



## Decision and Reasons for Decision

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Application Number:	311618
Applicant:	83DCQB
Respondent:	West Moreton Hospital and Health Service
Decision Date:	29 October 2013
Catchwords:	<p><b>ADMINISTRATIVE LAW – INFORMATION PRIVACY ACT – QUEENSLAND – REFUSAL OF ACCESS – an agency may refuse access to a document of an agency in the same way and to the same extent the agency could refuse access to the document under section 47 of the <i>Right to Information Act 2009</i> (Qld) were the document to be the subject of an access application under that Act – section 67(1) of the <i>Information Privacy Act 2009</i> (Qld)</b></p> <p><b>ADMINISTRATIVE LAW – RIGHT TO INFORMATION ACT – QUEENSLAND – REFUSAL OF ACCESS – HEALTHCARE INFORMATION – applicant sought access to his clinical records – whether the clinical records comprise the applicant’s relevant healthcare information – whether disclosure of the clinical records might be prejudicial to the physical or mental health or wellbeing of the applicant – whether disclosure of the clinical records is contrary to the applicant’s best interests under section 51 of the <i>Right to Information Act 2009</i> (Qld)</b></p>

### REASONS FOR DECISION

#### Summary

1. The applicant sought access under the *Information Privacy Act 2009* (Qld) (**IP Act**) to *all clinical notes and documents held therein* as held by The Park Centre for Mental Health Treatment, Education and Research (**The Park**) from 7 December 1979 to May 2012.
2. West Moreton Hospital and Health Service (**Health Service**) located 28 volumes of the applicant’s clinical records (**Clinical Records**) and refused access to the Clinical Records on the basis that disclosure could reasonably be expected to endanger a person’s life or physical safety or result in a person being subjected to a serious act of harassment or intimidation.<sup>1</sup>
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Health Service’s decision.

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<sup>1</sup> Under section 67(1) of the IP Act and sections 47(3)(a) and 48 and schedule 3, sections 10(1)(c) and (d) of the *Right to Information Act 2009* (Qld).

4. Having fully considered the submissions made by both the applicant and the Health Service, I am satisfied that access to the Clinical Records can be refused under section 67(1) of the IP Act and sections 47(3)(d) and 51 of the *Right to Information Act 2009* (Qld) (**RTI Act**) as there is a real and tangible possibility that disclosure of the Clinical Records might prejudice the applicant's mental health or wellbeing.
5. Accordingly, the Health Service's decision to refuse access to the Clinical Records is affirmed, though for different reasons.

## **Background**

6. Significant procedural steps relating to the application and external review are set out in the appendix.

## **Reviewable decision**

7. The decision under review is the Health Service's decision dated 13 June 2013 to refuse access to the Clinical Records on the basis that disclosure could reasonably be expected to endanger a person's life or physical safety or result in a person being subjected to a serious act of harassment or intimidation.<sup>2</sup> The Health Service's decision states that, based on clinical advice, disclosure of any information contained within the applicant's clinical record, could reasonably be expected to put other persons at risk should the applicant be provided with access to this information.

## **Evidence considered**

8. The evidence, submissions, legislation and other material considered in reaching this decision are referred to in part in these reasons (including footnotes and appendix).
9. I have been unable to include part of the evidence relied on in the reasons for decision as I consider that disclosing and discussing this evidence poses a similar risk of prejudice to the applicant's mental health or wellbeing as does the disclosure of the clinical records.

## **Relevant law**

10. In the conduct of an external review the Information Commissioner, may decide any matter in relation to an access application that could have been decided by an agency under the IP Act.<sup>3</sup> In making a decision on access to information under the IP Act, the Information Commissioner should decide to give access to the information unless giving access would, on balance, be contrary to the public interest.<sup>4</sup>
11. 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, however, this right is subject to other provisions of the IP Act and the RTI Act,<sup>5</sup> including the grounds on which an agency may refuse access to documents.

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<sup>2</sup> Under section 67(1) of the IP Act and sections 47(3)(a) and 48 and schedule 3, sections 10(1)(c) and (d) of the *Right to Information Act 2009* (Qld).

<sup>3</sup> Section 118(1)(b) of the IP Act.

<sup>4</sup> Section 64 of the IP Act

<sup>5</sup> Section 67 of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent the agency could refuse access to the document under section 47 of the RTI Act.

12. Relevantly, an agency may refuse access to the applicant's relevant healthcare information<sup>6</sup> if disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant under section 51 of the RTI Act.<sup>7</sup>
13. Section 51(2) of the RTI Act provides that despite relevant considerations which generally apply when an applicant seeks their personal information,<sup>8</sup> Parliament considers it would, on balance, be contrary to the public interest to give access to a document to the extent it comprises relevant healthcare information of the applicant if the disclosure of the information might be prejudicial to the applicant's physical or mental health or wellbeing.

## Findings

### ***Do the Clinical Records comprise the applicant's relevant healthcare information?***

14. Yes. The IP Act provides that relevant healthcare information is information given by a healthcare professional.<sup>9</sup> In this case, as the applicant is seeking his clinical record I am satisfied that the documents in issue comprise the applicant's relevant healthcare information, being information provided by healthcare professionals involved in his treatment at The Park.

### ***Might disclosing the Clinical Records be prejudicial to the applicant's physical or mental health or wellbeing?***

15. Yes, for the reasons that follow.
16. In making this decision, I have carefully assessed all of the applicant's submissions.<sup>10</sup> The applicant indicates that he is seeking the information to prepare a report to the Mental Health Review Tribunal (**MHRT**).
17. I acknowledge that it is important to the applicant to obtain the information he is seeking for his stated purpose. However, this is not relevant to the assessment regarding the potential effect of disclosing the information in issue. I note though that the MHRT has wide powers to do all things necessary,<sup>11</sup> and can inform itself on a matter in any way it considers appropriate,<sup>12</sup> when conducting a hearing,<sup>13</sup> and as such, is able to access any relevant clinical information.
18. The applicant has also provided a number of documents to OIC supporting his contention that he is mentally stable and that he is not violent. One of these is a detailed response by the applicant to a 2013 letter between mental health clinicians.<sup>14</sup> The applicant's response, which he describes as a '*true copy a summary of the Forensic Psychiatry report*', disputes the veracity of the information provided by the clinicians. The applicant has also provided a medical report from 1971 which states that there is no evidence of psychopathy or psychosis in the applicant's behaviour, as well as a letter from the applicant's treating psychiatrist dated 26 July 2013 stating relevantly "[a]t your

<sup>6</sup> Section 47(3)(d) and as defined under schedule 5 of the IP Act.

<sup>7</sup> Section 47(3)(d).

<sup>8</sup> Schedule 3, section 12(2) and schedule 4, part 2, item 7.

<sup>9</sup> Schedule 5 of the IP Act.

<sup>10</sup> Including the submissions made by the applicant in the external review application received by OIC on 19 June 2013, letters received by OIC on 25 June 2013, 28 June 2013, 01 July 2013, 29 July 2013, 1 August 2013 and a phone call from the applicant on 5 August 2013.

<sup>11</sup> Section 439 (1) of the *Mental Health Act 2000* (Qld) (**MH Act**).

<sup>12</sup> Section 459(2)(b) of the MH Act.

<sup>13</sup> Section 203(6) of the MH Act.

<sup>14</sup> A copy of which the applicant enclosed with his external review application.

consultation, I was of the opinion that your mental health was stable ... [i]n particular, that there is no evidence of aggressive or threatening behaviour”.

19. I accept the statement made by the applicant’s treating psychiatrist as to the stability of the applicant’s mental health since leaving The Park and on presentation at his recent appointment as well as the clinician’s statement as to there being no evidence of aggressive or threatening behaviour.
20. The relevant question to be determined here however centres on the possible effect of disclosing the information in issue; that is, whether disclosing the Clinical Records might have a prejudicial effect on the applicant’s current mental health and wellbeing. The applicant’s submissions at paragraph 18 above are relevant only to the extent that they suggest that his mental health is presently stable.
21. In order to assess whether disclosure of the Clinical Records might have a detrimental effect on the applicant’s mental health and wellbeing, OIC requested that the Health Service provide information from appropriately qualified senior clinicians regarding the possible impact of disclosure. These clinicians were strongly of the view that disclosing the Clinical Records posed a real risk to the applicant’s mental health and wellbeing.
22. In reaching a decision in this external review, I have given significant weight to these medical opinions and I consider that there is a real and tangible possibility<sup>15</sup> of prejudice to the applicant’s mental health and wellbeing if the Clinical Records were disclosed to him.

## DECISION

23. I am satisfied that access to the Clinical Records can be refused on the basis that their disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant.<sup>16</sup>
24. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

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## Right to Information Commissioner

**Date: 29 October 2013**

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<sup>15</sup> This meaning of the term “might be prejudicial” was adopted by the Commonwealth Administrative Appeals Tribunal for the purposes of a similar provision in the *Freedom of Information Act 1982* (Cth) in *Re K and Director-General of Social Security* (1984) 6 ALD 354 at 356-7 and endorsed by the Information Commissioner in *S and Medical Board of Queensland* (Unreported, Queensland Information Commissioner, 12 October 1994) when considering section 44(3) of the repealed *Freedom of Information Act 1992* (FOI Act). Section 51(2) of the RTI Act is the equivalent provision to section 44(3) of the repealed FOI Act. As this section also contains the phrase “might be prejudicial”, this interpretation is still relevant.

<sup>16</sup> Under section 67(1) of the IP Act and section 47(3)(d) of the RTI Act.

**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
10 May 2013	The Health Service received the applicant's access application dated 1 May 2013 seeking access to the Clinical Records under the IP Act.
13 June 2013	The Health Service made a decision refusing access to the Clinical Records.
19 June 2013	OIC received the applicant's external review application dated 18 June 2013.
21 June 2013	The Health Service provided OIC with information relevant to the processing of the access application.
25 June 2013	OIC received a submission from the applicant dated 21 June 2013, being what he describes as 'a true copy a summary of the Forensic Psychiatrist report'.
28 June 2013	OIC received correspondence from the applicant indicating that he was obtaining further evidence which would be provided in due course.
1 July 2013	OIC received correspondence from the applicant indicating that he was providing the enclosed ' <i>Summary from RGH Concord to No 3 RAAF Hospital Richmond</i> ' dated 25 March 1971, in support of his application.
1 & 3 July 2013	OIC telephoned and subsequently wrote to the Health Service requesting a submission as to whether disclosure of the Clinical Records might be prejudicial to the applicant's mental health or wellbeing.
3 July 2013	The Health Service provided the submission requested above.
16 July 2013	OIC accepted the external review application and conveyed to the applicant a preliminary view that access to the Clinical Records could be refused on the basis that disclosure of this information might be prejudicial to his mental health or well-being. OIC invited the applicant, if he did not accept the preliminary view, to make submissions in response by 30 July 2013.
29 July 2013	OIC received a submission from the applicant dated 25 July 2013
1 August 2013	OIC received a letter from the applicant dated 31 July 2013, enclosing a letter from his current treating psychiatrist dated 26 July 2013.
21 August 2013	OIC sought further clinical information from the Health Service.
23 August 2013	The Health Service provided the information requested above.