

Notice of Decision and Reasons for Decision

Applicant:	'AO2'
Agency:	St Vincent's Hospital
Decision Date:	30 September 2019
Provisions considered:	Sections 39, 41
Citation:	'AO2' and St Vincent's Health (<i>Freedom of Information</i>) [2019] VICmr 128 (30 September 2019)

FREEDOM OF INFORMATION – request for amendment – hospital record – misleading impression – incorrect – misleading statement – information in the nature of opinion – agreement by agency to make an amendment by adding an appropriate notation to the record

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 documents in accordance with the Applicant's request.

My decision is the same as the Agency's decision in that I have determined to refuse to grant the Applicant's request for the documents to be amended under section 39 as I am not satisfied the statements recorded in the Agency's documents are inaccurate, incomplete, out of date or would give a misleading impression.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

30 September 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for the following amendments to their hospital record:
 - (a) To scan supporting documentation provided by the Applicant into their medical file; and
 - (b) The diagnosis of '[medical condition]' made by [named medical practitioner] and subsequent reports be removed, and the correct diagnosis of '[medical condition]' noted as correct.
2. By letter dated 12 June 2019, the Agency determined not to amend the Applicant's medical record in accordance with their request, stating:

In relation to your request to have documents removed from your Hospital record, I wish to advise that Section 49 of the Freedom of Information Act provides for the following relation (sic) to the amendment of Records,

"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 information which has been corrected or amended or of destroying the document except with the concurrence of the Keeper of Public Records"

As a result, the Hospital is unable to accede to your request to remove documents from your record as you have requested.

Furthermore, we wish to advise that the Hospital is not willing to attach any notation to the relevant documentation on your Hospital record as you have requested.

3. By email dated 24 June 2019, the Applicant made an application under section 49A(2) for review by the Information Commissioner of the Agency's decision.
4. On 9 August 2019, the Agency advised the documents provided to the Agency by the Applicant were scanned onto the Applicant's hospital record.
5. The Agency informed OVIC staff the Applicant had not been provided a copy of their hospital record.
6. Following OVIC staff liaison with both parties, the Applicant made a request to the Agency for a copy of their hospital record.
7. On 3 September 2019, following receipt of their hospital record, the Applicant particularised the amendments sought:

I request the following to be amended/noted void for reasons stated in my initial correspondence.

- (a) Pages 2, 3 & 4 – Dr [first named clinician] Report - Please mark as void, there should be no discussion of [symptom] or re-evaluation at the [specialist clinic] when such [symptoms] have an organic cause, [medical condition].
- (b) Pages 6 & 7 - '[diagnosis]. Declined [specialist] clinic follow-up,' '[Applicant] kindly declined offer for [specialist] referral' - Please mark as void, due to correct diagnosis of [medical condition].
- (c) Page 13 - '[diagnosis]. Declined [specialist] clinic follow-up' - Please mark as void, due to correct diagnosis of [medical condition].
- (d) Page 32 - '[diagnosis]. Patient declined referral to [specialist] clinic' - Please mark as void, due to correct diagnosis of [medical condition].

- (e) Page 38 - 'Unable to work/study due to disease' - This is not true, I was studying my [course name] at the time and brought this to the hospital's attention on several occasions, thus I request this be amended.
- (f) Page 58 – Dr [second named clinician] Report - Please mark as void, there should be no discussion of [symptoms] when such [symptoms] have an organic cause, [medical condition].
- (g) Page 59 – Dr [third named clinician] Report - Please mark as void, there should be no discussion of follow-up at the [specialist]clinic when such [symptoms] have an organic cause, [medical condition].

8. OVIC staff notified the Agency of the Applicant’s requested amendments and provided the Agency an opportunity to make submissions in response.
9. The Agency submitted the following notation could be placed on the Applicant’s patient Electronic Medical Record (**EMR**), alongside documents forwarded by the Applicant:

Patient disputes the diagnosis of ‘[diagnosis]’. See medical documents provided by patient and email correspondence dated [specified date and time].

Application of section 39

10. 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.

11. 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.
12. 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.

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. I am satisfied the information sought to be amended relates to the personal affairs of the Applicant.
14. I am satisfied the information was 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 Victorian Administrative Appeals Tribunal set out four considerations relevant to whether an amendment sought to information in the nature of an opinion should be made:
 - (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;
 - (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.

'[diagnosis]'

22. The Applicant submits:

¹ *G v Health Commission of Victoria* (unreported, Vic County Ct, Rendit J, 13 September 1984) at p 10.

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].

... I am well aware that '[diagnosis]' alongside follow up at the '[specialist] clinic' equates to a diagnosis of [medical condition].

... it is evident that a misdiagnosis has occurred and the diagnosis of [medical condition], should not have been made at the first instance.

... I would like my St Vincent's Medical Record to be amended to contain the truth, that is, the misdiagnosis of [medical condition] noted as void and the correct diagnosis of [medical condition] noted as correct. Failure to make such amendments places my health and safety in the future at considerable risk.

23. The Applicant further submits the Agency failed to:
- (a) take into account the medical malpractice which occurred at [specified hospital];
 - (b) acknowledge the Australian Health Practitioner Regulation Agency (sic) (AHPRA) letter and subsequent intervention;
 - (c) the importance of scientific research in diagnosing patients;
 - (d) address two employees, [named clinicians], engaged in an act of collusion to pervert the course of justice; and
 - (e) acknowledge that such decision gives rise to multiple causes of action under both Australian and Victorian Law (e.g. negligence, defamation, fraud etc).
24. The Applicant provided correspondence from the Australian Health Practitioner Regulation Authority (**AHPRA**), a radiology report and a number of laboratory test results in support of their contention. These documents suggest the Applicant has received medical treatment and diagnosis internationally.
25. The Applicant submits their diagnosis has been verified by AHPRA 'and overseas world-renowned experts in [category of medical condition], who practice in accordance with peer-reviewed journal articles'.
26. I have reviewed the correspondence from AHPRA provided by the Applicant, which states 'the Medical Board of Australia and AHPRA do not have a position on [medical condition] or any other clinical condition'.
27. I consider each reference to '[diagnosis]' to be information in the nature of opinion, specifically, the clinician's professional opinion the Applicant experienced [symptoms].
28. In an application for amendment under section 39, where an applicant is in effect seeking to challenge an opinion as distinct from the accuracy of facts, there is doubt as to whether the powers under Part V of the FOI Act were intended to have such application.⁵
29. In the Victorian Civil and Administrative Tribunal (**VCAT**) decision of *Re Resch and Department of Veteran's Affairs*,⁶ VCAT distinguished between a medical history on the one hand, and an opinion based on that history on the other, stating:

It may be one thing to establish that factual information of the 'personal data' kind is 'incomplete, incorrect, out-of-date or misleading': it may be quite another when one is dealing with matters that depend upon professional judgment or opinion or upon subjective evaluation of an individual.

⁵ *Mann v Medical Practitioners Board (Vic)* (1997) 12 VAR 142 at p 147.

⁶ (1986) 9 ALD 380 at [19].

30. In *QXD v Monash Health*,⁷ VCAT accepted that:
- (a) conflicting medical opinions in themselves do not render a particular record misleading or incorrect; and
 - (b) an applicant should not be permitted to use the FOI Act to substitute their opinions or the opinion of other medical practitioners for the opinions of the authors of the records in question.
31. Medical opinions may differ between medical practitioners, more so in circumstances such as these where the Applicant is reported to have received medical treatment and undergone medical testing by international practitioners. It is not appropriate for me, as a decision maker under the FOI Act to determine the veracity of the diagnosis made by registered, qualified and experienced medical practitioners.
32. On the information before me, I am not satisfied the facts underlying the opinions of the medical practitioners have been thoroughly discredited nor demonstrated to be totally inadequate. Nor am I satisfied there is any evidence to establish the medical practitioners were tainted by bias or ill will, incompetence or lack of balance, or necessary experience.
33. I have considered the reports by Dr [first named clinician] that refer to the Applicant's concerns with respect to the diagnosis of '[diagnosis]'.
34. I have considered the documents provided to the Agency by the Applicant now form part of its hospital record.
35. On the information before me, I am not satisfied these statements are inaccurate, incomplete, out of date or give a misleading impression.

[Specialist] clinic follow-up

36. The Applicant submits mentions of '[specialist] clinic follow-up' should be 'marked as void', contending 'there should be no discussion of follow-up at the [specialist] clinic when such [symptoms] have an organic cause, [medical condition]'.
37. I consider the statements that refer to the Applicant being offered follow-up with the [specialist] clinic and the Applicant declining that offer are factual records.
38. The Applicant does not dispute they were offered follow-up with the [specialist] clinic. Nor does the Applicant dispute they declined the offer.
39. On the information before me, I am not satisfied these statements are inaccurate, incomplete, out of date or would give a misleading impression.

'Unable to work/study due to disease'

40. The Applicant submits this statement is inaccurate because they were 'studying my [course name] at the time and brought this to the hospital's attention on several occasions'.
41. The Applicant has not provided any evidence to support their statement.
42. On the information before me, I am not satisfied this statement is inaccurate, incomplete, out of date or would give a misleading impression.

⁷ (Review and Regulation) [2018] VCAT 997 at [49]-[52].

Conclusion

43. I have determined to refuse to grant the Applicant's request for the documents to be amended under section 39 as I am not satisfied the statements recorded in the Agency's documents are inaccurate, incomplete, out of date or would give a misleading impression:
- (a) the statements relating to the diagnosis of '[diagnosis]';
 - (b) the statements relating to [specialist] clinic; and
 - (c) the statement concerning the Applicant being 'unable to work/study due to disease'.

Review rights

44. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁸
45. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
46. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
47. 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.
48. 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.¹¹

When this decision takes effect

49. My decision does not take effect until the relevant review period (stated above) expires. If either party applies to VCAT for a review, my decision will be subject to any VCAT determination.

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).

Annexure 1 –Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision
1.	[date]	Medical Report – Dr. [first named clinician]	2	Agency refused the Applicant's request for amendment under section 39	Applicant's request to amend the documents under section 39 is refused
2.	[date]	Outpatient Attendances Record – Dr. [first named clinician]	1		
3.	[date]	[Clinical field] eOutpatient	2		
4.	[date]	[Clinical field] eOutpatient	1		
5.	[date]	Discharge Summary	6		
6.	[date]	Emergency Department eRecord	3		
7.	[date]	Progress Notes – Dr. [second named clinician]	1		
8.	[date]	Progress Notes – Dr. [third named clinician]	1		