



Decision and Reasons for Decision

Citation:	<i>N80 and Metro South Hospital and Health Service [2024] QICmr 40 (22 August 2024)</i>
Application Number:	317632
Applicant:	N80
Respondent:	Metro South Hospital and Health Service
Decision Date:	22 August 2024
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - applicant seeks access to deceased parent's medical records - personal information of others - personal information and privacy - whether disclosure of information would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied to Metro South Hospital and Health Service (**MSHHS**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to the medical records of his late mother.¹
2. MSHHS located 350 pages and decided to refuse access to all pages² on the ground that disclosure would, on balance, be contrary to the public interest.³
3. The applicant applied to the Information Commissioner for external review of MSHHS's decision to refuse him access to all of the information.⁴
4. For the reasons explained below, I affirm MSHHS's decision and find that disclosure of the medical records would, on balance, be contrary to the public interest and access may be refused on this basis.

¹ Application dated 27 September 2023.

² Decision dated 26 October 2023.

³ Section 47(3)(b) of the RTI Act.

⁴ Application dated 28 October 2023.

Background

5. During this review, in an effort to resolve the matter, the Office of the Information Commissioner (**OIC**) provided the applicant with a letter from MSHHS setting out the date of his mother's death, confirming that she was an admitted palliative care patient.⁵ The applicant advised during the external review that he intended to apply for a copy of the death certificate.⁶

Reviewable decision

6. The decision under review is MSHHS's decision dated 26 October 2023.

Evidence considered

7. Significant procedural steps relating to the external review are set out in the Appendix.
8. 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
9. I have 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) (**IP Act**).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 and issue for determination

10. The information in issue comprises 350 pages of medical records of the applicant's deceased mother (**Medical Records**).
11. The issue for determination is whether access to the Medical Records may be refused under the RTI Act because its disclosure would, on balance, be contrary to the public interest.

Relevant law

12. Under the RTI Act, a person has a right to be given access to documents of an agency.¹² However, this right is subject to provisions of the RTI Act including the

⁵ By email on 22 November 2023.

⁶ By email on 24 November 2023.

⁷ As contained in the external review application dated 28 October 2023, in emails on 1 November 2023, 24 November 2023, 23 January 2024, 9 February 2024 and a submission dated 13 February 2024.

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]. OIC's approach to the HR Act set out in this paragraph has been considered and endorsed by QCAT Judicial Member McGill in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23], noting that he saw '*no reason to differ*' from this position.

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

¹¹ XYZ at [573].

¹² Section 23 of the RTI Act.

grounds on which access to documents may be refused.¹³ One of the grounds upon which access may be refused is where disclosure would, on balance, be contrary to the public interest.¹⁴

13. In assessing whether disclosure of information would, on balance, be contrary to the public interest, a decision-maker must:¹⁵
 - identify factors irrelevant to the public interest and disregard them
 - identify factors in favour of disclosure of information
 - identify factors in favour of nondisclosure of information; and
 - decide whether, on balance, disclosure of the information would be contrary to the public interest.
14. 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,¹⁶ together with all other relevant information, in reaching my decision, noting Parliament's intention that grounds for refusing access to information be interpreted narrowly.¹⁷

Findings

Applicant's submissions

15. The applicant has provided submissions throughout the external review which I have carefully considered to the extent they are relevant to the issue for determination. In summary, the applicant states:¹⁸
 - he seeks access to the Medical Records to resolve his outstanding questions about his mother's death, including the treatment she received and cause of her death
 - he needs facts to determine whether he should inform the police or consider legal action
 - the delays in the applicant receiving access to the facts causes damage and loss to the applicant's family
 - he has concerns about medical negligence and seeks to understand if his mother was discharged from hospital while critically ill
 - he spoke to his mother regularly; and
 - he seeks access to the information to understand the family's health prospects and susceptibility.
16. The applicant also states that as he had paid for the access application, he expects to receive access to the requested information.¹⁹ This submission appears to proceed from a misunderstanding about the access framework. The application fee does not entitle an applicant to access requested documents; rather, the charge is a mandatory

¹³ Section 47 of the RTI Act.

¹⁴ Sections 47(3)(b) and 49 of the RTI Act. The term 'public interest' 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, or a substantial segment, of the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

¹⁵ Section 49(3) of the RTI Act.

¹⁶ I have considered each of the public interest factors outlined in schedule 4 of the RTI Act, taking care to disregard any irrelevant factors.

¹⁷ Section 47(2)(a) of the RTI Act. In deciding whether disclosure of the Medical Records would, on balance, be contrary to the public interest, I have taken no irrelevant factors into account in making my decision.

¹⁸ Emails received on 9 and 13 February 2024.

¹⁹ In an email received by OIC on 28 October 2023 the applicant stated 'I have paid for the information and expect your servants to deliver.'

requirement of the statutory scheme and is one of the requirements of a valid application.²⁰

Irrelevant factors

17. None of the irrelevant factors set out in schedule 4, part 1 of the RTI Act arise in the circumstances of this case, and I have not taken any into account when considering this matter.

Factors favouring disclosure

18. The Medical Records would be the personal information²¹ of the deceased if they were alive, and the applicant is an eligible family member of the deceased.²² This enlivens a factor favouring disclosure of the Medical Records. Previous decisions of the Information Commissioner have identified circumstances that will affect the weight of this factor, including:²³

- the extent to which the eligible family member was in contact with and/or had a relationship with the deceased and the extent to which that overlaps with the time the information covers
- the nature and sensitivity of the information; and
- the extent to which the information is or may be known to the applicant.

19. I have carefully examined the Medical Records and considered the applicant's submission that he was in regular contact with his mother. I am unable to identify anything in the Medical Records to support this submission. On the applicant's own submissions, the nature of his mother's illness and circumstances of her death are largely unknown to him. Accordingly, I consider only low weight applies to this factor favouring disclosure.²⁴

20. The social wellbeing of the community, especially regarding the grief experienced by the loss of a family member, is a factor favouring disclosure previously identified by the Information Commissioner which arises in these circumstances.²⁵ The applicant's submissions in this regard do not directly address the grief he has experienced at the loss of his mother; however the loss of a parent is usually a significant event for an individual. In the circumstances, I afford this factor moderate weight.

21. The applicant expresses concerns about medical negligence in the treatment provided to his late mother. Accordingly I have considered whether disclosure of the Medical Records could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official, or reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct.²⁶ In order for these (and any) public interest factors to be enlivened, the expectation must be reasonably based, neither irrational, absurd or ridiculous,²⁷ nor merely a possibility.²⁸

²⁰ Section 24(2)(a) of the RTI Act.

²¹ Defined in schedule 5 of the RTI Act and section 12 of the 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.'

²² Schedule 4, part 2, item 9 of the RTI Act. 'Eligible family member' is defined in Schedule 5 of the RTI Act by way of a priority list of relatives. Based on the information he has provided the applicant falls within category (b) of the priority list.

²³ *WEU27L and Mackay Hospital and Health Service* [2017] QICmr 44 (11 September 2017) at [26] (**WEU27L**).

²⁴ Schedule 4, part 2, item 9 of the RTI Act.

²⁵ *Keogh and Department of Health* (Unreported, Queensland Information Commissioner, 31 August 2010) at [12]-[22].

²⁶ Schedule 4, part 2, items 5 and 6 of the RTI Act.

²⁷ *Attorney-General v Cockcroft* (1986) 64 ALR 97 at 106.

22. The threshold to enliven the possible deficiencies of conduct factor is low—it only requires that disclosure would enable inquiry into possible shortcomings in conduct, not that disclosure would reveal evidence of such conduct.²⁹ While I am unable to identify any deficiencies of care or conduct in the Medical Records, I consider disclosure of the Medical Records would allow the applicant to assess the records for any evidence of possible deficiencies of care. I afford moderate weight to this factor.
23. The factor relating to misconduct, or negligent, improper or unlawful conduct in the Medical Records will arise when disclosure could reveal or substantiate this type of conduct. Having considered the Medical Records, I am not persuaded that disclosure would have this result, and I note that it is open to the applicant to report any concerns about the treatment and care provided to his mother to the relevant authorities, such as the Office of the Health Ombudsman. In the circumstances, I am satisfied this factor carries no weight.
24. Given the applicant's submissions about possible negligence, and that he is suffering loss and damage from nondisclosure of this information, I have also considered whether disclosure of the Medical Records could reasonably be expected to contribute to the administration of justice for a person.³⁰ This factor will arise when:³¹
 - a) loss or damage or some kind of wrong had been suffered in respect of which a remedy was, or might be, available under the law
 - b) the applicant had a reasonable basis for seeking to pursue the remedy; and
 - c) disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy was available, or worth pursuing.
25. The applicant's submissions do not explain how release of the Medical Records will assist him to pursue any available remedy or evaluate whether the remedy is available, so I am satisfied this factor carries no weight in the circumstances.
26. Similarly, as the applicant submits that access to the Medical Records will assist him determine whether to report certain allegations to the police, I have considered whether disclosure could reasonably be expected to contribute to the enforcement of the criminal law.³² It is open to the applicant to raise his concerns with the police. Queensland Police Service has broad powers to investigate any matters reported to it and obtain relevant information to inform such investigations. As such, I am satisfied this factor does not carry any weight in these circumstances.
27. I have also considered whether disclosure of the Medical Records could reasonably be expected to contribute to the transparency and accountability of MSHHS and maintain public confidence in the health system.³³ The Medical Records document the care provided to the deceased, including discussions between health staff and the deceased and other individuals. I accept that disclosure of the Medical Records could promote general accountability and transparency regarding the health care provided to the deceased.

²⁸ *Murphy and Treasury Department* (1995) 2 QAR 744 at [44]; *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at [154] to [160].

²⁹ *Kelson v Queensland Police Service* [2019] QCATA 67 at [55]-[74].

³⁰ Schedule 4, part 2, item 17 of the RTI Act. See also *Willsford and Brisbane City Council* (1996) 3 QAR 368 at [17] (*Willsford*).

³¹ *Willsford* at [17].

³² Schedule 4, part 2, item 18 of the RTI Act.

³³ Schedule 4, part 2, item 1 of the RTI Act.

28. In determining the weight that should be afforded to this factor, I note that the records comprise the healthcare records of one individual and are specific to the circumstances of the deceased. Release of the Medical Records would enhance public confidence in the health system, especially regarding the information provided to the deceased and others about her diagnosis, prognosis and available treatment. It would not, however, inform the community in any great detail about the general practices nor indicate any systemic issues in the same way that disclosure of information such as an investigation report would. In the circumstances, I afford moderate weight to this public interest factor.³⁴
29. I have not identified any other factor favouring disclosure of the Medical Records.³⁵

Factors favouring nondisclosure

30. The Medical Records comprise details of the medical opinions and care provided to the deceased, and records discussions with the deceased (and others) in the particularly sensitive context of end-of-life care. It also includes the personal information of other individuals present, including their relationships to the deceased and information and opinions provided by them.
31. The RTI Act recognises that a public interest harm will occur if personal information (of living and deceased persons) is disclosed.³⁶ The Medical Records are the personal information of the deceased, and also contain a small amount of personal information³⁷ of other individuals.
32. The effective operation and delivery of health care services relies upon full and frank disclosure of information by patients and family members. Disclosure of the type of sensitive personal information contained within the Medical Records could reasonably be expected to result in a reduction in public confidence in the confidentiality of medical records and a reduction in the ability of public health facilities to provide health care efficiently and effectively. In previous decisions by the Information Commissioner, it has been found that the risk reasonably expected to result from 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.³⁸ Given the inherently sensitive nature of the Medical Records as noted above at paragraph 30, I afford the public interest harm factor relating to protecting personal information significant weight.³⁹
33. I am satisfied that the Medical Records relate to a person who has died, and:
- a) the information would, if the person were alive, be personal information of that person
 - b) the applicant is an eligible family member of the person; **and**
 - c) the disclosure of the information could reasonably be expected, if the person were alive, to impact on the person's privacy.⁴⁰

³⁴ Schedule 4, part 2, item 1 of the RTI Act.

³⁵ For example, the Medical Records do not comprise the applicant's personal information (schedule 4, part 2, item 7 of the RTI Act), and disclosure of the Medical Records could not reasonably be expected to contribute to the administration of justice generally including procedural fairness (schedule 4, part 2, item 16 of the RTI Act).

³⁶ Schedule 4, part 4, section 6(1) of the RTI Act.

³⁷ Noting that the definition of personal information in schedule 5 of the RTI Act and section 12 of the IP Act applies only to 'individuals' (schedule 1 of the *Acts Interpretation Act 1954* (Qld)), however, the schedule 4, part 4, section 6 factor applies even where the individual is deceased.

³⁸ *TFN20S and Gold Coast Hospital and Health Service* [2018] QICmr 37 (20 August 2018) at [49].

³⁹ Schedule 4, part 4, section 6 of the RTI Act.

⁴⁰ Schedule 4, part 3, item 5 of the RTI Act.

34. This factor is the converse factor to the eligible family member disclosure factor discussed at paragraph 18 and 19 above. The weight of this factor is determined by an assessment of the impact to the deceased's privacy if they were alive.⁴¹ Medical records are inherently sensitive and private in nature, and disclosure of this type of information to another person would usually represent a significant breach of a person's privacy. Previous decisions of the Information Commissioner have identified the following elements to consider whether the privacy is reduced in the particular circumstances of each case:⁴²
- evidence of involvement in care
 - extent of knowledge of medical history or incident; and
 - evidence of special dependence or relationship.
35. As noted above, there is no evidence in the Medical Records that the applicant was part of the treatment discussions between the deceased, other individuals and the health staff, nor evidence of the applicant's involvement in the care of his mother. The applicant did not adduce any material or submissions on this point in his response to OIC's preliminary view.⁴³ Consequently, I am satisfied that the impact to the deceased's privacy were she alive of disclosing the Medical Records to the applicant would be significant. I afford correspondingly significant weight to this public interest factor.
36. For completeness, I also note that the Medical Records in some instances include the personal information of other individuals in a sensitive context, and disclosure of this information would also impact their right to privacy.⁴⁴ Given the sensitive context, I afford significant weight to this factor though I note it relates only to a small amount of the Medical Records.

Balancing the public interest

37. In summary, with respect to factors weighing in favour of disclosure, I find that:
- considerations of accountability and transparency, contributing to the social wellbeing of the community⁴⁵ and allowing or assisting enquiry into possible deficiencies of care or conduct raise factors that carry moderate weight; and
 - the eligible family member factor⁴⁶ attracts low weight.
38. Balancing against the above factors is the significant weight I have attributed to both the factors relating to the protection of the deceased's privacy if she were alive⁴⁷ and the privacy of other individuals⁴⁸ as well as the personal information harm factor.⁴⁹ Each of these factors weigh heavily in favour of nondisclosure of the Medical Records.⁵⁰

⁴¹ *X19 and Metro South Hospital and Health Service* [2020] QICmr 12 (26 February 2020) at [38].

⁴² *Summers and Department of Health; Hintz (Third Party)* (1997) 3 QAR 479 at [19], which considered equivalent provisions in the now-repealed *Freedom of Information Act 1992* (Qld) and applied in *Lowe and Department of Health* (Unreported, Queensland Information Commissioner, 25 November 2010) at [14].

⁴³ Issued on 8 February 2024.

⁴⁴ Schedule 4, part 3, item 3 of the RTI Act.

⁴⁵ Schedule 4, part 2, item 1 of the RTI Act, and the social wellbeing of the community factor.

⁴⁶ Schedule 4, part 2, item 9 of the RTI Act.

⁴⁷ Schedule 4, part 3, item 5 of the RTI Act.

⁴⁸ Schedule 4, part 3, item 3 of the RTI Act.

⁴⁹ Schedule 4, part 4, section 6 of the RTI Act.

⁵⁰ Schedule 4, part 3, item 5; and schedule 4, part 4, section 6 of the RTI Act.

39. On balance, I am satisfied the nondisclosure factors outweigh the disclosure factors.⁵¹ Accordingly I find that access to the Medical Records may be refused, as disclosure would be, on balance, contrary to the public interest.⁵²

DECISION

40. I affirm the decision under review. I find that access to the Medical Records may be refused under sections 47(3)(b) and 49 of the RTI Act as disclosure would be, on balance, contrary to the public interest.
41. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Jane Williams
Assistant Information Commissioner

Date: 22 August 2024

⁵¹ Section 49(3) of the RTI Act.

⁵² Section 47(3)(b) of the RTI Act.

APPENDIX**Significant procedural steps**

Date	Event
28 October 2023	OIC received the application for external review.
30 October 2023	OIC requested that MSHHS provide preliminary documents.
31 October 2023	OIC received the preliminary documents.
1 November 2023	OIC received an email from the applicant clarifying the scope of the request.
2 November 2023	OIC telephoned the applicant to discuss the request.
24 November 2023	OIC received an email from the applicant confirming the separate application for a death certificate.
30 November 2023	OIC advised the parties that the application for external review had been accepted. OIC requested that MSHHS provide a copy of the Medical Records.
5 December 2023	OIC received a copy of the Medical Records.
23 January 2024	OIC received an email from the applicant confirming the request for information.
8 February 2024	OIC issued a preliminary view to the applicant.
9 February 2024	OIC received submissions from the applicant.
13 February 2024	OIC received further submissions from the applicant in response to the preliminary view.
4 March 2024	OIC emailed the applicant to confirm a formal decision would be issued to finalise the external review.