



Decision and Reasons for Decision

Citation:	<i>W91 and West Moreton Hospital and Health Service [2023] QICmr 37 (15 August 2023)</i>
Application Number:	317138
Applicant:	W91
Respondent:	West Moreton Hospital and Health Service
Decision Date:	15 August 2023
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - medical records of deceased person - personal information and privacy - whether disclosure would, on balance, be contrary to the public interest – sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to West Moreton Hospital and Health Service (**Health Service**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to his deceased grandfather's health records between 1946 and 1952.²
2. The Health Service located 26 pages and decided³ to grant full access to seven pages, partial access to seven pages, and to refuse access in full to twelve pages. The Health Service decided that disclosure of the relevant information would, on balance, be contrary to the public interest.⁴
3. The applicant applied to the Health Service for internal review of the initial decision,⁵ however, the Health Service did not give a decision within the prescribed timeframe and was therefore deemed to have made a decision affirming the initial decision.⁶
4. The applicant applied to the Office of the Information Commissioner (**OIC**) for review of the Health Service's deemed internal review decision.
5. For the reasons explained below, I decide to affirm the decision under review.

¹ By application dated 3 November 2022.

² The applicant's grandfather died in 1952.

³ Decision dated 16 December 2022.

⁴ The Health Service also refused access to certain information under section 47(3)(e) of the RTI Act on the grounds that it was unlocatable. The applicant did not seek review of this part of the Health Service's decision.

⁵ Email of 24 December 2022, received by the Health Service on 28 December 2022.

⁶ Notice of deemed decision dated 7 February 2023.

Background

6. The applicant is compiling information about his family history and seeks further information about his late grandfather.

Reviewable decision

7. The decision under review is the Health Service's deemed internal review decision dated 7 February 2023.

Evidence considered

8. Significant procedural steps relating to the external review are set out in the Appendix.
9. The 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.⁷
10. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.⁸ 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 RTI Act and the *Information Privacy Act 2009* (Qld).⁹ 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:¹⁰ '*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.*'¹¹

Information in issue

11. The information in issue is contained on seven part pages¹² and twelve full pages,¹³ excluding identifying information for the clinical staff who were involved in the care of the applicant's grandfather¹⁴ at a mental health facility (**Information in Issue**).

Issue for determination

12. The issue for determination is whether access to the Information in Issue may be refused under the RTI Act because its disclosure would, on balance, be contrary to the public interest.

Relevant law

13. The RTI Act's primary object is to give a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the

⁷ Including the internal and external review applications and in correspondence of 21 February 2023, 3 March 2023 and 22 June 2023 (enclosing a letter dated 19 June 2023).

⁸ Section 21(2) of the HR Act.

⁹ *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].

¹⁰ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹¹ *XYZ* at [573].

¹² Pages 2, 9-11, 13, 16 and 19.

¹³ Pages 5-8, 12, 14-15, 18, and 21-25.

¹⁴ The applicant advised that he did not wish to pursue access to information about clinical staff in an email on 24 December 2022.

public interest to give access.¹⁵ The Act must be applied and interpreted to further this primary object,¹⁶ and is to be administered with a pro-disclosure bias.¹⁷

14. Section 23 of the RTI Act gives effect to the Act's primary object, by conferring a right to be given access to documents. This right is subject to other provisions of the RTI Act,¹⁸ including grounds on which access may be refused.¹⁹ One of these grounds (which are to be interpreted narrowly)²⁰ permits an agency to refuse access to a document to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest.²¹
15. The steps to be followed in determining whether disclosure of information would, on balance, be contrary to the public interest,²² are prescribed in section 49 of the RTI Act. In summary, a decision-maker must:
 - 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.
16. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of the public interest lies in a particular case. I have had regard to these factors,²³ and to the applicant's submissions, in reaching my decision.

Submissions of the parties

17. In its initial decision, the Health Service recognised the application of the following public interest factors favouring disclosure of the Information in Issue:
 - a) enhance government transparency and accountability²⁴
 - b) inform the community of the government's operations;²⁵ and
 - c) contribute to the social and economic well-being of the community and the family of the deceased.²⁶
18. The Health Service recognised the application of the following public interest nondisclosure/harm factors:

¹⁵ Section 3(1) of the RTI Act.

¹⁶ Section 3(2) of the RTI Act.

¹⁷ Section 44 of the RTI Act.

¹⁸ Section 23(1) of the RTI Act.

¹⁹ Section 47 of the RTI Act.

²⁰ Section 47(2)(a) of the RTI Act.

²¹ Sections 47(3)(b) and 49 of the RTI Act.

²² The 'public interest' '...is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interests of an individual or individuals': *Director of Public Prosecutions v Smith* (1991) 1 VR 63. The concept 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, although there are some recognised public interest considerations that may apply for the benefit of an individual: Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 *AIAL Forum* 12, 14.

²³ Taking care to disregard irrelevant factors.

²⁴ Schedule 4, part 2, item 1 of the RTI Act.

²⁵ Schedule 4, part 2, item 3 of the RTI Act.

²⁶ As recognised in OIC's decision in *OKP and Department of Communities* (Unreported, Queensland Information Commissioner, 9 July 2009) (**OKP decision**).

- a) disclosure would disclose the personal information²⁷ of a person, whether living or dead, thereby causing a public interest harm;²⁸ and
- b) disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy.²⁹

19. After balancing the factors weighing both for and against disclosure of the Information in Issue, the Health Service decided that the significant weight that it afforded to the nondisclosure/harm factors outweighed the public interest factors favouring disclosure.

20. In an email to the Health Service on 18 December 2022, the applicant attached a letter that contained details of the applicant's knowledge of his grandfather's life and family history. In the opening paragraph of the attached letter, the applicant stated:

I am a little put out at your use of the s.47(3)(b) & s.49 RTI Act – Contrary to Public Interest ruling applied to [name of grandfather]. Let me tell you things about this man and maybe you could reverse some of your decisions especially to do with family.

21. As regards the Information in Issue, the applicant stated:

On page 10 Personal History (1) I am sure something here could have been shown. Page 19 Names and addresses of Relatives and Friends could have been shown. Page 20 number 5, is there something missing here? I would like you to recheck some of your decisions as family names are well known to me.

22. In a subsequent email to the Health Service on 24 December 2022,³⁰ the applicant listed all pages to which access had been refused and made comments or asked questions about the redacted information, as well as re-stating the information about his grandfather and other family members of which he was already aware.

23. On external review, OIC's preliminary view³¹ invited further submissions from the applicant. The applicant stated as follows in his responding covering email:³²

... I have attached some things I feel should be released, and I am sure if this can be done then there will be four Grandchildren who would be pleased with full information about the two months stay in hospital.

24. In the attached letter, the applicant provided further information about his grandfather and other family members. He discussed the information that had been released to him by the Health Service as well as other information that he had obtained through researching his family history, and made comments and asked questions about the redacted information, including noting the gaps in his knowledge of his grandfather's life and apparent inconsistencies or errors in the released information. The applicant submitted that the Health Service's refusal of access to information gave him 'no confidence in the Health System or FOI'.

²⁷ Personal information is defined in section 12 of the *Information Privacy Act 2009* (Qld) (IP Act) 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'.

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

²⁹ Schedule 4, part 3, item 3 of the RTI Act. The concept of 'privacy' is not defined in either the IP Act or RTI Act. It can, however, essentially be viewed as the right of an individual to preserve their 'personal sphere' free from interference from others (paraphrasing the Australian Law Reform Commission's definition of the concept in 'For your information: Australian Privacy Law and Practice' Australian Law Reform Commission Report No. 108 released 12 August 2008, at paragraph 1.56).

³⁰ Treated as an application for internal review and received by the Health Service on 28 December 2022. The applicant also provided this email to OIC on external review.

³¹ Letter dated 12 June 2023.

³² Email of 22 June 2023 and attached letter dated 19 June 2023.

Consideration of public interest factors

25. In addition to the public interest factors favouring disclosure identified by the Health Service in its decision (as set out at paragraph 17 above), I consider that the following factors favouring disclosure also apply, and are raised by the applicant's submissions:
- a) the information is the personal information of a deceased person and the applicant is an eligible family member of the deceased;³³ and
 - b) disclosure could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.³⁴
26. In addition to the public interest factors favouring nondisclosure identified by the Health Service (as set out at paragraph 18 above), I consider that the following factor favouring nondisclosure also applies:
- a) disclosure of the personal information of a deceased person to an eligible family member could reasonably be expected, if the person were alive, to impact on the person's privacy.³⁵
27. The Information in Issue comprises details of the medical care provided to the applicant's grandfather, including mental/physical health assessments, medication, medical procedures and tests, including test results, and observations and discussions between health staff and the applicant's grandfather. It includes the thoughts, beliefs, feelings and opinions of the applicant's grandfather about himself and others, as well as medical opinions about his state of health. It also includes the personal information of other individuals, including their relationships, living circumstances, and information and opinions provided by them.
28. The Information in Issue is clearly the personal information of persons other than the applicant. An automatic public interest harm in disclosure therefore arises. Given the inherently sensitive nature of the Information in Issue – healthcare records and information gathered in the context of an individual's treatment in a mental health facility – I afford this harm factor significant weight. Disclosure of this type of sensitive personal information could reasonably be expected to result in a reduction in public confidence in the health system and a reduction in the ability of public health facilities to provide health care efficiently and effectively. The effective operation and delivery of health care services relies upon full and frank disclosure of information by patients and family members. In previous OIC decisions, it has been found that the risk in disclosing medical information of other individuals is that patients will no longer engage in an open and frank relationship with health care providers if that information could be disclosed to others without their consent after their death.³⁶ This harm in disclosure also applies to family members who provide information about those receiving care.
29. In terms of the associated public interest in protecting an individual's right to privacy in respect of their sensitive personal information, the applicant focuses on the age of the Information in Issue and the fact that those family members mentioned in the records, including the applicant's grandfather, are long deceased. I also recognise that, through his own research, the applicant already has some knowledge of aspects of his

³³ Schedule 4, part 2, item 9 of the RTI Act. 'Eligible family member' is defined in Schedule 5 to the RTI Act by way of a priority list of relatives. Based on the information he has provided, it would appear that the applicant falls within category (e) of the priority list.

³⁴ Schedule 4, part 2, item 11 of the RTI Act.

³⁵ Schedule 4, part 3, item 5 of the RTI Act.

³⁶ See *TFN20S and Gold Coast Hospital and Health Service* [2018] QICmr 37 (20 August 2018) at paragraph 49.

grandfather's state of health, as well as some family relationships. The age of information, as well as an applicant's knowledge of information, may serve to diminish the weight to be afforded to the public interest in protecting the right to privacy in respect of such information. But the right is not destroyed – a residual right to privacy remains.³⁷ This is particularly important to recognise in circumstances where there are no restrictions upon what a person may do with information released to them under the RTI Act, including the possibility of further dissemination.³⁸

30. Taking account of the sensitive nature of the Information in Issue and the context in which I have noted that it was collected/provided, as well as the fact that the persons involved are unable to provide their consent to disclosure, I find that significant weight should be afforded to the public interest in protecting the residual right to privacy of the relevant persons in respect of their personal information.
31. In some circumstances where a person is deceased, it has been recognised that it may be appropriate to afford less weight to the public interest in protecting the deceased's right to privacy in respect of their health care information where it can be established that the applicant was closely involved in the deceased's health care treatment. However, that is not the case here.
32. As to the countervailing public interest factors that operate in favour of both disclosure and nondisclosure of personal information of a deceased person to an eligible family member, I acknowledge that there is a public interest in the applicant, as an eligible family member for his deceased grandfather, to obtain access to his grandfather's personal information. However, I consider that this public interest in disclosure is, in effect, cancelled out by the countervailing factor favouring nondisclosure that recognises that disclosure could reasonably be expected, if the person were alive, to impact on the person's privacy. I have discussed above why I am of the view that the public interest in protecting the residual right to privacy that exists in respect of the Information in Issue, regardless of its age, remains significant. I also note that, while the applicant may qualify as an eligible family member for his grandfather, the relationship is relatively remote in terms of the priority list defined in the RTI Act.³⁹
33. Turning now to the remaining public interest factors favouring disclosure, I note that the applicant has been given access to administrative information about his grandfather's admission to the relevant health facility, including basic family history details, the nature of his grandfather's illness, his appearance and behaviour, and who requested the admission. This disclosure goes some way to answering some of the specific questions the applicant has raised about his grandfather.
34. I accept that disclosure of the Information in Issue could reasonably be expected, to a limited extent, to enhance the Health Service's accountability and transparency for the health treatment afforded to the applicant's grandfather and the health care decisions that were made, and inform the community of the operations of the relevant health care facility in its dealings with the applicant's grandfather. However, given the nature of the information, I would afford each of these factors only low weight when balancing the public interest. The Information in Issue does not, to any significant extent, reflect on the actions or decisions of the health care facility.

³⁷ *Queensland Newspapers Pty Ltd and Department of Justice and Attorney-General* [2018] QICmr 52 at [31].

³⁸ Noting that 'There is no provision of that Act which contemplates any restriction or limitation on the use which that person can make of that information, including by way of further dissemination' – see *FLK v Information Commissioner* [2021] QCATA 46 at [17] per McGill J.

³⁹ See the definition of 'eligible family member' in schedule 5 to the RTI Act.

35. As regards the public interest in enhancing the social and economic well-being of the community,⁴⁰ the Health Service in its decision recognised that disclosure of the Information in Issue may give the applicant a more complete picture of his grandfather's state of health towards the end of his life, and assist him to understand more about his family's medical history, including any genetic conditions. However, taking account of the information already released to the applicant, as well as the nature of the Information in Issue, I afford this factor low to moderate weight in the public interest balancing test. I am not satisfied that disclosure would significantly enhance the applicant's knowledge in that regard, nor inform him about family medical issues that could reasonably be considered of current or continuing concern.

Finding

36. After balancing the various public interest factors favouring disclosure and nondisclosure of the Information in Issue, I find that the significant weight that I afford to the public interest in protecting the personal information and privacy of the applicant's deceased grandfather and the other individuals referred to in the Information in Issue is sufficient to outweigh the various public interest factors favouring disclosure, to which I have afforded low to moderate weight. As such, I find that disclosure of the Information in Issue would, on balance, be contrary to the public interest.

DECISION

37. I affirm the decision under review by finding that access to the Information in Issue may be refused under the RTI Act because its disclosure would, on balance, be contrary to the public interest.
38. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

S Martin
Assistant Information Commissioner

Date: 15 August 2023

⁴⁰ In the *OKP decision*, this factor was found to include enhancing the ability of community members to improve their health and outlook; to assist bereaved members to recover from their grief; and to assist individuals to function as productive members of society.

APPENDIX

Significant procedural steps

Date	Event
20 February 2023	OIC received the application for external review. OIC requested and received preliminary documents from the Health Service.
21 February 2023	OIC received an email from the applicant.
3 March 2023	OIC advised the parties that the application for external review had been accepted. OIC received an email from the applicant.
12 June 2023	OIC communicated a preliminary view to the applicant.
22 June 2023	OIC received submissions from the applicant.