

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 05/2005
Application 209/04

Participants:

JOANNE WATSON
Applicant

WEST MORETON HEALTH SERVICE DISTRICT
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – matter in issue comprising medical records of the applicant's deceased mother – deceased founding member of the Barjai Arts Group and Brisbane's New Theatre – applicant seeking access to the matter in issue to assist in a research project on the Barjai Arts Group and Brisbane's New Theatre – consent of deceased's closest living relatives to disclosure – whether the disclosure would, on balance, be in the public interest – application of s.44(1) of the *Freedom of Information Act 1992 Qld*

Freedom of Information Act 1992 Qld s.27(4), s.44(1), s.51

Fotheringham and Queensland Health, Re (1995) 2 QAR 799

Getman v National Labor Relations Board 450 F.2d 670 (D.C. Cir. 1971)

Pemberton and The University of Queensland, Re (1994) 2 QAR 293

Stewart and Department of Transport, Re (1993) 1 QAR 227

Summers and Cairns Health Service District, Re (1997) 3 QAR 479

DECISION

I set aside the decision under review (being the deemed decision of the West Moreton Health Service District to refuse access to documents sought in the applicant's FOI access application dated 15 May 2002). In substitution for it, I find that the matter in issue, except for folio 1, is not exempt from disclosure to the applicant under section 44(1) of the *Freedom of Information Act 1992* Qld.

Date of decision: 23 June 2005

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CATHI TAYLOR
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of the deemed decision of the West Moreton Health Service District (the WMHSD) to refuse her access to the applicant's deceased mother's medical records.
2. By letter dated 15 May 2002, the applicant applied to the Wolston Park Hospital for access to the deceased's "case files from 1960 to 1964". The applicant is a professional historian. At the time the applicant made her access application, the applicant stated she was:

...compiling a mixture of social history and biography, centred upon the life and achievements of [the deceased], who was a significant figure in Queensland's artistic circles. [The deceased] was instrumental in the formation of Brisbane's Barjai Arts group of the 1940s and Brisbane's New Theatre group in the 1950s. This research is supported by Arts Queensland...
3. The applicant was granted financial assistance by Arts Queensland in 2001-02 to research the Barjai Arts group and Brisbane's New Theatre, of which the deceased had been a founding member.
4. By letter dated 29 May 2002, Ms J Priest, FOI Decision Maker for the WMHSD, requested that the applicant provide appropriate documentary evidence that the applicant was the deceased's closest living relative.
5. By letter dated 2 September 2002, in response to the WMHSD's letter dated 29 May 2002, the applicant provided the WMHSD with a copy of her birth certificate and the death certificate of the deceased. The applicant also provided the WMHSD with copies of documents regarding her credentials (identified in paragraph 41 below).

6. The WMHSD failed to process the applicant's FOI access application within the time limit stipulated in s.27(4) of the *Freedom of Information Act 1992 Qld* (FOI Act), and was therefore deemed to have refused access to the documents requested by the applicant.
7. By letter dated 31 March 2004, the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of the WMHSD's deemed refusal of access.

Steps taken in the external review process

8. By letter dated 14 April 2004, the WMHSD was asked by this Office whether it was prepared to give the applicant access to any documents, or any parts of documents, that were responsive to the applicant's FOI access application. In the event that the WMHSD was not prepared to give the applicant access, the WMHSD was asked to provide this Office with copies of those documents.
9. By letter dated 14 April 2004, Ms Priest provided this Office with a copy of the "*Wolston Park Clinical Record of [the deceased]*" and the FOI file.
10. By letter dated 29 April 2004, Assistant Information Commissioner (AC) Newbery requested that the applicant provide further information to establish a connection between the illness of the deceased and the groups that the applicant is researching. In that letter, AC Newbery explained that she sought this information in order to assist this Office to evaluate the public interest in access by the applicant to the deceased's medical records. AC Newbery also sought further clarification of the applicant's reasons for wanting to "set straight" a number of rumours concerning the death of the deceased. In her letter AC Newbery also requested that the applicant provide contact details for the deceased's other closest living relatives.
11. By telephone on 29 and 30 April 2004, this Office obtained from the applicant contact details for her siblings and consulted them on their views regarding disclosure of the matter in issue to the applicant.
12. By letter dated 20 May 2004, the applicant provided further details as to why she sought access to the deceased's medical records.
13. By letter dated 17 June 2004, AC Barker advised the WMHSD that, based on the submissions made in the applicant's letter dated 20 May 2004, it might be possible to distinguish this application from the decision of Information Commissioner Albietz in *Re Fotheringham and Queensland Health* (1995) 2 QAR 799. On that basis, AC Barker requested that the WMHSD advise whether it was prepared to grant the applicant access to all or part of the deceased's medical records and, in the event the WMHSD decided not to grant access to any part of the records, the ground/s on which such documents were considered to be exempt.
14. By letter dated 1 July 2004, Ms A Marshall, Acting Freedom of Information Decision Maker for the WMHSD, advised AC Barker that the position of the WMHSD was that the medical records of the deceased were exempt under s.44(1) of the FOI Act. The WMHSD also provided submissions in support of its position.
15. By letter dated 23 August 2004, AC Barker invited the applicant to provide further submissions on how and why any of the matter in issue would assist the applicant in her research regarding the deceased's involvement in the Barjai Arts group and Brisbane's New Theatre, and any public interest considerations which she believed would be served by the disclosure of the medical records on the deceased's Hospital file.

16. Staff of this Office prepared a Schedule itemising the documents that the WMHSD had identified as responsive to the applicant's FOI access application and provided a copy of the Schedule to the applicant. By letter dated 23 August 2004, the applicant was asked to consider narrowing the scope of the documents to which she sought access.
17. By letter dated 10 September 2004, the applicant replied to AC Barker's letter dated 23 August 2004, providing further submissions in support of her application. The applicant also informed this Office that she did not wish to pursue access to some of the folios itemised in the Schedule. (The majority of the excluded folios related to details of day-to-day treatment and statements by the deceased and observations of the deceased's condition noted by nurses and others during her hospitalisation.) Accordingly, those folios are no longer in issue in this review.
18. In making my decision in this case, I have taken into account the following material:
- the contents of the matter in issue;
 - the applicant's FOI access application dated 15 May 2002, and application for external review dated 31 March 2004 (including attachments);
 - letters from the applicant dated 20 May 2004 and 10 September 2004; and
 - letters from the WMHSD dated 14 April 2004 (including attachments) and 1 July 2004.

Matter in issue

19. The matter in issue consists of medical records held by the WMHSD in relation to the deceased from 1962 to 1964, comprising folio numbers 1, 25, 26, 32, 33-40, 42-43, 48-49, 54-56, 63-70, 74, 77-88, 90, 92, 95-97, 101-103, 106, 108, 110-111, 113-116.

Section 44(1) of the FOI Act

20. Section 44(1) of the FOI Act provides:

44.(1) Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.

(a) Requirement for exemption

21. The s.44(1) exemption clearly extends the scope of its protection to information concerning the personal affairs of deceased persons. In applying s.44(1) of the FOI Act, the first question to ask is whether disclosure of the matter in issue would disclose information concerning the personal affairs of a person other than the applicant for access. If that is the case a public interest consideration favouring non-disclosure is established, and the matter in issue will be exempt, unless there are public interest considerations favouring disclosure, which outweigh all public interest considerations favouring non-disclosure.
22. In *Re Stewart and Department of Transport* (1993) 1 QAR 227, Commissioner Albietz discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations) as it appears in the FOI Act (see pp.256-267, paragraphs 79-114). In particular, he said that information concerns the "personal affairs of a person" if it concerns the private aspects of a person's life and that, while there may be a substantial

grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:

- family and marital relationships;
- health or ill health;
- relationships and emotional ties with other people; and
- domestic responsibilities or financial obligations.

23. Whether or not matter contained in a document comprises information concerning an individual's personal affairs is a question of fact, to be determined according to the proper characterisation of the information in question.

(b) Application to the matter in issue

24. The matter in issue concerns the admission, medical treatment, care and progress of the deceased. There is also some information recording the deceased's periods of leave from the Wolston Park Hospital and visits made by the deceased's husband.

25. All of the matter in issue falls within the core meaning described above; it comprises information concerning the personal affairs of the deceased. I am therefore satisfied that disclosure of the matter in issue would disclose information concerning the personal affairs of a person other than the applicant for access. Accordingly, that matter is *prima facie* exempt from disclosure to the applicant under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated within s.44(1).

(c) Public interest balancing test

26. Because of the way that s.44(1) of the FOI Act is worded and structured, the mere finding that information concerns the personal affairs of a person other than the applicant for access must always tip the scales against disclosure of that information (to an extent that will vary from case to case according to the relative weight of the privacy interests attaching to the particular information in issue in the particular circumstances of any given case), and must decisively tip the scales if there are no public interest considerations which tell in favour of disclosure of the information in issue. It therefore becomes necessary to examine whether there are public interest considerations favouring disclosure and, if so, whether they outweigh all public interest considerations favouring non-disclosure.

(i) Public interest considerations against disclosure

- Privacy of an individual's medical records

27. As Commissioner Albiez stated in *Re Summers and Cairns Health Service District* (1997) 3 QAR 479, the public interest in respecting the privacy of an individual's medical records is a strong one, which will ordinarily be deserving of considerable weight in the application of a public interest balancing test (p.484, paragraph 18): see also *Re Fotheringham*, at paragraphs 11, 24-25 and 33.

28. The WMHSD submitted that the deceased's rights to privacy in her lifetime, as well as in death, need to be appropriately respected. Further, had the deceased:

...known of the risk that, after her death, her medical records could potentially be accessed and insights gleaned from them regarding her mental health would be published in a book, she may not have been as forthcoming with providing information.

29. I agree that respect for the privacy of the deceased is of great importance. I note, however, that the documents to which access is sought have been substantially reduced during the course of this review. In this respect, I also note that the documents remaining in issue are information about the deceased, as distinct from information provided by the deceased. (The remaining matter in issue primarily relates to dates and periods of admission and leave, and information regarding diagnoses, such as discharge summaries and medical recommendations.)
30. In her letter dated 2 September 2002 to the WMHSD, the applicant submitted that considerable years had elapsed since the deceased's death in 1964 and that privacy concerns in respect of deceased persons lose their potency with the passage of time. Further, the applicant stated that the stigma associated with mental health issues almost 40 years ago does not apply today. However, in its letter dated 1 July 2004, the WMHSD contends that in the present case the period of time since the creation of the records in issue (1962-1964) was not so considerable that the privacy concerns in respect of those records are substantially reduced.

- Consent of closest living relatives to disclosure

31. The views of the closest living relative of a deceased person concerning release are also relevant to the application of the public interest balancing test in s.44(1) of the FOI Act. In *Re Fotheringham* (at paragraph 9), Commissioner Albietz stated:

Since it is obviously not possible to consult with a deceased person over a question of access to information concerning the deceased person's personal affairs, the practical alternative recognised by the legislature (see s. 51(3) of the FOI Act) is consultation with the deceased person's closest relative. The views expressed by the closest relative, whether for or against disclosure of information concerning the deceased's personal affairs, will ordinarily be relevant factors for an agency to take into account when deciding, pursuant to the discretion conferred by s.28(1) of the FOI Act, whether or not to claim an exemption which is available. The views expressed by the closest relative may also, according to the circumstances of a particular case, be entitled to some weight in the application of the public interest balancing test incorporated within s.44(1) of the FOI Act.

32. In this case, the applicant is the deceased's closest living relative. The deceased's husband is also deceased. Staff of this Office consulted the applicant's siblings, as the other closest living relatives of the deceased, and they have advised that they support the applicant's FOI access application for disclosure of the matter in issue. The circumstances in this case are therefore significantly different from *Re Fotheringham*, where the closest living relative strongly objected to the disclosure of the matter in issue.
33. The FOI Act in s.51 provides a clear mechanism for consultation of a deceased's closest living relatives. I am of the view that, where the closest living relatives support the applicant's FOI access application for disclosure of the matter in issue, the privacy interest favouring against disclosure is diminished. I am satisfied that, in the circumstances of this case, the views of the deceased's children are of some weight in the application of the public interest balancing test. However, I note that in the absence of any public interest considerations favouring disclosure, the consent of the deceased's closest living relatives alone would not be sufficient to outweigh all public interest considerations favouring non-disclosure.

(ii) Public interest considerations favouring disclosure

34. Ultimately, I am required to decide whether there are public interest considerations favouring disclosure that outweigh the public interest in protecting the privacy of information concerning the personal affairs of the deceased.
35. In her letter to the WMHSD dated 2 September 2002, the applicant submitted the following reasons in support of her FOI access application:
- *...I am next of kin.*
 - *I am a bona fide researcher with a PhD and a proven track record in the handling of sensitive material (as documented in my correspondence of 15 May 2002). It is not my intention to publish records that I may access through your office, and I am fully aware that copyright law does not permit the publication of records produced by or on behalf of the Crown without the permission of the Director General. In any case, no publisher in their right mind would allow me to do so.*
 - *It is important, in the interests of developing a professional history of a significant figure in the post-war arts scene, that I avoid conclusions based upon partial or biased personal accounts. Your office holds the only unbiased, contemporaneous reports available to shed light upon my mother's health status in the early 1960s.*
 - *Considerable years have elapsed since her death in 1964. Mental health records from earlier periods are freely available through Queensland State Archives and privacy concerns in respect of deceased persons lose their potency with the passage of time. Clearly, the stigma surrounding mental health issues almost 40 years ago, does not apply today.*
 - *I am required to provide a detailed and accurate biographical history. This biography would be seriously incomplete without reference to her health difficulties.*
 - *It would be in the interest of my own emotional and mental health and well-being to gain a clear understanding of my mother's health problems, which have been surrounded by confusion, secrecy, silence and/or speculation throughout my life. I do not see how else I can achieve this clarification, other than by access to records held by your office.*
36. I will discuss in turn the applicant's central arguments outlined above.
- Availability of similar records
37. The applicant states above that "*mental health records from earlier periods are freely available through Queensland State Archives*". I note that inquiries of this Office have found that records similar to the matter in issue are currently held by Queensland State Archives under restricted access conditions for 100 years. It would therefore appear that such practices do not support the applicant's arguments for access in this regard.
- Personal interest of applicant
38. As stated in paragraph 35 above, the applicant submitted that she sought access to the deceased's medical records for several reasons, including that it would be in the interest of her own emotional and mental health and wellbeing to gain a clear understanding of the

deceased's health problem. In considering that argument, I note that similar arguments were raised by the applicant in *Re Summers*. In that case, Commissioner Albietz found (at paragraph 24) that the argument that disclosure of the matter in issue would give Mrs Summers peace of mind and enable her to understand the treatment of her deceased daughter (whose medical records were in issue in that case) could not properly be characterised as a public interest consideration but, rather, as a personal interest of the applicant. Similarly, I am satisfied that the applicant's argument in this case could not properly be characterised as a public interest consideration, but as a personal interest of the applicant.

- Historical and cultural research

39. The applicant also submitted that she sought access to the matter in issue for the purposes of researching the Barjai Arts group and Brisbane's New Theatre, of which the deceased was a founding member.
40. I am of the view that there is a public interest consideration in making available to members of the public, detailed and accurate historical and cultural research regarding the Barjai Arts group and Brisbane's New Theatre. The applicant has submitted that she is in a position to give effect to this public interest through this research project. The research project has attracted Government funding and such historical and cultural research can contribute to society's understanding and identification of itself.
41. By letter dated 15 May 2002, in further support of her FOI access application the applicant provided to the WMHSD:
 - a copy of her Doctor of Philosophy degree from the University of Queensland;
 - a reference from Dr Evans, Associate Professor of History from the University of Queensland;
 - an undated letter from the Minister for Employment Training and Youth and Minister for Arts confirming a grant of \$4,070 in 2001-02 towards the costs of researching Brisbane's Barjai Arts and New Theatre groups in the 1950s;
 - a letter dated 30 May 1993 from the Palm Island Aboriginal Council, congratulating the applicant on her time and effort on the History Thesis of Palm Island; and
 - a letter dated 14 August 1995 from Mr McHugh, Executive Director of the Department of Education, South-Western Regional Office, congratulating the applicant on the publication of "Collated Oral Histories of the South-West".
42. The documents listed above establish the applicant's skills and experience in the field of history, and her reputation as a respected historian. I mention this having regard to a decision under U.S. freedom of information legislation by the U.S. Court of Appeals in *Getman v National Labor Relations Board* 450 F.2d 670 (D.C. Cir. 1971). The applicants in that case were law professors proposing to conduct a study into aspects of labor union election rules. They sought details of union members' names and addresses. The court considered as relevant to its determination the study's public interest purpose, the researchers' skills, and the likelihood of completing the proposed study without the requested information.

43. The references provided by the applicant are also intended to support her claim that disclosure of the matter in issue would be in the public interest. For example, Dr Evans stated:

I have no difficulty in asserting that she will commit herself fully and wholeheartedly to this present project as it is one which touches her personally as well as thoroughly engaging her intellectual curiosity. The project itself is fascinating and one that is sure to open up whole new understandings of cultural life in Brisbane and Queensland in a little understood era.

44. In *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 (at paragraph 164) Commissioner Albietz stated that in certain circumstances it may be appropriate:

...to recognise a legitimate public interest which favours disclosure of particular documents to a particular applicant for access, even though no such public interest consideration would be present when disclosure to other applicants was in contemplation ...

45. I am of the view that such circumstances exist in this case. The applicant holds appropriate qualifications and experience as a historian and is thus able to use the information contained in the matter in issue sensitively and appropriately in serving the public interest through her research project. Further, the applicant is also the deceased's closest living relative and is likely to ensure sensitive handling of privacy issues in accordance with the wishes of the closest living relatives.

46. In her external review application dated 31 March 2004, the applicant raised a number of grounds to support her claim that it would be in the public interest to allow her access to the matter in issue. The applicant stated (and provided documentary evidence to support her claim) that she was conducting research into the Barjai Arts group. The applicant has submitted:

The research I am conducting is for the purposes of a biography/social history regarding my mother and the arts group 'Barjai' of 1940s Brisbane. I am supported in this endeavour by prominent historians as well as being funded by Arts Queensland. In addition, a chapter of this research is soon to be published in the book Radical Brisbane, which is to be launched at the Museum of Brisbane, City Hall, on 1st May 2004. However, I cannot progress the conclusion of this work without access to my mother's medical records.

47. In her letter dated 20 May 2004, the applicant further elaborated on the public interest of accessing the matter in issue by confirming that the deceased had been a founding member of both the Barjai Arts group and Brisbane's New Theatre. The applicant submitted:

...it is through tracing her life story that I am able to explore these two components of Brisbane post-war culture. Her biography thus provides the 'glue' that cements the story of these two cultural formations together. The project is structured around her life story. Thus, it is not possible to provide an adequate conclusion to this history without access to the records that explain her demise at a relatively young age.

Whereas many other members of the Barjai group ... went on to have quite outstanding professional careers later in life, my mother's story ceases at a comparatively early age. I believe that this was due to some kind of significantly disabling medical condition, but I do not know what this was, nor do I know the duration of her illness. It behoves me as a professional historian to acquire the facts, thus putting an end to various speculations that have circulated amongst remaining members of the Barjai arts group and their peers. Oral history interviews to date have unearthed a broad range of speculations including one, from a prominent Australian author, that my mother 'threw herself from a moving vehicle' and eventually died as a result of the injuries. My desire to set the record straight comes from the need to establish an accurate, factual account of her life (rather than asserting one speculation over another).

- Relevance of matter in issue to research project

48. In *Re Fotheringham*, much of the matter in issue was of a very routine medical nature which, in Commissioner Albietz's view (at paragraph 20), would not have been of any assistance in demonstrating what effect Mrs Davis' mental illness may have had on her husband's (Steele Rudd's) life and work. In this case, the applicant has submitted that her research cannot be effectively concluded without adequate information regarding the deceased's cause of death, and her illness which required periods of treatment at Wolston Park Hospital in the early 1960s. The applicant stated, in her letter dated 2 September 2002:

I am required to provide a detailed and accurate biographical history. This biography would be seriously incomplete without reference to her health difficulties.

49. The WMHSD has submitted that the applicant already has the deceased's death certificate, and can therefore utilise the information contained in that certificate to end speculation in that regard. However, the applicant contends that she has no way of ascertaining whether the deceased's cause of death stated in the death certificate was in any way connected to, or constitutes, the diagnosis that lead to her admission and treatment at Wolston Park Hospital, or the length of time that she was an inpatient.

50. As noted above, during the course of the external review the applicant reduced the scope of the documents to which she sought access under the FOI Act. The remaining matter in issue relates to dates of admission and hospitalisation, including periods of leave from the hospital, and information regarding diagnoses, such as discharge summaries and medical recommendations. With the exception of folio 1 (which I will address separately below), I am of the view that this information, which directly relates to the deceased as the primary subject of the applicant's research, would allow the applicant to provide significant insight in the biography into the deceased's final years. The applicant would also be able to provide insight into the periods the deceased was hospitalised or, alternatively, perhaps was able to participate in activities related to developments relevant to cultural history and/or her own professional career. I am therefore satisfied that the matter remaining in issue, other than folio 1, would assist the applicant in documenting the deceased's withdrawal from active participation in the Brisbane's Barjai Arts and New Theatre groups.

51. Following examination of folio 1, which comprises a diagnosis by a medical practitioner of an isolated general medical complaint unrelated to the deceased's cause of death or periods of hospitalisation, I am satisfied that the information in this document does not relate to the applicant's research project. I am therefore satisfied that the public interest in disclosure of this document would not outweigh the public interest in protecting the privacy of the deceased in this respect.

52. Having considered the submissions made by the applicant, and the other information contained in her letters, it is my view that the public interest considerations favouring disclosure to the applicant of the matter in issue in this case, with the exception of folio 1, outweigh, on balance, the public interest in protecting the privacy of the deceased's medical records, the weight of which has been reduced by the consent of the deceased's closest living relatives.

(d) Conclusion

53. For the reasons set out in paragraphs 26-52 above, I am satisfied that the matter in issue, with the exception of folio 1, does not qualify for exemption from disclosure to the applicant under s.44(1) of the FOI Act. I am satisfied, for the reasons set out above at paragraph 51 that folio 1 is exempt from disclosure to the applicant under s.44(1) of the FOI Act.

Decision

54. I set aside the decision under review (being the deemed decision of the WMHSD to refuse access to documents sought in the applicant's FOI access application dated 15 May 2002). In substitution for it, I find that the matter in issue (identified in paragraph 19 above), except for folio 1, is not exempt from disclosure to the applicant under s.44(1) of the FOI Act.

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CATHI TAYLOR
INFORMATION COMMISSIONER