

Notice of Decision and Reasons for Decision

Applicant:	'CE7'
Agency:	Northern Health
Decision date:	9 October 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:	'CE7' and Northern Health (<i>Freedom of Information</i>) [2020] VICmr 292 (9 October 2020)

FREEDOM OF INFORMATION – health 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 is the same as the Agency's fresh 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

9 October 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the medical records of a named third party.
2. In its decision, the Agency did not identify any documents relevant to the terms of the Applicant's request. Instead, the Agency refused access to documents on the grounds the Applicant did not provide evidence they were the deceased person's 'Senior Next of Kin', as outlined in the *Human Tissue Act 1982* (Vic).

Application for review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.

Preliminary view and Fresh decision

4. On [date], OVIC staff provided the Agency with my preliminary view in relation to the Agency's decision that the Agency had not clearly set out its reasons for refusing access to documents as required by section 27(1) and 8.2 of the *Professional Standards* issued under Part IB of the FOI Act. OVIC staff explained the reasons for my view and invited the Agency to provide a submission to address the matters raised, or elect to make a fresh decision under section 49M(1).
5. On [date], in response to my preliminary view, the Agency advised OVIC of its intention to make a fresh decision.
6. On [date], the Agency made a fresh decision refusing access to documents relying on the exemption in section 38 of the FOI Act in conjunction with the *Health Services Act 1998* (Vic) (**Health Services Act**) and in reference to the definition of 'Senior Available Next of Kin' in the *Human Tissue Act 1982* (Vic) (**Human Tissue Act**).
7. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.

Review

8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
 9. I have considered all communications and submissions received from the parties.
 10. 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.
 11. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.
 12. In conducting a review under section 49F of the FOI Act, section 49P requires that I make a new or 'fresh decision'.
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13. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be 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.
14. I note the Agency's fresh decision references section 49L. However, the correct provision under which the Agency made its fresh decision is section 49M. Further, the Agency's fresh decision does not specify the relevant section of the Health Services Act under which disclosure of certain information is prohibited.
15. Having reviewed the documents and information provided by the Agency, I consider the Agency intends to to rely on section 38 of the FOI Act in conjunction with section 141(2) of the Health Services Act to refuse access to documents.

Application of section 38

16. 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).
17. 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.
18. Section 141 of the Health Services Act states in part:

...

 - (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.

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

19. I note section 141(3) of the Health Services Act sets out circumstances in which section 141(2) does not apply, including section 141(3)(a) which provides section 141(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?

20. 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 information in the documents?

21. The documents subject to review are the medical records of the Applicant's [relationship descriptor].

22. 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);
- (b) staff of the Agency are 'relevant persons', being people engaged by a relevant health service; and
- (c) the exempt information identifies a person, who has been a patient in, or has received health services from the Agency and that identified person is not the Applicant.

23. Therefore, I am satisfied section 141(2) of the Health Services Act specially applies to the documents subject to review.

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

24. In relation to section 141(3)(a), as set out above, where a person has died, documents may be released to a third party where consent (which may be expressed or implied) has been given by the 'senior available next of kin' of the person to whom the records relate.

25. For the purposes of the Health Services Act, the phrase 'senior available next of kin' is defined in the Human Tissue Act to mean:

...

- (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.

²Health Services Act, section 3(1).

26. In response to the Applicant's request, the Agency consulted with the deceased person's senior available next of kin. However, they did not consent to disclosure of the records to the Applicant.
27. Based on the information before me, I am satisfied the Applicant is not the senior next of kin of the deceased person whose information is sought. Further, I am satisfied the senior next of kin has not provided consent to release the documents to the Applicant.
28. Therefore, the exception in section 141(3)(a) of the Health Services Act does not apply. I also consider the other exceptions listed under section 141(3) do not apply in this matter.

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

29. I am satisfied section 141(2) of the Health Services Act prohibits the Agency from disclosing the specific kind of information subject to the Applicant's request, being the medical records of a third party.
30. While I note this matter is sensitive, I am required to interpret the provisions under the Health Services Act and the FOI Act as they apply to the specific circumstances of this matter.
31. Accordingly, for the reasons set out above, I am satisfied the documents are exempt under section 38.

Deletion of exempt or irrelevant information

32. 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.
33. Given my decision in relation to the application of section 38 of the FOI Act and section 141(2) to the requested documents, I am satisfied it is not practicable to provide an edited copy of the documents to the Applicant in accordance with section 25, as I am satisfied they are exempt in full.

Conclusion

34. On the information before me, I am satisfied 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

35. 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
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁴
37. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁵
38. 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.

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

⁴ Section 52(5).

⁵ Section 52(9).

39. 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

⁶ Sections 50(3F) and (3FA).
