

## Notice of Decision and Reasons for Decision

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Applicant:	'BM7'
Agency:	Austin Health
Decision date:	23 April 2020
Provision considered:	Section 39
Citation:	'BM7' and Austin Health ( <i>Freedom of Information</i> ) [2020] VICmr 122 (23 April 2020)

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FREEDOM OF INFORMATION – amendment request – hospital record – misleading impression – information not incorrect or misleading

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

I am not satisfied the statements recorded in the Agency's documents are inaccurate, incomplete, out of date or would give a misleading impression.

Accordingly, I have determined to refuse to grant the Applicant's request for the document to be amended under section 39.

My reasons for decision follow.

**Joanne Kummrow**

Public Access Deputy Commissioner

23 April 2020

## Reasons for Decision

### Background to review

1. On [date], the Applicant made a request to the Agency to amend a document:

... I refer to Medical Report written by Dr. [specified name and position] on [specified date]. Under Section 39 of the Freedom of Information Act 1982 Victoria. The information contained in the report is false and misleading against myself. I would like this report to be corrected as it holds inaccurate information on what actually occurred in my appointment with Dr. [specified name] on [specified date], a new copy sent to myself and my general practitioner Dr. [specified name]. My [specified person] is a witness to this day. This is what I would like the report to state as follows. ...

2. The Applicant's request also contained an attachment of the two page medical letter (the **document**) in question, two photographs and instructions as to how the letter should be amended.
3. The relevant document is a letter from a medical specialist to the Applicant's general practitioner. It details their opinion on the Applicant's medical condition and options for investigation and treatment, and an account of what took place at a medical consultation.
4. On [date], the Agency determined not to amend the document in accordance with the Applicant's request, stating in its decision letter:

While we understand your dissatisfaction with your consultation, Austin Health does not consider that the information or wording in the outpatient letter to be inaccurate or give a misleading impression.

[specified person's] letter is [their] own assessment, opinion and judgment based on [their] professional training and experience, as well as the information presented to [them] at the time of your consultation. Clinicians provide their opinions in a professional capacity and are not always accepted or agreed upon by others.

Therefore, we are of the view that amending the letter with your own wording rather than that of Dr [specified person's] is not warranted.

We consider that the most appropriate way to resolve your concern is to place a copy of your email dated [date] on your file.

5. On [date], the Applicant requested that photographs also be added to the Applicant's medical record alongside the email dated [date] and the unamended letter, stating that it was evidence of having sustained [description of injury] and is evidence to support their case.
6. On [date], the Agency advised the Applicant that a copy of their email had been added to their medical record. However, the Agency declined the Applicant's request to have the photographs added to their medical record.
7. On [date], the Applicant made an application under section 49A(2) for review by the Information Commissioner of the Agency's decision and provided the following in support of their request for amendment:
  - (a) a copy of the unamended letter;
  - (b) a copy of letter the Applicant received from the Director of the relevant Agency area in response to the Applicant's email to Agency on [date] regarding their experience at a clinic appointment on [specified date];
  - (c) two photographs date and time stamped: [date and time] and [date and time];

- (d) the Agency's decision letter; and
  - (e) the Agency [specified type of] report dated [date].
8. On [date], the Applicant consented to this office sharing the Applicant's review application and supporting documents with the Agency.
  9. OVIC staff sought further information from the Applicant in support of their request to add the photographs to their medical record, including seeking the original copy of the photographs the Applicant stated were taken on [date].
  10. On [date], the Applicant advised they cannot get a copy of the original photographs requested.

### **Application of section 39**

11. 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.

12. Importantly, section 39 places the onus on an applicant to establish the case for amendment. That is, an applicant must establish their claim a record subject to an amendment request should be corrected or amended.
13. 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***

14. I am satisfied the information sought to be amended, namely the letter dated [specified date] (the **document**), relates to the personal affairs of the Applicant.
15. The Agency submits the document was sent to the Applicant's general practitioner. However, the Agency confirmed the Applicant did not acquire a copy of the document under the FOI Act.
16. I further note the Agency's position '...section 39 applies [only] to a document released by an agency under the Act'.
17. While I accept the document was not obtained by the Applicant under the FOI Act, in *Re Al-Hakim v Monash University*<sup>1</sup>, the Victorian Civil and Administrative Tribunal (**VCAT**) determined it is not a requirement that a document in the possession of an agency, which an applicant seeks to amend, have been released to the applicant under the FOI Act. As such, section 39 can be invoked whether or not an applicant seeks to amend a document obtained under the FOI Act or through other means.

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<sup>1</sup> (unreported, VCAT, Macnamara DP, 12 July 2002) at [26].

***Is the information inaccurate, incomplete, out of date or would it give a misleading impression?***

18. The purpose of section 39 is to ensure personal affairs information concerning an applicant in the possession of an agency and read by third parties does not unfairly harm or misrepresent personal facts about the applicant.<sup>2</sup>

19. In *Setterfield v Chisolm Institute of Technology (No 2)*,<sup>3</sup> 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...

20. As stated above, the Applicant bears the onus of demonstrating the information is inaccurate, incomplete, out of date or would give a misleading impression.

21. In *G v Health Commission of Victoria*,<sup>4</sup> 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.

22. In *Re Stephens and Victoria Police*,<sup>5</sup> 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.

23. In *QXD v Monash Health*,<sup>6</sup> VCAT accepted:

- (a) conflicting medical opinions in themselves do not render a particular record misleading or incorrect; and

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<sup>2</sup> *G v Health Commission of Victoria* (unreported, Vic County Ct, Rendit J, 13 September 1984) at p10.

<sup>3</sup> (1986) 1 VAR 202 at [208]-[209].

<sup>4</sup> *G v Health Commission of Victoria* (unreported, Vic County Ct, Rendit J, 13 September 1984) at pp9-11.

<sup>5</sup> (1988) 2 VAR 236 at [239].

<sup>6</sup> (*Review and Regulation*) [2018] VCAT 997 at [49]-[52].

- (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.

24. In their review application, the Applicant states, in part:

... It is a fabricated medical report/ document written by Dr [specified person] to suit [themselves] and [their] behaviour which has been supported by the [specified title role] and [specified person].

I have requested that my photographic evidence of [description of injury] see attachment above to attached with my email a true copy of what happened in my appointment on [specified date] however [specified person] has refused to attach the evidence but withholding it claiming it is not warranted.

25. In its submission dated [date], the Agency states:

... On [date], Austin Health notified [the Applicant] in writing that it would place a copy of the Email on [their] medical record alongside the (unamended) Letter. This decision was offered in the context of Austin Health having determined that the Letter was not inaccurate nor did it create a misleading impression because it contained Dr [specified person's] own assessment, opinion and judgement of [the Applicant's] current medical condition based on [their] professional training and experience, as well as information presented to [them] by [the Applicant] at the appointment. We understand that [the Applicant] accepted this decision.

26. The Agency submits, in relation to the Applicant's amendment request, that also including the Applicant's photographs to their medical record alongside their email is not appropriate for the following reasons:

- (a) the photographs were not taken by Agency staff at the appointment;
- (b) Agency staff did not consider it necessary to capture photographs on the day as they stated there were no significant injuries observed; and
- (c) it is not possible to determine whether the photographs are in fact of the Applicant and, even if they were, it was not possible to objectively determine whether they were taken on the day the Applicant claims they were taken.

27. The Agency further submits:

...Austin Health also considers that the request for the Photos to be added to the medical record is not a request to which section 39 of the applies [sic] because, in our opinion, section 39 applies to a document released by an agency under the Act. The Photos are not such a document. Rather, they were not generated by, nor have they been in the possession of, Austin Health. The Photos are purportedly documents generated and owned by [the Applicant]. Accordingly, Austin Health considers it has no obligation under the Act (or any other statute) to add documents generated or originally in the possession of a patient to a patient's medical record. Arguably, if Austin Health were to cede to such requests the integrity of our medical records would be compromised.

28. Having reviewed the Applicant's review application and submissions provided by the Applicant and Agency, I have determined to refuse the Applicant's request to amend the document for the following reasons:

- (a) The Applicant has not provided evidence to support their view information in the document is incorrect. Rather, the Applicant has provided their opinion on what occurred at the appointment and what additional information the medical practitioner should have recorded in their letter.

- (b) While the Applicant has a different opinion to the medical practitioner about the Applicant's medical condition and what took place at the consultation, this is not sufficient for me to be satisfied the statements recorded in the Agency's documents are inaccurate, incomplete, out of date or would give a misleading impression.
  - (c) Rather, I accept the information provided by the medical practitioner in their letter to a general practitioner is based on their professional clinical opinion and expertise.
  - (d) The Applicant has not provided any information to demonstrate the opinion formed by the medical practitioner was tainted by bias or ill will, or they were not appropriately qualified to form such an opinion.
  - (e) Medical opinions may change over time according to a patient's condition and treatment.
  - (f) I consider the document amounts to one piece of information in relation to the Applicant's medical history and condition recorded at one medical consultation and is not intended to represent the Applicant's entire medical history.
  - (g) I am not satisfied evidence has been provided to support the Applicant's request for the photographs to be added to their medical record.
  - (h) In any case, the Applicant has not provided the original photographs to evidence they were taken on [date], as submitted by the Applicant, or provided any further evidence to support their request for the photographs to be added to their medical record.
29. Therefore, I am not satisfied the facts underlying the opinions of the relevant medical practitioner have been thoroughly discredited nor demonstrated to be totally inadequate. Nor am I satisfied there is any evidence to establish the medical practitioner was tainted by bias or ill will, incompetence or lack of balance, or necessary experience.
30. Accordingly, I have determined to refuse to grant the Applicant's request for the document to be amended under section 39.

### **Conclusion**

31. On the information before me, I am not satisfied the statements recorded in the Agency's documents are inaccurate, incomplete, out of date or would give a misleading impression.
32. Accordingly, I have determined to refuse to grant the Applicant's request for the document to be amended under section 39.

### **Review rights**

33. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>7</sup>
34. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>8</sup>
35. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>9</sup>

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<sup>7</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>8</sup> Section 52(5).

<sup>9</sup> Section 52(9).

36. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
37. 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.<sup>10</sup>

***When this decision takes effect***

38. My decision takes effect immediately. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>10</sup> Sections 50(3F) and (3FA).