



## Decision and Reasons for Decision

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**Application Number:** 310029

**Applicant:** Keogh

**Respondent:** Department of Health

**Decision Date:** 31 August 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, on balance, be contrary to the public interest in accordance with section 49 of the *Right to Information Act 2009* (Qld) – medical records of Applicant’s deceased son

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## REASONS FOR DECISION

### Summary

1. The applicant applied to the Department Health (QH)<sup>1</sup> to access her deceased son's medical records. The son was admitted to hospital lacking capacity after a car accident and the applicant was involved in the medical treatment decisions made by the doctors, including the decision to cease life support and for organ donation.
2. In reviewing QH's decision to refuse access to all of the documents, the Information Commissioner varied QH's decision finding that the agency should give access to some of 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 Internal Review Decision 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, Initial Decision, application for internal review, Internal Review Decision and External Review Application
  - file notes of telephone conversations with the applicant's solicitor during the course of this review
  - file notes of telephone conversations with QH during the course of this review
  - written correspondence received from the QH during the course of this review
  - the third party consultation undertaken by the Office
  - the information in issue
  - relevant sections of the 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.

### The law

6. QH must decide to give access to a document unless disclosure would, on balance, be contrary to the public interest.<sup>2</sup>

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<sup>1</sup> Commonly known as Queensland Health.

<sup>2</sup> Sections 44 and 49 of the RTI Act.

7. It is the Parliament's intention that the grounds for refusing to give access are to be interpreted narrowly and an agency may give access to a document even if a ground on which access may be refused applies.<sup>3</sup>

## Findings

8. To decide whether disclosure of the information in issue would be contrary to the public interest, the following steps are followed:<sup>4</sup>
- identify any irrelevant factors that apply in relation to the information and disregard them
  - 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 (Part 1 Factors)***

9. No irrelevant factors have been identified.

### ***Factors in favour of disclosure (Part 2 Factors)***

10. I agree with the factors identified by QH as factors favouring disclosure of the information in issue in the public interest:
- a) the Applicant's general right to seek access under the RTI Act to documents held by QH
  - b) the information is the personal information of a deceased person and the Applicant is an eligible family member.
11. In addition to the above, I have identified two further factors that favour disclosure: the social and economic well-being of the community and accountability.

### ***Social and economic well-being of the community***

12. The Applicant's solicitors submit that the information in issue will assist the Applicant as follows:

*[Ms Keogh] made the decision to approve the turning off of Henry's life support system. [She] feels that she will have no peace in her own mind until she knows, from closely reading her son's treatment file that she made the right decision.*

13. The Applicant's solicitors have provided medical opinion evidence to the Office confirming their client has endured a protracted grieving period following the sudden death of her son, which is affecting her ability to return to work. Contrary to QH's submission, it is the medical opinion of the relevant health professional that disclosure of the information in issue would assist the Applicant to accept the circumstances surrounding her son's untimely death.

<sup>3</sup> Section 47(2) of the RTI Act.

<sup>4</sup> Section 47(3)(b) of the RTI Act.

14. In the context of the Applicant's submissions, I acknowledge that the Information Commissioner has previously recognised the existence of a public interest in the social and economic well-being of the community.<sup>5</sup>
15. During the course of this review QH requested and was provided with a copy of the medical opinion referred to above. Its response was:

*...on my reading of the letter tendered by the applicant's GP, it does not say unequivocally that disclosure will assist the applicant, but rather that it may assist the applicant (and I note that the GP's position in that regard was tendered without any knowledge regarding the actual contents of the documents in issue).*

*Even if we accept the social welfare benefit of assisting bereaved persons to recover from their grief, in this particular case we have no basis on which we can assume that disclosure of the matter in issue to the applicant will necessarily have such a positive therapeutic benefit. Our concern is that the preliminary view proceeds on that assumption, and does not take into consideration the possibility/probability of released the matter in issue directly to the applicant having exactly the opposite effect – i.e., exacerbating the applicant's grief reaction.*

16. In support of its position, QH states it has spoken with a senior staff member of Queenslanders Donate who has expressed concern about the disclosure of such information outside the context of the supportive counselling environment. I note QH has not clarified what this concern was or how the individual consulted is qualified to comment on the circumstances of this case.
17. It appears the basis of QH's above submission is that unless it can be guaranteed or unequivocally confirmed that the information in issue will assist the applicant, it should not be released. Furthermore QH states that the Office has not taken into consideration the possibility that release of the information in issue may exacerbate the applicant's grief reaction.
18. In determining this issue in the context of an external review, I am only required to be satisfied on the balance of probabilities<sup>6</sup> that disclosure of the information in issue will have a positive effect on the applicant's ability to return to work and therefore not be considered contrary to the public interest. In deciding this issue, I consider the evidence of the applicant's GP carries more weight than a conversation QH had with a staff member of Queenslanders Donate.
19. The applicant's GP has known the applicant for the past 13 years and because of her medical background is in a better position to make appropriate conclusions regarding the applicant's current mental state and what is likely to aid in her rehabilitation. Further, whilst the GP has not seen the contents of the information in issue, being a medical professional she would have an understanding of the type of information contained within the relevant documents. As I have no evidence before me which indicates that release of the information in issue is likely to exacerbate the applicant's grief reaction, QH's concerns in that regard does not warrant further consideration in the current circumstances.
20. In the present case, I am satisfied that it is more probable than not that disclosure of most of the information in issue will assist in the Applicant's rehabilitation, thereby bringing her prolonged state of bereavement and associated low productivity to an end.

<sup>5</sup> *OKP and Department of Communities* (Unreported, Queensland Information Commissioner, 9 July 2009) at page 17.

<sup>6</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 343-344.

21. However in relation to some of the information in issue,<sup>7</sup> I do not consider it would assist the Applicant in any meaningful way because it comprises information which has no relevance to the decisions made by the Applicant on behalf of her son.
22. Accordingly, to the extent that the information in issue may assist the Applicant to improve her health and outlook, the disclosure of those parts of the information in issue would be in the interests of the social and economic well-being of the community.

### ***Accountability***

23. In support of its decision to refuse the Applicant access to the information in issue, QH refers to previous decisions of the Office and, in particular relies on paragraph 24 of *Re Summers and Cairns District Health Service*<sup>8</sup> (**Summers**) where the Information Commissioner stated:

*...the public interest in accountability of public hospitals for the provision of medical services would not ordinarily outweigh the public interest in protecting privacy issues except where this would expose unsatisfactory or negligent performance and enable remedial and/or compensatory action to be taken.*

24. I now consider it appropriate to adopt a lower threshold for an accountability argument than what was applied in *Summers*. 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.
25. End of life decision making is a significant process and it is in the public interest for there to be public scrutiny of it so that public confidence in the health system is maintained.

### ***Factors in favour of non-disclosure (Parts 3 and 4 Factors)***

26. In the Internal Review Decision, QH raised the following factors in favour of non-disclosure:
  - c) the information is the personal information of a deceased person, the Applicant is an eligible family member and the disclosure of the information could reasonably be expected to impact on the deceased person's privacy if they were still alive - QH is of the view that there is a very strong public interest in preserving the privacy of an individual's medical record even after their death
  - d) an individual's personal information is a private concern, communication of which is generally only the prerogative of the individual rather than the government – in this case the person cited in the documents is unable to authorise the release of their personal information.

<sup>7</sup> This includes documents 61, 140-204 and the social work note dated 5 May 2009 on document 129.

<sup>8</sup> (1997) 3 QAR 479.

27. I agree with the factors QH has identified in favour of non-disclosure however I differ in the weight to be accorded to them.
28. The Information Commissioner has previously recognised that in certain circumstances the privacy interest of the individual who the medical records concern, may be reduced. In *Summers*<sup>9</sup> the Information Commissioner recognised that the following points (as demonstrated by the applicant) 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.
29. Having regard to the commentary in *Summers*, I consider that the following facts are relevant in this case:
- for the duration of his admission at RBWH, the Applicant's son was incapacitated and solely reliant on his parents to make health care decisions on his behalf
  - the Applicant's presence during her son's admission and involvement in the care of her son meant she was in a position to have detailed knowledge of her son's ill health and prognosis
  - the Applicant, along with her ex-husband, gave consent for the medical practitioner to decide to cease her son's life support and donate his organs.
30. The Applicant's son's privacy interests are substantially diminished in relation to information relevant to applicant's son's period of incapacity and which was necessary to inform the Applicant so that she could make health care decisions on his behalf.

### **Conclusion on balancing the public interest**

31. On the basis of the information before me, I am satisfied that:
- disclosure of information in issue would not be contrary to the public interest in relation to all documents except for (i) document 61 which relates to the personal information of a third party and is unrelated to the treatment afforded the applicant's son by RBWH; (ii) for documents 140-204 which relate to the procedure concerning organ donation and (iii) the social work note dated 5 May 2009 on document 129.

### **DECISION**

32. I vary the decision under review by finding that the majority of the information in issue should be disclosed to the Applicant on the basis that its release would not be contrary to the public interest under section 49 of the RTI Act.

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Julie Kinross  
**Information Commissioner**  
**Date: 31 August 2010**

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<sup>9</sup> at paragraph 19.

## Appendix

### **Significant procedural steps**

33. By letter dated 30 September 2009, South Queensland Law lodged an application under the RTI Act on behalf of their client, Ms Keogh (the **Applicant**) with QH seeking access to '*...medical records relating to [her deceased son's] treatment at [the Royal Brisbane and Women's Hospital].*' (**Access Application**).
34. By letter dated 4 November 2009, QH decided to refuse the applicant access to all documents responsive to the above application in accordance with section 47(3)(b) of the RTI Act (**Initial Decision**).
35. By letter dated 13 November 2009, South Queensland Law (on behalf of the Applicant) lodged an application for internal review of QH's decision.
36. By letter dated 9 December 2009, Prof. K. McNeil of QH affirmed the Initial Decision (**Internal Review Decision**).
37. On 18 December 2009, the Office of the Information Commissioner (**the Office**) received an email from South Queensland Law (on behalf of the Applicant) seeking an external review of QH's decision to refuse access to the information in issue (**External Review Application**).
38. By letters dated 14 January 2010, the Office informed the applicant and QH that the External Review Application had been accepted for review.
39. By letter dated 21 January 2010, QH provided a copy of the information in issue.
40. In a telephone conversation on 5 February 2010, the Office attempted to informally resolve the review with QH. QH indicated it would be prepared to reconsider the exemption status of the documents if the Office provided it with a written preliminary view.
41. By letter dated 12 May 2010, QH was provided with a preliminary view and asked to make any final submissions by 26 May 2010.
42. In a telephone conversation on 26 May 2010, QH requested a copy of the medical opinion evidence referred to in the preliminary view and also requested an extension of time in which to provide its response.
43. By letter dated 26 May 2010, QH was provided with a copy of the medical opinion evidence requested and agreed to provide QH with an extension of time until 2 June 2010 in which to provide its submissions.
44. By letter received by this Office on 9 June 2010 (one week past the agreed extension of time date), QH provided submissions in response to the preliminary view.
45. By letter dated 9 August 2010, QH was provided with a further preliminary view. QH was invited to provide submissions in response to this preliminary view by 23 August 2010.
46. In a telephone conversation on 24 August 2010, QH indicated that a delay in obtaining information from one of its sources meant it would be unable to provide its response to the further preliminary view until 26 August 2010. As at the date of this decision, no response to the further preliminary view has been received from QH.