

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: F2009247
Decision Ref: D0162009**

Participants:

'M'
Complainant

- and -

**Child and Adolescent Health
Service**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – medical records – child protection unit – section 23(4) – personal information about a child who has not turned 16 – whether access would not be in the best interests of the child – whether the child does not have the capacity to appreciate the circumstances and make a mature judgement.

Freedom of Information Act 1992: section 23(4); Glossary in Schedule 2
Privacy Act 1988 (Cth)

DECISION

The decision of the agency to refuse access to the disputed documents under section 23(4) of the *Freedom of Information Act 1992* is confirmed.

Sven Bluemmel
INFORMATION COMMISSIONER

13 August 2009

REASONS FOR DECISION

1. This complaint arises from a decision made by the Child and Adolescent Health Service ('the agency') to refuse 'M' ('the complainant') access to documents under the *Freedom of Information Act 1992* ('the FOI Act'). In order to protect the privacy of the complainant and other related parties, including the complainant's daughter who is under the age of 16, I have decided not to identify the complainant by name in these reasons for decision.

BACKGROUND

2. On 15 March 2009, the complainant's daughter attended at the agency and was subsequently examined at the Child Protection Unit ('the CPU') at Princess Margaret Hospital for Children, which is part of the agency. I am advised by the agency that, following the completion of the examinations and related tests, the complainant was advised, albeit in broad terms, of the outcome of those examinations and tests. I am more particularly advised by the agency that the complainant was advised that the relevant medical practitioner determined that there was most likely a medical cause for the child's complaint and that the agency did not propose to refer the matter to another authority for further action.
3. On 24 March 2009, the complainant wrote to the agency seeking access to a copy of his daughter's medical records. The agency treated the complainant's written request as an access application made under the FOI Act.
4. On 6 May 2009, the agency refused access to the requested documents under section 23(4) of the FOI Act. The agency advised the complainant that the information contained in his daughter's CPU medical record "is highly sensitive and quite troubling" and, therefore, the agency did not consider that it was in the best interests of the child for her medical information to be released under the FOI process.
5. The complainant sought internal review of that decision and, on 26 May 2009, the agency confirmed its initial decision. The internal review decision-maker said that the information contained in the requested documents "is of a highly sensitive and personal nature, and it involves explicit details of clinical examinations and reviews undertaken by clinical staff". The internal review decision-maker also said that it would be inappropriate and not in the best interests of the complainant's daughter for the requested documents to be copied and released by the agency because the agency "must respect the child's rights to privacy related to sensitive information".
6. On 22 June 2009, the complainant applied to the Information Commissioner for external review of the agency's decision.

THE DISPUTED DOCUMENTS

7. The disputed documents in this matter are the medical records of the complainant's daughter held by the agency.

REVIEW BY THE INFORMATION COMMISSIONER

8. After receiving the complainant's complaint, I obtained copies of relevant documents from the agency. Thereafter, my Senior Investigations Officer met with the internal review decision-maker of the agency. After examining the relevant documents and considering the other material before me, including the information gathered by my officer, I formed the preliminary view that the decision of the agency appeared, in all the circumstances, to be justified. On 29 July 2009, the parties were informed of my preliminary view and my reasons for that view. However, the complainant did not accept my preliminary view and maintains his claim that he is entitled to have access to a copy of the disputed documents.

REFUSAL OF ACCESS UNDER SECTION 23(4)

9. Section 23(4) of the FOI Act provides:

“(4) If a document contains personal information and the applicant, or the person to whom the information relates, is a child who has not turned 16, the agency may refuse access to the document if it is satisfied that access would not be in the best interests of the child and that the child does not have the capacity to appreciate the circumstances and make a mature judgment as to what might be in his or her best interests.”

CONSIDERATION

10. The complainant made various submissions to me in support of disclosure to him of the disputed documents. In summary, the complainant submits that:
- he has sought access to the disputed documents in an endeavour to determine how best to proceed with follow-up testing of his daughter in respect of the issue which required attendance at the agency on 15 March 2009;
 - as a parent he is obligated both morally and legally to act for his daughter and he is sure that Parliament did not intend the FOI Act to obstruct parents in their endeavours to fulfil their legal and moral obligations;
 - comments written in the initial notice of decision were inappropriate;
 - the agency's dealing with him demonstrated a possible gender bias against males; and
 - the national privacy principles associated with *the Privacy Act 1988* (Cth) ('the Privacy Act') have precedence over the provisions of the FOI Act.
11. In reviewing a decision of an agency to refuse access in accordance with s.23(4) of the FOI Act, I consider that my role is to decide whether, in the circumstances of the particular case, the use of s.23(4) is justified. In my view, I must be satisfied about four issues.

12. First, I must be satisfied that the requested documents contain personal information about a child who has not turned 16. In the Glossary to the FOI Act, the term ‘personal information’ is defined to mean:

“...information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead -

(a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or

(b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample.”

13. Second, I must be satisfied that the decision-maker, at the relevant time, held the view that giving access would not be in the best interests of the child. Third, I must be satisfied that the decision-maker, at the relevant time, held the view that the child does not have the capacity to appreciate the circumstances and make a mature judgement as to what might be in her best interests. Finally, I must be satisfied that the views of the decision-maker on the above issues were held on reasonable grounds.
14. In this case, the complainant applied to the agency for access to a copy of the medical records of his four year old daughter. Accordingly, the information relates to a child who has not turned 16. Having regard to the nature of the requested documents as described in the access application, in my opinion, each of the requested documents would contain some “personal information”, as that term is defined in the FOI Act, about the complainant’s daughter. Therefore, I am satisfied that the agency has addressed the first issue.
15. In considering issues 2 to 4, I am of the view that I should give weight to the professional expertise of the relevant officers of the agency. In this case, I am advised that the decision on internal review was made by an officer who has extensive experience and qualifications in the area of child health and, before making her decision, the decision-maker sought the views of the senior medical officer in charge of the CPU. I am also advised that it is a longstanding policy of the agency to put the interests of the child above the interests of another party, including the parents of the child. This is particularly relevant where the requested documents contain detailed private and sensitive information about a child.
16. The agency advised my office that it is particularly concerned about copies of the relevant documents being made and distributed at any time in the future. In the agency’s opinion, the possible copying and distribution of such documents would be a significant breach of the child’s privacy and would not be in the best interests of the child. As no conditions may be attached to the disclosure of documents under the FOI Act, disclosure to an access applicant is potentially disclosure to the world at large. In this case I accept that if the disputed documents were to be disclosed to the complainant and, thereby, to the world at

large, then the complainant, and any other person to whom the documents were subsequently disclosed, may unintentionally or intentionally disclose those documents without any controls placed upon their release.

17. The complainant's submissions, described in paragraph 10, do not persuasively address the four issues which I describe in paragraphs 12 and 13. In my view, if those issues are satisfied, then I do not have discretion to further consider public interest arguments. Apart from the claim that the national privacy principles associated with the Privacy Act have precedence over the provisions of the FOI Act, the complainant's submissions consist of arguments in favour of disclosure of the disputed documents to him on the basis that it is in the public interest to do so or that the agency was biased in its consideration of the issues. Having considered the national privacy principles in the Privacy Act as described by the complainant, I have not been able to identify any basis to the claim that those principles have precedence over the provisions of the FOI Act in this case. Therefore, I do not consider that claim has any merit in respect of the issues for my determination.
18. Even if it were open to me to consider public interest arguments as relevant in this case, I am not persuaded by the arguments made by the complainant that it is in the best interests of his daughter for him to have a copy of his daughter's medical record in this case. Moreover, there is nothing before me that supports that the agency was biased in its handling of this matter. The material before me supports the conclusion that the relevant child health professionals at the agency made the decision to refuse access in this case on the basis that it is in the best interests of the child, in accordance with normal and longstanding practice.
19. Having considered the reasons given to the complainant by the decision-makers, as described in paragraphs 4 and 5, and the advice given to my officer by the internal review decision-maker, I am satisfied that each of the agency decision-makers has sufficiently demonstrated that they held the view that giving access would not be in the best interests of the child and that the child does not have the capacity to appreciate the circumstances and make a mature judgement as to what might be in her best interests. Therefore, I am satisfied that the agency has addressed the second and third issues described in paragraph 13.
20. Based on the information before me, I am satisfied that the decision to refuse access to the disputed documents was made after careful consideration of all of the relevant factors and in the absence of bias. Therefore, with respect to the final issue, for the reasons described in paragraphs 15-18, I am satisfied that the views of the agency's decision-makers were held on reasonable grounds.

CONCLUSION

21. In light of the above, I find the agency's decision is justified. Accordingly, I confirm the decision of the agency to refuse access to the disputed documents under s.23(4) of the FOI Act.
