

Notice of Decision and Reasons for Decision

Applicant:	'BN9'
Agency:	Austin Health
Decision date:	13 May 2020
Exemptions and provisions considered:	Section 33(1) and 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	'BN9' and Austin Health (<i>Freedom of Information</i>) [2020] VICmr 134 (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

13 May 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:

[the Applicant's family member's] Entire Medical Record - All documents, tests, x rays, scans, diagnostic notes and also in particular [their] "acquired brain injury"
2. The Applicant provided the Agency with an 'Authority for Release of Information', signing the written consent to release as their [family member's] next of kin.
3. In its decision, the Agency identified documents falling within the terms of the Applicant's request. It decided to refuse access to the documents in full.
4. The Agency relied on the exemptions under sections 33(1), 35(1)(b) and section 38 in conjunction with section 141(2) of the *Health Services Act 1988* (Vic) (**Health Services Act**) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. 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.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. 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] and correspondence provided regarding its decision.
9. 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

Section 38

10. 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
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(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).

11. 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.

12. The Agency relies on section 38 in conjunction with section 141(2) of the Health Services Act to exempt the documents.

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;

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 [family member].

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 in the Health Services Act,¹ for the purposes of section 141(1) of that Act;
 - (b) staff of the Agency are 'relevant persons', being persons engaged by a relevant health service; and
 - (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 [family member] 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 their [family member'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.
26. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'² 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 under section 25.³
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.

¹ Health Services Act, section 3(1).

² *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].

³ *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].

Sections 33(1) and 35(1)(b)

28. In light of my decision in relation to section 38, it is not necessary for me to consider the application of the exemptions under sections 33(1) and 35(1)(b) 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 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.

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.⁴
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁵
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁶
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.⁷

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.

⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁵ Section 52(5).

⁶ Section 52(9).

⁷ Sections 50(3F) and (3FA).