following considerations may be relevant in determining the extent to which the privacy interest in a person's medical records may be diminished:
 - evidence of involvement in care
 - extent of knowledge of medical history/incident
 - evidence of special dependence/relationship.
15. Having carefully considered the Information in Issue, I am satisfied that:
 - the Information in Issue discloses sufficient evidence of the factors listed above in *Summers* namely the applicant's close involvement in the admission and

⁴ Sections 44, 48 and 49 of the RTI Act.

⁵ Section 49(3) of the RTI Act.

⁶ The relevant factors are set out at Schedule 4 part 3 items 3 and 5 and Schedule 4 part 4 section 6 of the RTI Act.

⁷ (1997) 3 QAR 479 at paragraph 19.

treatment of her late husband, knowledge of the incident and close relationship with the deceased⁸

- some of the Information in Issue is about the applicant or was provided by the applicant to QH
- the applicant is an eligible family member of the deceased⁹
- the privacy interest attaching to the deceased's medical records in this instance is significantly reduced.

Accountability of QH

16. There is a broad public interest in the accountability of public hospitals for the provision of public sector health services.¹⁰ In *Keogh and Department of Health (Keogh)*¹¹ the Information Commissioner decided that it was appropriate to adopt a lower threshold for an accountability argument than what was applied in *Summers* on the following basis:

*Public confidence in the health system is essential. Inability to obtain the medical records in circumstances such as these, can leave lingering doubts in relative's minds about the quality of health services. To the extent that access to medical records in circumstances such as these can prevent a lack of confidence developing, then access is important. Accordingly, in addition to evidence of wrongdoing, the public interest in the maintenance of public confidence in a public service may now also be used to mount a public interest argument in favour of accountability.*¹²

17. On the basis of the Information Commissioner's reasoning in *Keogh*, I accept that in some cases, it may therefore be in the public interest for close relatives of patients to be provided with adequate information to allow them to assess whether the standard of care and treatment provided to their family member was appropriate in the circumstances. However, it remains necessary to consider the facts of each case to decide whether the relevant accountability interest is sufficiently strong and whether it is appropriately served by disclosure of the information.
18. In this case, I understand that the applicant's husband passed away shortly after he was admitted to hospital and while in the care of QH. His medical records relate solely to this admission and I am satisfied that disclosure of the Information in Issue could reasonably be expected to assist the applicant in assessing whether the standard of care provided to her late husband was appropriate in the circumstances.
19. Having assessed the relevant evidence in this case, I am satisfied that:
- there is a public interest in providing the applicant with adequate information to allow her to assess whether the standard of care provided to her late husband was appropriate
 - disclosure of the Information in Issue could reasonably be expected to assist the applicant to make that assessment
 - this public interest should be afforded moderate weight.

⁸ Section 108(3) of the RTI Act provides that the Information Commissioner must not, in reasons for a decision on external review, include information that is claimed to be exempt information or contrary to the public interest information. Therefore, I am unable to refer to the specific evidence of the factors in *Summers* which appear in the Information in Issue. In the preliminary view letter, OIC referred QH to the relevant parts of the Information in Issue which support my findings on this issue.

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

¹⁰ See generally the decision in *Summers*.

¹¹ (Unreported, Queensland Information Commissioner, 31 August 2010) at paragraph 24.

¹² *Keogh* at paragraph 24.

Balancing the relevant public interest factors

20. In balancing the competing public interest factors, I find that:

- the public interest in protecting the deceased's privacy in this case is reduced to such an extent that it does not justify nondisclosure of the Information in Issue to the applicant
- the public interest in the accountability of public hospitals should be afforded moderate weight in the circumstances
- disclosure of the Information in Issue to the applicant would not, on balance, be contrary to the public interest under section 49 of the RTI Act.

DECISION

21. I set aside QH's decision to refuse access to the Information in Issue under section 47(3)(b) of the RTI Act and find that disclosure would not, on balance, be contrary to the public interest.

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

Jenny Mead
Right to Information Commissioner

Date: 25 November 2010

APPENDIX**Significant procedural steps**

Date	Event
31 May 2010	The applicant applies to QH for access to the Information in Issue under the RTI Act.
6 August 2010	QH decides to refuse access to the Information in Issue on the basis that its disclosure would, on balance, be contrary to the public interest under section 49 of the RTI Act.
12 August 2010	The applicant applies to OIC for external review of the decision.
18 August 2010	QH provides OIC with copies of documents relating to the application.
20 August 2010	OIC informs QH and the applicant that the external review application has been accepted for review.
8 September 2010	QH provides OIC with a copy of the Information in Issue.
4 October 2010	OIC conveys a written preliminary view to QH that disclosure of the Information in Issue would not, on balance, be contrary to the public interest. OIC invites QH to provide any submissions in support of its case by 18 October 2010 if it contests the preliminary view. QH does not make any submissions in response to the preliminary view.