

## Determination

### External review - section 39 *Freedom of Information Act 1991*

Applicant	[The applicant]
Agency	Southern Adelaide Local Health Network
Ombudsman reference	2016/09030
Agency reference	A307019
Determination	The determination of the agency is confirmed.

## REASONS

### Application for access

1. By application under the *Freedom of Information Act 1991* (the FOI Act) the applicant requested access from the agency to:

Photocopies and electronically scanned version of all medical records since [a deceased relative's] admission into Flinders Medical Hospital since 2012 to and including [the deceased relative's] death on 6/6/2016.

### Background

2. For ease of reference, procedural steps relating to the application and the external review are set out in the appendix.

### Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

### Provisional determination

4. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 6 December 2016. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to confirm the agency's determination.
5. On 12 December 2016, my senior legal officer met with the applicant. The applicant accepted the reasons for my provisional determination.
6. On 13 December 2016, the agency emailed my senior legal officer and advised that they accepted my provisional determination.

## Relevant law

7. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.<sup>1</sup>
8. The FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusing access.
9. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
10. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

## Documents in issue

11. On internal review, the agency determined to confirm its original determination to refuse access to any documents falling within the scope of the application. In doing so, the agency observed that 'releasing medical records to a third party without appropriate consent would be in breach of section 93 of the *Health Care Act 2008*'.

## Issues in this review

12. The issue for me to consider is whether the documents to which the applicant has sought access are exempt pursuant to one of the clauses set out in Schedule 1 to the FOI Act.

## Consideration

13. Clause 12(1) of Schedule 1 provides:

A document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act.

14. Section 93(2) of the *Health Care Act 2008* (**the Health Care Act**) provides:

Subject to subsection (3), a person engaged or formerly engaged in connection with the operation of this Act must not disclose personal information relating to a person obtained while so engaged except to the extent that he or she may be authorised or required to disclose that information -

- (a) by the Chief Executive or his or her employer; or
- (b) in the case of information obtained while working at an incorporated hospital<sup>2</sup> or SAAS - by the hospital or SAAS (as the case requires).

Maximum penalty: \$10 000.

By virtue of subsection (6) of section 93, the term 'personal information' means information or an opinion, whether true or not, relating to a natural person or the affairs of a natural person whose identity is apparent, or can reasonably be ascertained, from

<sup>1</sup> *Freedom of Information Act 1991*, section 12.

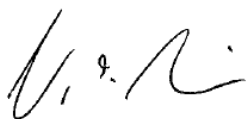
<sup>2</sup> The Southern Adelaide Local Health Network is an 'incorporated hospital' for the purposes of the Health Care Act. <http://www.sahealth.sa.gov.au/wps/wcm/connect/public+contents/sa+health+internet/about+us/our+local+health+networks> accessed on 5 December 2016.

the information or opinion. There can be no doubt that a person's medical records constitute 'personal information' relating to that person.

15. Subsection (3) of section 93 of the Health Care Act makes exceptions to the general prohibition established by subsection (2). Subsection (3) relevantly provides:  
Subsection (2) does not prevent a person from -
- (a) disclosing information as required or authorised by or under a law; or
  - (b) disclosing information at the request, or with the consent, of -
    - (i) the person to whom the information relates; or
    - (ii) a guardian of the person to whom the information relates; or
    - (iii) a medical agent of the person to whom the information relates; or
    - (iv) a substitute decision-maker for the person to whom the information relates (within the meaning of the *Advance Care Directives Act 2013*); ...
16. The FOI Act neither requires nor authorises the disclosure of information to any person. Rather, it provides members of the public with a right to be given access to an agency's documents subject to an agency's determination to refuse access to documents that are exempt. Given this, the agency could not rely on section 93(3)(a) of the Health Care Act to disclose to the applicant personal information relating to [the deceased relative].
17. As [the deceased relative] had passed away before the applicant made his application, neither sub-paragraphs (ii) or (iv) of section 93(3)(b) were enlivened. A deceased person cannot have a guardian or a substitute decision-maker.
18. As the exceptions to the terms of section 93(2) of the Health Care Act have no application in the present case, I conclude that it would be an offence for the agency to disclose [the deceased relative's] medical records to any other person, including the applicant. Documents falling within the scope of the application are therefore exempt from disclosure pursuant to clause 12(1) of Schedule 1 to the FOI Act.

### Determination

19. In light of my views above, I confirm the agency's determination.



Wayne Lines  
SA OMBUDSMAN

12 January 2017

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## APPENDIX

### Procedural steps

Date	Event
5 October 2016	The agency determined the application.
31 October 2016	The agency received the internal review application dated 31 October 2016.
9 November 2016	The agency confirmed the determination.
16 November 2016	The Ombudsman received the applicant's request for external review.
6 December 2016	The Ombudsman provided the applicant and the agency with his provisional determination.
12 December 2016	The applicant advised that he accepted the views expressed in the provisional determination.
13 December 2016	The agency advised that it accepted the views expressed in the provisional determination.