

Notice of Decision and Reasons for Decision

Applicant:	'FP3'
Agency:	St Vincent's Health
Decision date:	14 February 2024
Sections considered:	Section 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 141(2) of the <i>Health Services Act 1988</i> (Vic)
Citation:	'FP3' and St Vincent's Health (Freedom of Information) [2024] VICmr 25 (14 February 2024)

FREEDOM OF INFORMATION –medical records – health records – deceased person – ‘senior available next of kin’ – secrecy provision – prohibition on release of third party medical records – *Health Services Act 1988* (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.

I am satisfied the documents are exempt in full under section 38 of the FOI Act in conjunction with section 141(2) of the *Health Services Act 1988* (Vic).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, I have determined to refuse access to the documents in full.

My reasons for decision follow.

For information about further review rights through the Victorian Civil and Administrative Tribunal, please refer to the end of this decision.

Shantelle Ryan
Acting Public Access Deputy Commissioner

14 February 2024

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the entire medical record of a deceased third party.
2. The Applicant is the deceased third party's [relationship descriptor]. The Applicant submits they were their [relationship descriptor] carer.
3. The Agency identified 560 pages of documents falling within the terms of the Applicant's request and refused access to the documents in full under section 33(1). The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined a copy of the documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties.
8. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.
9. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.
10. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.¹ 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 exemptions

Section 38 - Documents to which secrecy provisions of enactments apply

11. In undertaking my review, I have considered the exemption under section 38 of the FOI Act in conjunction with section 141 of the *Health Services Act 1988* (Vic) (**Health Services Act**).

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at [591].

12. Section 38 provides:

38 Documents to which secrecy provisions of enactments apply

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 conditions 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; and
 - (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).

Health Services Act

14. Section 141 of the Health Services Act provides:

141 Confidentiality

- (1) In this section –

relevant person means –

- (a) a relevant health service; or

....

relevant health service means –

- (a) a public hospital or denominational hospital;

...

- (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.

- (2A) For the purposes of subsection (2)(c), "any other Act" does not include the Health Privacy Principles in the Health Records Act 2001 or Part 3 or Part 5 of that Act.

- (2B) Subsection (2) does not apply to a person (other than an independent contractor) who is a relevant person in relation to a relevant health service who gives information in accordance with HPP 2 of the Health Privacy Principles in the Health Records Act 2001 to another person (other than an independent contractor) who is a relevant person in relation to that relevant health service.

...

15. I note section 141(3) of the Health Services Act sets out the circumstances in which this provision does not apply, including section 141(3)(a):

Subsection (2) does not apply—

- (a) 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;

Is there an enactment in force?

16. I am satisfied the Health Services Act is an enactment in force for the purposes of section 38 of the FOI Act.

Does the Health Services Act apply specifically to the kind of information in the documents?

17. In order for section 38 to apply to an enactment, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

18. In relation to the application of section 141(2), I am satisfied:

- (a) the Agency is a relevant health service, being a 'public hospital' as defined by Schedule 5 of the Health Services Act,² for the purposes of section 141(1) of that Act;
- (b) staff of the Agency are 'relevant persons', being people engaged by a relevant health service; and
- (c) the exempt information identifies a person who has been patient in, or received health services from, the Agency and the identified person is not the Applicant.

19. I acknowledge that certain information in the documents relates to the Applicant. However, I consider this information to be intertwined with the information of the third party patient who received health services from the Agency.

20. Therefore, I am satisfied section 141(2) of the Health Services Act specifically applies to the documents subject to review.

Does the Health Services Act prohibit persons from disclosing the information in the documents?

²Health Services Act, section 3(1).

21. I am satisfied the Health Services Act prohibits the Agency from disclosing the specific kind of information the subject of the Applicant's request, being a document created in the course of a person receiving health care from which the relevant person may be identified.

Do any of the exceptions set out in section 141(3) of the Health Services Act apply?

22. The medical records of an individual are inherently private and contain sensitive health information. A person retains a right to personal privacy even after their death.
23. In relation to section 141(3)(a), as set out above, where a person has died, documents may be released where consent (which may be express or implied) is given by the deceased person's 'senior available next of kin'.
24. The Agency submits that the Applicant is not the senior available next of kin of the deceased patient.
25. While the Applicant submits they were the deceased patient's carer, I do not consider this fact is sufficient to establish the Applicant is the deceased person's 'senior available next of kin' for the purposes of accessing the deceased person's medical records.
26. Rather, having reviewed information in the deceased person's medical record, I consider it does not support a finding the Applicant is the deceased patient's senior available next of kin.
27. Therefore, I am unable to be satisfied the Applicant is the 'senior available next of kin' for the purposes of the exception to the prohibition on disclosure of the deceased person's medical records under section 141(3) of the Health Services Act.
28. Disclosure of information in breach of section 141(2) of the Health Services Act attracts a financial penalty, which highlights the legislature's intention that such information should remain confidential.
29. While I acknowledge this is no doubt a sensitive matter for the Applicant, I am required to make my decision in accordance with the FOI Act and the Health Services Act, as set out above.
30. For the reasons set out above, I am satisfied the documents are exempt from release under section 38 of the FOI Act in conjunction with section 141(2) of the Health Services Act.

Section 33(1) – Personal affairs information

31. In light of my decision in relation to section 38, it is not necessary for me to consider the exemption relied on by the Agency under section 33(1).

Section 25 – Deletion of exempt or irrelevant information

32. 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 such a copy.
33. Given my decision in relation to section 38 of the FOI Act in conjunction with section 141(2) of the Health Services Act, which prohibits the Agency from giving a third party any information acquired by the Agency by reason of a person being a patient of or receiving health services

from the Agency, I am satisfied the documents are exempt in full and there is no obligation to provide an edited copy of the documents under section 25.

Conclusion

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

Timeframe to seek a review of my decision

35. If the Applicant is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.³
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁴
37. 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.
38. 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.⁵

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

⁴ Section 52(5).

⁵ Sections 50(3F) and 50(3FA).