

Notice of Decision and Reasons for Decision

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| Applicant: | 'DY4' |
| Agency: | Barwon Health |
| Decision date: | 21 March 2022 |
| Provision considered: | Section 39 |
| Citation: | 'DY4' and Barwon Health (Freedom of Information) [2022] VICmr 13 (21 March 2022) |

FREEDOM OF INFORMATION – amendment request – medical record – information not incorrect or misleading – third party amendment – next of kin – addition of document

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 have decided to refuse to grant the Applicant's request for a third party's medical file to be amended under section 39 as I am not satisfied the Applicant has demonstrated they are the next-of-kin of the third party to whom the document relates.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

21 March 2022

Reasons for Decision

Background to review

1. On [date], the Applicant contacted the Agency, which is a public hospital, to amend the medical record of a deceased person which is held by the Agency. Specifically, the Applicant sought an amendment to a document stating the deceased person has tattoos.
2. In its decision, the Agency determined to refuse the Applicant's requested amendment. However, it placed a copy of the Applicant's amendment request onto the deceased person's medical record. The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(2) of the Agency's decision to refuse access.
4. 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.
5. 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.

Submissions

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 read and considered all communications and submissions received from the parties during this review.
8. This includes emails between the Applicant and the Agency, as well as emails directly to my office including:
 - (a) details of the information in the medical file sought to be amended;¹
 - (b) the reason why the Applicant considers the information is inaccurate, incomplete, out of date or misleading;
 - (c) the amendment sought, i.e. the correction of information contained in the medical file in relation to tattoos on the deceased; and
 - (d) evidence provided in support of the amendment, including a letter from the Funeral Director/Qualified Embalmer who prepared the body of the third deceased person, stating the deceased person did not have any visible tattoos on their body. This document was provided by the Applicant, and subsequently to the Agency during the course of my review.

Application of section 39

9. Section 39 provides a person may request an amendment to a record held by an agency that contains their personal information:

¹ a copy of the document, page number and the information in the document sought to be amended.

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.

10. 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.
11. 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.

Requirements for a valid amendment request

12. Section 40 sets out the requirements for making an amendment application under section 39:

A request under section 39—

- (a) shall be in writing;
- (b) shall specify an address to which a notice under section 43 may be sent to the person making the request; and
- (c) shall give particulars of the matters in respect of which the claimant believes the record of information kept by the agency or Minister is incomplete, incorrect, out of date or misleading and shall specify the amendments that the claimant wishes to be made.

13. Therefore, to comply with section 40(c), an amendment request must:

- (a) specify how the information is inaccurate, incomplete, out of date or misleading; and
- (b) specify the amendment the Applicant wishes to be made.

14. Having reviewed the Applicant's request dated [date], in relation to which they sought amendment to the third party's record, I am satisfied the Applicant's request complies with section 40(c).

Is the Applicant entitled to request the correction or amendment of the deceased person's medical record?

15. Section 39 provides that a deceased person's next-of-kin is entitled to request a correction or amendment to the deceased person's records.
16. The Applicant seeks amendment to the medical record of a deceased third party held by the Agency. In their request to the Agency dated [date], the Applicant states they were 'the first contact and medical [next-of-kin]' of the deceased person. They also state they cared for the deceased person over the past years.
17. The term 'next-of-kin' is not defined in the FOI Act.
18. For the purposes of this review, I have considered the meaning of 'Senior available next of kin' as defined in the *Human Tissue Act 1982* (Vic) (**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**; [emphasis added]
- (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.²

19. Therefore, the definition of 'senior available next of kin' provides for a hierarchy of persons, subject to the descending categories of person and the age and availability of a person within the hierarchy and relevant category.³
20. While I note the phrase 'senior available next of kin' includes the word 'senior', I do not interpret this to necessarily mean a deceased person's children in descending order based on their age. In the case of 'a son or daughter', other than a child of a deceased person being over 18 years and available, the definition does not expressly prescribe a priority amongst children where there is more than one child who is over 18 years and available.
21. As such, I consider the definition of 'senior available next of kin' does not require there to be one senior available next-of-kin only, where more than one person meets the requirements of age and availability. Accordingly, I consider there may be situations in which there is more than one 'senior available next of kin', for the purposes of the Human Tissue Act.
22. I note OVIC requested evidence from the Applicant that they are the next-of-kin of the deceased person, however, the Applicant did not provide any evidence to confirm they are the next-of-kin.
23. Therefore, there is insufficient evidence before me to be satisfied the Applicant is the next-of-kin of the deceased person. Accordingly, I am not satisfied the Applicant is entitled to request the amendment to the deceased person's records in accordance with section 39.
24. Nevertheless, for completeness I will consider whether information in the document to which the Applicant seeks to amend is inaccurate, incomplete, out of date or misleading.

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

25. The purpose of section 39 is to ensure personal information concerning an applicant and read by a third party does not unfairly harm or misrepresent personal facts about the applicant.⁴
26. In *Setterfield v Chisolm Institute of Technology (No 2)*,⁵ 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...

27. In *G v Health Commission of Victoria*,⁶ the following observations were made:

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

² *Human Tissue Act 1982* (Vic), section 3(1).

³ *In the matter of an Application by Vernon* [2020] NSWSC 608 at [5].

⁴ *G v Health Commission of Victoria* (unreported, Vic County Ct, Rendit J, 13 September 1984) at [10].

⁵ (1986) 1 VAR 202 at [208]-[209].

⁶ (unreported, Vic County Ct, Rendit J, 13 September 1984) at [9]-[11].

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.

28. As stated above, an applicant seeking amendment to a record bears the onus of demonstrating the information in the document is inaccurate, incomplete, out of date or would give a misleading impression.
29. The Applicant's amendment request to the Agency states:

[named third party] does not have any tattoo anywhere on [their] body, nor is there any evidence [they] ever had any tattoos. [Named third party] will be buried tomorrow and with [their] remains will be buried the most significant evidence, to the fact, [they have] never had any tattoos.
30. I am satisfied the Applicant seeks correction of an observation in a document stating the deceased person has tattoos. The observation is recorded in a document prepared by a [role description] Clinician in relation to the psychiatric assessment of the deceased person.
31. I consider the specific observation concerning tattoos is not a diagnosis or medical opinion of the [role description] Clinician, rather, it is their observation of the person's physical appearance.
32. On the information before me, I am satisfied the facts underlying the observation of the clinician has been demonstrated to be inaccurate, as the Applicant has provided a letter from the Funeral Director/Qualified Embalmer who prepared the deceased person's body, confirming the deceased person does not have visible tattoos. In my view, this is equivalent to adding a notation to the document to correct the inaccurate information.

Other matters

33. I note the letter from the Funeral Director/Qualified Embalmer was not available to the Agency during its processing of the Applicant's request.
34. During the course of the review, OVIC attempted to resolve the matter informally by requesting the letter from the Funeral Director/Qualified Embalmer be placed upon the deceased person's medical file with the intention of clarifying the incorrect statement in the document to which the Applicant seeks to be amended.
35. A copy of the letter was provided to the Agency during the course of the review with the Applicant's consent, resulting in the letter being placed on the deceased person's medical file.
36. The Applicant was advised of the letter being placed onto the deceased's medical file, however sought to proceed with the review with my office in order to receive a written decision on their amendment request.

Conclusion

37. While I am satisfied the document the Applicant seeks to be amended contains incorrect information, I have determined to refuse the Applicant's request to amend the record, as they have not demonstrated they are the third party's next-of-kin.
38. Accordingly, I have determined to refuse to grant the Applicant's request for the medical file of the third party to be amended under section 39.

39. For completeness, I note that the placement of the letter from the Funeral Director/Qualified Embalmer on the deceased's medical file should mean that the medical file as a whole is no longer inaccurate, incomplete, out of date or misleading.

Review rights

40. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁷
41. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
42. 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.
43. The Agency is required to notify the Information Commissioner in writing as soon as practicable an application to VCAT is made to review of my decision.⁹
44. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁷ Section 50(1)(b) and the Agency in section 50(3D).

⁸ Section 52(5).

⁹ Sections 50(3F) and (3FA).