

Notice of Decision and Reasons for Decision

Applicant:	'BN7'
Agency:	Bendigo Health Care Group
Decision Date:	13 May 2020
Exemption and provision 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:	'BN7' and Bendigo Health Care Group (<i>Freedom of Information</i>) [2020] VICmr 132 (13 May 2020)

FREEDOM OF INFORMATION – medical records – health records – 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.

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

As I am not satisfied it is practicable to delete exempt information from the documents in accordance with section 25, I have determined to refuse access to the documents in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 - 1) Admission/Discharge Summary of [date range]
 - 2) Admission, any notes associated with second presentation [date] any/all notes up until [Next of Kin] NOK changed on [date]
 - 3) Copy of paperwork supplied, which saw the change of NOK details on [date]
2. In its decision, the Agency identified documents falling within the terms of the Applicant's request totalling 65 pages and refused access to the documents in full.
3. The Agency relied on the exemption under section 33(1) to refuse access to parts of the documents. The Agency's decision letter sets out the reasons for its decision.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined copies of the documents subject to review. The documents are clinical health records created by the Agency in the provision of health services to a third party and other associated documents.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's submission, dated [date] and information provided with their review application; and
 - (c) the Agency's submission, dated [date].
8. 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

9. Having reviewed the documents and relevant provisions in the *Health Services Act 1988* (Vic) (**Health Services Act**), I am satisfied the documents subject to review are exempt under section 38 of the FOI Act in conjunction with section 141(2) of the Health Services Act, noting the Agency did not rely on this exemption in its decision to refuse access to the documents.

10. In undertaking a review under section 49F, section 49P requires that I make a 'fresh decision'. Therefore, my review does not involve determining whether the Agency's original decision is correct, but rather requires my fresh decision is the 'correct or preferable decision'.¹ This involves ensuring my decision is correctly made under the FOI Act and any other relevant applicable law in force at the time of making my fresh decision.

Section 38

11. 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).
12. 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.

13. 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.

14. 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;

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

Is there an enactment in force?

15. 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?

16. The documents subject to review are the medical records of the Applicant's parent.

17. The Agency is a 'public hospital', as defined in the Health Services Act, being a 'public health service' under Schedule 5 of that Act.

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

- (a) the Agency is a relevant health service, being a 'public hospital' as defined by the Health Services Act,² for the purposes of section 141(1) of that Act;
- (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.

19. Therefore, I am satisfied the Health Services Act applies to the information in the documents.

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

20. 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.

21. As the Applicant's parent is not deceased, the exception in section 141(3)(a) of the Health Services Act does not apply.

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

22. I am satisfied the Health Services Act prohibits the Agency from disclosing the specific kind of information the subject of the Applicant's request, being documents contained in their parent's medical records, under the provisions of the Health Services Act.

23. While I acknowledge this will be a sensitive matter for the Applicant, I am required to make my decision in accordance with the FOI Act and the Health Services Act, as set out above.

24. For the reasons set out above, I am satisfied the documents are exempt under section 38.

Deletion of exempt or irrelevant information

25. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.

²Health Services Act, section 3(1).

26. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'³ and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required in accordance with section 25.⁴
27. I have considered the effect of deleting exempt information from the documents in accordance with section 25. I am satisfied it is not practicable to delete the exempt information as to do so would render the documents meaningless.

Section 33(1)

28. In light of my decision in relation to section 38, it is not necessary for me to consider the application of section 33(1) to the same documents.

Conclusion

29. On the information before me, I am satisfied the documents are exempt under section 38 of the FOI Act in conjunction with section 141(2) of the Health Services Act.
30. As I am satisfied it is not practicable to delete exempt information from the documents in accordance with section 25, I have determined to refuse access to the documents in full.

Review rights

31. 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
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
34. 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.
35. 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

When this decision takes effect

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

³ *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].

⁴ *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].

⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁶ Section 52(5).

⁷ Section 52(9).

⁸ Sections 50(3F) and (3FA).