



## Applying the legislation

GUIDELINE *Right to Information Act 2009 and Information Privacy Act 2009*

### Applications for medical records of the deceased

Applicants can apply for access to a deceased person's medical records under the *Right to Information Act 2009* (RTI Act) but they cannot apply for these records under the *Information Privacy Act 2009*<sup>1</sup>. An agency must decide to give access to the records unless doing so would be contrary to the public interest.

There may be a variety of reasons why an applicant seeks access to medical records of a deceased person. While applicants are not required to give reasons for making an application, their reasons may reveal public interest factors favouring disclosure of the records.

Relevant considerations when deciding an application for a deceased person's medical records include the:

- deceased person's right to privacy
- relationship between the applicant and the deceased; and
- applicant's involvement in deceased person's healthcare.

#### Where the applicant is an eligible family member

Who can be an *eligible family member* for a deceased person is set out in schedule 5 of the RTI Act and explained in [OIC's guideline](#)<sup>2</sup>. The applicant is not required to be an eligible family member to apply for, or to be given access to, a deceased person's medical records, however if the applicant **is** an eligible family member this should be taken into consideration when making the access decision.

Note that some public interest factors for and against disclosure will only apply where the applicant is an eligible family member.

#### Evidence supporting the application

A decision maker will need evidence to support the above considerations in order to take them into account when making their decision. If this information is not present on the files, they will need to contact the applicant and invite them to provide it. The OIC's information sheet [Applying for medical records of a person who is deceased](#) may help applicants understand what they need to show.

The provision of this information is voluntary and a failure to provide it will not make an application non-compliant. However, if an applicant is unable or unwilling

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<sup>1</sup> An individual can only apply for documents containing their own personal information under the IP Act.

<sup>2</sup><https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/decision-making/eligible-family-members>



to provide additional information, decision makers will need to proceed to make a decision based on the evidence they have before them.

### **Non-medical information in medical records**

Medical records may contain information of a personal nature that does not relate to the healthcare, treatment or medical condition of the deceased, such as information about the deceased person's thoughts or feelings. This kind of information is more likely to be contrary to the public interest to release than information of a purely healthcare or medical nature.<sup>3</sup>

### **Public interest factors favouring disclosure**

#### ***Eligible family member***

Schedule 4, part 2, item 9 of the RTI Act provides that a factor favouring disclosure is where the information would have been personal information of the deceased person when they were alive and the applicant is an eligible family member.

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

The Information Commissioner has recognised that there is a public interest in the social and economic well-being of the community, which includes:

- the ability of its members to improve their health and outlook
- assisting bereaved members to recover from their grief; and
- assisting people to function as productive members of society.<sup>4</sup>

It may be relevant to consider whether disclosing the information could contribute to the social and economic well-being of the community. It is not necessary that the benefit can be guaranteed to result from the disclosure only that, on the balance of probabilities, the disclosure will have a positive effect.

#### ***Accountability***

A public interest factor favouring disclosure of information is that its release would enhance government accountability.<sup>5</sup> The weight to be given to this factor will depend on the facts of each case. In some circumstances, government accountability can be enhanced by an applicant having access to evidence of the care provided to a person who is now deceased. There is also a public interest in maintaining the public's confidence in a public service such as the health system.

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<sup>3</sup> See *Swales and Department of Health* (Unreported, Queensland information Commissioner 9 March 2011) (Swales)

<sup>4</sup> *OKP and Department of Communities* (Unreported, Queensland information Commissioner, 9 July 2009) at page 17.

<sup>5</sup> Schedule 4, part 2, item 1 of the RTI Act.



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**Example**

The Information Commissioner noted in *Keogh*<sup>6</sup> that “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”<sup>7</sup>. As the applicant had been involved in making the decision to end the deceased person’s life support, this factor weighed in favour of disclosure to her.

**Public interest factors favouring nondisclosure**

***Deceased person’s privacy interests***

Medical and health information is generally considered to be sensitive personal information which is subject to strong privacy protections. This persists even after death, as the RTI Act recognises that deceased persons retain a privacy interest. Schedule 4, part 3, item 5 provides that a public interest factor against disclosure arises where:

- the applicant is an eligible family member
- the information would have been the deceased person’s personal information when they were alive; and
- had the deceased person been alive, release could reasonably be expected to impact on their privacy.<sup>8</sup>

Schedule 4, part 4, section 6 provides that a public interest harm can be caused by disclosing personal information of a person, whether living or dead.<sup>9</sup>

In *Summers and Cairns District Health Service*<sup>10</sup> (*Summers*), the Information Commissioner recognised that the privacy interest of a deceased person may be lessened:

- if there is evidence of the applicant’s involvement in the deceased’s care
- based on the extent of the applicant’s knowledge of the deceased’s medical history; or
- where there is evidence of the deceased’s special dependence on, or relationship with, the applicant.

How much weight, if any, an agency gives to these factors will depend on the specific circumstances of the application and the relationship between the applicant and the deceased. Generally, if the applicant and the deceased were

<sup>6</sup> *Keogh and Department of Health* (Unreported, Queensland information Commissioner, 31 August 2010) (*Keogh*).

<sup>7</sup> At paragraph 25.

<sup>8</sup> Schedule 4, part 3, item 5.

<sup>9</sup> Schedule 4, part 4, section 6.

<sup>10</sup> (1997) 3 QAR 479 at paragraph 19



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very close and the applicant was heavily involved in the healthcare of the now deceased person, this will tend to weigh in favour of release of the information.<sup>11</sup>

In *X19 and Metro South Hospital and Health Service*<sup>12</sup> the applicant was living interstate and, by virtue of her lack of proximity, was not closely involved in her deceased's mother's care. Despite evidence of telephone contact with her mother and siblings, the Commissioner found that the applicant was not involved in a sufficiently detailed way in decisions concerning her mother's day to day health care to reduce the prejudice to the deceased's privacy.

In *Keogh*, the applicant's enduring power of attorney, and involvement in making healthcare decisions, for the deceased was a significant aspect in reducing the weight given to the deceased person's privacy interests.

**Example**

In *Swales*<sup>13</sup>, the Information Commissioner found the deceased person's privacy interests in relation to her medical information was greatly diminished because the applicant, the deceased person's mother, in addition to other factors:

- knew about her daughter's medical condition and was involved in her care; and
- stated that the medical record would be used if any of the daughter's siblings or applicant's grandchildren were diagnosed with the same condition as the daughter.

For additional information and assistance please refer to OIC's guidelines, or contact the Enquiries Service on 07 3234 7373 or email [enquiries@oic.qld.gov.au](mailto:enquiries@oic.qld.gov.au).

**This guide is introductory only, and deals with issues in a general way. It is not legal advice. Additional factors may be relevant in specific circumstances. For detailed guidance, legal advice should be sought.**

If you have any comments or suggestions on the content of this document, please submit them to [feedback@oic.qld.gov.au](mailto:feedback@oic.qld.gov.au).

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*Changes to legislation after the update date are not included in this document*

<sup>11</sup> Keogh at paragraph 28

<sup>12</sup> [2020] QICmr12 (26 February 2020)

<sup>13</sup> At paragraph 23-24