



Office of the Victorian
Information Commissioner

t 1300 00 6842
e enquiries@ovic.vic.gov.au
w ovic.vic.gov.au

PO Box 24274
Melbourne Victoria 3001

Notice of Decision and Reasons for Decision

Applicant: 'CS9'
Agency: Austin Health
Decision Date: 1 March 2021
Provision considered: Section 39

Citation: *'CS9' and Austin Health (Freedom of Information)* [2021] VICmr 63 (1 March 2021)

FREEDOM OF INFORMATION – amendment request – hospital record – misleading impression – information not incorrect or misleading

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 the same as the Agency's decision.

I am not satisfied statements recorded in the document are inaccurate, incomplete, out of date or would give a misleading impression.

Accordingly, I have determined to refuse to grant the Applicant's request for the document to be amended under section 39.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

1 March 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking to amend a document of the Agency:

[description of records and request to remove information].
2. The Applicant's request also included a copy of the two-page medical letter on which the relevant information sought to be amended by the Applicant was circled.
3. The Applicant provided the Agency with a recording of a telephone conversation between the Applicant and the medical practitioner named in the Applicant's amendment application in support of their amendment request.
4. By letter dated[date], the Agency refused to grant the Applicant's requested amendments stating:

... Austin Health does not consider information or wording in the letter from Dr [named person] to be inaccurate or give a misleading impression.

[further detail redacted]

Therefore, I am of the view that amending the letter with this change is not warranted as the information is not inaccurate and nor does it give a misleading impression...

...With regard to the second aspect of your amendment request whereby you state that [certain information] is false and misleading, I make the following comments;

I believe that this paragraph is not inaccurate nor does it give a misleading impression. It is Dr [named person] view and opinion and is reflective of his own experience in communicating with you...
5. The Agency's decision letter sets out the reasons for decision.

Review

6. On [date]the Applicant sought review by the Information Commissioner under section 49A(2) of the Agency's decision to refuse to amend the document in accordance with the Applicant's request.
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.

Application of section 39

9. Section 39 provides in relation to a person seeking an amendment to their personal affairs information in an agency document:

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. Therefore, in order for an amendment to a document to be approved under section 39, I must be satisfied the information in the document is inaccurate, incomplete, out of date or would give a misleading impression.

11. Section 39 places the onus on an applicant to establish the case for amendment.
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.

Does the information relate to the personal affairs of the Applicant and was it released to the Applicant under the FOI Act?

13. I am satisfied the information sought to be amended, namely a letter dated [date], relates to the personal affairs of the Applicant.
14. The document was sent to the Applicant by a medical practitioner from the Agency. The Agency confirmed the document was not acquired in response to an FOI request.
15. While I accept the document was not obtained by the Applicant under the FOI Act, in *Re Al-Hakim v Monash University*,¹ the Victorian Civil and Administrative Tribunal (VCAT) determined it is not necessary for an applicant seeking to amend a document in the possession of an agency to have obtained a copy of the document under the FOI Act. As such, section 39 can be invoked whether or not an applicant seeks to amend a document obtained under the FOI Act or through other means.

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

16. The purpose of section 39 is to ensure personal information concerning an applicant and read by third parties does not unfairly harm or misrepresent personal facts about the applicant.²
17. In *Setterfield v Chisolm Institute of Technology (No 2)*,³ 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...

18. As stated above, the Applicant bears the onus of demonstrating the information is inaccurate, incomplete, out of date or would give a misleading impression.
19. In *G v Health Commission of Victoria*,⁴ the following was observed 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.

¹ (unreported, VCAT, Macnamara DP, 12 July 2002) at [26].

² *G v Health Commission of Victoria* (unreported, Vic County Ct, Rendit J, 13 September 1984) at [10].

³ (1986) 1 VAR 202 at [208]-[209].

⁴ (unreported, Vic County Ct, Rendit J, 13 September 1984) at [9]-[11].

20. The Applicant submits the following information in the document is incorrect and misleading:
- [further detail redacted]
21. In relation to the first point of information, the Applicant provided OVIC a recording of a telephone conversation between themselves and the medical practitioner.
22. In response, the Agency submitted:
- [further detail redacted]
23. I acknowledge the Applicant's position that the Agency officer did not use the words [further detail redacted]. However, I am not satisfied the use of the words [redacted] gives a misleading impression of the conversation, where the medical practitioner used other words that conveyed the same meaning. I accept the Agency's submission that changing the words [further detail redacted] would not meaningfully change the overall context of the document.
24. In relation to the second point of information, I consider this to be the views and observations of an Agency officer in relation to the Applicant's involvement with the Agency and their medical care. I acknowledge the Applicant disputes the statement made by the Agency. However, the fact the Applicant disputes the views and observations made by an Agency officer is not sufficient grounds to grant the amendment sought to the document.
25. On the information before me, I am not satisfied the Applicant has discharged the onus of demonstrating the information in the document is inaccurate, incomplete, out of date or would give a misleading impression.

Conclusion

26. Accordingly, I have determined to refuse to grant the Applicant's amendment request as I am not satisfied the information recorded in the document is inaccurate, incomplete, out of date or would give a misleading impression, as required under section 39.

Review rights

27. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁵
28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
29. 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.
30. 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.⁷
31. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁶ Section 52(5).

⁷ Sections 50(3F) and (3FA).