

Notice of Decision and Reasons for Decision

Applicant:	'FJ6'
Agency:	Mercy Hospitals Victoria Ltd
Decision date:	17 October 2023
Exemption and provision considered:	Section 38 in conjunction with section 141(2) of the <i>Health Services Act 1988</i> (Vic)
Citation:	'FJ6' and <i>Mercy Hospitals Victoria Ltd</i> (Freedom of Information) [2023] VICmr 92 (18 October 2023)

FREEDOM OF INFORMATION – medical records of deceased family member – senior available next of kin – *Health Services Act 1998* (Vic) – *Health Tissue Act 1982* (Vic)

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 access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request the same as the Agency's decision as I am satisfied the documents are exempt in full under section 38 in conjunction with section 141(2) of the *Health Services Act 1988* (Vic).

My reasons for decision follow.

Rachel Dixon
Acting Information Commissioner

17 October 2023

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to a complete medical record of their deceased child (**deceased person**).
2. The Agency made two separate decisions in response to the Applicant's request.
3. On [date], the Agency made a decision in relation to the deceased person's Werribee Mercy Hospital medical file, releasing documents to the Applicant.
4. On [date], the Agency made a decision in relation to the deceased person's mental health records held by Mercy Mental Health Program, refusing access in full under section 38 of the FOI Act in conjunction with sections 141(2) of the *Health Services Act 1988* (Vic) (**Health Services Act**) and section 346(1) of the *Mental Health Act 2014* (Vic) (**Mental Health Act**). The Agency's decision letter sets out the reasons for its decision.

Review application

5. The Applicant sought a review of the Agency's decision dated [date] under section 49A(1).
6. I have examined a copy of the documents subject to review.
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 information received from the Applicant and the Agency.
9. Parliament's intention is that the FOI Act must be interpreted to further the object of the FOI Act, including facilitating and promoting the disclosure of information in a timely manner and at the lowest reasonable cost.
10. In undertaking my review, I have had regard to the object of the FOI Act to promote access to information, limited only by exceptions and exemptions that are necessary to protect essential public interests, privacy and business affairs.
11. In conducting a review, I make a new or 'fresh decision'¹ that is the 'correct or preferable decision'.² This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

Review of exemption

Section 38 - Documents to which secrecy provisions of enactments apply

12. Section 38 provides:

¹ Section 49P.

² *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at [591].

A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

13. Therefore, for a document to be exempt under section 38, three requirements must be satisfied:
- (a) there must be an enactment in force;
 - (b) the enactment must be formulated with such precision that it specifies the actual information prohibited from disclosure in the document;
 - (c) the enactment must prohibit persons referred to in the enactment from disclosing the specific kind of information in the document (either absolutely or subject to exceptions or qualifications)

14. The Agency refused access in full under section 38 in conjunction with sections 141(2) of the Health Services Act and 346(1) of the Mental Health Act.

15. My decision will only address the application of section 141(2) of the Health Services Act.

First requirement – is there an enactment in force?

16. An enactment means a section of a Victorian Act that is in force.

17. I am satisfied the Health Services Act is an enactment in force.

Second requirement – Does the enactment refer specifically to information in the documents?

18. Section 141(2) of the Health Services Act provides:

- (2) A relevant person must not, except to the extent necessary—
 - (a) to carry out functions under this or any other Act; or
 - (b) to exercise powers under this or any other Act in relation to a relevant health service; or
 - (c) to give any information he or she is expressly authorised, permitted or required to give under this or any other Act—

give to any other person, whether directly or indirectly, any information acquired by reason of being a relevant person if a person who is or has been a patient in, or has received health services from, a relevant health service could be identified from that information.

Penalty: 50 penalty units.

19. Section 141(1) defines relevant person to include ‘a relevant health service’ and ‘a person who is or had been engaged or employed in or by a relevant health service, or perform work for a relevant health service’.

20. The definition of 'relevant health service' in section 141(1) of the Health Services Act includes 'a public hospital or denominational hospital'.
21. The documents subject to review are the medical records of a deceased person.
22. In relation to the application of section 141(2) of the Health Services Act, I am satisfied:
 - (a) the Agency is a 'relevant health service', being a 'denominational hospital', as defined in the Health Services Act,³ for the purposes of section 141(2);
 - (b) Agency officers are 'relevant persons', being persons employed or engaged by a relevant health service; and
 - (c) the documents requested by the Applicant identify a person, who has been a patient in, or has received health services from the Agency and that identified person is not the Applicant.
23. Therefore, I am satisfied section 141(2) of the Health Services Act specifically applies to the documents subject to review.

Third requirement – Does the enactment prohibit persons referred to in the enactment from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications)?

24. Section 141(3) of the Health Services Act sets out circumstances in which section 141(2) of the Health Services Act does not apply.
25. Section 141(3)(a) provides that the prohibition on disclosure in section 141(2) of the Health Services Act does not apply–
 - to the giving of information with the prior consent (which may be express or implied) of the person to whom it relates or, if that person has died, with the consent (which may be express or implied) of the senior available next of kin of that person.
26. There is no information before me to indicate that the remaining exceptions under section 143(3) of the Health Services Act are relevant in the circumstances of this matter.
27. Accordingly, as the documents concern a deceased person, the documents may be released to a third party where consent (which may be expressed or implied) has been given by the 'senior available next of kin' of the person to whom the records relate.
28. Section 3(1) of the Health Services Act states 'senior available next of kin' has the same meaning as defined in the *Health Tissue Act 1982* (Vic) (**Human Tissue Act**).
29. The 'senior available next of kin' of a deceased adult is defined in section 3 of the Human Tissue Act to mean:

³ 'Denominational hospital' is defined in section 3(1) of the Health Services Act. The Agency is listed in Schedule 2 of the Health Services Act as a 'denominational hospital'.

- (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;
 - (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;
30. The Applicant is a parent of the deceased person. A parent of a deceased person will only be a senior available next of kin if the deceased person, immediately before their death, did not have a spouse or domestic partner, or adult children who are available.
31. The Agency submits the Applicant is not the deceased person's senior available next of kin because the deceased person had a partner at the time of their death and their children appear to be available, and therefore, fall within points (i) and (ii) set out above.
32. The Agency also states that the person they consider to be the deceased person's senior available next of kin had not given consent for the Agency to grant access to the requested documents.
33. The Agency has referred to information in the documents in support of its view that the Applicant is not the deceased person's senior available next of kin and its confidential submissions set out the reasons why it considers the deceased person had a 'domestic partner' at the time of their death.
34. On review of the documents, I am unable to conclude with certainty that the deceased person had a spouse or domestic partner at the time of their death.
35. However, I am satisfied that the documents indicate that the deceased person had children at the time of their death, who have now obtained the age of 18 years or older.
36. There is no information before me to indicate that the deceased person's children are not 'available' to give consent.
37. Therefore, based on the information before me, I am satisfied the Applicant is not the senior next of kin of the deceased person whose information is sought, as the deceased person has adult children who are available.
38. Therefore, the exception in section 141(3)(a) of the Health Services Act does not apply.
39. As I am satisfied the medical record is exempt from release under section 38 in conjunction with section 141(2) of the Health Services Act, it is unnecessary to also consider if the records are exempt from release under section 38 in conjunction with section 346 of the Mental Health Act or section 33(1).

Section 25 – Deletion of exempt or irrelevant information

40. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving an edited copy.
41. Determining whether it is practicable to edit a document involves consideration of the effort and editing involved in making the deletions ‘from a resources point of view’⁴ and the effectiveness of the deletions. A document is not required to be edited if it would render the document meaningless or unintelligible.⁵
42. I am satisfied the documents are exempt from release in full, and therefore an edited version of the documents cannot be provided.

Conclusion

43. On the information before me, I am satisfied the documents are exempt from release in full under section 38 in conjunction with section 141(2) of the Health Services Act.

Timeframe to seek a review of my decision

44. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.⁶
45. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷
46. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸
47. 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.
48. 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.⁹

When this decision takes effect

49. My decision does not take effect until the Agency’s 14-day review period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁴ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31].

⁵ *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁷ Section 52(5).

⁸ Section 52(9).

⁹ Sections 50(3F) and 50(3FA).