

## Notice of Decision and Reasons for Decision

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Applicant: 'EC4'  
Agency: Monash Health  
Decision date: 27 June 2022  
Provision considered: Section 39  
Citation: 'EC4' and Monash Health (Freedom of Information) [2022] VICmr 48 (27 June 2022)

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FREEDOM OF INFORMATION – amendment request – medical opinion and observations – discharge summary – health records – [amendment granted]

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 a document in accordance with the Applicant's request.

My decision on the Applicant's request is different from the Agency's decision in that I have determined to grant one of the Applicant's requested amendments.

In relation to the remaining amendment requests, which are refused, I am not satisfied the information in the document is inaccurate, incomplete, out of date or would give a misleading impression.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

27 June 2022

## Reasons for Decision

### Background to review

1. The Applicant made a request under section 39 for a number of amendments to be made to their patient discharge summary created by the Agency.
2. The document concerns the Applicant's admission to hospital. The amendments sought concern the Applicant's presentation, mental state, and social and personal history at the time of their admission and discharge. The relevant information was recorded by a registered medical practitioner.
3. In making their amendment request, the Applicant provided an annotated copy of the discharge summary, numbering and underlining the information they request be amended and a document specifying the requested amendments.
4. The Agency granted two of the Applicant's requested amendments and refused the remaining amendment requests as it was not satisfied the relevant information in the Applicant's patient discharge summary is incomplete, incorrect, out of date or misleading.
5. The Agency's decision states:

The information contained in your record is the expert opinion of a practitioner at the time entry was recorded. The information by the practitioner is based on their professional training and experience and is also derived from other medical information contact in your record. Accordingly, [the Agency] is satisfied that opinions recorded are genuine and formed the practitioners' views on the events at that point in time, based on the medical evidence before them.

### Review application

6. The Applicant sought review by the Information Commissioner under section 49A(2) of the Agency's decision to refuse the requested amendments.
7. I have considered all communications and submissions received from the Applicant and Agency.
8. The Applicant provided additional documentation in support of their review application, including letters from medical professionals and statutory declarations made by the Applicant.

### Application of section 39

9. Section 39 provides:

**39 Person may request amendment of record**

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. Section 40 sets out the requirements for making an amendment request:

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.

11. Section 39 places the onus on an applicant to establish the case for an amendment. That is, an applicant must establish their claim a record subject to an amendment request should be corrected or amended.
12. 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.

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

13. The purpose of section 39 is to ensure personal affairs information concerning an applicant in the possession of an agency and read by third parties does not unfairly harm or misrepresent personal facts about the applicant.<sup>1</sup>
14. Notably, section 39 is concerned with the accuracy of official records, not with the merits or legality of the official action recorded in them.<sup>2</sup>
15. In *Setterfield v Chisolm Institute of Technology (No 2)*,<sup>3</sup> 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...

16. In *G v Health Commission of Victoria*,<sup>4</sup> the following observations were also made in relation to section 39:

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 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.

17. Information that may be the subject of a correction or amendment request can be information in the nature of opinion. In *Re Stephens and Victoria Police*,<sup>5</sup> the former Victorian Administrative Appeals Tribunal (**VCAT**) set out four considerations relevant to whether an amendment sought to information in the nature of an opinion should be made:
  - (a) the facts underlying such opinion have been thoroughly discredited or have been demonstrated to be totally inadequate;
  - (b) the person forming such opinion was tainted by bias or ill will, incompetence or lack of balance, or necessary experience;
  - (c) the factual substratum underlying the opinion is so trivial as to render the opinion formed

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<sup>1</sup> *G v Health Commission of Victoria* (unreported, Vic County Ct, Rendit J, 13 September 1984) at 10.

<sup>2</sup> *Smeaton v Accident Compensation Conciliation Service* [2010] VCAT 1236 at [22], referring to *Credwson v Central Sydney Area Health Service* [2002] NSWCA 345 at [24].

<sup>3</sup> (1986) 1 VAR 202 at [208]-[209].

<sup>4</sup> (unreported, Vic County Ct, Rendit J, 13 September 1984) at pp 9-11.

<sup>5</sup> (1988) 2 VAR 236 at [239].

dangerous to rely upon and likely to result in error; and

(d) the facts upon which the opinion was based were misapprehended.

18. In *QXD v Monash Health*,<sup>6</sup> VCAT accepted:

(a) conflicting medical opinions in themselves do not render a particular record misleading or incorrect; and

(b) an applicant should not be permitted to use the FOI Act to substitute their opinions or the opinion of other medical practitioners for the opinions of the authors of the records in question.

19. In its submission, the Agency states the opinions recorded in the document are genuine and constitute a medical practitioner's views on events at a point in time and are based on their professional opinion and the medical evidence before them.

20. While I acknowledge the Applicant disputes the views and observations made by the medical practitioner, this is not sufficient grounds for me to grant the amendment sought to the document.

21. Further, it is not appropriate for me, as a decision maker under the FOI Act, to determine the veracity of professional observations made by a registered medical practitioner.

22. I accept the information provided by medical staff in the Applicant's medical records is based on their professional clinical opinion and expertise, and their observations of the Applicant's presentation at a particular point in time. Medical opinions may change over time according to a patient's condition and treatment and is not intended to represent the Applicant's entire medical history.

23. I have determined to grant one of the Applicant's requested amendments to the following information in the document, marked 'A' in the Applicant's amendment request: '[the Applicant's response as they] reflected on the deception from the lawyer in [location]'. The Applicant seeks this to be amended to 'the [nationality] lawyer in [location]'.

24. In their amendment request and submission in support of the review, the Applicant refers to an incident where an individual allegedly impersonated a lawyer. This incident is described on pages 2 and 5 of the patient discharge summary.

25. In support of their review application, the Applicant provided a statutory declaration in relation to the alleged incident and in their submission, provided the address of where the incident took place.

26. On the information before me, I am satisfied the phrase 'lawyer in [location]' on page 3 of the discharge summary is inaccurate and should be amended to '[nationality] lawyer in [location]' by way of a notation to the relevant document.

27. However, I am not satisfied the facts underlying the remaining observations and opinions of the medical practitioner have been discredited or demonstrated to be inaccurate. Nor am I satisfied there is evidence to establish the medical practitioner was tainted by bias or ill-will, incompetence or a lack of balance or necessary experience, or the facts upon which their opinion is based were misapprehended.

28. Accordingly, with the exception of the above amendment request, I have determined to refuse the Applicant's requested amendments under section 39 as I am not satisfied the information recorded in the Agency's document is inaccurate, incomplete, out of date or would give a misleading impression.

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<sup>6</sup> (Review and Regulation) [2018] VCAT 997 at [49]-[52].

## Review rights

29. If the Applicant or the Agency are not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>7</sup>
30. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>8</sup>
31. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>9</sup>
32. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
33. 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.<sup>10</sup>
34. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>7</sup> Under section 50(3B) for the Applicant and section 50(3D) for the Agency.

<sup>8</sup> Section 52(4).

<sup>9</sup> Section 52(9).

<sup>10</sup> Section 50(3F).