

Notice of Decision and Reasons for Decision

Applicant:	'AG4'
Agency:	Melbourne Health
Decision Date:	28 June 2019
Section considered:	Section 39
Citation:	'AG4' and Melbourne Health (<i>Freedom of Information</i>) [2019] VICmr 58 (28 June 2019)

FREEDOM OF INFORMATION – Request for amendment – medical record – alert – misleading impression – misleading statement – information in the nature of opinion

All references to legislation in this document are to the *Freedom of Information Act 1982 (Vic)* (**FOI Act**) unless otherwise stated.

Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse to amend a document in accordance with the Applicant's request.

My decision on the Applicant's request differs from the Agency's decision. I have decided to amend the document as set out in the attached Schedule of Documents in **Annexure 1**.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

28 June 2018

Reasons for Decision

Background to review

1. On 22 January 2019, the Applicant made a request to the Agency through their legal representative for:
 - (a) An amendment of the medical record (identified by bar code [barcode number]) to remove the annotated comments of Dr [surname] under 'Results/Outcome'.
 - (b) Removal of Dr [surname]'s 'Alert for suspected drugs of dependence', referenced within the same record.
2. By letter dated 28 March 2019, the Agency determined not to amend the documents in accordance with the Applicant's amendment request, stating:

Your request has now been carefully considered by relevant senior clinical and managerial staff, in conjunction with Dr [name], who was the most senior clinician to have reviewed [the Applicant] in the [Hospital name] Emergency Department (ED) on [date].

...

Dr [surname] acknowledges that some words written by him in [the Applicant's] medical record could have been phrased differently. On this basis, I am prepared to make a decision to amend the following phrases under the "Results/Outcome" section in the medical record and in the GP letter derived from these:

Original Phrase	Amended Phrase
"She presented to emergency with a multitude of innumerable somatic concerns"	"She presented to emergency with these concerns..."
"She alluded to a traumatic childhood..."	"She told me she had a traumatic childhood..."
"She requested alprazolam given a complex and entitled justification having a special exemption for prescription"	"She requested alprazolam and told me she had a special exemption for prescription."

...

I am prepared to make a decision making the amendments in the table above – the medical record will otherwise not be altered.

3. By email dated 24 April 2019, the Applicant made an application under section 49A(2) through their legal representative for review by the Information Commissioner of the Agency's decision.
4. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. I have read and considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision, dated 28 March 2019;
 - (b) the Applicant's request for review;

- (c) the Applicant's submissions, dated 27 May 2019 and 26 June 2019; and
 - (d) the Agency's submission, dated 6 June 2019.
6. I have examined copies of the documents which are the subject of this review as set out in the attached Schedule of Documents.

Application of section 39

7. Section 39 provides:

39 Person may request amendment of record

Where a document containing information relating to the personal affairs of a person (including a deceased person) is released to the person who is the subject of that information (or in the case of a deceased person, that person's next-of-kin) that person shall be entitled to request the correction or amendment of any part of that information where it is inaccurate, incomplete, out of date, or where it would give a misleading impression.

8. Importantly, section 39 places the onus on an applicant to establish the case for amendment. That is, an applicant must point to evidence to substantiate the claim that the statements subject to the request should be corrected or amended.

9. With respect to the way in which corrections or amendments are made, section 49 provides:

Where a request for correction or amendment under section 39 has been acceded to by an agency, the correction or amendment may take the form of a notation of the original document but no correction or amendment shall be made which has the effect of deleting or expunging the information which has been corrected or amended or of destroying the document except with the concurrence of the Keeper of Public Records.

10. In their submission, the Applicant clarified the amendments sought. The Applicant requested amendment of the following statements contained within the medical record:

- (a) ...requesting Alprazolam prescriptions (**Statement A**);
- (b) She requested alprazolam given a complex and entitled justification having a special exemption for prescription (**Statement B**);
- (c) Today I denied prescribing or dispensing alprazolam (**Statement C**);
- (d) She described a number of dramatic somatic symptoms [redacted – description of the Applicant's described symptoms] (**Statement D**);
- (e) I will enter an alert into the system for suspected drugs of dependence (**Statement E**).

11. The Applicant further submitted they were uncertain if an alert had been 'entered into the system' and requested removal of the alert (**Alert**) if that were the case.

12. The Agency submits the Alert was added to the Applicant's medical record on [date] and has not been removed. The Alert is categorised on the record as one of 'safety and security' and includes the comment 'suspected seeking drugs of dependence'.

The information relates to the personal affairs of a person and has been released to the person who is the subject of that information

13. The documents relate to the personal affairs of the Applicant.
14. The documents were released to the Applicant in response to an FOI access request.

The information is inaccurate, incomplete, out of date or would give a misleading impression

15. The purpose of section 39 is to ensure personal information concerning an applicant and read by third parties does not unfairly harm or misrepresent personal facts about the applicant.¹
16. In *Setterfield v Chisolm Institute of Technology (No 2)*,² the following comments were made on the scope of section 39:

Section 39 is about words... Incorrect words either resulting from malice, false assumptions, a misunderstanding of the facts or sheer clerical bungling...

17. The Applicant bears the onus of demonstrating the information is inaccurate, incomplete, out of date or would give a misleading impression.
18. In *G v Health Commission of Victoria*,³ the following observations were made in relation to section 39:

A misleading statement or impression is one which is untrue or is likely to lead to an erroneous conclusion... Whether there would be misleading impressions is... objective. What, on the reading of the material, is fairly and reasonably open as an interpretation, not what would some person failing to apply reason or who was biased or who failed to act fairly and reasonably in interpreting the material get, as an impression.

[T]here is a difference between a misleading impression and an inaccuracy, although each will overlap the other to a large extent. One can readily envisage circumstances where the recorded facts are inaccurate, and also give a misleading impression, either because of incompleteness or because the language used in recording the facts, whilst accurate, yet would convey a misleading impression.

19. His Honour was of the view that where the contents of a file gives the impression that a particular act took place but, when the applicant's explanation is read, there is a dispute created as to the correct conclusion, then the contents of the file may be held to give a misleading impression.
20. Information that may be the subject of a correction or amendment request can be information in the nature of an opinion.
21. In *Re Stephens and Victoria Police*,⁴ the former Administrative Appeals Tribunal set out four considerations relevant to whether an amendment pursuant to section 39 should be made of information that was in the nature of an opinion:
 - (a) the facts underlying such opinion have been thoroughly discredited or have been demonstrated to be totally inadequate;
 - (b) the person forming such opinion was tainted by bias or ill will, incompetence or lack of balance, or necessary experience;

¹ *G v Health Commission of Victoria* (unreported, Vic County Ct, Rendit J, 13 September 1984) at p10.

² (1986) 1 VAR 202 at [208] - [209].

³ (unreported, Vic County Ct, Rendit J, 13 September 1984) at pp 9 – 11.

⁴ (1988) 2 VAR 236, at [239].

- (c) the factual substratum underlying the opinion is so trivial as to render the opinion formed dangerous to rely upon and likely to result in error; and
 - (d) the facts upon which the opinion was based were misapprehended.
22. The Applicant submits Statements A, B, C and D are inaccurate and misleading, contending she 'never requested alprazolam or any medications', and the Doctor did not examine her.
23. With respect to Statement D, the Applicant provides an alternative version of events, indicating:
- [redacted – detailed description of medical condition].
24. The Applicant submits Statement E is 'a statement of future intent which... has no basis in fact and is misleading'.
25. The Applicant submits the Statements have caused her to refrain from and be fearful of seeking medical treatment on the basis that the Statements may 'colour her treatment', thereby putting her health at risk.
26. In its decision letter, the Agency advised the Applicant's request for amendment had been 'carefully considered by relevant senior clinical and managerial staff, in conjunction with Dr [name], who was the most senior clinician to have reviewed [the Applicant] ...'. Following that review, three amendments were made to the Applicant's record.
27. The Agency submits the Statements are 'clinically appropriate and relevant', and the alert is clinically relevant and 'an important consideration for any future presentations'.
28. The Agency further submits a notation has been placed on the Applicant's medical record. The notation links to correspondence from the Applicant's legal practitioner, which accepts the amendments proposed by the Agency in its decision letter and advises of the Applicant's continued dissatisfaction with the Agency's decision.

Statements A, B, C and E

29. I consider Statements A, B, C and E to be recordings of fact.
30. In my view, the Applicant has not provided any evidence to support her view that Statements A, B, C and E, and the Alert are inaccurate, incomplete or give a misleading impression beyond her contention that she 'never requested alprazolam or any medications'.
31. I am not satisfied there is any evidence to establish the Doctor was tainted by bias or ill will, incompetence or lack of balance, or necessary experience. I do not find the factual substratum to be trivial, or that the Doctor was under any misapprehension about the facts.
32. I am satisfied the Agency's amendment to Statement B as outlined in its letter dated 28 March 2019 is appropriate.

Alert

33. I consider the Alert to be information in the nature of opinion; specifically, the Doctor's opinion that the Applicant was seeking drugs of dependence on [date], and that this is relevant to matters of safety and security.

34. It is not appropriate for me, as a decision maker under the FOI Act, to determine the Alert should be amended solely on the contention of the Applicant that she 'never requested alprazolam or any medications'.
35. I am not satisfied there is any evidence to establish the Doctor was tainted by bias or ill will, incompetence or lack of balance, or necessary experience. I do not find the factual substratum to be trivial, or that the Doctor was under any misapprehension about the facts.

Statement D

36. I consider Statement D to be a recording of fact.
37. I have considered the alternative version of events provided by the Applicant.
38. I am not satisfied there is any evidence to establish the Doctor was tainted by bias or ill will, incompetence or lack of balance, or necessary experience. I do not find the factual substratum to be trivial, or that the Doctor was under any misapprehension about the facts.
39. However, on reading the Applicant's version of events, I am satisfied the language and sentence structure used by the Doctor in recording the Applicant's description of her symptoms would convey a misleading impression.

Conclusion

40. I am satisfied Statement D gives a misleading impression. Accordingly, I am satisfied Statement D should be amended by way of notation.
41. I am not satisfied on the information before me that Statements A, B, C and E are inaccurate, incomplete or give a misleading impression. Accordingly, I consider these statements are not to be amended.
42. I am not satisfied the Alert is inaccurate, incomplete or gives a misleading impression. Accordingly, I consider the Alert is not to be amended.

Review rights

43. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.⁵
44. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
45. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
46. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
47. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.⁸

⁵ The Applicant in section 50(3B) and the Agency in section 50(3D).

⁶ Section 52(6).

⁷ Section 52(9).

⁸ Sections 50(3F).

When this decision takes effect

48. My decision does not take effect until the relevant review period (stated above) expires, or if either party applies to VCAT for a review, until the VCAT proceeding is concluded.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Directions in relation to amendment on ED Medical e-notes
1.	[Date]	ED Medical e-notes	2	Refused Applicant's request for amendment Section 39	Amendment to Statement A is refused. Amendment to Statement B is refused. Amendment to Statement C is refused. Amendment to Statement D is granted by way of notation to the medical record. Amendment to Statement E is refused. Amendment to the Alert is refused.	Add the following notation to the Applicant's medical record, following the heading 'Results / Outcome': <i>Patient disputes Doctor's recording of her description of symptoms:</i> <i>[redacted – detailed description of medical symptoms provided by Applicant].</i>