

Notice of Decision and Reasons for Decision

Applicant:	'FO5'
Agency:	Monash Health
Decision date:	1 February 2024
Section considered:	Section 39
Citation:	'FO5' and Monash Health (Freedom of Information) [2024] VICmr 18 (1 February 2024)

FREEDOM OF INFORMATION – amendment request – medical record and observations – discharge summary – health records

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 in that I have determined not to grant the Applicant's requested amendments.

My reasons for decision follow.

Shantelle Ryan
Acting Public Access Deputy Commissioner

1 February 2024

Reasons for Decision

Background to review

1. The Applicant made a request under section 39 of the FOI Act to amend their medical record.
2. The Agency determined not to grant the Applicant's request.
3. The Agency's decision letter states:

The medical information contained in your record is the expert opinion of medical practitioners at the time the entries were recorded. The information recorded by the medical practitioners is based on their professional training and experience. Accordingly, Monash Health is satisfied that the opinions recorded are genuine and formed from the medical practitioners' views on the events at that point in time, based on the information before them.

We can place a copy of each request for an amendment in your medical record if you would [like] these to form part of your medical record.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. During the review, OVIC staff asked the Applicant to clarify their request. By email of [date], the Applicant requested amendments to their discharge documentation dated [date].
6. I have considered all communications and submissions received from the parties.

Application of section 39

7. 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

8. 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.

9. Section 39 places the onus on an applicant to establish the case for an amendment. That is, an applicant must establish that the record subject to an amendment request should be corrected or amended.
10. 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?

11. 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.¹
12. Notably, section 39 is concerned with the accuracy of official records, not with the merits or legality of the official action recorded in them.²
13. 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...

14. In *G v Health Commission of Victoria*,⁴ 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.

15. 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*,⁵ the former Victorian Administrative

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

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

³ (1986) 1 VAR 202 at [208]-[209].

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

⁵ (1988) 2 VAR 236 at [239].

Appeals Tribunal (**AAT**) 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 dangerous to rely upon and likely to result in error; and
- (d) the facts upon which the opinion was based were misapprehended.

16. In *QXD v Monash Health*,⁶ the Victorian Civil and Administrative Tribunal (**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.

17. In their communications with OVIC, the Applicant states that the discharge document does not accurately state how the injury occurred, the nature of the injury, that they were not playing 'pokies' prior to the injury and that they were not 'on workcover' at the time of the injury.

18. 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.

19. I acknowledge medical records are important to members of the public as they contain sensitive information recorded during times where people are often vulnerable.

20. I also acknowledge it is important to the Applicant that certain details in the discharge document accurately reflect their view of their medical condition and the circumstances leading up to their injury.

21. However, to agree to the Applicant's request, I must be satisfied the information recorded in the document is inaccurate. At present, the information before me is that the Agency and the Applicant have conflicting views and I do not have evidence as to which version of events occurred.

22. Accordingly, from the information before me, I am not satisfied the facts underlying the observations and opinions of the medical practitioner have been discredited or are demonstrated to be inaccurate. Nor am I satisfied there is evidence to establish the medical

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

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.

23. It is important for medical records to reflect the understanding of medical practitioners at the time of treatment. If that understanding is not correct, then it is appropriate to add to the record rather than amending the record. Making permanent amendments as requested by the Applicant would create a misleading record of the information considered by the treating practitioners at the time of the treatment.
24. Accordingly, I consider the Agency's offer to add the Applicant's amendment requests to their medical file is reasonable in the circumstances.
25. Accordingly, 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.

Review rights

26. If the Applicant or the Agency are not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.
27. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.
28. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.
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 an application to VCAT is made to review of my decision.
31. If a review application is made to VCAT, my decision will be subject to any VCAT determination.