



Decision and Reasons for Decision

Citation:	<i>88OQAO and Wide Bay Hospital and Health Service [2019] QICmr 14 (1 May 2019)</i>
Application Number:	314408
Applicant:	88OQAO
Respondent:	Wide Bay Hospital and Health Service
Decision Date:	1 May 2019
Catchwords:	ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – HEALTHCARE INFORMATION – applicant’s clinical records – whether applicant’s relevant healthcare information – whether disclosure prejudicial to physical or mental health or wellbeing of the applicant – whether disclosure contrary to the applicant’s best interests – section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(d) and 51 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant was a patient of the Wide Bay Hospital and Health Service (**Health Service**) for a period of time.
2. The applicant sought access under the *Information Privacy Act 2009* (Qld) (**IP Act**) to his health records held by the Health Service from 8 June 2018 to 10 December 2018.
3. The Health Service identified the relevant health records¹ and purported to refuse access to the health records on the basis that its disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant.²
4. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Health Service’s decision.³
5. Having considered the submissions of both parties, I am satisfied that the health records comprise the applicant’s healthcare information and that there is a real and tangible possibility that its disclosure might prejudice the applicant’s mental health or wellbeing. Accordingly, I have decided to vary the Health Service’s deemed decision, and find that access to the health records may be refused under 67(1) of the IP Act and sections 47(3)(d) and 51 of the *Right to Information Act 2009* (Qld) (**RTI Act**).

¹ The Health Service identified that the Bundaberg hospital held one file comprising of 294 pages of which 192 pages fell within the scope of the access application.

² As the Health Service failed to notify the applicant of its decision within the applicable statutory timeframe, the decision under review is a deemed decision refusing access to the health records.

³ See applicant’s email to OIC dated 22 January 2019.

Background

6. Significant procedural steps taken during the external review are set out in the Appendix to this decision.
7. The applicant applied for access to his health records on 7 December 2018 with the relevant period for the Health Service to make a decision expiring on 16 January 2019.
8. The applicant contacted⁴ the Health Service on 21 January 2019 to enquire about his access application. The Health Service notified the applicant by telephone that its decision was to refuse access to the health records.⁵ The applicant then applied for external review on 22 January 2019, based on this telephone conversation, and the expiration of the period in which the Health Service was required to make a decision.
9. On external review the Health Service explained to OIC that it intended to provide its decision notice to the applicant on 9 January 2019, however, due to administrative error the decision notice was not sent to the applicant until 22 January 2019.

Reviewable decision

10. The decision under review is the Health Service's deemed refusal of access to the applicant's health records under section 66(1) of the IP Act.
11. OIC has taken the Health Service's purported decision of 22 January 2019 as its submission in this review.

Evidence considered

12. Evidence, submissions, legislation and other material I have considered in reaching this decision are identified in these reasons.

Issue for determination

13. The issue for determination in this external review is whether access to the health records may be refused on the ground that its disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant under 67(1) of the IP Act and sections 47(3)(d) and 51 of the RTI Act.

Relevant law

14. Under the IP Act, an individual has a right to be given access to documents of an agency to the extent those documents contain the individual's personal information. However, this right is subject to other provisions of the IP and RTI Acts, including the grounds on which an agency may refuse access to documents.⁶ An agency may refuse access to a document if:⁷
 - the decision to refuse access is made by an appropriately qualified healthcare professional appointed by the agency⁸
 - the information comprises the applicant's relevant healthcare information; and
 - disclosing the information might be prejudicial to the physical or mental health or wellbeing of an applicant.

⁴ As confirmed to OIC by telephone conversation with the Health Service on 26 April 2019.

⁵ Despite the timeframe for the Health Service to make a decision having already expired.

⁶ Section 67(1) of the IP Act allows an agency to refuse access to documents on the grounds set out in section 47 of the RTI Act.

⁷ Section 50(5)(b) of the IP Act and sections 47(3)(d) and 51 of the RTI Act.

⁸ As defined in schedule 5 of the IP Act.

15. Under section 118(1)(b) of the IP Act, the Information Commissioner has the power to decide any matter in relation to an access application that could have been decided by an agency. Accordingly, I have the power, as an authorised delegate of the Information Commissioner, to make the same decision that an appropriately qualified healthcare professional appointed by the Health Service could have made under sections 47(3)(d) and 51 of the RTI Act.

Findings

Are the health records the applicant's relevant healthcare information?

16. Yes. The IP Act provides that *relevant healthcare information* is healthcare information given by a healthcare professional.⁹ The applicant's health records comprise healthcare information provided by healthcare professionals and is therefore the applicant's relevant healthcare information.

Might disclosing the health records prejudice the applicant's physical or mental health or wellbeing?

17. Yes.
18. In this context, the prejudice must be real and tangible as opposed to a fanciful, remote or far-fetched possibility.¹⁰ In considering whether there is a real and tangible risk that the applicant's physical or mental health or wellbeing might be prejudiced by the disclosure of the health records to him I have considered the submissions made by the applicant and the Health Service.
19. The applicant's submissions raise extensive and wide-ranging concerns. Many of these submissions are outside the issues I can consider in this external review, particularly those relating to the applicant's discontent with health services.¹¹ In summary, however, the applicant indicates that he requires the health records for his Mental Health Appeals Tribunal Hearing.¹² The applicant believes he is 'dying, chronically ill and denied life saving treatment to this very day'¹³ and that from '... around July 2018 (he) started a letter Campaign to MPs all over Queensland and was quickly set up with a Mental Health Involuntary Order ...'¹⁴ Overall it appears that the applicant rejects any contention that disclosing the health records might prejudice his wellbeing and confirms his distrust of mental health service providers.¹⁵
20. In the Health Service's purported decision the Clinical Director of Mental Health Services, Wide Bay Hospital and Health Service concluded that the release of the health records to the applicant would be detrimental to his physical or mental health and therefore refused access pursuant to section 47(3)(d) of the RTI Act.¹⁶ I note that the Clinical

⁹ Schedule 5 of the IP Act.

¹⁰ This meaning of the term 'might be prejudicial' was adopted by the 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* (1994) 2 QAR 249 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 remains relevant.

¹¹ OIC's role in conducting an external review under the IP Act is confined to determining whether access can be refused to information under the relevant provisions of the IP and RTI Acts. OIC does not have the jurisdiction to investigate the actions of officers or agencies or review the complaint handling or investigation processes of other entities. For these reasons, to the extent the applicant's submissions raise concerns of this nature, I have not considered them in reaching this decision.

¹² See email to OIC from applicant dated 22 January 2019. However in a later email dated 5 February, the applicant states that he was found 'not guilty' and his Treatment Order was removed on 4 February 2018.

¹³ See email to OIC from applicant dated 15 March 2019.

¹⁴ See email to OIC from applicant dated 29 March 2019.

¹⁵ As indicated by the applicant's submission to OIC received on 29 March 2019.

¹⁶ See Statement attached to decision dated 9 January 2019.

Director is an appropriately qualified healthcare professional appointed by the Health Service.¹⁷

21. In support of the purported decision, the Health Service provided further submissions on external review. These submissions explained, with specific reference to the applicant's medical history and the nature of the health records in issue, how disclosing this information might prejudice the applicant's physical or mental health or wellbeing.¹⁸ I am unable to include details of the health records or the Health Service's submissions in this decision as I consider that disclosing and discussing this evidence poses a similar risk of prejudice to the applicant's mental health or wellbeing. Further, the IP Act does not permit me to describe this information in detail.¹⁹
22. Based on the considerations above, I have preferred the evidence provided by the Clinical Director, an appropriately qualified healthcare decision maker within the Health Service, in finding that there is a real and tangible risk that disclosing the health records might prejudice the applicant's physical or mental health or wellbeing.

DECISION

23. I am satisfied that the health records comprise the applicant's relevant healthcare information and that its disclosure might be prejudicial to the physical or mental health or wellbeing of the applicant.
24. I therefore vary the deemed decision of the Health Service and find that access to the health records may be refused under section 67(1) of the IP Act and sections 47(3)(d) and 51 of the RTI Act.
25. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

S Martin
Assistant Information Commissioner

Date: 1 May 2019

¹⁷ See definitions of 'appropriately qualified' and 'health care professional' in schedule 5 of the IP Act.

¹⁸ Telephone conference between OIC and the Health Service on 13 March 2019.

¹⁹ See section 121 of the IP Act.

APPENDIX

Significant procedural steps

Date	Event
22 January 2019	OIC received the applicant's external review application.
23 January 2019	OIC notified the applicant and Health Service that it had received the application for external review. The Health Service provided OIC with relevant procedural documents.
5 February 2019	OIC received the applicant's additional submissions.
11 February 2019	OIC notified the applicant and Health Service that the external review application had been accepted. OIC asked the Health Service to provide a copy of documents located in response to the access application.
12 February 2019	OIC received documents from the Health Service.
13 March 2019	The Health Service provided OIC with verbal submissions.
15 March 2019	OIC received a submission from the applicant via email.
22 March 2019	OIC conveyed to the applicant a preliminary view that access to the health records may be refused on the basis that they contain relevant healthcare information and that disclosure might be prejudicial to his physical or mental health or wellbeing. OIC invited the applicant to provide a submission in response by 5 April 2019.
29 March 2019	OIC received submissions from the applicant.