



Decision and Reasons for Decision

Application Number: 310156

Applicant: Swales

Respondent: Department of Health

Decision Date: 9 March 2011

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 daughter

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REASONS FOR DECISION

Summary

1. The applicant is seeking access to her deceased adult daughter's full and complete medical records which are held by the Princess Alexandra Hospital (**PA Hospital**), under the *Right to Information Act 2009* (**RTI Act**).
2. By decision dated 18 March 2010, the applicant was granted access to 20 pages and refused access to 1083 pages under section 47(3)(b) of the RTI Act (**Decision**) on the basis that disclosure would, on balance, be contrary to public interest under section 49 of the RTI Act.
3. During the course of this external review, the Department of Health (also known as Queensland Health) (**QH**) agreed to release all but two full pages and parts of four pages to the applicant (**the Remaining Information**).¹
4. The applicant submits that the Remaining Information should be released to her in full.
5. Having reviewed the Remaining Information, I am satisfied that QH is entitled to refuse the applicant access to the Remaining Information on the basis that disclosure would, on balance, be contrary to public interest under section 49 of the RTI Act.

Reviewable decision

6. The decision under review is the Decision of QH dated 18 March 2010.

Background

7. Significant procedural steps are set out in the Appendix.

Evidence relied upon

8. In making this decision, I have taken the following into account:
 - the Access Application, Decision and External Review Application
 - submissions provided by the applicant
 - file notes of telephone conversations between OIC staff and the applicant
 - file notes of telephone conversations and correspondence between OIC staff and QH staff
 - relevant provisions of the RTI Act; and
 - previous decisions of the Information Commissioner of Queensland and other relevant case law as identified in this decision.

Relevant Law

9. Under section 23 of the RTI Act, a person has a right to be given access to documents of an agency. However, this right is subject to a number of exclusions and limitations, including grounds for refusal of access. These grounds are contained in section 47 of the RTI Act.

¹ See Appendix at paragraph 8.

10. Relevantly, sections 47(3)(b) and 49 of the RTI Act provide a ground for refusal of access where disclosure of information would, on balance, be contrary to public interest.
11. In determining whether disclosure of the Remaining Information would, on balance, be contrary to public interest I must:
 - identify and disregard irrelevant factors
 - identify factors favouring disclosure of the information in the public interest
 - identify factors favouring non-disclosure of the information in the public interest
 - balance the relevant factors favouring disclosure and non-disclosure; and
 - decide whether disclosure of the information would, on balance, be contrary to public interest.

Findings

Irrelevant factors

12. No irrelevant factors have been identified.

Factors in favour of disclosure

13. QH has identified the following factors as favouring disclosure of the information in the public interest:
 - the applicant's general right to seek access to documents held by QH; and
 - the applicant's public interest in accessing information contained in records held by the PA Hospital.
14. In addition to the above factors, a further factor in favour of disclosure is:
 - the information is the personal information of an individual who is deceased (the *deceased person*) and the applicant is an eligible family member of the deceased person.
15. In this case, I am satisfied that:
 - the medical records comprise the personal information of the applicant's adult deceased daughter; and
 - the applicant is the deceased person's mother and is an eligible family member.²

Factors in favour of non-disclosure

16. QH has identified the following factors in favour of nondisclosure:
 - the information concerns personal information about another person
 - an individual's personal information is a private concern, communication of which is generally only the prerogative of the individual rather than the government
 - disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy; and
 - the person cited in the documents has not been able to authorise the release of their personal information.

² 'Eligible family member' is defined in schedule 6 of the RTI Act.

17. In addition to the factors favouring nondisclosure identified by QH, I have identified the following factor favouring nondisclosure:
- the information is the personal information of an individual who is deceased (the *deceased person*), the applicant is an eligible family member of the deceased person and the disclosure of the information could reasonably be expected to impact on the deceased person's privacy if the deceased person were alive.
18. I have also identified the following factor favouring nondisclosure because of public interest harm in disclosure:
- disclosure of the information could reasonably be expected to cause a public interest harm if disclosure would disclose personal information of a person, whether living or dead.

Applying the factors identified

19. In this case, the applicant is an eligible family member of the deceased person. As a result, there is a public interest factor in favour of disclosure of most of the Remaining Information.
20. However, where disclosure of the information could reasonably be expected to impact on the deceased person's privacy if the deceased person were alive, this will also give rise to a factor favouring nondisclosure.³
21. An individual's medical records contain sensitive information. There is generally a very strong public interest in protecting an individual's right to privacy by not disclosing their medical records under the RTI Act.⁴
22. 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 *Re Summers and Cairns District Health Service*⁵ 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; and
 - evidence of special dependence/relationship.
23. Having regard to the commentary in *Summers*, I consider that the following facts are relevant in this case:
- the applicant and her family knew about her daughter's medical condition and were involved in her care, particularly as her condition deteriorated
 - the applicant stated that her daughter had intended to make an application for her medical records as she wanted her family to have them but due to her sudden deterioration, this was not done
 - the applicant has stated that Logan Hospital released her daughter's entire medical record to the family; and

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

⁴ See also schedule 4, part 3, item 3 and schedule 4 part 4 section 6 of the RTI Act.

⁵ (1997) 3 QAR 497 at paragraph 19.

- the applicant has stated that her daughter's medical record would be used in the event that any of her other children, or their children, are diagnosed with the same medical condition as her daughter.
24. I am therefore satisfied that if the applicant's daughter were still alive, that her privacy interest would be substantially diminished in relation to her medical information vis-à-vis her mother, particularly because of her mother's detailed knowledge of, and involvement in, her care.
25. In relation to most of the Remaining Information, it is comprised of discussions of a personal nature that do not touch upon the medical condition for which the applicant's daughter was being treated. Most of the Remaining Information instead discloses the applicant's daughter's thoughts and feelings and there is no information before me to indicate that she discussed this information with the applicant.
26. On this basis, I am satisfied that disclosure of the Remaining Information to the applicant could reasonably be expected to impact on the deceased's privacy if she were alive. Accordingly, this is a relevant factor favouring nondisclosure of the Remaining Information.
27. In addition, some of the Remaining Information is also inextricably intertwined with the personal information of another person who is alive.
28. Personal information is '*information or an opinion... whether true or not ... about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*'⁶
29. I am satisfied that the personal information of the other person, which is contained in the Remaining Information, clearly identifies who the other person is. I am also satisfied that if the Remaining Information was to be released to the applicant, it could reasonably be expected to prejudice the other persons right to privacy. Accordingly, this is a factor favouring nondisclosure of the Remaining Information.

Balancing the public interest

30. In balancing the competing public interest factors, I find that:
- in relation to most of the Remaining Information:
 - the applicant is an eligible family member who has applied for access to the medical records of a deceased person
 - the information relates to the applicant's daughter's thoughts and feelings revealed in discussions that do not touch on the medical condition for which she was being treated
 - there is no evidence to indicate that these thoughts and feelings were shared with the applicant or other members of the family; and
 - if the information was disclosed, it could reasonably be expected to impact on her privacy if she were alive.
 - in relation to some of the Remaining Information:
 - it contains the personal information of another person who can be identified from the information
 - disclosure of the information would disclose personal information of that other person; and

⁶ See section 12 of the IP Act.

- there is a strong privacy interest in protecting the other persons right to privacy.

31. Accordingly, on balance the public interest factors in favour of nondisclosure in relation to the Remaining Information outweigh the public interest factors in favour of disclosure.

DECISION

32. I vary the decision under review by finding that access to the Remaining Information should be refused on the basis that disclosure would be contrary to the public interest under section 47(3)(b) of the RTI Act.

33. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Clare Smith
Right to Information Commissioner

Date: 9 March 2011

Appendix

Significant procedural steps

1. By letter dated 15 January 2010, the applicant applied to the Princess Alexandra Hospital for access to 'a full and complete copy of all my daughters' medical records. I am her mother.' (**Access Application**).
2. By letter dated 18 March 2010, the applicant was granted access to 20 pages and refused access to 1083 pages in accordance with section 47(3)(b) of the RTI Act (**Decision**).⁷
3. On 22 March 2010, the Office of the Information Commissioner (**the Office**) received an email from the applicant seeking external review of the Decision to refuse access to the information in issue (**External Review Application**).
4. The applicant made the following submission in her External Review Application:

I don't see why a person can make a decision on my daughters Medical Records. Donna Pottinger did not know who my daughter was, she would not know what my daughter was like or what she went through or what her wishes were. I cared for my daughter from the first moment of her illness and right up to the moment of her death, I was with my daughter [when] she passed away. My daughter ... and I had discussed getting a complete copy of all her medical records from both the P.A. Hospital and the Logan Hospital, the Logan Hospital supplied me with a complete copy of everything they had of [my daughter's] medical record, which was not a lot they held nothing back, but the P.A. Hospital have held back on everything that would be of relevant help to her brothers and sisters if they came down with this disease. The only thing that the P.A. Hospital has sent me are discharge summaries that we already have a few nursing notes and medication sheets all of which we already have. I don't see why a person who had nothing to do with my daughter has the right to view her medical records and her family does not. Donna Pottinger says it would be an unwanted invasion of her privacy, but by Donna Pottinger reading my daughters medical records I consider that an invasion of my daughters privacy. Donna Pottinger goes on to say "I have also considered that the disclosure of documents under the RTI Act is considered to be "release to the world" at large and there would be no control over the use of this personal information about Ms Swales. I consider her reading my daughters records as just that. What is stopping Donna Pottinger discussing my daughters information with who she likes now that she has read the records.

The information contained in my [daughter's] medical records is for the use only if they are needed how is that release of information to the world. The information contained in [my daughter's medical records] is only to be used if we need it in the future for one of her 6 siblings or for their children.

I cared for [my daughter], I bathed her, I sat with her through the night I did all I could for my daughter, I love my daughter and would never do anything with the information contained in her medical records that would ever hurt her.

The medical records are something that [my daughter] wanted her family to have. [My daughter] was going to apply for a complete copy of her medical records, unfortunately she got to sick to quickly and we lost her ... I am asking for her complete medical records to be released to me her mother so that in the event that something happen[s] to one of her 2 brothers or her 4 sisters.

5. By letters dated 9 April 2010, the Office informed the applicant and QH that the External Review Application had been accepted for review.

⁷ The Decision maker was Donna Pottinger of the Princess Alexandra Hospital.

6. By letter dated 13 April 2010, QH provided a copy of the information in issue.
7. In a telephone conversation on 15 September 2010, this Office provided QH with a preliminary view in an attempt to informally resolve this review.
8. By letter dated 23 November 2010, following further discussions with QH, a written preliminary view was forwarded to QH expressing the view that all but the following information (**the Remaining Information**) could be released to the applicant:
 - pages 232 and 233 of Volume 3
 - the Social Work Entry on page 256 of Volume 3
 - the entry at the very bottom of page 10 of Volume 4
 - the 'comments/notes' section of page 27 of Volume 4; and
 - one sentence in the 'comments/notes' section of page 62 of Volume 4.
9. By email dated 23 November 2010, QH agreed with the written preliminary view and agreed to release the further information to the applicant with the exception of the Remaining Information.
10. By letter dated 29 November 2010, the applicant was informed that QH had agreed to release all but the Remaining Information to her.
11. By email dated 29 November 2010, the applicant submitted as follows:

...I want to know why this information has been withheld from us is there something to hide in these particular notes. I am asking you to reconsider your decision. We feel that as these are our daughters notes we have a right as her parents to see them. I wish to know everything good or bad that is contained in her hospital records as I have the same disease that ultimately claimed her life and [my daughter] has 6 siblings. If even one piece of information contained in the withheld information had the chance to save even one of them and they were your children would you not want that information. If it was your family in the same situation would you not want what we are asking for. I love my daughter very much and I was there holding her hands ... when she passed away ... I miss her every second of everyday and I always will, she was my baby girl and my heart has a big hole that only a person who has lost a child could understand, I have now lost 4 children [my daughter], a set of twin boys and my youngest son's twin.

Please I am asking you to please reconsider your decision to with hold any information from us."

12. On 5 January 2011, the applicant made further submissions to this Office during a telephone conversation. The submissions were confirmed in an email to the applicant as follows:
 - her daughter wanted her to have a complete copy of her medical records but fell ill very suddenly before she could make an access application herself
 - Logan Hospital provided a full copy of their medical records, so the PA Hospital should also be able to do so
 - the QH employees who processed her Access Application invaded her daughter's privacy when they viewed the information. On this basis, the information is no longer private and can be released to her
 - it is wrong if QH employee's (that is, people who did not know her daughter) can view her daughter's thoughts and feelings, but family members cannot; and
 - the information would be precious to her, whatever the nature of the thoughts and feelings of her daughter it records.