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OmbudsmanSA

STATEMENT ON FORMAL RESOLUTION

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Failure to consult or consider relevant factors before release of medical information



Essential Insights

Personal medical records often contain confidential and sensitive health information that generally should not be disclosed to third parties without patient consent. Therefore, when medical records are requested under the *Freedom of Information Act 1991 (FOI Act)*, it is imperative that agencies make reasonable efforts to consult with the patient before releasing their medical information. Where attempts to consult are not successful, decision makers must give serious consideration and weight to relevant factors before determining whether disclosure is reasonable and appropriate in the circumstances.

COMPLAINT

The Ombudsman received a complaint relating to the unreasonable disclosure of sensitive medical information by the Northern Adelaide Local Health Network (**NALHN**) to a third party (a relative of the patient) under the FOI Act. The information was requested by the FOI applicant for the purposes of legal proceedings.

Under the FOI Act, an agency must not give access to a document containing the personal affairs of any person without first taking 'such steps as are reasonably practicable to obtain

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the views of the person concerned' as to whether disclosure of their personal information would be unreasonable.¹ Seeking the views of the person concerned is also referred to as 'consultation.'

In this case, NALHN advised that it did not attempt to consult with the patient because:

- he had not attended the health service for more than two years
- it was unsure of his whereabouts
- it had concerns about the patient's capacity to respond to such a request
- it had no record of a substitute decision maker it could contact in the alternative

Despite failing to consult, NALHN determined that release of the medical records to the FOI applicant was not unreasonable because:

- one of the documents had already been provided to a different third party and provided to a Court
- the information was required as part of a South Australian Civil and Administrative Tribunal (**SACAT**) application for guardianship orders
- disclosure would have otherwise been permitted under a confidentiality exception in the *Health Care Act 2008*,² (**HCA**) which provides that personal health information can be disclosed to a relative of the patient if it is reasonably required for the 'treatment, care or rehabilitation of the person.'

The Ombudsman considered that NALHN could have taken further steps to try and consult with the patient, such as contacting the FOI applicant to obtain contact details as they would have needed this information for the purposes of making the guardianship application. Further, the Ombudsman noted that there is nothing in the FOI Act that would prevent an agency from consulting with a person who may not have sufficient capacity to respond. The relevant issue is whether reasonably practicable steps have been taken to seek their views. The Ombudsman also observed that the agency did not appear to have any records of its reasons not to consult, leaving it unable to demonstrate whether reasonable steps were taken (or considered) to facilitate consultation.

The Ombudsman also formed the view that NALHN's reasons for deciding that disclosure would not be unreasonable in the circumstances took irrelevant considerations into account, including:

- that a different relative had previously been provided with one of the documents – this document was created specifically for that relative for purposes separate to the current legal proceedings
- that a court had already received one of the documents- the Court had filed the document confidentially and not openly disclosed the information
- that the information was required for a SACAT guardianship application- as the application had not yet been made at the time of the FOI request, there was nothing to indicate that the SACAT required the information. Had this been the case, the Tribunal could have issued a summons.

¹ *Freedom of Information Act 1991* section 26(2)

² Section 93(3)(c)

- that disclosure would have been permitted under section 93(c) of the HCA – disclosure to the FOI applicant was for the purposes of including in a guardianship application rather than reasonably required for the care, treatment and rehabilitation of the patient. Given the age of the documents, it was not clear whether the information would have been relevant to the patient’s current care.

Finally, the Ombudsman identified that NALHN may have failed to give adequate weight to relevant factors in deciding that disclosure would not be unreasonable:

- the Court had refused to provide a copy of the document to the FOI applicant on the basis of confidentiality and privacy
- SACAT has a process for obtaining medical information confidentially in cases where patient consent to disclose has not been provided, or clinicians have concerns about confidentiality.

The Ombudsman formed the view that NALHN’s omissions in consultation, and its consideration of irrelevant factors in deciding to release the information, likely amounted to administrative error under the *Ombudsman Act 1972*. The Ombudsman considered that these issues would be best addressed through training and guidance for relevant staff as to their consultation obligations under the FOI Act, and decision-making processes.

KEY OUTCOMES FOLLOWING THE OMBUDSMAN’S ASSESSMENT

NALHN agreed to take the following actions to resolve this matter:

- Acknowledging the errors identified
- Providing an apology to the patient for failing to consult
- Providing a reminder to staff, and updating training and guidance material to emphasise that:
 - section 26(2) of the FOI Act imposes an obligation on the agency to take reasonably practicable steps to consult with an interested party where discovered documents contain matter pertaining to that person’s personal affairs
 - ‘reasonably practicable steps’ may include making enquiries with parties outside of the agency to obtain contact details of the interested party
 - an interested party’s lack of capacity to respond does not mean that reasonable steps do not need to be taken to consult
 - contemporaneous records must be kept of all attempts to contact the interested party, or, if a decision is made not to consult, there must be good reasons for this that are accurately recorded at the time
 - when assessing the unreasonableness of disclosure, relevant considerations should be identified and balanced
 - consideration should be given to whether sensitive medical documents requested for legal proceedings can be supplied via court/or tribunal processes, rather than under FOI, to protect the personal privacy of patients.