

Notice of Decision and Reasons for Decision

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| Applicant: | 'AU1' |
| Agency: | Mercy Hospitals Victoria Ltd |
| Decision date: | 2 December 2019 |
| Exemptions considered: | Section 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 141(2) of the <i>Health Services Act 1988</i> (Vic) |
| Citation: | 'AU1' and <i>Mercy Hospitals Victoria Ltd (Freedom of Information)</i> [2019] VICmr 182 (2 December 2019) |

FREEDOM OF INFORMATION – patient medical records – senior available next of kin – secrecy provision – prohibition on release of third party medical records

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 access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request is the same as the Agency's decision.

I am satisfied the documents are exempt in full under section 38 of the FOI Act in conjunction with section 141(2) of the *Health Services Act 1988* (Vic).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
2 December 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to their [parent's] medical records.
2. In its decision, the Agency identified certain documents within the scope of the review. The Agency decided to refuse access to the documents in full.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
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 considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's review application and attachments;
 - (c) the Agency's submission dated 4 July 2019; and
 - (d) all communications with the Agency and the Applicant throughout the review.
6. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

Review of exemptions

7. The Agency relied on section 38 to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

Section 38

8. A document is exempt under section 38 if:
 - (a) there is an enactment in force;
 - (b) that applies specifically to the kind of information in the document; and
 - (c) the enactment must prohibit persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).
 9. For section 38 to apply to an enactment, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
 10. The Agency relies on section 38 in conjunction with section 141(2) of the *Health Services Act 1988* (Vic) (**Health Services Act**).
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11. Section 141(2) of the Health Services Act states:

- (2) A relevant person must not, except to the extent necessary—
 - (a) to carry out functions under this or any other Act; or
 - (b) to exercise powers under this or any other Act in relation to a relevant health service; or
 - (c) to give any information he or she is expressly authorised, permitted or required to give under this or any other Act—

give to any other person, whether directly or indirectly, any information acquired by reason of being a relevant person if a person who is or has been a patient in, or has received health services from, a relevant health service could be identified from that information.

Penalty: 50 penalty units.

- (2A) For the purposes of subsection (2)(c), "any other Act" does not include the Health Privacy Principles in the Health Records Act 2001 or Part 3 or Part 5 of that Act.
- (2B) Subsection (2) does not apply to a person (other than an independent contractor) who is a relevant person in relation to a relevant health service who gives information in accordance with HPP 2 of the Health Privacy Principles in the Health Records Act 2001 to another person (other than an independent contractor) who is a relevant person in relation to that relevant health service.

12. I note section 141(3) of the Health Services Act sets out the circumstances in which this provision does not apply, including section 141(3)(a):

Subsection (2) does not apply—

- (a) to the giving of information with the prior consent (which may be express or implied) of the person to whom it relates or, if that person has died, with the consent (which may be express or implied) of the senior available next of kin of that person;

Is there an enactment in force?

13. I am satisfied the Health Services Act is an enactment in force for the purposes of section 38.

Does the Health Services Act apply specifically to the information in the documents?

14. The documents subject to review are the medical records of the Applicant's [parent].

15. In relation to the application of section 141(2), I am satisfied:

- (a) the Agency is a relevant health service, being a public hospital for the purposes of section 141(1);
- (b) staff of the agency are 'relevant persons', being people engaged by a relevant health service;
- (c) the information identifies a person other than the applicant.

16. I am therefore satisfied the Health Services Act applies to information in the documents.

Do any of the exceptions set out in section 141(3) of the Health Services Act apply?

17. In relation to section 141(3)(a), as set out above, where a person has died, documents may be released where consent (which may be express or implied) has been given by the 'senior available next of kin' of the person to whom the records relate.
18. For the purposes of the Health Services Act, the senior available next of kin is defined in the *Human Tissue Act 1982* (Vic).
19. The Human Tissue Act states:

senior available next of kin means—

...

- (b) in relation to any other deceased person—
 - (i) where the person, immediately before the person's death, had a spouse or domestic partner and that spouse or domestic partner is available—the spouse or domestic partner;
 - (ii) where the person, immediately before the person's death, did not have a spouse or domestic partner or the spouse or domestic partner is not available—a son or daughter of the person who has attained the age of 18 years and who is available;
 - (iii) where no person referred to in subparagraph (i) or (ii) is available but a parent of the person is available—that parent; or
 - (iv) where no person referred to in subparagraph (i), (ii) or (iii) is available—a brother or sister of the person who has attained the age of eighteen years and is available.

20. In response to this review, the Agency consulted with the senior available next of kin. However, they did not consent to disclosure of the records to the Applicant.
21. While I note the concerns raised by the Applicant in relation to the capacity of the senior next of kin to respond to such consultation, I accept the Agency can reasonably assume the senior next of kin in this matter is competent to provide or refuse the required consent for the purposes of the Health Services Act.
22. Based on the information before me, I am satisfied the Applicant is not the senior next of kin. Further, I am satisfied the senior next of kin has not provided consent to release the documents to the Applicant.
23. Therefore, the exception in section 141(3)(a) of the Health Services Act does not apply. I also consider the other exceptions under section 141(3) do not apply in this matter.
24. I acknowledge the Applicant seeks access to the information to 'provide closure' by understanding how their [parent] died and whether [their parent] had any hereditary illnesses. However, based on the information before me, these are not factors I am permitted to consider in determining whether section 141(3)(a) of the Health Services Act prohibits disclosure of the documents.

Does the Health Services Act prohibit persons, referred to in the enactment, from disclosing that specific kind of information?

25. I am satisfied the Health Services Act prohibits the Agency from disclosing the specific kind of information subject to the Applicant's request, being their [parent's] medical records, under the provisions of the Health Services Act.
26. I note that this matter is sensitive, however, I must consider the provisions of the Health Services Act and the FOI Act as set out above and how they apply to the specific circumstances before me.
27. For the reasons set out above, I am satisfied the documents are exempt under section 38.

Deletion of exempt or irrelevant information

28. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
29. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹ and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.²
30. I have considered the effect of deleting exempt information from the documents. In my view, it is not practicable to delete the exempt information, because deleting the exempt information would render the documents meaningless.

Conclusion

31. On the information before me, I am satisfied the documents are exempt in full under section 38 of the FOI Act in conjunction with section 141(2) of the Health Services Act.

Review rights

32. 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.³
33. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁴
34. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁵
35. 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.
36. 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.⁶

¹ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

² *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

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

⁴ Section 52(5).

⁵ Section 52(9).

When this decision takes effect

37. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁶ Sections 50(3F) and (3FA).