

19 July 2023

Legislative and Regulatory Reform
Department of Health

By email only: legandregreform@health.vic.gov.au

Dear Legislative and Regulatory Reform team,

Proposed Health Records Regulations 2023 and Regulatory Impact Statement

Thank you for the opportunity to comment on the proposed Health Records Regulations 2023 (**proposed 2023 Regulations**) and associated Regulatory Impact Statement (**RIS**).

My office, the Office of the Victorian Information Commissioner (**OVIC**), has combined oversight of freedom of information, privacy and information security, administering both the *Freedom of Information Act 1982* (Vic) (**FOI Act**) and the *Privacy and Data Protection Act 2014* (Vic).

Access to health records under the FOI Act

As you are aware, the FOI Act is Victoria's primary legislation granting individuals the right to request access to their own health records held by Victorian public sector agencies (such as public hospitals and health service providers) (**agencies**). The procedures in Part 5 and HPP 6 of the *Health Records Act 2001* (Vic) cannot be used to request health records from these agencies.¹

The FOI Act requires agencies to provide access at the lowest reasonable cost, and the *Freedom of Information (Access Charges) Regulations 2014* (Vic) prescribe the maximum fees an agency can charge. Importantly, an agency must not impose a charge for an individual to receive a copy, summary or explanation of their own health information, except in limited situations.²

OVIC understands the situation is different for private health service providers, who are permitted to impose fees for access to health information up to the maximum prescribed amounts in the *Health Records Regulations 2012* (Vic) (**2012 Regulations**) and proposed 2023 Regulations.

¹ *Health Records Act 2001* (Vic), section 16.

² See FOI Act, sections 22(1)(g)(h) and (i). For further information read [OVIC's FOI Guidelines on the Freedom of Information \(Access Charges\) Regulations 2014](#), paragraphs 1.55-1.85.

In OVIC's view, the default position should be that individuals are able to access their own health information for free. OVIC is pleased to read in the RIS that many providers already do not charge a fee or choose not to charge low-income individuals.

Where there are public policy reasons in favour of permitting organisations to charge for access, OVIC supports regulatory action to set the maximum amount that may be charged. Organisations should not be permitted to charge prices that exceed those in the 2012 Regulations and proposed 2023 Regulations. Higher fees would undermine the ability for individuals to exercise their important right to access their own health information.

Informal release of health information outside the FOI Act

In the previous financial year, Victorian government agencies received approximately 45,000 FOI requests. Out of that number, individuals seeking access to their own health records is the most common type of request that agencies receive.

OVIC is undertaking a significant program of work to encourage and support agencies to release more information to the public through proactive and informal release (**PAIR**) mechanisms and to enhance the culture of access to information in Victoria. That is, to encourage agencies to release more information to the public, without needing to process requests under the FOI Act.

There are significant benefits to both agencies and the public when health records are released informally, either in full or in part, outside the FOI Act. For example, informal release:

- improves government service delivery and builds public trust and confidence by providing access to information faster and more easily than under FOI;
- reduces the need for an individual to make a formal FOI request and reduces the staff and financial resources required to administer the FOI Act; and
- provides the opportunity for an agency and individual to agree on when and in what form information is to be released.

OVIC strongly encourages agencies to adopt a policy and practice of handling requests for health records informally in the first instance, unless circumstances exist that make it appropriate for the request to be processed under the FOI Act.³

To support the informal release of health records, there are PAIR resources available on OVIC's website, including:

- a general [Practice Note on Informal Release of Information](#); and

³ [Professional Standard 1](#) requires an agency to consider whether a document in its possession and requested under the FOI Act, can properly be provided outside the FOI Act, and if so, facilitate access or otherwise advise how an applicant can access the document.

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- a sector specific Practice Note on the Release of Health Records held by Victorian Public Sector Agencies.

OVIC is also preparing additional resources, including a PAIR template policy that agencies can use to help implement PAIR within their own organisation.

The sector specific Practice Note makes clear that where an individual requests access to their own health records, those records can be released to the individual informally under HPP 2.2(b), instead of the more formal process under the FOI Act.

Promoting informal release when implementing the new 2023 Regulations

OVIC understands the Department will engage with key stakeholders to communicate the making of the new 2023 Regulations and provide education and guidance about key matters in the Regulations.

OVIC strongly encourages the Department to enhance its stakeholder engagement by incorporating education and guidance about the benefits of informal release. This could be achieved through promoting and sharing OVIC's Practice Notes and other PAIR resources available on OVIC's website. OVIC would be pleased to work with the Department on the best way to engage with stakeholders, to improve the informal release of health records across the public sector.

If you would like to discuss this submission, please do not hesitate to contact me directly or my colleague Emma Stephens, Acting Principal Policy Officer at emma.stephens@ovic.vic.gov.au.

Yours Sincerely



Sven Bluemmel

Information Commissioner