

9 September 2022

New South Wales Department of Communities and Justice

By email only: policy@justice.nsw.gov.au

Submission in response to consultation paper – A nationally consistent scheme for access to digital records upon death or loss of decision-making capacity

Thank you for the opportunity to make a submission in response to the New South Wales Government's consultation paper on a nationally consistent scheme for access to digital records upon death or loss of decision-making capacity.

My office, the Office of the Victorian Information Commissioner (**OVIC**), is the primary regulator for information privacy, information security and freedom of information in Victoria, administering both the *Privacy and Data Protection Act 2014 (PDP Act)* and the *Freedom of Information Act 1982 (Vic) (FOI Act)*. Notably, health information is regulated under the *Health Records Act 2001 (Vic)* which is administered by the Health Complaints Commissioner. My office does not have oversight over health information except to the extent that an individual is seeking access to health records held by a Victorian government organisation.

As my office has oversight over public sector organisations only, this submission responds to specific questions in the consultation paper in relation to accessing digital records held by Victorian Government organisations and more broadly in relation to appropriate safeguards that OVIC would recommend be included in the proposed scheme to protect individuals' privacy rights.

Question 1 - Should Australian jurisdictions introduce a statutory scheme that enables an authorised person to access a deceased or incapacitated person's digital records in limited circumstances? What, if any, legislative and non-legislative options currently facilitate access to such records?

The proposed scheme is intended to enable an authorised person to access the digital records of a deceased individual or an individual who has lost their decision-making capacity for the purpose of administering that individual's estate or managing their affairs, or to the extent of the express terms, if any, of the instrument appointing the authorised person.¹ The consultation paper states that the definition of 'digital record' would extend to records held by both private and government organisations, and cites health records, aged care records and taxation records as examples of digital records that may be held by government organisations.

The FOI Act gives an individual the right to request access to documents held by Victorian public sector agencies, subject to exceptions and exemptions necessary to protect essential public and private interests. A document is defined broadly in the FOI Act and essentially captures all information in any form.² Thus, in

¹ Department of Communities and Justice, *A nationally consistent scheme for access to digital records upon death or loss of decision-making capacity consultation paper*, page 14.

² 'Document' is defined in section 5 of the FOI Act.

Victoria, an authorised person would be able to make a formal request to a public sector agency for access to digital records of a deceased individual or an individual who has lost their decision-making capacity under the FOI Act, unless an exception or exemption applied.

In addition to the right to request access under Freedom of Information, the FOI Act also promotes the proactive and informal release of information. Informal release involves an organisation receiving a request for access to information and releasing the requested information or document, either in full or in part, outside the FOI Act.³ Therefore, where it is possible and lawful to do so, an organisation may be able to provide access to digital records of a deceased individual or an individual who has lost their decision-making capacity, without the need for a formal access request.⁴

While the FOI Act is generally the primary mechanism for access to information held by Victorian public sector agencies, Information Privacy Principle 6 in the PDP Act also provides individuals, or their authorised representatives, the right to access personal information unless an exception applies. However, IPP 6 will only apply where the FOI Act does not.⁵

Questions 7 and 10 - What safeguards are required to protect rights and interests of the deceased person or adult with impaired capacity? Should an offence of disclosing information except in limited circumstances be included in a nationally consistent scheme?

As discussed in the consultation paper, recommendation 4.3 of the New South Wales Law Reform Commission report sets out the extent of an authorised person's right to access the digital records of a deceased individual or an individual with impaired capacity. Given digital records may contain personal and sensitive information, it would be prudent to ensure the proposed scheme is administered in a way that protects individuals' privacy rights.

With regard to an authorised person's right to access digital records of an individual with impaired capacity, OVIC recommends ensuring the scheme is clear about the duration of the right. For instance, where an individual's loss of decision-making capacity is not permanent, the authorised person should be entitled to manage the individual's affairs for the duration of the impairment only. The authorised person should not be entitled to manage the individual's affairs for an indefinite period of time.

OVIC is also of the view that introducing an offence for the improper disclosure of information is an important safeguard for ensuring digital records are handled in a privacy-protective manner, where applicable.

Conclusion

I have no objection to this submission being published by the Department of Communities and Justice without further reference to me. I also propose to publish a copy of this submission on the OVIC website.

³ Proactive release of information involves an agency making information or documents it holds or collects publicly available, on its own accord, without someone making a request for that information. Detailed guidance on proactive and informal release of information is available on the OVIC website here: <https://ovic.vic.gov.au/freedom-of-information/resources-for-agencies/practice-notes/proactive-release-of-information/>.

⁴ Detailed guidance on informal release of information is available on the OVIC website here: <https://ovic.vic.gov.au/freedom-of-information/resources-for-agencies/practice-notes/informal-release-of-information/>

⁵ Detailed guidance on IPP 6 is available in the 'Access and Correction' chapter of OVIC's *Guidelines to the Information Privacy Principles* available here: <https://ovic.vic.gov.au/book/ipp-6-access-and-correction/>.

If you would like to discuss this submission, please do not hesitate to contact me directly or my colleague Anita Mugo, Senior Policy Officer at anita.mugo@ovic.vic.gov.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'S-Bl', with a long horizontal flourish extending to the right.

Sven Bluemmel
Information Commissioner