

Notice of Decision and Reasons for Decision

Applicant:	'BS5'
Agency:	Austin Health
Decision date:	26 June 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:	'BS5' and Austin Health (<i>Freedom of Information</i>) [2020] VICmr 177 (26 June 2020)

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

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).

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

26 June 2020

Reasons for Decision

Background to review

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

I request you to provide to me, and so also to [other named third parties] copies of the medical records Austin Hospital [location] are holding of the Late [third party's name] of [address]

...

I need to be informed what, if any, bills are outstanding from any medication that might have been issued when allegedly the Late [third party] discharged [themselves] from hospital.

2. In its decision, the Agency identified certain documents falling within the terms of the Applicant's request. It decided to grant access to some of those documents in part being the invoices, and refuse access to documents in full being the third party medical records.
3. The Agency relied on the exemptions under sections 33(1), 35(1)(b) and 38 in conjunction with the *Health Services Act 1988* (Vic) (**Health Services Act**), 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. The Applicant indicated they only sought access to the invoices that formed part of the documents. Accordingly, this review relates to invoice documents to which the Agency granted access in part.
6. I have examined a copy of the document subject to review. The document comprises of medical invoices created by the Agency in the provision of providing health services to a third party individual.
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 from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's submissions dated [date], [date] and [date] and information provided with the Applicant's review application; and
 - (c) the Agency's submission dated [date].
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

10. Having reviewed the document and relevant provisions in the Health Services Act, I am satisfied the document subject to review is exempt under section 38 of the FOI Act in conjunction with section

141(2) of the Health Services Act, noting the Agency did not consider this document to be part of the scope of the review.

11. In undertaking a review under section 49F of the FOI Act, section 49P requires that I make a 'fresh decision'.
12. Therefore, my review does not involve determining whether the Agency's original 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.

Section 38

13. 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).
14. 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.

15. 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.

16. 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—

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

- (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?

17. 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?

18. The document subject to review is the medical invoices of the Applicant's deceased [relationship descriptor].

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

20. 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 exempt information identifies a person other than the applicant.

21. Therefore, I am satisfied the Health Services Act applies to the information in the document.

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

22. 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.

23. The third-party to whom the records relate is deceased and so the Agency sought the views of the senior available next of kin. Consent to release was not provided and as a result, 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?

24. 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 a document created in the course of receiving health care that the person may be identified from, under the provisions of the Health Services Act.

25. While I acknowledge this may 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.

26. For the reasons set out above, I am satisfied the information in the document is exempt under section 38.

²Health Services Act, section 3(1).

Deletion of exempt or irrelevant information

27. 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.
28. 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 the document meaningless, they are not 'practicable' and release of the document is not required under section 25.⁴
29. I have considered the effect of deleting exempt information from the document. In my view, it is practicable for the Agency to delete the exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.
30. The information deleted by the Agency is to remain deleted as it is exempt under section 38 of the FOI Act.

Conclusion

31. On the information before me, I am satisfied the information in the document is exempt under section 38 of the FOI Act in conjunction with section 141(2) of the Health Services Act.
32. As it is practicable to edit the documents subject to review to delete exempt information, I have determined to grant access to the documents in part.

Review rights

33. 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
34. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
35. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
36. 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.
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.⁸

³ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [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 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [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).

When this decision takes effect

38. 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.